

An appeal

- by -

Dr. Patrick Nesbitt Inc.
("Nesbitt")

- 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: Shafik Bhalloo

FILE No.: 2007A/73

DATE OF DECISION: August 31, 2007

DECISION

OVERVIEW

1. This is an appeal by Dr. Patrick Nesbitt Inc. (“Nesbitt”) under Section 112 of *the Employment Standards Act* (“Act”) against a Determination of the Director of Employment Standards (“the Director”) issued April 25, 2007 (the “Determination”).
2. Ms. Lynne James (“Ms. James”) filed a complaint pursuant to Section 17 of the Act alleging that her employer, Nesbitt, contravened the Act by failing to pay her compensation for length of service after Nesbitt terminated her employment (the “Complaint”).
3. The Director’s delegate (the “Delegate”) conducted an investigation into the Complaint and held a hearing of the Complaint on March 7, 2007 (the “Hearing”). Thereafter, the Delegate issued the Determination concluding that Nesbitt violated the Act and ordered Nesbitt to pay James \$6,400 in compensation for length of service pursuant to Section 63 of the Act, \$512 for annual vacation pay pursuant to Section 58 of the Act, and accrued interest on the last two amounts in the sum of \$57.23 pursuant to Section 88 of the Act, for a total of \$7,097.21. The Director also imposed an administrative penalty of \$500 on Nesbitt for contravention of Section 63 of the Act.
4. Nesbitt is appealing the Determination on all three grounds available in Section 112 of the Act, namely:
 - (1) The Director of Employment Standards erred in law in making the Determination;
 - (2) The Director of Employment Standards failed to observe the principles of natural justice in making the Determination; and
 - (3) Evidence has become available that was not available at the time the Determination was being made.
5. Nesbitt is also requesting an oral hearing of its Appeal.
6. As Nesbitt has filed its Appeal after the expiry of the Appeal period in Section 112 of the Act, there is a preliminary issue that needs to be dealt with, namely, whether the Tribunal should exercise its discretion under Section 109(1)(b) of the Act to extend to the time for Nesbitt’s Appeal. The Tribunal is of the view that an oral hearing is not necessary in order to adjudicate this preliminary issue and therefore, the Tribunal will determine the preliminary issue based on the parties’ written submissions as well as the Section 112(5) “Record”.
7. Nesbitt is also seeking a suspension of the Determination pending the Appeal pursuant to section 113 of the Act and made a very short written submission in support thereof, which I only need to consider if Nesbitt is successful in obtaining an extension of time to file its Appeal. Similarly, I only need to consider the merits of Nesbitt’s Appeal if Nesbitt is successful in obtaining an extension of time to file its appeal.

ISSUES

1. Should Nesbitt be afforded an extension of time for requesting an Appeal even though the Appeal period has expired?
2. If the answer to first question is in the affirmative, then should the Tribunal suspend the Determination as requested by Nesbitt?

FACTS AND ARGUMENT

8. The facts relevant to this Appeal are as follows:
9. Nesbitt operated a medical clinic from 22611 Dewdney Trunk Road, in Maple Ridge (“Nesbitt’s Office Address”).
10. Ms. James was employed as the office manager with Nesbitt from April 1, 1990 to July 13, 2006.
11. On November 28, 2006, Ms. James filed the Complaint against Nesbitt.
12. The Tracking Sheet of the Employment Standards Branch (the “Branch”) pertaining to the Complaint shows a record of a telephone conference on January 12, 2007 between the principal of Nesbitt, Mr. Patrick Nesbitt (“Nesbitt”) and an officer at the Branch wherein Mr. Nesbitt advised, inter alia, that he is in business and that he will attend at the mediation of the matter on February 2, 2007.
13. On January 15, 2007, the Delegate sent a Notice of Mediation Session (the “Notice”) to Nesbitt’s attention at Nesbitt’s Office Address advising that mediation was scheduled at 1:30 p.m. on February 2, 2007. The Notice also advised that if the matter was not resolved through mediation then an Industrial Relations Officer will conduct an adjudication hearing under the Act.
14. While there is no indication in the Section 112(5) Record if the mediation was attended by Mr. Nesbitt, the mediation was clearly unsuccessful as on February 6, 2007, the Delegate issued a Demand for Employer Records (the “Demand for Records”) and a Notice of Complaint Hearing (the “Hearing Notice”) to Nesbitt and sent both to Nesbitt’s Office Address as well as Nesbitt’s registered and records office at 22311-119th Avenue, Maple Ridge (“Nesbitt’s Registered and Records Office”) by registered mail. However, the registered mail was returned to the Branch on or about February 9, 2007 as undeliverable and it was then sent by regular mail to Nesbitt’s Registered and Records Office on February 15, 2007 and not returned to the Branch. There is also a Canada Post “Track a Package” record showing that the Notice of Hearing sent to Nesbitt’s Office Address was redirected and successfully forwarded to Nesbitt’s receiver on February 9, 2007.
15. The Delegate also sent Nesbitt, by regular mail, registered mail and fax, copies of the records submitted to the Branch by Ms. James on February 26, 2007 at both Nesbitt’s Office Address and Nesbitt’s Registered and Records Office.
16. The Hearing of the Complaint was scheduled on March 7, 2007 at 9:00 a.m.
17. At 10:00 a.m. on March 7, 2007 when the Hearing was scheduled to commence, Ms. James was present but Mr. Nesbitt was not. The conduct officer at the Branch attempted to contact Mr. Nesbitt but without

any success and left a voicemail message for Mr. Nesbitt. Mr. Nesbitt contacted the Branch in response to the message and attended at the Hearing later in the morning.

18. Before the Hearing commenced, a mediator at the Branch assisted the parties with a view to resolving the matter but was unsuccessful and the Hearing commenced at 12:30 p.m. on the same date.
19. At the Hearing, Mr. Nesbitt confirmed that Nesbitt's address in the branch's file was correct although Nesbitt's office was not operating at the time.
20. The Director's Determination was issued on April 25, 2007;
21. The Determination was sent to Nesbitt by registered mail on April 25, 2007 to both, Nesbitt's Address at 22611 Dewdney Trunk Road, Maple Ridge, British Columbia, as well as Nesbitt's Registered and Records Office at 22311-119th Avenue, Maple Ridge, British Columbia.
22. A cover letter of the Delegate attaching the Determination to Nesbitt contained the following information and direction on Appeal:

"Appeal Information

Should you wish to appeal this Determination to the Employment Standards Tribunal, your Appeal must be delivered to the Tribunal by 4:30 p.m. on June 4, 2007. Information on the Tribunal and how to appeal a Determination can be found at the Tribunal's website www.bcest.bc.ca or by contacting the Employment Standards Tribunal at (604) 775-3512. The Tribunal is separate and independent from the Employment Standards Branch."

23. The cover letter from the Delegate enclosing the Determination also indicated:

"If payment is not received within 38 days of a Determination, additional interest will accrue. The amounts owing may be referred to a collection agency without further notice to you."
24. As Nesbitt did not make a payment pursuant to the Determination within 38 days of the Determination, on or about June 15, 2007, the Director obtained from the Supreme Court of British Columbia a Writ of Seizure and Sale against Nesbitt in respect of the outstanding award in the Determination.
25. Nesbitt filed its Appeal of the Determination on July 10, 2007, 36 days after the expiry of the Appeal period.
26. In Mr. Nesbitt's submissions for late filing of Nesbitt's Appeal, he states that he was unable to "reply earlier because of medical problems" and that he can "provide corroborating evidence of this". He also states that he has a "large amount of new evidence that is relevant to this case" and he was "only informed recently that new evidence can be introduced" and at the Hearing, he was told that "new evidence could not be introduced at the appeal", although he does not indicate who told him this.
27. In his further submissions on Appeal on August 7, 2007, Mr. Nesbitt elaborates on the medical problems that prevented him appealing or responding earlier. He states that he was suffering "blindness from several retinal detachments" and "Bipolar II with Socialphobia". While he does not provide any corroborating evidence of either, he states that he can offer "corroborating evidence of this from (his) physician".

ANALYSIS

28. Section 112 of the Act is the code for any party wishing to appeal the Director's determination including the appeal period or time limit for filing an appeal. Subsection 112(3)(a) and (b) provide:

112(3) The appeal 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).

29. Section 109(1)(b) of the Act sets out the Tribunal's authority to extend the time period for requesting an Appeal under Section 112, and provides:

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

...

- (c) extend the time period for requesting an appeal even though the period has expired;

30. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Re: Tang, BC EST # D211/96*.

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.

31. What are the factors that the Tribunal should consider in determining whether compelling reasons exist for extending the time for filing an appeal? In *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet), BC EST # D080/01*, the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party as well as the Director was aware of this intention;
4. The respondent party will not be unduly prejudiced by the granting of the extension;
5. There is a strong *prima facie* case in favour of the appellant.

32. Having reviewed the submissions of all of the parties in the Appeal, I am not satisfied that an extension ought to be granted to Nesbitt to file its Appeal late.
33. First, I am not persuaded that Nesbitt has offered a reasonable and credible explanation for the failure to request an Appeal within the statutory time limits. The Determination was served on Nesbitt in accordance with Section 122(1) of the Act by registered mail. Nesbitt does not contest receiving the Determination. In his submissions, Mr. Nesbitt explains that Nesbitt's late filing of the Appeal was due to his medical problems, namely, blindness from several retinal detachments and bipolar disorder. However, Mr. Nesbitt does not provide any corroborating evidence for the same, although he suggests that he can provide corroborating evidence for his medical ailments. He also does not indicate when he underwent the surgeries for the retinal detachments and how that prevented him from filing an appeal on behalf of Nesbitt until July 10, 2007, after execution proceedings had been commenced against Nesbitt. Nesbitt, in my view, has not discharged the burden placed on it to show a reasonable and credible explanation for failing to file an appeal in a timely fashion.
34. Second, there is no evidence whatsoever in Mr. Nesbitt's submissions showing a genuine and ongoing bona fide intention on the part of Nesbitt to appeal the Determination. It appears that it was only after execution had begun, after the Writ of Seizure and Sale was issued against Nesbitt for the failure to pay the award in the Determination, that Nesbitt filed the Appeal. Mr. Nesbitt never telephoned the Delegate or anyone else at the Branch after the Determination was issued to advise of Nesbitt's intention to appeal or that he required more time to file an Appeal because of his alleged medical ailments. What is telling is that it was shortly after the bailiff attended at Nesbitt's office address (in and during the period of June 20, 2007 to July 4, 2007 according to the Director) that Nesbitt filed the Appeal of the Determination. There is also no evidence that Mr. Nesbitt was incapacitated by his alleged medical ailments until July 10, 2007 before he was able to file an Appeal on behalf of Nesbitt.
35. Third, there is no indication that Nesbitt made any attempts to inform the Director or Ms. James of Nesbitt's intention to appeal the Determination at any time.
36. Fourth, one of the essential purposes of the Act is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act. Ms. James initiated the Complaint approximately 9 months ago. She received a resolution in the form of the Determination almost four months ago. It is, in my view, not only unfair and prejudicial to Ms. James if an extension of time were granted to Nesbitt to file its late appeal because it would delay Ms. James collecting her award but it would be contrary to one of the essential purposes of the Act, namely, fair and efficient resolution of the dispute in question between Ms. James and Nesbitt.
37. Finally, having reviewed the so called "new evidence" Mr. Nesbitt wishes to present in Nesbitt's Appeal, I am not persuaded that there is a strong prima facie case in Nesbitt's favour. In my view, the so called "new evidence" does not satisfy the test delineated by the Tribunal in *Re Merilus Technologies Inc. B.C. EST. # D171/O3* for admitting fresh evidence on Appeal, particularly because I am not at all persuaded that the "new evidence" could not, with the exercise of due diligence on the part of Nesbitt, have been discovered and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made.

ORDER

38. Pursuant to Section 114(1)(b) of the Act, Nesbitt's Appeal is dismissed on the basis that a request for an Appeal has not been made within the time permitted.
39. Further, pursuant to Section 115 of the Act, the Determination is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal