

An appeal

- by -

637520 B.C. Ltd. operating as Mac's Convenience Store - # 2669

- 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

TRIBUNAL MEMBER: John Savage

FILE No.: 2005A/40

DATE OF DECISION: May 13, 2005

DECISION

SUBMISSIONS

Mohammed Ali (Karal) Abdi, for the Appellant

J. Ross Gould, for the Director

OVERVIEW

This is an appeal by 637520 BC LTD operating as “Mac’s Convenience Store” (“Mac’s”) from a Determination of the Director of Employment Standards dated December 15, 2004.

The Delegate of the Director in his Determination found that Mac’s had contravened the *Employment Standards Act* and found that some \$2,399.85 in wages was owing Mohamed Ali Aden, and assessed administrative penalties totaling \$2000.00.

The appellant faxed a letter of appeal and Appeal Form dated January 23, 2005 on January 26, 2005 to the Director of Employment Standards at the Employment Standards Branch office in Victoria, BC. Had the letter of appeal and Appeal Form been correctly addressed the appeal would have been timely.

The Employment Standards Tribunal received an appeal of the Determination on March 16, 2005.

Section 109(1)(b) of the *Employment Standards Act* allows the Tribunal to extend the time period for requesting an appeal.

ISSUE

Should the Employment Standards Tribunal extend the time period for requesting an appeal?

LEGISLATION

An appeal from a Determination of the Director of Employment Standards is governed by section 112 of the *Employment Standards Act*. The Act requires that the appeal be delivered to the office of the tribunal “30 days after the date of service of the determination, if the person was served by registered mail”.

Section 109 of the Act provides that the Employment Standards Tribunal may extend the time period for requesting an appeal even though the appeal period has expired.

SUBMISSIONS & ANALYSIS

The Appellant says he intended to appeal in a timely way but sent his notice of appeal to the wrong address. It is apparent that the appeal was prepared within the appeal period and delivered to an Employment Standards office in Victoria, but not to the Tribunal. The Director does not oppose the extension of time.

In a recent decision, *Round Table Enterprises* (ESTD# D052/05), this Tribunal followed the leading case of *Niemisto* in describing the circumstances under which an extension of time would be granted as follows:

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are 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.

The question, then, is whether these circumstances have been met.

1. Reasonable and credible explanation

The Appellant provides this explanation regarding the lateness of the appeal:

“As you see the attached documents, January 23rd, 2005, I sent you my appeal application with payroll documents, But it goes Director of Employment Standards, PO Box 9570 Stn Prov Govt. Victoria, BC, V8W 9K1. I apologize to this office, they did not get my application and I did not know before March 11, 2005 when you called me. I was surprised, you didn't get my appeal documents and when you faxed to me, I didn't realize, we sent wrong address”.

The Appellant completed his appeal letter and Appeal Form and delivered the same to an office of the Employment Standards Branch of the Ministry of Labour within the appeal period. The Appellant simply misaddressed the appeal documents by sending them to the office of the Director of Employment Standards instead of to the offices of the Employment Standards Tribunal.

I note that the address to which the Appellant delivered his notice of appeal is that of the Director of Employment Standards, that address is included in the Appeal Form, and a copy of the appeal documents is required to be sent to the Director.

This is a reasonable and credible explanation for the failure to deliver the appeal to this Tribunal within the statutory time limit.

2. Bona Fide Intention to Appeal

The letter dated January 23, 2005 and Appeal Form of the same date indicate that there was a *bone fide* intention to appeal the Determination prior to the expiration of the appeal period which intention continued through the period until this application was made. The second criterion is therefore satisfied.

3. Respondent Party and Director Aware of Intention to Appeal

The Director has been aware of the Appellant's intention to appeal the Determination since before the appeal period expired and has been in receipt of the documents which would otherwise normally initiate the appeal. The Respondent Party makes no submission. In the circumstances I find that this criterion is satisfied.

4. Respondent Party will not be Unduly Prejudiced

Neither the Director nor the Respondent Party asserts undue prejudice. There is no evidence that undue prejudice would result from the appeal period being extended.

5. Strong *Prima Facie* Case

As I have noted, there was no submission received from the Respondent Party objecting or consenting to the extension of time. The Director does not object to an extension of time. There is no suggestion that the appeal is frivolous. In these circumstances it would not be appropriate to delve further into the merits of the appeal: *Round Table Enterprises* (ESTD# D052/05).

ORDER

Pursuant to section 109(1)(b) of the *Employment Standards Act* I order that the deadline for filing the appeal be extended to March 16, 2005.

John Savage
Member
Employment Standards Tribunal