

An appeal

- by -

Dashmesh Trucking Ltd.
("Dashmesh")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

and

An application for suspension

- by -

Dashmesh Trucking Ltd.
("Dashmesh")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/27 & 2010A/28

DATE OF DECISION: April 7, 2010

DECISION

SUBMISSIONS

Greg Brown

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Dashmesh Trucking Ltd., (“Dashmesh”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued August 17, 2009.
2. Mark Jordan worked for Dashmesh as a truck driver from April 1, 2008, until March 17, 2009. Mr. Jordan filed a complaint alleging that Dashmesh had contravened the *Act* by failing to pay him regular wages and compensation for length of service.
3. Following an investigation into Mr. Jordan’s complaint, the Director’s delegate determined that Dashmesh had contravened Sections 17, 18 and 63 of the *Act* in failing to pay Mr. Jordan regular wages, vacation pay and compensation for length of service. The delegate determined that Mr. Jordan was entitled to \$1,086.74. The delegate also imposed a \$1,000 penalty on Dashmesh for the contraventions of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. Dashmesh contends that the delegate erred in law in finding that Mr. Jordan was entitled to wages, vacation pay and compensation for length of service. It also contends that it was never notified of the complaint or the investigation. Dashmesh seeks to have the Determination cancelled.
5. Pursuant to section 112 of the *Act*, Dashmesh’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Dashmesh’s appeal period expired September 24, 2009. On or about February 23, 2010, West Coast Court Bailiffs Inc. secured the sum of \$6,352.20 from Dashmesh. Dashmesh filed an appeal of the Determination on February 15, 2010, and sought an extension of time in which to file the appeal. Dashmesh also sought a suspension of the Determination. The Director agreed to place the seized funds in trust until the appeal is decided.
6. These reasons address the timeliness of Dashmesh’s appeal and are based on the written submissions of the parties.

ISSUES

7. 1. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

8. Mr. Jordan filed his complaint on June 3, 2009, after having sent the employer a Self Help kit and receiving no response. On June 24, 2009, the delegate advised the employer of the complaint by registered mail. The letter was sent to the home address of the employer, which was also the registered and records office. The registered mail was returned marked “Moved unknown”. The delegate advised Mr. Jordan that the address he provided the Branch was incorrect. Mr. Jordan obtained and provided the Branch with the new address of

the employer. The delegate conducted a search of BC Assessment Authority records and confirmed the new residential address was owned by a Director of Dashmesh. The Branch sent another letter to the new address by registered mail advising the employer of the complaint and an opportunity to respond. The letter was successfully delivered but the delegate received no response to the complaint.

9. The delegate determined that the employer had notice of the case against it and failed to respond. He determined, based on the uncontradicted evidence of the employee, that Mr. Jordan had not been paid for 9.25 hours of work and that he was entitled to compensation for length of service. The delegate also determined that Mr. Jordan was entitled to vacation pay on the unpaid wages.
10. Dashmesh contends that it had no knowledge of the allegations against it because the delegate sent the documents to an incorrect address. Dashmesh provided a copy of two cheques issued June 25, 2009, and August 13, 2009 in support of its position that Mr. Jordan was paid in full. Finally, Dashmesh says that Mr. Jordan is not entitled to compensation for length of service because Mr. Jordan “refused to answer the phone” when he was called to work.
11. The Director contends that Dashmesh has not provided any reasons why the appeal could not have been filed before the deadline. Although Dashmesh asserts that the Branch had an incorrect address, the Director says the Branch had the employer’s new address. The Director submits that Dashmesh’s appeal is an attempt to re-argue the appeal on the merits and asks that the appeal be dismissed.

ANALYSIS

12. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
13. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
14. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
15. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
 - (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - (2) there has been a genuine, ongoing bona fide intention to appeal the determination;
 - (3) the respondent party as well as the director has been made aware of this intention;
 - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - (5) there is a strong prima facie case in favour of the appellant.
16. These criteria are not exhaustive.
17. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.

18. The record indicates that the Determination was sent by registered mail to Dashmesh and to Rupinder K. Grewal at the address indicated on the appeal form. The mail sent to Rupinder K. Grewal was successfully delivered on July 13, 2009. I find that the Employer was notified of the complaint and given the opportunity to respond. Despite being served with the Determination, Dashmesh took no steps to appeal it until the Branch enforced it through a Bailiff seizure.
19. I am not persuaded that Dashmesh had a genuine, ongoing intention to file an appeal of the Determination.
20. I have no information as to whether or not the Director or Mr. Jordan would suffer any prejudice if an extension were granted.
21. Finally, I am unable to find that there is a strong *prima facie* case in Dashmesh's favour. Although Dashmesh submitted new evidence on appeal, this evidence does not meet the Tribunal's test for new evidence.
22. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
 - a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - b) the evidence must be relevant to a material issue arising from the complaint;
 - c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - d) the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
23. The Tribunal has a well established principle that it will not consider new evidence that could have been provided at the investigation or hearing stage (see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97). As this information was available during the investigation, Dashmesh ought to have provided it to the delegate at that time. The employer cannot now rely on this evidence as a basis for its appeal.
24. Finally, having reviewed the record and the Determination, I find that the delegate's conclusions were supportable on the evidence before him and would thus find no *prima facie* case in support of any of the other grounds of appeal. Although Dashmesh provided copies of cancelled cheques in support of its position that Mr. Jordan was paid vacation pay, none of those cheques show that Mr. Jordan was paid for work performed on March 16 and 17, 2009 as claimed by Mr. Jordan, or vacation pay on the hours claimed by Mr. Jordan. Finally, I find Dashmesh's claim that Mr. Jordan refused to come to work as a basis to deny compensation for length of service to lack any evidentiary basis.
25. I deny Dashmesh's application.

ORDER

26. Pursuant to section 109(1)(a) of the *Act*, I deny Dashmesh's application to extend the time for filing an appeal. Accordingly, I also deny Dashmesh's application to suspend the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal