

An appeal

- by -

Chuck's Auto Supply Ltd.
("Chuck's")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2000/837

DATE OF DECISION: February 14, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Chuck’s Auto Supply Ltd. (“Chuck’s”) of a Determination that was issued on November 8, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Chuck’s had contravened Part 2, Sections 18(1) and 21, Part 4, Section 40 and Part 8, Section 63 of the *Act* in respect of the employment of Chad D’Hondt (“D’Hondt”) and ordered Chuck’s to cease contravening and to comply with the *Act* and to pay an amount of \$1,408.61.

The appeal contends the Director failed to deduct certain amounts that were “owed” to the employer, including the cost of medical coverage, payments allegedly made on his behalf to a group pension plan and amounts charged to the employee’s personal account with the employer.

The appeal was filed late and a preliminary matter has arisen concerning whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for requesting an appeal. This decision deals with the preliminary objection. The Tribunal has decided this matter can be decided on the written submissions of the parties.

ISSUE

The issue being considered in this decision is whether the Tribunal should extend the time limited for requesting an appeal under the *Act*. If the appeal is accepted, there are additional issues arising from the appeal concerning whether, in the circumstances, Chuck’s should be allowed to provide additional material that was not provided to the Director during the investigation and whether Chuck’s has met the burden of showing there is an error in the Determination sufficient to require the Tribunal to cancel or vary it. The additional issues have been deferred pending a determination on the preliminary matter.

FACTS

The Determination was issued on November 8, 2000. It was received by Chuck’s on November 10, 2000 and a copy of the Determination was also delivered to the registered and records office of Chuck’s on that same date. The Determination clearly indicates that any person served with the Determination may appeal it and also clearly notes that any appeal must be delivered to the Tribunal no later than 4:30 PM on December 1, 2000. This appeal was not delivered to the Tribunal until December 7, 2000 at 3:54 PM.

ARGUMENT AND ANALYSIS

In the appeal, counsel for Chuck’s made the following submission on the reason for filing the appeal late:

The Employer's appeal is filed late as the principal of the Employer had been wrongfully advised and was under the impression that the Employer had until December 8, 2000 to file the appeal. As the principal of the Employer thought the Employer had until December 8, 2000 to file the appeal and as the principal was away the week of November 24, 2000 to December 1, 2000, the employer did not review the Determination until the week of December 5, 2000.

As noted in the submissions of the Director and D'Hondt, the above reason does not explain the failure to take any step to appeal the Determination between November 10 and November 24, 2000. In a later submission, counsel for Chuck's clarified that the wrong advice on the appeal date was given to the principal of the Employer in the evening of November 28, 2000. It is apparent that up to November 28, 2000, Chuck's had done nothing in respect of preparing an appeal.

The Tribunal has consistently held that it would not grant extensions under Section 109(1)(b) of the *Act* as a matter of course and would exercise its discretionary powers only where there were compelling reasons to do so (see, for example, *Re Metty M. Tang*, BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal's decision in *Re Niemisto* (BC EST 99/96) stated the following:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. there has been a genuine and on-going bona fide intention to appeal the Determination;
- iii. the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
- v. there is a strong prima facie case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

In the circumstances, I am not convinced this is an appropriate case to exercise my discretion in favour of extending the time for requesting an appeal. The explanation given by counsel for

Chuck's for the delay is not reasonable. In my view, it indicates that either the principal of Chuck's or counsel for Chuck's, and more probably both, were cavalier and careless in their approach to an appeal. As noted in *Re Matty M. Tang, supra*, there is an obligation on an appellant to exercise reasonable diligence in pursuing an appeal and that obligation has clearly not been met in this case. As well, I can find no basis for concluding there was any ongoing bona-fide intention to appeal the Determination and, even if there was, it was not communicated to any other party. No effort had been made up to November 28, 2000 to prepare an appeal. It does not appear that any effort was ever made to confirm the assumption about when the appeal was required to be delivered. Even on December 5, 2000, which is the date counsel for Chuck's indicated he realized the appeal was required to be filed on December 1, 2000, none of the parties nor the Tribunal were notified of the "misunderstanding" or that an appeal would be forthcoming.

Finally, I am not satisfied that there is sufficient merit to the appeal to justify an exercise of discretion in favour of extending the time limits. While the Tribunal has not received all submissions from the parties on the question of the additional material provided with the appeal, the circumstances set out in the Determination raise a concern about whether this material should be allowed to be introduced.

The request for an extension of time under Section 109(1)(b) of the *Act* is denied.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated November 8, 2000 be confirmed in the amount of \$1,408.61, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson

David B. Stevenson
Adjudicator
Employment Standards Tribunal

DBS/bls