



An appeal

- by -

LS Labour Solutions Inc.
("L.S.")

- 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: Carol L. Roberts

FILE No.: 2008A/86

DATE OF DECISION: October 16, 2008

DECISION

SUBMISSIONS

Ronnie Gill	on behalf of LS Labour Solutions
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by LS Labour Solutions Inc. (“L.S.”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (“the Director”) issued March 17, 2008.
2. L.S. was a licensed farm labour contractor as defined by section 1 of the *Act*. Its licence was issued December 28, 2006 for a one year period and permitted it to employ a maximum of 36 employees. On January 11, 2008, L.S. notified the Employment Standards Branch that it would no longer be operating as a farm labour contractor.
3. On January 11, 2008, a delegate of the Director issued L.S. a Demand for Records, including payroll records, all direct deposit information, cancelled cheques, bank statements and daily log records required to be kept under section 6(5) of the *Employment Standards Regulation* (the “Regulation”).
4. After a review of the records, the delegate advised L.S. that it had failed to comply with sections 6 and 40.2 of the *Regulation* in failing to pay the employees by cheque rather than by direct deposit and failing to maintain complete daily logs and sought L.S.’s response. After considering L.S.’s response, the delegate Determined that it was in contravention of those sections. The delegate also noted that L.S. had contravened section 6 of the *Regulation* on two previous occasions and imposed a \$10,000.00 administrative penalty for the section 6 contravention and \$500 for the section 40.2 contravention.
5. Pursuant to section 112 of the Act, the appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. L.S.’s appeal period expired April 24, 2008. L.S.’s notice of appeal, dated August 6, 2008, was submitted to the Tribunal on August 8, 2008. The appeal documents were not successfully received until August 18, 2008.
6. L.S. says that the Director’s delegate failed to observe the principles of natural justice in making the Determination. It also says that evidence has become available that was not available at the time the Determination was being made and seeks to have the Determination cancelled.
7. L.S. also seeks an extension of time in which to file the appeal.
8. These reasons address only the timeliness of L. S.’s appeal and are based on the written submissions of the parties.

ISSUE

9. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

10. L.S. says that it did not file an appeal before the deadline because it only became aware of the Determination when it sought to have funds held in trust by the Director returned. Ms. Gill denies that the delegate sent the Determination to her or any other officer of L.S. She says that the delegate sent the Determination to the wrong farm labour contractor and that it was picked up by someone unrelated to L.S. She also submits that neither the officers nor directors received notice of the Determination.
11. Ms. Gill contends that the Determination was wrongly addressed due to a “blatant oversight” by staff at the Branch in violation of the “Privacy Act”.
12. The delegate says that the Determination was mailed to the correct address. The delegate also says that the grounds of appeal have not been substantiated.

THE FACTS AND ANALYSIS

13. Section 112 of the *Act* provides that a person served with a Determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
14. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
 - (3) the respondent party as well as the director has been made aware of this intention;
 - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - (5) there is a strong *prima facie* case in favour of the appellant.
17. These criteria are not exhaustive.

18. Having reviewed the submissions of the parties, I find no basis to grant the application.
19. I accept that L.S. was not made aware of the Determination until some time in July, 2008. The delegate submitted records demonstrating that the Determination had been mailed to L.S. at its correct address of 3508 Thurston Place, Abbotsford. However, Canada Post records indicate that the package was signed for by “Dynamic Work Force Ltd.” at an address at 3543 Thurston Place on March 18, 2008. The delegate provided no records indicating that either L.S.’s officers or directors had been served by mail, registered or otherwise.
20. However, while I accept, for the purposes of this appeal that L.S. was not served either by registered mail or personally, the evidence is that it became aware of it some time in early July. Although Ms. Gill does not indicate the date on which she had a copy of the Determination, in her written submission she indicates that she “located the number on the Canada Post Corporation on July 7, 2008”. I infer that this was the date she determined that the Determination had been mailed to an incorrect address after having had a discussion with the delegate about the refund.
21. Even if I were to use July 7, 2008 as the date the Determination was served, L.S. did not file its appeal within the statutory time limit. The appeal was dated August 6, 2008, which is outside the 21 day period for filing an appeal.
22. I find no genuine and ongoing intention to appeal the Determination within the statutory time limit and no reasonable and credible explanation for L.S.’s failure to appeal the Determination within the appeal deadline. L.S. states that it asked the producer to provide it with the “picking cards” and he advised that he had “thrown them out”. L.S. says that since it had no evidence to refute the delegate’s conclusion, it assumed there was “no need to appeal”. However, Ms. Gill says that on August 1, 2008, L.S. asked its employees to provide their own calendars and obtained the necessary evidence at that time. L.S. waited almost one month to take any action towards appealing the Determination. This does not demonstrate a genuine and ongoing intention to appeal until August 1, 2008, after the appeal deadline.
23. Finally, I find no strong *prima facie* case in L.S.’s favour. Although L.S. alleges that the delegate failed to observe the principles of natural justice, there is no evidence L.S. was denied the opportunity to know the claims made against it or to respond to them. The record shows that the delegate notified L.S. of potential contraventions of the *Act* and *Regulation* by way of a letter dated February 14, 2008. Ms. Gill responded to that letter on February 25, 2008.
24. In her appeal submission Ms. Gill states that she misinterpreted the requirements of section 6(4) of the *Regulation*. Her failure to understand her obligations as a farm labour contractor is not one of the statutory grounds of appeal. I am also unable to conclude that the delegate erred in law in his interpretation of the *Act* or *Regulation*.
25. Finally, although L.S. says that it has “new evidence”, the information it seeks to rely upon, which is said to be information taken from each employee’s calendar, was available during the investigation had the employer exercised due diligence and ought to have been produced to the delegate at that time. Consequently, it will not be considered on appeal.

ORDER

26. Pursuant to section 109(1)(a) of the *Act*, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal