

An appeal

- by -

King Framing Ltd.
(“KFL”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/58

DATE OF DECISION: July 13, 2011

DECISION

SUBMISSIONS

Harpreet S. Nirwan

counsel for King Framing Ltd.

Gagan Dhaliwal

on behalf of the Director of Employment Standards

INTRODUCTION

1. I have before me an application pursuant to section 109(1)(b) of the *Employment Standards Act* (the “*Act*”) to extend the time for filing an appeal to the Tribunal. On February 22, 2011, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination (the “Determination”) and accompanying “Reasons for the Determination” (the “delegate’s reasons”) ordering King Framing Ltd. (“KFL”) to pay its former employee, Hardev S. Dhanoa (“Dhanoa”), the sum of \$1,648.96 on account of unpaid wages and section 88 interest. In addition, and also by way of the Determination, the delegate levied three separate \$500 monetary penalties (see section 98) against KFL for having contravened sections 18 and 40 of the *Act* and section 46 of the *Employment Standards Regulation*. Thus, the total amount payable under the Determination is \$3,148.96.
2. KFL operates in the construction sector as a framing company. Mr. Dhanoa filed a complaint alleging that he worked for KFL from March 8 to 25, 2010, without being paid. The delegate presided at a complaint hearing on January 24, 2011, and issued the Determination and accompanying reasons on February 22, 2011. The Determination contained a notice about appeal procedures in a text box headed “Appeal Information” indicating that an appeal to the Tribunal must be filed by no later than April 1, 2011 – this deadline was calculated in accordance with subsections 112(3) and 122(2) of the *Act*. The appeal was filed on May 10, 2011, and thus triggering the present application to extend the appeal period.
3. The Tribunal invited the parties to file submissions regarding KFL’s application to extend the appeal period and the delegate filed a brief submission opposing the application. Mr. Dhanoa did not file a submission.

ANALYSIS AND FINDINGS

4. Section 109(1)(b) of the *Act* states that the Tribunal “may...extend the time period for requesting an appeal even though the period has expired”. In determining whether to grant such an application, the Tribunal will consider a variety of factors including the absolute length of the delay, the reason for failing to file a timely appeal, possible prejudice to other parties and whether the appeal is meritorious on its face.
5. In the instant situation, the delay is not unduly long – the appeal having been filed about five weeks after the statutory deadline. The Appellant’s president has provided evidence that he left Vancouver for India on February 7, 2011, and did not return to Vancouver until April 10, 2011. Thus, the Determination arrived when this individual was out of the country. On the other hand, although the appeal deadline had by then expired, the appeal was not filed until about one month later (on May 10, 2011). There is nothing in the material before me adequately explaining why the appeal was not filed sooner other than the fact that KFL did not proceed on its own but instead chose to retain legal counsel – I do not find this to be a satisfactory explanation.

6. Further, at the conclusion of the hearing the delegate advised the parties that his decision would be released within a 4- to 6-week period. KFL's president, either before he left for India, or while he was away, could have made arrangements for some other individual to assume conduct of the company's business affairs. I do not understand why the Determination – and it was mailed to the company's business office, its president's residence and to its registered/records office in an envelope marked as emanating from the Employment Standards Branch – was not opened upon receipt at which point the president could have been contacted and his instructions regarding an appeal obtained.
7. While I do not see that any particular prejudice would be visited on Mr. Dhanoa if the appeal period were to be extended, in my view, the inevitable result of the appeal is that it would fail. I do not see why the parties should be put through an unnecessary and somewhat time-consuming adjudicative exercise when the end result seems obvious. Although KFL's legal counsel characterizes the grounds of appeal as having significant merit, I consider this appeal to be very close to a frivolous one.
8. The grounds of appeal asserted in its appeal documents are: i) error of law and ii) breach of the principles of natural justice (subsections 112(1)(a) and (b)). The natural justice ground is not particularized and I fail to see how, in this case, this ground might apply. The parties were given notice of the complaint hearing and all attended with their witnesses in tow; the delegate heard all of the evidence (six persons testified at the hearing), considered that evidence and the parties' arguments, and then issued a decision. There is no suggestion that the delegate was, or appeared to be, biased or otherwise in a conflict of interest. What more could be asked of the delegate in the circumstances?
9. As for the alleged errors of law, KFL complains about the wage payment order being based on a \$12 per hour rate when "there was no evidence presented at all on this point". This is plainly an untenable assertion. Mr. Dhanoa's original complaint set out the \$12 per hour figure as did his earlier "self-help kit" form that was provided to the employer and Mr. Dhanoa testified at the hearing that \$12 was the agreed hourly rate. Apparently, KFL led no evidence about the agreed wage rate and never challenged Mr. Dhanoa regarding his evidence on the point.
10. KFL also says that the delegate should not have discounted KFL's payroll records (which did not show Mr. Dhanoa to be employed at any time), however, I do not see that the delegate erred in failing to accord the payroll records any weight. I might note that KFL ultimately acknowledged that Mr. Dhanoa *was* employed, at least for a couple of hours on one day, and thus, the records – to the extent that they did not record Mr. Dhanoa as an employee at any time – were clearly inaccurate.
11. To some degree, the delegate's findings turned on credibility but there was sufficient additional corroborative evidence to support the delegate's credibility findings. For example, while Mr. Dhanoa's evidence was consistent throughout the entire matter (from his self-help kit through to the hearing), KFL's evidence was a "moving target". KFL submitted nearly identical written statements from some of its employees that Mr. Dhanoa only worked on March 8 for two hours but at the hearing these witnesses could not recall the actual day in question. KFL's evidence was that Mr. Dhanoa only worked one day for two hours and yet Mr. Dhanoa was able to provide detailed (and unchallenged) evidence about working on three specific work sites during his period of employment. Mr. Dhanoa said that there were many telephone calls to and from KFL during his employment relating to when he was to be picked up each day – KFL said no such calls were ever made but when ordered to produce its telephone records (that would have affirmatively sorted out the controversy), it ultimately failed to do so.
12. In my judgment, there is absolutely no merit to the suggestion that the delegate erred in law. That being the case, I do not think it appropriate to extend the appeal period in this instance.

ORDER

13. The application to extend the time for filing an appeal is refused. Pursuant to subsection 114(1)(b) of the *Act* this appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal