

An appeal

- by -

Precision Home Components Inc. ("Precision")

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/074

DATE OF DECISION: July 30, 2009



DECISION

SUBMISSIONS

John Chiang and Mohammed Janif on behalf of Precision

Chantal Martel on behalf of the Director of Employment Standards

OVERVIEW

- This is an appeal by Precision pursuant to section 112 of the *Employment Standards Act* (the "Act") from a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 25, 2009. In that decision, the Director ordered Precision to the pay the administrative penalty of \$500 under section 29 of the *Employment Standards Regulations* (the "Regulations") for contravention of section 28 of the Act.
- Mohammed Janif ("Janif") on behalf of Precision on Appeal Form 1 has appealed the Determination of the Director on the grounds that the Director failed to observe the principles of natural justice in making the Determination. The appeal was required to be delivered to the Employment Standards Tribunal by 4.30 pm on May 4, 2009; it was e-mailed to the Employment Standards Tribunal on June 3, 2009. A reason given by Precision for the delay in filing the appeal was that its premises were destroyed by fire in January 2008 and a temporary postal box was set up, and then Precision subsequently moved offices twice in 2008. Janif submitted that the Determination was not received until May 29, 2009 and this was after receiving an e-mail from Greg of the Employment Standards Office on May 25, 2009.
- In regards to the substance of the appeal, Janif submitted that the management was formed and organized in the summer of 2007 but there was insufficient time for Precision to set up proper records of employee working hours by December. Furthermore, it was submitted that Mr. Turtle was part of the management and no such record of the number of hours worked was kept because his remuneration was not based on the number of hours. Also Janif said that the building was destroyed in January 2008 and all activities ceased thereafter.

ISSUE

- The issues to be determined by the Tribunal are as follows:
 - a. Should the Tribunal use its power under section 109 of the *Act* and extend the time period for requesting an appeal even though the period has expired;
 - b. If the time period is extended for requesting an appeal, did the Director fail to observe the principles of natural justice in making the Determination?

BACKGROUND

Precision is a manufacturer of prefabricated panel homes. Cameron Turtle filed a complaint under section 74 of the Act that Precision had contravened the Act by failing to pay regular wages and vacation pay. In a Determination dated March 25, 2009, the Director found that Precision had not contravened the Act and no wages were outstanding. However, the Director found that Precision had contravened section 28 of the Act and ordered a \$500 administrative penalty. Section 28 reads as follows:

- 28 (1) For each employee, an employer must keep records of the following information:
 - (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
 - (2) Payroll records must
 - (a) be in English,
 - (b) be kept at the employer's principal place of business in British Columbia, and
 - (c) be retained by the employer for 2 years after the employment terminates.
- The Director's order of a \$500 administrative penalty was appealed by Precision on June 3, 2009, one month after the appeal request period had expired.

ANALYSIS

- I will first consider whether to extend the deadline and accept this late appeal. Section 109(1)(b) of the Act gives the Tribunal the power to extend the time period for requesting an appeal even though the period has expired. The Employment Standards Tribunal has previously considered some or all of the following factors in determining whether to extend an appeal period¹:
 - a. Is there a good reason why the Appellant could not meet the deadline?
 - b. Was there an unreasonably long delay in filing the appeal?
 - c. Did the Appellant always intend to appeal the Determination?

¹ See for instance Niemisto BC EST # D099/096 and Freney BC EST # D130/04



- d. Were the other parties such as the Respondent (Director of Employment Standards) and the delegate who wrote the Determination aware of the intent to appeal?
- e. Would extending the appeal deadline harm the Respondent's case?
- f. Does the Appellant have a strong case that might succeed if the Tribunal grants an extension?
- 8. The above factors do not constitute an exhaustive list and some of those factors are more relevant than others given the particular circumstances of the case.
- I will first consider the reasons for the late submission of the appeal. Precision gave as reasons for the lateness of the appeal, *inter alia*, the fact that their premises were destroyed in January 2008 and that they moved twice in 2008. I presume that what Precision is arguing is that they did not receive the Determination when it was sent because of the fire in January 2008 and because of its two relocations in 2008. I note that the Determination was not rendered until March of 2009. Their explanation lacks credibility in that there were several months in 2009 in which they could have notified the Employment Standards Branch of a change of address, particularly since Janif was aware a decision would be forthcoming. Furthermore, it is pointed out in the Director's submissions that a copy of the Determination was sent by registered mail to each director of Precision, Caroline Janif and Mohammed Janif, at 146 East 7th Ave. Vancouver. Both copies were returned "unclaimed". No explanation was given as to why these copies of the Determination were unclaimed. Overall I find these reasons very weak.
- Secondly, I find it important to consider whether Precision has a strong case which might succeed if an extension were granted. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
 - 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was made.
- Precision has appealed on ground (b). They have acknowledged in their previous submissions that section 28 of the *Act* was contravened. Natural justice requires that a party has an opportunity to know the case against him or her, the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.
- I have reviewed the submissions of Janif (as set out in paragraph 3 above) and find no evidence of a breach of natural justice. Precision's argument that there was insufficient time between the summer of 2007 and December 2007 to establish proper records is not credible. The further argument that a record need not be kept for employees not paid by the hour is contrary to the requirements of section 28 of the Act (28(1)(c) and (d).



I find the two factors discussed above, that is, the reasons for the lateness of the appeal and the probability of success, to be the most relevant factors in this case regarding accepting a late appeal. I am not satisfied from an analysis of these factors that an extension of the appeal period should be granted. The fact that the Determination was not received by Precision until late May appears to be entirely their own fault, that is, for not supplying a change of address to the Employment Standards Branch. There is no evidence that there is a case which might succeed if an extension were granted.

ORDER

The request by Precision to extend the time period for an appeal is **denied.**

Margaret Ostrowski, Q.C. Member Employment Standards Tribunal