Employment Standards TRIBUNAL

An appeal

- by -

Karnail Logistics Ltd.

- 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: Shera L. Skinner

FILE No.: 2004A/74

DATE OF DECISION: June 29, 2004

DECISION

SUBMISSIONS

Wendy Brandt	on behalf of Karnail Logistics Ltd.
Dariush Sayeghan	on behalf of himself
Ken MacLean	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal brought by Karnail Logistics Ltd. ("the Company") pursuant to section 112 of the *Employment Standards Act* (the "Act") against a Determination issued by a delegate of the Director of Employment Standards (the "Delegate") dated March 5, 2004. The Delegate found that the Company owed the employee complainant, Dariush Sayeghan ("Sayeghan") $442.68 in annual vacation pay and overtime. The Delegate also found that the Company was in breach of both section 17(1) (for failing to pay wages within 8 days after the end of the pay period), and section 18(2) (for failing to pay wages owing to an employee within 6 days after the employee terminates the employment). Four (4) administrative penalties of $500 each were assessed against the Company for a total of $2000.

The Company's appeal was filed with the Tribunal on April 23, 2004. Pursuant to section 112 of the Act, the appeal must be filed with the Tribunal within 30 days after the date of service of the Determination (if served by registered mail), or within 21 days after the date of service of the Determination (if the person was personally served). There is no issue that the Company's appeal period expired April 13, 2004. Accordingly, pursuant to section 109(1)(b), the Company is requesting that the Tribunal extend the time period for requesting an appeal.

For the reasons given below, I have declined to extend the time period for the Company's appeal.

ISSUE

Should the Tribunal exercise its discretion under section 109(1)(b) to extend the appeal period in this case?

FACTS

Sayeghan worked for the Company as a heavy duty mechanic from December 12, 2002 to January 25, 2003, at which time he resigned his employment. On March 15, 2003, Sayeghan utilized the self-help kit and requested the payment of regular wages and overtime for January, 2003, and vacation pay for the entire term of employment. In response, the Company provided Sayeghan with two post-dated cheques dated March 21, 2003, and April 11, 2003, representing his unpaid regular wages.

On April 2, 2003, Sayeghan filed a complaint with the Employment Standards Branch alleging that he had not been paid overtime and vacation pay by the Company. An oral hearing was scheduled for

January 14, 2004. A representative of the employer was not in attendance, and therefore the hearing took place with only the participation of Sayeghan.

On March 5, 2004, the Determination was issued by the Delegate, finding that the Company owed Sayeghan $247.02 in overtime, and $173.85 in vacation pay. The Delegate assessed a $500 administrative penalty for each violation (totaling $1000). The Delegate also found that the Company was in breach of both section 17(1) (for failing to pay wages within 8 days after the end of the pay period), and section 18(2) (for failing to pay wages owing to an employee within 6 days after the employee terminates the employment). Again, two $500 penalties were assessed against the Company, for a grand total of $2442.68 ($442.68 in overtime and vacation pay, and $2000 in administrative penalties).

The Determination was sent by registered mail. There is no issue that it was received, and that the applicable appeal period expired April 13, 2004 (the 30 day time period would have expired April 12, 2004, but that was Easter Monday: *Interpretation Act*, ss. 25(2) and 29)).

According to the Company, it posted the appeal via regular mail to both the Tribunal and the Victoria location of the Employment Standards Branch on April 7, 2004. It is a fact, however, that neither the Tribunal nor the Employment Standards Branch received the appeal. On April 21, 2004, a representative of the Company, Wendy Brandt, was advised by telephone by a Tribunal staff member that the Company's appeal had not been received. Accordingly, Ms. Brandt forwarded the appeal on April 23, 2004 to the Tribunal. In her letter, she explained that she had sent the original appeal to the Tribunal and the Victoria Employment Standards Branch by regular mail, and had been advised by the Employment Standards Branch that it had never arrived. Ms. Brandt asked for an extension of the appeal period because of the "mail mix-up."

The parties were asked for submissions on the timeliness issue on April 23, 2004. In this letter, the parties were specifically advised of the legal test that the Tribunal would be considering to determine whether the appeal period should be extended.

The Tribunal received a submission from the Delegate on May 12, 2004, from Sayeghan on May 21, 2004, and from Wendy Brandt on June 1, 2004.

ARGUMENTS

The Company argues that the appeal time should be extended because of the "mail mix-up" and asks that the Tribunal "reduce the penalty amount" and "once reduced, if we could ask for some type of payment schedule with paying off the reduced penalty." Despite being asked to make submissions on the legal test regarding late appeals, the Company did not do so.

Sayeghan's submission states that the Company should not be able to "qualify for an appeal" because "they have already missed the mediation meeting and hearing that was appointed by the Employment Standards Branch."

The Delegate argues that there is no evidence that the appeal was filed at all before the appeal period expired, there is no genuine ongoing bona fide intention to appeal the Determination, the complainant will be unduly prejudiced by the granting of the request, and there is no evidence of a prima facie case.

ANALYSIS AND DECISION

Section 112 (3) states that a person who wishes to appeal a Determination to the Tribunal must do so within "30 days after the date of service of the determination, if the person was served by registered mail." Section 122(2) states that "[i]f service is by registered mail, the determination…is deemed to be served 8 days after the determination…is deposited in a Canada Post Office."

The Delegate sent the Determination by registered mail to the Company on March 5, 2004. In the evidence in front of me, there is no issue that the Company received the Determination, and that the appeal was due by 4:30 pm on April 13, 2004 (as April 12, 2004 was Easter Monday). The deadline for the appeal is clearly set out in a box at the bottom of the Delegate's cover letter to the Company.

The Tribunal has the ability to extend the deadline for an appeal under section 109(1)(b) of the Act. However, the Tribunal has made it clear over the years that it will not extend the appeal period casually. Instead, the Tribunal will only do so if there are compelling reasons [*Metty M. Tang*, BC EST #D211/96]. The legal test or factors that the Tribunal will consider are as follows:

1. Is there a reasonable and credible explanation for the failure to request an appeal within the statutory time limit?
2. Has there been a genuine and on-going *bona fide* intention to appeal the Determination?
3. Have the parties been made aware of this intention?
4. Will the respondent party be unduly prejudiced by the granting of an extension?
5. Is there a strong *prima facie* case in favour of the appellant?

[*Niemisto*, BC EST #D099/96]

I find that the appellant has not satisfied this test and that there are no compelling reasons to extend the time period for the appeal.

While there is no significant prejudice to the complainant, and there may be a prima facie case on the merits of the "double jeopardy" nature of the administrative penalties imposed, I find that these factors are outweighed by factors #1, #2 and #3 of the above test.

There is no evidence of an ongoing and genuine *bona fide* intention to appeal the Determination, nor was this intention communicated to the Delegate or the complainant. There was no company representative in attendance at the oral hearing before the Employment Standards Branch. It was only after the Determination was made that the Company has shown any interest in participating in this matter (and then it was not done in a timely fashion). Further, in order to appeal a Determination to the Tribunal, the appellant must state in its appeal form whether it is appealing on the grounds of an error in law, a failure to observe the principles of natural justice, or because new evidence has become available that was not available at the time of the Determination. Despite there being three check boxes on the appeal form for this purpose, the Company did not indicate its ground of appeal.

Finally, I find that there is no reasonable and credible explanation for why the appeal was filed late. The representative of the Company says that she mailed the appeal via regular mail on Wednesday, April 7, 2004 to both the Tribunal and the Employment Standards Branch in Victoria. However, there is no dispute that neither the Branch nor the Tribunal received it.

There is nothing in the Act that specifies how an appeal must be delivered to the Tribunal, be it by regular mail, registered mail, or in person. In other words, it is up to the appellant to take whatever measures are necessary to ensure that the Tribunal receives the appeal in time. If the appellant had sent the appeal by registered mail or dropped it off in person and had it date stamped, there would have been proof that it had been filed. However, if an appellant chooses to send a time-sensitive appeal by regular mail, it takes the risk that it may not arrive in time. In this case, Ms. Brandt states that she mailed the appeal on Wednesday April 7, 2004. It is entirely possible that the next pick-up of the mail wasn't until Thursday, April 8, 2004. Given that this was the Easter long weekend, she should have been concerned in the first place about whether mailing it on April 7, 2004 was sufficient time to allow it to get to the Tribunal by Tuesday, April 13, 2004. In any event, she should have followed up with the Tribunal on Tuesday April 13, 2004 to ensure that it had arrived (at which time she could have faxed it). Ms. Brandt did in fact communicate with the Tribunal on April 21, 2004, and it was then that she discovered the problem. I find that it was the company's responsibility, given the late posting of the appeal by regular mail, to follow up before April 21, 2004. As stated in *Koutsantonis Enterprises Ltd. operating as Olympia Pizza & Steak House*, BC EST #D555/98, "the obligation is on the Appellant to exercise reasonable diligence in the pursuit of an appeal" (page 5). I am not persuaded that the Company has done this. (Indeed, while I have not found it necessary to weigh this in my determination, I note that the Company failed to make any submissions on the factors concerning extension of the time limit, despite being specifically requested to do so.)

Accordingly, I decline to extend the time period for the company's appeal. Pursuant to section 114(1), the appeal is dismissed and the Determination is confirmed.

Shera L. Skinner
Member
Employment Standards Tribunal