



An appeal

- by -

Dan Dennill and Marlene Dennill
Operating as Fibremaster Restorations & Carpet
(the "Dennills")

- 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: Cindy J. Lombard

FILE No.: 2000/693, 2000/694, 2000/695

DATE OF DECISION: February 14, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Dan Dennill and Marlene Dennill operating as Fibremaster Restorations & Carpet (“Dennills”) from the following Determination of a Delegate of the Director of Employment Standards dated September 8, 2000, making the following Orders:

1. Finding that Ashok Gaba and Allen Sorenson are due regular wages, overtime, vacation pay and interest in the amount of \$3,060.16.
2. Imposing a penalty of \$300.00 for contravention of the *Act* including 16, 17(1), 18(1)(2), 28(1), 40(1)(2) and 58(3) and the Regulations Section 15.
3. Imposing a penalty of \$500.00 for failure to produce employer records in response to a Demand for Employer Records by the Director.

The Determination was delivered to the Appellant Dennills and service was acknowledged by them by Canada Post proof of confirmation of delivery on September 11, 2000.

The time to appeal the Determination expired on October 4, 2000.

The Dennills filed their appeal on October 10, 2000, i.e. 6 days after the deadline.

ISSUE TO BE DECIDED

The sole issue at this time is whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Employment Standards Act* (the “Act”) to extend the time to file an appeal by the Dennills of the Determination.

FACTS AND ANALYSIS

Section 112(1) and (2) of the *Act* provides that:

112. (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*

- (2) *The request must be delivered within*
- (a) *15 days after the date of service, if the person was served by registered mail, and*
- (b) *8 days after the date of service, if the person was personally served or served under section 122(3).*

Section 109(1)(b) gives the Tribunal discretion to extend the time period for requesting an appeal if that time period has expired:

109. (1) *In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:*
- (b) *extend the time period for requesting an appeal even though the period has expired;*

The statutory discretion to extend the time for filing an appeal will only be granted for compelling reasons and the burden is on the Appellant Dennills to prove such reasons.

Some of the factors to be considered in determining whether a compelling reason exists are:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
2. There was a genuine and ongoing bone 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 face case in favour of the appellant.

The Appellants were served with the Determination on September 20, 2000, by registered mail. According to Section 112(2)(b) the time for appealing the Determination expired fifteen day later on October 4, 2000.

The Appellant Dennills say that upon receiving the Determination on September 20, 2000, Mrs. Dennill sent the letter dated September 20, 2000, stating that:

- a) They had received the Determination letter.
- b) They had received a letter from the Delegate of the Director on June 30, 2000, alleging that they owed wages to Gaba and Sorenson and requesting a statement of their hours and rate of pay. Further, the Appellant Dennills

say that on July 18, 2000, they had faxed that information to the Delegate and enclosed a copy of the facsimile cover sheet dated July 18, 2000 (but we note showing a fax date and time of 01/02/1991 at 6:15 p.m.) with an attached summary of hours worked and wages owing.

On July 21, 2000, a Demand for Employer Records was sent by the Delegate and received by the Dennills on August 4, 2000, as confirmed by the Canada Post Certificate of Delivery.

The Appellant Dennills says that they ignored the Demand because they had just sent their letter dated July 18, 2000, with enclosed list of hours, rate of pay and wages paid.

Although the Determination clearly states an appeal deadline of October 2, 2000, at 4:30 p.m. and attaches the procedure to be followed, no appeal was filed until October 10, 2000, six days after the deadline, which was October 4, 2000.

The Delegate of the Director says that appeal was filed only after he contacted the Appellant on October 10, 2000, concerning a new complaint being filed against them.

Mrs. Dennill ,on behalf of the Appellant, says in her letter dated October 23, 2000, that the appeal was filed late because, while she had put the paperwork together to file the appeal, she had left it to her office assistant to mail out because she was seven months pregnant at the time and had to spend a week in bed on doctor's advice. Mrs. Denhill says that when she returned to her office she received some mail concerning the Determination notice and only then discovered that the appeal papers had not reached their proper destination. Mrs. Dennills says that she then telephoned the Employment Standards Tribunal office and it was only then that she discovered that not only had they not received the appeal but her faxed letter of July 18, 2000, concerning the hours and wages of Gaga and Sorenson had not been received. Mrs. Dennill says that she then sent the appeal papers by facsimile.

On the basis of the evidence submitted, the Appellant Dennills have not discharged the burden on them to show compelling reasons why the time for filing the appeal should be extended.

It is in the interest of both employers and employees to have complaints dealt with expeditiously. Therefore, any extension of statutory time limits must be done only where a compelling reason exists.

The facts here do not present a prima facie case of any compelling reason:

- 1) The appellant was presented with a Demand for production of employer records on July 20, 2000, and never did comply with that Demand;
- 2) In response to the Delegate of the Director's letter dated June 30, 2000, the Demand received August 4, 2000, and Determination received September 30, 2000, the Appellant says that a letter sent to the



Employment Standards office on July 18, 2000, by facsimile was never received or went astray and the appeal documents sent by mail also did not reach the proper destination. In the case of the former letter, no proof that the letter was actually sent by facsimile on the alleged date is submitted (the date shown is in fact 1991) and in the case of the latter appeal documents, no sworn statement is provided from the office assistant that the appeal papers were in fact mailed. In summary, there is no reasonable and credible explanation for the delay in filing the appeal;

- 3) Nor is there evidence of a genuine and bona fide intention to appeal the Determination; rather, according to the Delegate, the appeal was only filed on October 10, 2000, following a telephone conversation on that same date advising them that a new complaint had been filed and that the Determination had been filed in Court and should be sent to a bailiff to execute. Furthermore, there had been no response from the Appellant to earlier correspondence to the Appellant dated October 3, 2000, advising that this step would be taken if there was no response to the Order to pay in the Determination.

ORDER

Pursuant to Section 114 of the *Act*, the appeal is dismissed on the basis that a request for an appeal has not been made within the time Section out in Section 112 of the *Act*.

Pursuant to Section 115 of the *Act*, I order that Determination be confirmed.

Cindy J. Lombard

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal