

An appeal

- by -

Millennium Compact Disc Industries Inc.
(“MCDI”)

- 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.: 2005A/73

DATE OF DECISION: July 13, 2005

DECISION

SUBMISSIONS

John Allen for Millennium Compact Disc Industries Inc.
Darlene Mellesmoen on her own behalf
Ivy Hallam for the Director of Employment Standards

INTRODUCTION

1. This is an appeal filed by Millennium Compact Disc Industries Inc. (“MCDI”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). MCDI appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on March 17th, 2005 pursuant to which it was ordered to pay its former employee, Darlene Mellesmoen (“Mellesmoen”), the sum of \$9,214.92 on account of unpaid wages and section 88 interest (the “Determination”).
2. Further, by way of the Determination, the Director’s delegate ordered MCDI to pay an additional \$1,500 in administrative penalties (three separate \$500 penalties for contraventions of sections 17, 58 and 63 of the *Act*).
3. MCDI appeals the Determination on the ground that the Director’s delegate erred in law. These reasons for decision do not address the merits of MCDI’s appeal. Rather, there is a question about the timeliness of the appeal and, accordingly, that matter must first be adjudicated.

TIMELINESS OF THE APPEAL

4. An appeal of a determination must be filed, in writing, with the Tribunal within “30 days after the date of service of the determination, if the person was served by registered mail” [see section 112(3)(a) of the *Act*]. However, if the appeal is not filed within this latter statutory time limit, the Tribunal may extend the appeal period pursuant to section 109(1)(b) of the *Act*.
5. The Determination (and attached “Reasons for the Determination”) was issued on March 17th, 2005. The Determination and Reasons were forwarded by registered mail to MCDI’s usual place of business and to its “registered and records office”. In addition, copies of the Determination and Reasons were mailed to three other individuals who were identified as MCDI directors and/or officers.
6. An appeal of the Determination should have been filed by no later than the close of business on April 25th, 2005. A notice setting out the appeal period—and further information about the appeal process—is contained on the last page (page 3) of the Determination. This latter appeal deadline was calculated relying on the “deemed service” provisions contained in section 122(2) of the *Act* (the actual appeal period may have expired a few days prior to April 25th, 2005 depending on when the registered letter was actually delivered to MCDI’s registered office).
7. MCDI’s appeal form is dated April 25th, 2005 and it was filed with the Tribunal on April 26th, 2005. Since MCDI’s appeal was, on its face, filed outside the statutory appeal period, the Tribunal’s Vice-Chair

wrote to all of the parties on May 4th, 2005 and requested their submissions regarding whether the Tribunal should extend the appeal period. In her May 4th letter, the Vice-Chair also summarized the various factors [derived from the Tribunal's section 109(1)(b) jurisprudence] the Tribunal considers when ruling on an application to extend the appeal period. The parties were given until May 26th, 2005 to file their submissions on the "timeliness of the appeal" issue.

8. I now have before me submissions dated May 11th, 2005 (from the Director's delegate), May 18th, 2005 (from Ms. Mellesmoen), and April 28th and June 17th, 2005 (from Mr. John Allen, on behalf of MCDI).

THE PARTIES' POSITIONS

MCDI

9. The Tribunal's appeal form contains a separate section (No. 7) dealing with "Late Appeals". Appellants are requested, in section 7 of the form, to explain why their appeal was filed after the appeal period expired. MCDI's form contains the following handwritten note in section 7: "Departure of counsel—Company representative had to prepare the appeal himself." In a 1-page letter dated April 29th, 2005 appended to MCDI's appeal form, Mr. Allen (MCDI's former operations manager and its agent in this appeal) explained that the company was facing difficult financial circumstances, assets seizures and lawsuits by creditors, and a consequent inability to maintain normal business operations. Mr. Allen further stated that the entire board of directors had resigned *en masse* and that since the company could not afford to retain legal counsel, he was soldiering on as best he could.
10. In his June 17th submission, Mr. Allen indicated that he was "affirm[ing] that the reasons for the delay in submitting the Appeal to the Tribunal are as stated in my letter to the Tribunal of April 28, 2005". The balance of Mr. Allen's June 17th submission deals solely with the merits of the appeal and does not address the "timeliness" issue whatsoever.

Ms. Mellesmoen

11. In her May 18th submission, Ms. Mellesmoen opposes MCDI's application to extend the appeal period. Ms. Mellesmoen claims that Mr. Allen does not have the proper legal authority to represent MCDI, that he has repeatedly attempted to "stall" the timely disposition of her complaint and that he has, on occasion, "threatened" her with counter-litigation if she continued to pursue her complaint.

The Director

12. In her May 11th submission, the Director's delegate indicated that she was not taking any position regarding the application to extend the appeal period.

FINDINGS AND ANALYSIS

13. I find Ms. Mellesmoen's assertion that Mr. Allen has no lawful status to act on behalf of MCDI to be persuasive. Ms. Mellesmoen submits that MCDI "has no president, no secretary treasurer, no board of directors, no legal counsel, no common shareholders and no manufacturing equipment or personnel".
14. Mr. Allen, in his April 28th letter, indicated: "Since the ESB Hearing, the entire Board of Directors of the Company has resigned, and the remaining assets of the Company have been seized by a secured creditor". I note that the evidentiary hearing before the Director's delegate was held on December 13th, 2004 and January 11th, 2005 (the Determination, as noted earlier, was issued on March 17th, 2005). In the absence of a board of directors, what person or persons had the lawful authority to authorize the filing of the instant appeal proceeding?
15. Mr. Allen's asserted authority to act on behalf of MCDI stems from a letter (on MCDI letterhead) dated June 16th, 2005 and signed by Mr. Wolfgang Burandt (identified in the Determination as an MCDI director/officer) in which Mr. Burandt states that he has "authorized former MCDI Operations Manager John Allen to represent the Company in the Appeal of the Determination". I note that Mr. Burandt's purported authority to so authorize Mr. Allen is not set out in the June 16th letter, nor does Mr. Burandt state that Mr. Allen's authority was vested in Mr. Allen at some point prior to the date of the letter.
16. MCDI's appeal was filed on April 26th, 2005; Mr. Allen signed the appeal form and asserted that he was MCDI's "Operations Manager *pro tem*". I have serious reservations regarding Mr. Allen's authority to act, and Mr. Burandt's authority to authorize Mr. Allen to act, on behalf of MCDI. I am not satisfied that MCDI's appeal is properly before the Tribunal since it appears that Mr. Allen was never authorized to act on the company's behalf by a proper board of directors' resolution or through lawfully delegated authority given to him by a duly appointed company officer.
17. Quite apart from the foregoing, even if I were satisfied that Mr. Allen was authorized to file the appeal, I am not satisfied that this is a case where the appeal period should be extended.
18. I do not consider lack of funds to retain legal counsel to be a satisfactory excuse. The Tribunal's procedures are designed to be readily accessible by laypersons and, indeed, the overwhelming majority of appeals are filed by persons who are not legally represented. I note that Mr. Allen testified before the delegate and was very familiar about the issues involved in the case. I also note that if Mr. Allen was concerned about meeting the appeal deadline—a deadline that was very clearly highlighted in the Determination—he might have made an application to extend the appeal deadline before it expired. It is not at all clear to me that the appellant has demonstrated an ongoing desire to appeal the Determination since it was first issued.
19. Finally, although the appeal is said to be based on alleged errors of law, so far as I can determine, the appeal primarily—if not exclusively—simply asks the Tribunal to overturn findings of fact that were made by the delegate in the face of conflicting evidence. It would appear that all of the delegate's findings of fact are supported by some evidentiary foundation. The appeal also raises at least two issues (relating to the status of another company employee) that are wholly irrelevant to Ms. Mellesmoen's unpaid wage claim.
20. Accordingly, I am refusing the application to extend the appeal period.

ORDER

21. The application to extend the appeal period is refused. Accordingly, pursuant to section 114(1)(b) of the *Act*, the appeal is dismissed. It follows that the Determination is confirmed as issued in the amount of \$10,714.92 together with whatever additional interest that may have accrued pursuant to section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal