

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Agvale Industries Ltd.
(" Agvale ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 1999/775

DATE OF DECISION: March 17, 2000

DECISION

OVERVIEW

This is an appeal filed by Agvale Industries Ltd. (“Agvale”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 16th, 1999 under file number ER 18-486 (the “Determination”).

By way of the Determination, the Director’s delegate determined that Agvale Industries Ltd. and Agvale Insulation Ltd. were associated corporations as defined by section 95 of the *Act*. Further, the delegate held that the two firms were jointly and separately liable for a total of \$8,800.61 in unpaid wages (including compensation for length of service) and interest owed to two former employees, Terry L. Crooks and Peter Bergen.

ISSUE TO BE DECIDED

Pursuant to section 112(2) of the *Act*, this appeal should have been filed with the Tribunal by no later than December 9th, 1999. In fact, this appeal was not filed until December 24th, 1999 some 2 weeks after the appeal period had expired. Accordingly, and pursuant to section 109(1)(b) of the *Act*, the appellant now seeks an extension of the appeal period. These reasons address only this latter application (*i.e.*, the timeliness of this appeal). The merits of the appeal will be addressed only if it is first determined that this appeal is properly before the Tribunal.

FACTS AND ANALYSIS

The two complainant employees were nominally employed by Agvale Insulation Ltd. although both occasionally performed services for Agvale Industries Ltd. Agvale Insulation Ltd. has now ceased active operations and filed for bankruptcy on October 26th, 1999; the firm Campbell Saunders Ltd. has been appointed as the bankruptcy trustee for Agvale Insulation Ltd. I understand that Agvale Industries Ltd. (the appellant here) continues to be an ongoing business enterprise.

On December 29th, 1999, following receipt of the appellant’s appeal documents, the Tribunal’s Acting Chair wrote to all parties seeking their respective submissions regarding the timeliness of the appeal. The Tribunal has now received written submissions from Agvale (dated February 2nd, 2000; filed February 3rd, 2000), Peter Bergen (undated; filed January 18th, 2000) and the Director’s delegate (dated and filed January 12th, 2000).

Agvale’s submission (signed by Mr. S.H Yoshioka, an Agvale director; he also signed the appeal form on behalf of Agvale) does not address, *in any fashion*, the timeliness of the appeal. Instead, the entire submission is devoted to various arguments as to why the delegate erred in finding that the two firms were “associated corporations”. Similarly, Bergen’s submission largely addresses the merits of the appeal although he does state that he opposes the application for an extension of

the appeal period on the basis that Agvale's principal's "carelessness" is not a reasonable excuse for the late filing. The delegate's submission does address the merits of the application for an extension of the appeal period; the delegate's position is that the appeal should be dismissed pursuant to section 114(1)(b) of the *Act*--"The tribunal may dismiss an appeal without a hearing of any kind if satisfied...that the appeal has not been requested within the time limit in section 112(2)".

On November 10th, 1999, and in accord with her obligation under section 77 of the *Act*, the delegate faxed a letter to Agvale setting out her view that the two companies could be properly declared to be "associated corporations" under section 95. In this same letter, the delegate requested that Agvale provide information, by no later than November 12th, 1999, to support its apparent position that a section 95 declaration would not be appropriate as well as any other information it wished to provide regarding the unpaid wage claims of the two complainants. The delegate provided a direct telephone number where she could be contacted. Further, the delegate also indicated that if no information was forthcoming, she proposed to issue a determination. Agvale chose not to respond to the delegate's November 10th letter and, accordingly, on November 16th, 1999 the Determination now before me was issued.

The Determination was forwarded to the registered and records offices of both Agvale firms (the same address for each firm) and to company directors Stanley H. Yoshioka and Jack Yoshioka. The following Notice is set out at the bottom of page 6 of the Determination:

Appeal Information

Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal no later than 4:30 PM on December 9, 1999. Complete information on the appeal procedure is attached. Appeal forms are available at any office of the Employment Standards Branch.

The attached information sheet described, in some considerable detail, the nature of the Tribunal and the appeal process. Of particular interest is the following statement contained in the information sheet: "A completed appeal form must be delivered to the Tribunal on or before the appeal deadline shown on the Determination."

On December 15th, 1999, about one month after the Determination was issued, the delegate faxed a demand for payment to Agvale's offices to the attention of Mr. Stan Yoshioka; payment was to be made by no later than December 20th and, once again, the delegate provided her direct telephone line.

Notwithstanding all of the foregoing, Agvale did not appeal the Determination until December 24th, 1999. The event precipitating the filing of this appeal on December 24th appears to have been the fact that, a few days earlier, the delegate issued a separate determination against Mr. Stanley Yoshioka pursuant to section 96 of the *Act*.

The Tribunal has consistently ruled that extensions of the appeal period will not be granted as a matter of course. The appellant seeking such a dispensation must satisfy the Tribunal, among other things, that they have had an ongoing *bona fide* intention to appeal and that they have a reasonable explanation to justify their failure to file a timely appeal. In the instant application, the appellant has not, as noted above, provided the Tribunal with *any* explanation, let alone a justification, for its failure to appeal the Determination within the statutory appeal period. The appellant has not shown, or even attempted to show, that the complainants would not suffer any prejudice if this appeal was allowed to go forward on its merits.

The material before me shows that the appellant ought to have been well aware of its appeal rights and the time limits governing an appeal to the Tribunal. The appellant appears to have taken a very cavalier attitude towards this entire matter, in general, and this appeal, in particular. It appears as though Agvale's principal filed an appeal only when his own personal liability for the complainants' unpaid wages was crystallized into a subsequent determination.

An order extending the appeal period may be granted in a proper case; this is manifestly not such a case. Finally, I might add that even if the appeal period had been extended, this appeal, on its face, appears to have dubious prospects for success.

ORDER

Agvale's application for an extension of the appeal period is refused. Pursuant to the provisions of section 114(1)(a) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal