

An appeal

- by -

Pacific Western Coastal Constructors Ltd.
("PWC")

- 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.: 2008A/57

DATE OF DECISION: August 6, 2008

ISSUE

7. 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.

ARGUMENT

8. PWC says that it did not file an appeal before the deadline because the delegate was told that Aviawest would be paying the employees. PWC argues that it mistakenly believed that the Branch would seek recovery of the outstanding wages from the developer's holdback. It also contends that, at the time the Determination was issued, it was in court seeking to have the lien against Fairfield (one of the group of companies forming Aviawest) upheld, which it did successfully. PWC says it does not understand why the Branch has not attached the funds being held in court for the workers.
9. The delegate denies that Aviawest agreed to pay the employees' wages. He says PWC was told that the developer was considering whether to make the payments and that the Determination was issued only after the developer decided it would not voluntarily make the payment. The delegate says that the Branch has attempted to collect the wages through demand notices and a Writ of Seizure and Sale, but has been unsuccessful.

THE FACTS AND ANALYSIS

10. 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 15 days of service, if served by registered mail, or 8 days after service, if served personally.
11. 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*.
12. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
13. 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, 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.
14. These criteria are not exhaustive.

15. Having reviewed the submissions of the parties, I decline to grant the application for an extension for the following reasons.
16. I find no genuine and ongoing intention to appeal the Determination within the statutory time limit. The first indication PWC intended to appeal the Determination was the appeal letter received by the Tribunal on June 10, 2008, nearly four months past the appeal deadline. It appears that the appeal was made only after the Branch made unsuccessful attempts to collect the outstanding amounts.
17. I also find no reasonable and credible explanation for PWC's failure to appeal the Determination within the appeal deadline. While it states that it believed that the developer was going to pay the outstanding wages, the delegate delayed issuing the Determination until after the developer indicated it would not do so. Thus, at the time PWC received the Determination, it knew the developer had not agreed to pay the wages from its holdback.
18. Finally, I find no strong *prima facie* case in PWC's favour. Although PWC alleges that the delegate failed to observe the principles of natural justice, there is no evidence PWC was denied the opportunity to know the claims made against it or to respond to them. Indeed, there was no dispute to the facts or that the employees were entitled to wages.
19. Furthermore, while PWC suggests that the BC Supreme Court upheld its lien against the developer, the decision merely confirms that a contract bonus may properly be included in a lien claim. The amount of PWC's lien claim was paid into court pending the Determination of the dispute between PWC and the developer on its merits. (*Fairfield Project Limited Partnership v. Pacific Western Coastal Constructors Ltd.*, 2008 BCSC 135) PWC's ongoing dispute with the developer does not affect its obligation to pay wages to its employees.

ORDER

20. Pursuant to section 109(1)(a) of the Act, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal