

An appeal

- by -

Guang Xuan Deng

- 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: Carol L. Roberts

FILE No.: 2011A/16

DATE OF DECISION: April 29, 2011

DECISION

SUBMISSIONS

Guang Xuan Deng	on his own behalf
George Shami	on behalf of IMP Fire & Safety Services Ltd.
J. R. Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Guan Xuan Deng (“Deng”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued January 21, 2011.
2. Deng was employed as a fire safety technician for IMP Fire & Safety Services Ltd. (IMP) from July 31, 2006, until February 10, 2010, when his employment was terminated. Deng filed a complaint alleging that he was owed compensation for length of service.
3. The Director’s delegate held a hearing into Deng’s complaint on December 6, 2010. Mr. Shami represented IMP while Deng represented himself.
4. Deng was paid by way of a commission structure. At the hearing, the parties provided the delegate with a signed statement of fact that stated that, should the delegate conclude that Deng was entitled to compensation for length of service, he would be entitled to \$1,521.43.
5. Following the hearing, the delegate determined that IMP had just cause to terminate Deng’s employment and had not contravened the *Act*.
6. The deadline for filing an appeal of the Determination was February 28, 2011. Deng submitted the appeal form on February 28, 2011. However, the appeal was incomplete because it did not contain all the required documents. The missing material was forwarded to the Tribunal on March 2, 2011.
7. The basis of Deng’s appeal is that evidence has become available that was not available at the time the Determination was being made.
8. These reasons address only the timeliness of Deng’s appeal and are based on the section 112(5) “record”, the written submissions of the parties, and the Reasons for the Determination.

ISSUE

9. 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

10. In his appeal submission, Deng says that he was unable to submit his full appeal submission by February 28, 2011, because his internet was not working. The appeal document set out the grounds for appeal, brief submissions as well as the ‘new evidence’. A copy of the Determination, which is to be included with the appeal documents, was not submitted to the Tribunal until March 2, 2011.
11. The delegate took no position on the lateness of the appeal.
12. Mr. Shami contended that Deng was submitting no new evidence and he argued that Deng’s appeal was frivolous and an abuse of the process.

ANALYSIS

13. 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.
14. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. 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 and on-going *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.
17. These criteria are not exhaustive.
18. I find it appropriate to grant the application. Deng filed his appeal form, along with the reasons for the appeal, on February 28, 2011, the statutory deadline for filing the appeal. Although it was not “perfected” until March 2, Deng clearly demonstrated a genuine and ongoing intention to file his appeal by the deadline. I note there is no indication Deng informed IMG or the Director of his intention to appeal the determination.
19. Although I accept that IMP may be inconvenienced by the granting of an extension, I am not persuaded that it will be unduly prejudiced.

20. I am not persuaded that Deng has a strong *prima facie* case. Deng submits his 2009 income tax return as new evidence, evidence which was available at the time of the hearing of the appeal. Deng also makes a number of allegations which are unrelated to the grounds of appeal identified on his form.
21. I find that Deng has satisfied three of the five criteria set out above. Although I am not persuaded that Deng has a strong *prima facie* case, this decision addresses only the timeliness of the appeal, not its merits.

ORDER

22. Pursuant to section 109(1)(b) of the *Act*, I allow the application to extend the time for filing an appeal to March 2, 2011.

Carol L. Roberts
Member
Employment Standards Tribunal