Employment Standards TRIBUNAL

An appeal

- by -

Kershaw Health Inc.
("Kershaw")

- 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: David B. Stevenson

FILE No.: 2009A/057

DATE OF DECISION: July 7, 2009

DECISION

SUBMISSIONS

Carol Kershaw	on behalf of Kershaw Health Inc.
Ken White	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kershaw Health Inc. ("Kershaw") of a Determination that was issued on November 19, 2008 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Kershaw had contravened Part 3, Sections 17 and 18 of the *Act* in respect of the employment of Andam Rogers ("Rogers") and ordered Kershaw to pay Rogers an amount of $257.62, an amount which included wages and interest.

2. The Director also imposed an administrative penalty on Kershaw under Section 29(1) of the Employment Standards Regulation (the "Regulation") in the amount of $1000.00.

3. The Determination was issued following a complaint hearing which was held on June 2 and 23, 2008.

4. The total amount of the Determination is $1257.62.

5. Kershaw has filed an appeal of the Determination, alleging the Director erred in law, failed to observe principles of natural justice in making the Determination and that new evidence has come available which was not available at the time the Determination was being made.

ISSUE

6. A preliminary issue relating to the timeliness of the appeal has arisen. On May 14, 2009, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal.

THE FACTS

7. The facts relating to the issue of timeliness are as follows:

    1. The Determination was issued on November 19, 2008 and sent by registered mail to Kershaw's business address on that date. Under section 122 of the *Act*, the Determination was deemed to have been received 8 days after it was deposited with Canada Post. The Determination was also sent to the registered and records office of Kershaw and to Carol Kershaw, the owner of Kershaw.

    2. The appeal was not filed with the Tribunal until May 4, 2009. Additional material related to the appeal was submitted to the Tribunal on May 12, 2009.

    3. The Determination provided appeal information which advised Kershaw of the date on which an appeal of the Determination had to be filed and that the appeal had to be filed with

the Tribunal. There was also a notation indicating the Tribunal is separate and independent from the Employment Standards Branch and the web site location of the Tribunal and the Tribunal's telephone number were given.

4. The statutory appeal period ended on December 29, 2008.

5. Carol Kershaw says an appeal letter was delivered to an Employment Standards Branch office before the appeal period expired and left with a receptionist. No copy of the letter has been provided.

ARGUMENTS AND ANALYSIS

8. There is no question the appeal was filed late. Section 112 sets out the requirements for filing an appeal; subsection 112(3) describes the appeal period as follows:

> *(3) the period referred to in subsection (2) is*
>
> *(a) 30 days after the date of service of the determination, if the person was served by registered mail, and*
>
> *(b) 21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).*

9. The Director argues the appeal should have been filed no later than December 29, 2008 and a delay in filing of more than 4½ months is unreasonably long. The Director argues there are no factors present that would justify the Tribunal exercising its discretion to extend the time limit for filing the appeal.

10. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

11. The Tribunal has identified several factors which should be considered in determining whether there are compelling reasons for extending the time for appeal:

i) whether there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) whether there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) whether the respondent party (*i.e.,* the employer or employee), as well as the Director, must have been made aware of this intention;

iv) whether the respondent party will not be unduly prejudiced by the granting of an extension; and

v) whether there is a strong *prima facie* case in favour of the appellant.

12. Other, perhaps unique, factors can also be considered. The burden of demonstrating the existence of any mitigating factors is on the party requesting the extension of time.

13. The delay here is not insubstantial – more than 4 months. No good reason has been provided for the delay. Kershaw says the failure to file the appeal within the statutory time limit is the result of a mistake in delivering the appeal to an Employment Standards Branch office instead of the Tribunal. How, in the face of the information set out in the Determination, such a mistake can be made is not explained. It should also be noted that the Appeal Form provided by the Tribunal clearly states that the Form, and any required attachments, **"must be delivered to the Tribunal within the appeal period"** and provides mail and fax addresses for that delivery.

14. The appeal does not indicate there was any conduct or representation by the Director or the staff at the Employment Standards Branch office that could be described as misleading. Kershaw simply indicates a staff person at an Employment Standards Branch office accepted the appeal. Under section 112(2), a copy of the appeal is required to be delivered to the Director. I agree with the Director that having a staff person at a Branch accept appeal documents is not an unusual circumstance and, of itself, does not generate any obligation on the Director to ensure the person has properly complied with the appeal process in the *Act*.

15. Allowing the matter to sit for more than 4 months without making any inquiry about its progress speaks against an on-going *bona fides* intention to appeal, as does the fact that the delivery of an appeal to the Tribunal appears to be closely related to collection efforts by the Director.

16. While an expression of intention to the Director to appeal the Determination can be found in the delivery of the appeal letter to the Employment Standards Branch office, there is no indication Kershaw ever expressed an intention to Rogers to appeal the Determination.

17. There is little prejudice to Rogers if an extension is granted. In the circumstances, this factor does not point one way or the other.

18. On its face, the appeal lacks merit. An assessment of this factor does not require a complete analysis of all of the arguments raised in the appeal and a decision on the merits of the appeal. That kind of analysis can only be done after a full review of the grounds of appeal. Rather, the Tribunal examines whether, on a fair reading of the appeal, it shows sufficient merit to justify a deeper examination. This factor is not predominant, but must be considered along with each of the other factors.

19. The Determination concluded that wages were owed to Rogers for October 3, 2007 and for attending 5 seminars totalling 14 hours of work. These conclusions are based on findings of fact for which there was some evidence, but which are challenged in the appeal. The difficulty in grounding an appeal on disputes with factual findings is that the *Act* does not provide for an appeal based on errors of fact alone and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. An appeal is not an opportunity to submit new evidence or to have the Tribunal "re-weigh" the evidence. It is an error correction process, with the burden on the appellant to show an error on one of the grounds in section 112. On its face, the appeal does not show the alleged errors of fact amount to errors of law or that there is any discreet question of law involved. Kershaw could not succeed in an appeal against findings of fact alone.

20. Kershaw challenges the administrative penalties imposed under section 29 of the *Regulation*, arguing the penalties imposed in this case are "punitive and out of line with the amount owing" and unreasonable. It suffices to say there is no merit in this argument. The legislative scheme provides for mandatory

administrative penalties without any exceptions where a contravention is found by the Director in a Determination issued under the *Act*: see *Actton Super-Save Gas Stations Ltd.*, BC EST # D067/04. The Tribunal has no ability to ignore the plain meaning of the words of a statute and substitute its view of whether the administrative penalties may be set aside based on its judgement about whether they are "out of line" or unreasonable: see for example *Douglas Mattson*, BC EST # RD647/01.

21. In sum, the factors weigh against an extension of time limited for filing an appeal under section 112.

22. Accordingly, the appeal is denied as being out of time.

ORDER

23. Pursuant to section 115 of the *Act*, I order the Determination dated November 19, 2008 be confirmed in the amount of $1257.62, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal