

An appeal

- by -

Avtar Grewal

- 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)

TRIBUNAL MEMBER: Sheldon M. Seigel

FILE No.: 2009A/31

DATE OF DECISION: May 5, 2009

DECISION

SUBMISSIONS

Avtar Grewal	on his own behalf
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. Avtar Grewal appeals a determination (the “Determination”) of the Director of Employment Standards (the “Director”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. A delegate of the Director found in a Determination dated July 30, 2008 that Mr. Grewal had contravened section 13 of the *Act*, and assessed an administrative penalty of \$500.00 under section 29 of the Employment Standards Regulation (the “Regulation”).
3. With respect to appeal timelines, the Determination indicated the following:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 on September 8, 2008.
4. On March 11, 2009, the Employment Standards Tribunal (the “Tribunal”) received an appeal form from Mr. Grewal, appealing the Determination. The appeal states that notice of the Determination was not communicated to Mr. Grewal until March 6, 2009, and seeks that the Determination be cancelled. Attached to the appeal is a letter from Mr. Grewal explaining his reasons for the late appeal and his substantive argument in favour of cancelling the Determination.
5. The Tribunal invited the Director to respond to Mr. Grewal’s late appeal. Ms. Sandhu forwarded a submission on behalf of the Director.

ISSUE

6. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* to extend the appeal period in this case? The section provides:

109(1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

...

(b) extend the time period for requesting an appeal even though the period has expired [.]

ARGUMENT AND ANALYSIS

Late Appeal

7. Mr. Grewal states in his appeal that his mailing address is #381 P.O. Box 8000, Abbotsford B.C. V2S 6H1 and that he has used this address for two years. He further states that on March 6, 2009 he was informed by an employment standards officer that letters regarding this matter had been sent to Mr. Grewal's attention at 32982 Harris Rd, Abbotsford. Mr. Grewal claims to have received no relevant notice or correspondence until March 6, 2009. The Tribunal received Mr. Grewal's appeal, together with reasons why the appeal was delivered late, five days later on March 11, 2009.
8. In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I may consider the following:
 - Whether there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - Whether there has been an unreasonably long delay in filing the appeal;
 - Whether there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - Whether the Director, was aware of the likelihood Mr. Grewal would appeal;
 - Whether there would be prejudice as a result of granting an extension;
 - Whether there is a strong *prima facie* case that the appeal might succeed if an extension is granted.
9. *See Niemesto, BC EST #D099/96.* These factors are not exhaustive.
10. The Tribunal will not grant extensions as a matter of course and will do so only where there are compelling reasons. The burden is on the appellant to show that the time period for an appeal should be extended: *Moën & Sagb Contracting Ltd.*, BC EST #D298/96.
11. The Determination indicates the deadline for appeal was September 8, 2008. Mr. Grewal's appeal was filed on March 11, 2009, approximately six months later. The Director says this is too long a delay. By way of explanation, Mr. Grewal says that he did not receive any notice of the Determination until March 6, 2009. The Director does not deny that notice was sent to another address, but indicates that Mr. Grewal provided that other address to the Director in June of 2008. The Director provides no supporting data for this statement.
12. Notice of the Determination being sent to an address other than the one used by the appellant is a reasonable explanation for a late appeal. Whether it is credible, I cannot ascertain in light of the single and unsupported response by the Director that Mr. Grewal provided a different address at a time when Mr. Grewal says he was no longer using that different address.
13. I have no evidence before me as to whether Mr. Grewal anticipated appealing the decision, or whether the Director would have known that he was so anticipating.

14. There is no evidence of any prejudice that would result by allowing the late appeal, and I cannot anticipate any, as the only parties involved are Mr. Grewal and the Director, and the money at stake is restricted to an administrative penalty.
15. The remaining consideration is whether a *prima facie* case exists that an appeal might be successful. I find that there is such a case.
16. Mr. Grewal argues that he was the manager of a nursery and the nursery purchased a crop of peas from a farmer. In his capacity as manager of the nursery, he sent labourers to harvest the crop. An inspection team visited the labourers and the farm operator at the farm and sought information as to the labourers' employer. The inspection team concluded that Mr. Grewal was the employer.
17. The Determination indicates under the heading of INTRODUCTION AND BACKGROUND that Mr. Grewal provided the farm with contract labour. I find that this is a conclusion that should have resulted from an investigation of the issue of whether Mr. Grewal provided labour in his personal capacity or as manager of the nursery.
18. The Determination states the relevant issue as being whether Mr. Grewal contravened the *Act* by operating as a farm labour contractor without being so licensed. There is no indication of whether the nursery was licensed as a farm labour contractor, or if that was considered an issue.
19. The Determination summarizes the EVIDENCE FROM INVESTIGATION as indicating that Mr. Grewal had brought the workers to the farm and that "when the team interviewed the workers... they stated that Grewal was their employer." For this appeal, the Director submitted supporting documents including notes that state:

Avtar Grewal stated he had [undecipherable] bought the peas from the farmer before picking them. Picked by his employees so he could control quality.
20. I find that these notes could equally apply to Mr. Grewal in his personal capacity or Mr. Grewal as the manager of the nursery. Accordingly, these notes could be consistent with Mr. Grewal's explanation. Further, the inspection team's notes on questioning nine labourers, does not support the Director's summary that "they stated that Grewal was their employer." The notes indicate that three of the labourers said they did not know who their employer was because they were new, two of the labourers said only that it was their first day, three of the labourers said nothing (or nothing was noted on the interview sheet) and one labourer said only that the farm owner picked him up.
21. Following his conclusions based on the inspection team interviews, the Director refers to the labourers as "Grewal's employees." I find that this is a conclusion not supported by reasons in the Determination.
22. Finally, the Director says that Mr. Grewal was afforded the opportunity to respond to the "observations" made by the inspection team by responding to a letter mailed to Mr. Grewal on June 20, 2008. No address is provided in the Determination as to what address that letter was sent. The Director then notes: "To date, Grewal has not provided the Branch with a response to the letter..." This failure to respond could be explained by Mr. Grewal's appeal position with respect to not receiving any relevant correspondence to his correct mailing address.

23. I find that the late appeal should be allowed. Pursuant to correspondence sent by the Tribunal to both the Director and Mr. Grewal, the Director shall be allowed to respond to Mr. Grewal's substantive appeal arguments before the appeal will be determined.

ORDER

24. Pursuant to section 109(1)(b) of the *Act*, I extend the appeal period to allow the appeal received by the Tribunal on March 11, 2009.

Sheldon M. Seigel
Member
Employment Standards Tribunal