

An appeal

- by -

Ali Dameyanti carrying on business as Canfee Janitorial Services
(the “Employer”)

- 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: Sheldon M. Seigel

FILE No.: 2009A/108

DATE OF DECISION: October 16, 2009

DECISION

SUBMISSIONS

Dameyanti Ali on behalf of the Employer

Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. The Employer, Canfee Janitorial, appeals a determination (the “Determination”) of the Director of Employment Standards (the “Director”), pursuant to section 112 of the *Employment Standards Act* (the “*Act*”).
2. A delegate of the Director found in the Determination that the Employer had contravened the *Act*, with respect to two employees Feroz Abdul and Tasleem Khan, and that both wages and annual vacation pay were outstanding. The Director also found that accrued interest under section 88 of the *Act* was owing to the employees, and that the total wages payable to the employees was \$2,852.28.
3. The Director also imposed two administrative penalties of \$500.00 each on the Employer for breaching two sections of the *Act*. The total administrative penalty amount was \$1000.00. The total amount payable by the Employer was \$3,852.28 inclusive of the administrative penalties.
4. The Employer operates a janitorial business. The Director found that the employees were not paid wages while employed with the Employer.
5. The employees filed a complaint with the Employment Standards Branch. The Delegate conducted an investigation into the complaint. The employees provided information to the Delegate. The Delegate wrote in the Determination;

I contacted both the complainants and the employer and invited them to attend a fact-finding meeting at the Employment Standards Branch Office. The Complainants accepted the invitation; the employer refused to attend the meeting.
6. The Delegate then said:

On October 27, 2008 I sent the employer a letter outlining the complaints and the evidence provided by the complainants to date. On November 10, 2008 I received a response to this letter from the employer.

On February 2, 2009, I sent the employer a preliminary findings letter outlining all of the evidence gathered to date and what the analysis of the evidence meant. The employer was sent this letter by registered mail and was asked to respond by February 12, 2009.
7. The Delegate indicated in the Determination that he contacted the Employer by phone on October 22, 2009 and spoke to a man who identified himself as Asif Ali- the owner of Canfee. Asif Ali stated that the complainants had never worked for Canfee and that he would only participate in the investigation by written correspondence.
8. The Delegate made a decision and issued the Determination on October 10, 2008. With respect to appeal timelines, the Determination indicated the following:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 on April 17, 2009.

9. On August 24, 2009, the Employment Standards Tribunal (the “Tribunal”) received an appeal of the Determination from the Employer. The appeal stated that the Employer is seeking a change or variance of the Determination so that it can fight the false accusations made by the employees. The appeal also sought that the appeal be allowed notwithstanding being late as it never received any documents requiring it to appear in court and “Canfee Janitorial Services came to the knowledge of this entire situation when [the court Bailiff] appeared at our premises”. The Employer also sought to suspend the Determination pursuant to s.113 of the *Act*. In response to the application for suspension, the Tribunal replied that the Director will undertake to not disburse any funds collected with respect to this matter until the decision on the appeal is published- thus making a formal order on the suspension unnecessary.

ISSUES

10. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* to extend the appeal period in this case? The section provides:

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 [.]

ARGUMENT AND ANALYSIS

11. In *Elite Rope Access and Ground Wurx Inc.*, (BC EST # D117/08) the test for allowing a late appeal was stated to be:

In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied that all of the following apply:

- there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been made aware of this intention;
- the respondent party will not be unduly prejudiced by the granting of an extension; and
- there is a strong *prima facie* case in favour of the appellant.

See *Niemesto*, BC EST # D099/96. These factors are not exhaustive.

12. The Tribunal will not grant extensions as a matter of course and will do so only where there are compelling reasons. The burden is on the appellant to show that the time period for an appeal should be extended: *Moen & Sagh Contracting Ltd.*, BC EST # D298/96.
13. The Determination indicates the deadline for appeal is April 17, 2009. The Employer’s appeal was filed on August 24, 2009, more than four months later. By way of explanation, the Employer says this matter first came to his attention when the Bailiff appeared at his place of business.

14. I note the following:
- The Delegate says he contacted the Employer by telephone on October 22, 2008 and the Employer indicated that he would not attend a meeting.
 - The Delegate sent the Employer a letter on October 27, 2008 outlining the complaints and the evidence provided by the complainants.
 - The Employer responded to the October 27 letter with its own correspondence dated November 9, 2008, denying the allegations made by the employees.
 - On February 2, 2009, the Delegate sent the Employer a preliminary findings letter outlining all of the evidence gathered to date and what the analysis of the evidence meant. This was sent to the Employer's address by registered mail, which is the same as the address indicated on the Employer's letterhead in his correspondence dated November 9, 2008 and the Appeal.
 - The Delegate's reply includes Canada Post documents that disclose that the letter was delivered and signed for on March 4, 2009.
 - The Determination was sent by registered mail on March 10, 2009 and was returned to sender when it was not claimed on two attempts to deliver it by Canada Post.
15. I find that the evidence discloses that the Employer did know of the process under way and was presented with both the telephone invitation and correspondence of the Delegate of the Director to participate in the investigation. I find the Employer's statement that it first knew of the issue when the bailiff appeared at his place of business to be wholly incredible. I further find that the Determination confirms that the Director did consider the Employer's position as put forth in its correspondence dated November 9, 2008 when making his decision.
16. I find that the Employer chose not to participate further than it did in the investigation and there was no reasonable and credible explanation for the failure to request an appeal within the statutory time limit. Further, the Employer's substantive submissions (consisting of a letter from one of its contractees that the two employees did not work at their site) far from indicative of a *prima facie* case in favour of the appellant.
17. The Employer has not met its burden of showing that the time limit for appeals should be extended in this case. I decline to exercise my discretion to extend the appeal period.

ORDER

18. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the appeal period.

Sheldon M. Seigel
Member
Employment Standards Tribunal