

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 -

Penney Auto Body Ltd.
("Penney")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 99/039

DATE OF DECISION: March 16, 1999

DECISION

OVERVIEW

This is an appeal by Penney Auto Body Ltd. (“Penney”), under Section 12 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued by a delegate of the Director of Employment Standards (the “Director”) on November 18, 1998.

Upon receipt of Penney’s appeal on January 28, 1999 the Registrar of the Tribunal noted that the appeal had been filed outside of the time period set out in the Section 112 of the *Act*. The Determination contained a clear statement that any appeal of it must be delivered to the Tribunal by December 11, 1998. Penney requests that the Tribunal exercise its discretion, under Section 109(1) of the *Act*, to extend the time period for making an appeal even though the period has expired.

The Director opposes Penney’s request for an extension as does the other interested party, Mr. Jerzy Zurawski, a former employee.

ISSUES TO BE DECIDED

Should the Tribunal grant Penney’s request to extend the time period for making an appeal?

FACTS AND ANALYSIS

The Director determined that Penney had contravened Section 63 of the *Act* by failing to pay compensation for length of service to Jerzy Zurawski, a former employee, whose employment was terminated on October 23, 1997. Penney is required to pay \$5,039.84 (plus interest under Section 88 of the *Act*) as compensation to Mr. Zurawski.

On January 20, 1999 the Tribunal received correspondence from Penney which advised of its interest in making an appeal. That correspondence included copies of a signed statement by Penney King (“owner” of Penney Auto Body Ltd.) and one signed by five of Penney’s employees. Those statements did not deal with any aspect of Penney’s request for an extension of the time period for making an appeal.

Penney’s appeal was delivered to the Tribunal on January 28, 1999. On February 5, 1999 John Rodrigues (Manager, Penney Auto Body Ltd.) delivered the following submission to the Tribunal:

We are sorry for missing the appeal date.

I was in an accident during this time and was not able to return the reply for submission. (sic)

Please accept my appeal.

The Director submits that the extension sought should not be granted and the appeal should not be allowed. She notes that no explanation is offered to explain why Mr. P. King did not deliver an appeal within the statutory time period. Also, Mr. Rodrigues' submission gives no particulars about the nature of his accident not the extent of his injuries. The submission of February 15, 1999 on behalf of Mr. Zurawski concurs with the Director's submission.

Section 109 (1)(b) of the *Act* gives the Tribunal the authority to extend the time period for requesting an appeal even though the period has expired.

In deciding whether to grant such an extension, the Tribunal has consistently required appellants to establish that:

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

[See, for example, *Mega Tire Inc.* (BC EST #D406/97), *Robert Pacholok et al* (BC EST #D526/97) and *Niemisto* (BC EST #D099/96)] This is not an exhaustive list of criteria which may be applied by the Tribunal and other factors may be considered in the circumstances of a particular appeal.

In addition, the appellant bears the onus of satisfying the Tribunal that it should exercise its discretion. However, compelling reasons are required for an extension to be granted (*Moen and Sagh Contracting Ltd.*, BC EST #D298/96).

To establish a strong *prima facie* case, the appeal must have some merit on its face and must not be obviously frivolous.[*Astrolabe Marine Inc.*, (BC EST #D304/97); *Douglas K. Berg* (BC EST #D212/97)].

In the circumstances of this case I cannot find a reasonable and/or credible explanation for Penney's failure to request an appeal within the statutory time period. Penney's first contact with the Tribunal was on January 20, 1999 - almost one month past the date by which the Determination required an appeal to be filed. Subsequent correspondence did not raise any substantive ground on which to grant Penney's request. There certainly is not a strong *prima facie* case in favour of Penney's appeal.

ORDER

I order, under Section 109(1)(b) and Section 114(a) of the *Act*, that the appeal should be dismissed as the Tribunal should not exercise its discretion to extend the time period for filing an appeal. In the result, the Determination is confirmed together with whatever interest may be payable under Section 88 of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sa