

An appeal

- by -

LS Labour Solutions Inc.

- 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 Ann Hart

FILE No.: 2005A/67

DATE OF DECISION: July 27, 2005

DECISION

SUBMISSIONS

Ronnie Gill on behalf of LS Labour Solutions Inc.
Sharn Kaila on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by LS Labour Solutions Inc. pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on January 6, 2005 (the “Determination”) by Sharn Kaila, a delegate of the Director of Employment Standards (the “Director”).
2. The appeal is brought on the grounds that the Director had failed to observe the principles of natural justice in making the Determination, and that there was new evidence which was not available at the time the Determination was made.
3. Ronnie Gill indicated that she sought an oral hearing in this matter. I have determined that because the issue to be determined in this Decision is limited to the request for an extension of time to file the appeal, it may be appropriately addressed through written submissions.

ISSUE

4. The only issue to be addressed in this Decision is whether the Tribunal should extend the deadline for filing an appeal in accordance with the powers of the Tribunal under section 109 (1)(b) of the Act.

THE DETERMINATION

5. The appellant, LS Labour Solutions Inc., is a licensed farm labour contractor. Mandeep Bahniwal was employed by the appellant as a farm labourer for the period from March 23, 2004 to May 7, 2004, and was paid \$8.00 per hour. In her complaint filed under the *Employment Standards Act*, Ms. Bahniwal alleged that she had not been paid for 224 hours of work during the period in which she was employed by the appellant.
6. In the Determination, the delegate for the Director concluded that LS Labour Solutions Inc. had contravened the *Act* by failing to pay to Mandeep Bahniwal all wages due upon termination of employment. LS Labour Solutions Inc. was ordered to pay to Ms. Bahniwal the sum of \$1792.00 for wages pursuant to section 18 of the *Act*; \$71.68 for annual vacation pay pursuant to section 58 of the *Act*; and \$48.72 in accrued interest payable under section 88 of the *Act*. The delegate for the Director also imposed a \$500 penalty for the contravention of the *Act*, pursuant to section 29(1) of the *Employment Standards Regulation*.

ANALYSIS

7. The period for appealing the Determination expired on February 14, 2005. The appeal was filed with the Employment Standards Tribunal (the “Tribunal”) on April 22, 2005. The appellant has applied for an extension of time to file the appeal.
8. In deciding whether to extend the period in which to file an appeal in this case, I note that one of the purposes of the *Employment Standards Act*, as set out in section 2(d), is “to provide fair and efficient procedures for resolving disputes”. The *Act* provides a time frame in which to appeal to ensure that appeals are dealt with efficiently. Under section 109(1)(b) of the *Act*, the Tribunal can extend the time for requesting an appeal, even though the appeal period has expired. The appellant has the onus of establishing that the period in which to file an appeal should be extended.
9. The Tribunal has consistently held that it should not grant extensions under Section 109(1)(b) as a matter of course and its discretionary powers should be exercised only where there are compelling reasons to do so. The following is a non-exhaustive list of principles concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BCEST #D099/96 and *Re Pacholok*, BCEST #D511/97):
 - i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has not been an unreasonably long delay in filing the appeal;
 - iii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iv) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - v) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - vi) there is a strong *prima facie* case in favour of the appellant.
10. The parties were advised of the above criteria by the Tribunal, and they directed their written submissions to those criteria. The submissions of the parties and findings on each of the criteria will be outlined in turn below.

i. Was there a good reason why the appellant could not file the appeal within the time frame provided under the Act?
11. Mrs. Gill submitted that the deadline for filing an appeal should be extended due to the fact that she gave birth by caesarean section on January 31, 2005. For this reason, she had been unable to meet with an investigation firm in connection with new evidence she wished to provide. Mrs. Gill maintained that the need for further evidence, and the requirement for a handwriting expert to prove the appellant’s case, were valid reasons as to why the appeal could not be filed before the deadline.
12. The delegate for the Director indicated that the Determination was received at the employer’s address and registered and records office on January 7, 2005. The appeal period expired on February 14, 2005. The appellant had twenty three days before she gave birth on January 31, 2005 to appeal the Determination.

The Determination was appealed eighty-one days after the appellant gave birth, and sixty-seven days after the expiry of the appeal period.

13. The delegate for the Director noted that on March 2, 2005, a letter was sent to the appellant to advise that the appeal period had expired, and collection proceedings would be commenced if the payment was not received by March 16, 2005. According to the delegate, on March 23, 2005, Ronnie Gill delivered a cheque to the Employment Standards Branch in person, and requested that the funds be held in trust until the conclusion of the appeal.
14. Another letter was written to the appellant on 15 April 2005 noting that a notice of appeal had not been filed, and that if an appeal notice was not received by April 22, 2005, the trust money would be released to Ms. Bahniwal. The appeal was then filed on April 22, 2005. The delegate for the Director noted that the appellant had personally delivered the cheque to the Employment Standards Branch on March 23, 2005, but had not filed the appeal until April 22, 2005.
15. Mrs. Gill indicated that her pregnancy was “*complicated*”. She wrote that her baby had been delivered by caesarean section, and that she had not expected “*as much turmoil subsequent to the birth due to several complications*”. Although there was no medical evidence on the file, and there was a lengthy delay in filing the appeal, Mrs. Gill’s explanation of the reasons for being unable to file the appeal on time appear to be credible. I find, based on the evidence presented, that there were good reasons why Mrs. Gill could not file the appeal on time.

ii) Was there an unreasonably long delay in filing the appeal?

16. The delegate for the Director noted that the appellant had twenty-three days from the date she received the Determination prior to the date she gave birth to file the appeal. The Determination was appealed eighty-one days after the appellant gave birth, and sixty-seven days after the expiry of the appeal period.
17. Mrs. Gill argued that the delay was not unreasonable considering her personal situation, as outlined above.
18. The appellant missed the deadline by approximately nine and one-half weeks. Under almost any circumstance, no matter what the cause, such a delay would be considered unreasonable. The deadline set by legislation was exceeded.

iii) Was there a genuine and on-going bona fide intention to appeal the Determination?

19. It was undisputed that the appellant did have an on-going intention to appeal the Determination.
20. In a letter dated February 14, 2005 to the Tribunal, Mrs. Gill asked that her letter be accepted as a “*formal appeal of this matter*”. Mrs. Gill further wrote that she was requesting an extension until March 31, 2005 to send what she referred to as “*a complete book of our defense*”.
21. In the submissions of Mrs. Gill dated May 31, 2005, she wrote about her on-going discussions with the delegate for the Director. According to Mrs. Gill, she had contacted Mr. Kaila in mid-January 2005 after receiving the Determination, and had advised him at that time that she had been quite ill, and that her baby was due on January 20, 2005. She had also advised Mr. Kaila at that time, and during subsequent

conversations, that she wished to find a handwriting expert to provide evidence to demonstrate that Ms. Bahniwal had been paid all of the wages she claimed were owing to her.

iv) Were the respondent and the Director aware of the intention of the appellant to appeal?

22. The delegate for the Director acknowledged that the Director and the respondent were aware of the intention to file the appeal.

v) Would the respondent party be unduly prejudiced by the granting of an extension?

23. The appellant submitted that the respondent would not be harmed by the extension of the appeal deadline because the appellant had deposited the funds in trust with the Ministry of Skills Development and Labour. Not allowing the extension of time to appeal would be harmful to the interests of the appellant.
24. The delegate for the Director did not make a submission on this factor. It has not been argued in the submissions on the file that Mandeep Bahniwal would be prejudiced in any way if the appeal period were to be extended. It was not shown that there would be any real prejudice to any party by granting the requested extension to the appeal period.

vi) Is there a strong prima facie case in favour of the appellant?

25. The final factor relates to the merits of the appeal. Mrs. Gill submitted that the appellant had a strong case, as it could prove, based on new information received, that Ms. Bahniwal had already been paid the funds in question by the appellant.
26. The delegate for the Director noted that the appellant sought to rely on new evidence, but had not provided an explanation as to why that the new documents could not have been produced during the investigation. Mr. Kaila wrote that no explanation was provided as to why those documents were not produced, or could not have been produced during the investigation.
27. In her submissions in reply dated May 31, 2005, Mrs. Gill wrote that one of the documents in question had been provided at the fact-finding meeting, and at that time, the appellant was not aware of any further documents. The additional documents had subsequently been found in the shredding basket. The delegate was notified immediately that the appellant had new evidence, and would engage the services of a handwriting analyst to prove that the documents in question had been written by Ms. Bahniwal.
28. The Determination indicates that a fact-finding meeting was held on November 26, 2004, and the employer was represented by Raghbir (Ronnie) Gill and Gurdev Gill, who were both directors of LS Labour Solutions Inc. Two witnesses for LS Labour Solutions Inc., Resham Kaur Padda and Surjit Kaur Buttar, were also present at the fact-finding meeting.
29. At the fact-finding meeting, LS Labour Solutions Inc. maintained that Ms. Bahniwal had been paid all of the wages she alleged were owing. The delegate wrote in the Determination that “*the employer provided no proof of having paid the complainant her wages other than two affidavits provided by two of their employees.*”

30. The delegate for the Director heard testimony of the representatives for the appellant and two witnesses for the appellant who had signed the affidavits which were submitted. The delegate wrote that he had given little weight to the affidavits presented because the witnesses' evidence at the fact-finding meeting had indicated that at least some of the information provided on the affidavits was not from their personal knowledge.
31. According to the delegate for the Director, LS Labour Solutions Inc. had provided a photocopied sheet of paper which it claimed was a list of hours written in Ms. Bahniwal's own handwriting, with a notation in the corner as follows: "*paid \$608*". This document was submitted as proof that the complainant had received at least some of the outstanding wages. The complaint gave evidence that she had written down her hours for Ronnie Gill at her request, but she had never written "*paid \$608*", nor was it written by anyone else in front of her. The delegate concluded: "...the '*list of hours*' is not in itself proof of payment, and the handwriting of the hours is noticeably different from the handwriting of the "*paid \$608*".
32. After considering all of the evidence before him, the delegate for the Director found that LS Labour Solutions Inc. had failed to meet the burden of proving that all wages had been paid in accordance with the *Employment Standards Act*.
33. Mrs. Gill submitted copies of the new evidence found, as well as a written opinion of the Examiner of Questioned Documents, Donald N. Brown, of Pacific Forensic Science Consultants and Services Ltd., who examined the handwriting on the documents in question. In addition, the appellant indicated that Malkiat Gill, who was out of the country at the time of the fact-finding meeting, could testify about a cash payment made to Ms. Bahniwal. Mrs. Gill claims that the new evidence will show that Ms. Bahniwal was paid in full, and no wages were owed to her.
34. The appellant would not have known in advance of the fact-finding meeting that Ms. Bahniwal would testify that she had not written the notation "*paid \$608*" on the handwritten document which was presented to the delegate for the Director. The appellant claims that since the fact-finding meeting, additional documents were found which demonstrate that Ms. Bahniwal was paid all the amounts owing to her. Further, the appellant has now submitted evidence concerning the handwriting on the documents in question which it maintains will establish that Ms. Bahniwal was not truthful in her testimony in the fact-finding meeting, or in filing her complaint under the *Employment Standards Act*.
35. It is difficult to assess whether the facts alleged in the appeal together with the new evidence would result in a successful appeal. The allegations made by the appellant are serious. A full review on the merits would ensure that all the information presented is taken into consideration before a final decision is made. The Determination was based on evidence available at the time, which did not include the new evidence the appellant now seeks to provide.
36. Despite the delay in filing the appeal, the appellant did clearly demonstrate an on-going *bona fide* intention to appeal the Determination, and it was not shown that there would be any real prejudice to any party by extending the appeal period. For all of the above reasons, I allow the request for an extension of time to file the appeal in this case.

CONCLUSION

37. The requested extension of time to file the appeal is allowed pursuant to section 109(1)(b) of the *Act*. This appeal is therefore properly before the Tribunal, and will now be adjudicated on its merits.

Carol Ann Hart
Member
Employment Standards Tribunal