

An appeal

- by -

Gary Tam
(“Mr. Tam”)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2011A/109

DATE OF DECISION: August 23, 2011

DECISION

SUBMISSIONS

Abigail Shaw

on behalf of Gary Tam

OVERVIEW

1. On July 27, 2011, a delegate of the Director of Employment Standards (the “Director”) issued a Determination on a complaint by Gary Tam (“Mr. Tam”) under the *Employment Standards Act* (the “Act”) against his former employer, Western Forest Products Inc. (“WFP”). The Determination found the Act had not been contravened by WFP and no wages were outstanding to Mr. Tam.
2. The Determination set September 6, 2011, as the date on which any appeal had to be delivered to the Tribunal. On August 10, 2011, the Tribunal received a pro-forma appeal from the office of legal counsel for Mr. Tam. The covering document with the appeal from a paralegal in the law office, indicated that legal counsel for Mr. Tam is a sole practitioner who “was and is out of the country” when the Determination was issued. The document also indicated that legal counsel would require certain documents “from the Employer and other witnesses” to properly address the issues in the Determination and to assist in the appeal and requested an extension of time from September 6, 2011, to September 27, 2011, to appeal the Determination.
3. Following receipt of the documents, the Tribunal contacted the paralegal and indicated to her that a submission providing a description of the documents perceived to be required and indicating their relevance to the appeal should be made to the Tribunal. That request was confirmed in a letter from the Tribunal dated August 16, 2011, which also specified the information requested by the Tribunal following receipt of the appeal was required to be provided to the office of the Tribunal by 4:00 pm August 17, 2011. The Tribunal has received no response from the letter.

ISSUE

4. The issue being addressed in this decision is whether an extension of time to file an appeal of the Determination should be granted.

ANALYSIS

5. In *Worldspan Marine Inc. and others*, BC EST # D037/11, The Tribunal made the following comments in the context of an application made prior to the expiry of the statutory appeal period to extend the time for filing an appeal:

The statutory requirements for filing an appeal are not onerous. Subsection 112(1) of the Act sets out three grounds on which a Determination may be appealed. In particular, an appeal can be grounded in evidence becoming available that was not available when the Determination was being made. A substantial body of law has been developed around this ground of appeal. The Tribunal takes a relatively strict approach to exercising its discretion about whether additional evidence will be accepted in an appeal, considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, and *Senor Rana's Cantina*

Ltd., BC EST # D017/05. The Tribunal also considers whether the evidence sought to be submitted with the appeal was available but not provided to the delegate during the investigation because of the failure or refusal of the appellant to participate in the complaint process: see *Tri-West Tractors Ltd.*, BC EST # D268/96; *Kaiser Stables Ltd.*, BC EST # D058/97.

Subsection 112(2) sets out what a person seeking to appeal must do in order to make an appeal:

- (2) *A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),*
- (a) *deliver to the office of the tribunal*
 - (i) *a written request specifying the grounds on which the appeal is based under subsection (1),*
 - (i.1) *a copy of the director's written reasons for the determination, and*
 - (ii) *payment of the appeal fee, if any, prescribed by regulation, and*
 - (b) *deliver a copy of the request under paragraph (a) (i) to the director.*

Under the *Administrative Tribunals Act*, the Tribunal is vested with the authority to make rules respecting its practice and procedure: see section 11. The Tribunal has established rules relating to appeals. Among other things, the rules require an appellant to provide an explanation for the grounds chosen. The objective of the rules is to meet the statutory purposes of speed, efficiency and finality in the appeal process. The rules are not, however, given an overly technical application. There is room within the application of the rules to ensure an appeal is fully and fairly heard: see *D. Hall & Associates Ltd.*, BC EST # D354/99.

The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). More specifically, it is a primary objective of the *Act* that the appeals system should be relatively informal and, while ensuring compliance with principles of natural justice, that appeals should be decided quickly at the lowest possible cost to the parties. The foundation for this approach is firmly grounded in the language of the *Act*, the intention of the legislature and a recognition that the *Act* is basic social legislation governing employment, a matter described by Mr. Justice Iacobucci in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, at page 1002, to be “of central importance to our society”. The entitlements contained in the *Act* have, by their inclusion in the legislation, been considered by the legislature to be basic social entitlements.

The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

Section 109(1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST # D099/96. The following criteria should be satisfied to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;

3. The respondent party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension;
5. There is a strong *prima facie* case in favour of the appellant.

The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. In the circumstances of this request, the expression of the first criterion would be modified slightly to reflect this request is being made before the appeal period has expired; the Associated Employer must still demonstrate there is reasonable and credible explanation for the extension sought.

6. The above comments are applicable to the request made here.

DECISION

7. I am not persuaded the circumstances in this case justify extending the time limits for appeal.
8. My decision on this application turns on the absence of a reasonable explanation for the request and the failure by the appellant to show there is a strong *prima facie* case on appeal.
9. Except in very unusual circumstances, and this is not one of those circumstances, the unavailability of legal counsel will not be accepted as a reasonable explanation for delaying the statutory appeal process. As indicated above, the statutory requirements for filing an appeal are not onerous. Appeals to the Tribunal under the *Act* are typically filed by lay persons. The Tribunal's rules are available on-line and are drafted in plain language. The context of this appeal is not unusual and does not suggest the involvement of legal counsel is essential to the process.
10. In any event, one of the grounds chosen in this appeal is evidence coming available that was not available when the Determination was being made. An appeal based on new, or additional, documents has a hard road to hoe and the appeal must show there is some basis for reliance on this ground. In this appeal, the appellant has made an initial assessment of the potential merit and success of this ground of appeal impossible by having failed to provide the Tribunal a description of the documents which are sought and their potential relevance to the appeal.
11. While the Tribunal has discretionary authority to order production of documents in an appeal, such discretion has been limited to documents that may be relevant: see section 109(1) (d), (g) and (h). As stated by the Tribunal in *Antepreet Brar and others*, BC EST # D072/00:

In my view, an assessment of what documents “may be relevant” for purposes of a production order must be driven by the Determination itself and by the stated reasons for appealing that Determination.
12. The difficulty in assessing the *prima facie* merits of the appeal is not confined to the matter of possible new, or additional, evidence. While the pro-forma appeal form submitted on behalf of Mr. Tam has indicated the appeal is based on each of the grounds set out in section 112 of the *Act*, no explanation for the chosen grounds of appeal have been provided.
13. In other words, there does not appear to have been any effort to satisfy even the most basic of the requirements for filing an appeal and no basis for assessing the merits of the appeal at this stage.

14. This failing also militates against the Tribunal exercising discretion to allow an extension of the statutory appeal period.
15. For the above reasons, the request to extend the appeal period is denied.

David B. Stevenson
Member
Employment Standards Tribunal