

An appeal

- by -

Black Forest Cedar Products Inc.
("Black Forest")

- 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: David B. Stevenson

FILE No.: 2005A/90

DATE OF DECISION: August 5, 2005

DECISION

SUBMISSIONS

Jaspreet S. Malik	on behalf of Black Forest Cedar Products Ltd.
Jim Leask	on his own behalf
Ken White	on behalf of the Director

OVERVIEW

1. This is an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) by Black Forest Cedar Products Ltd. (“Black Forest”) of a Determination that was issued on September 8, 2004 by a delegate of the Director of Employment Standards (the “Director”).
2. The Determination found that Black Forest had contravened Part 3, Section 18 and Part 7, Section 58 of the *Act* in respect of the employment of Jim Leask and ordered Black Forest to cease contravening those provisions of the *Act*, to comply with the *Act* and the *Employment Standards Regulation* and to pay wages to Mr. Leask in the amount of \$10,464.43. The Determination also included an administrative penalty in the amount of \$1000.00.

PRELIMINARY ISSUE

3. A preliminary issue relating to the timeliness of the appeal has arisen. On May 24, 2005, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal.

THE FACTS

4. The facts relating to the preliminary issue are:

The Determination was issued on September 8, 2004 and was sent to the business address of Black Forest by registered mail, to the registered and records office of Black Forest and to the home address of Surjit K. Sangha, the sole director and officer of Black Forest on that date.

The appeal of the Determination was received in the offices of the Tribunal on May 24, 2005. Included with the appeal was the following explanation for the delay in filing the appeal:

. . . Surjit K. Sangha, the Director of the Employer was not in a position to either participate or respond to the Determination as a result of severe depression. As outlined in three letter [sic] from her Doctor (attached) she was under medical care and unable to participate.

In addition, due to her depression, she spent vast amounts of time living with her brother in Surrey. As a result much of her mail was not attended to, including the Determination.

Ms. Sangha only became fully aware the a Determination had been made when she received a Notice of Seizure.

Ms, Sangha was, apparently, able to participate in an unsuccessful mediation process conducted by a delegate of the Director in April 2004.

The time limit for filing an appeal of the Determination expired on October 18, 2004.

ARGUMENT AND ANALYSIS

5. The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. 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 is not an unreasonable delay in filing the appeal;
 - (3) there has been a genuine, ongoing bona fide intention to appeal the determination;
 - (4) the respondent and the director has been made aware of this intention;
 - (5) the respondent will not be unduly prejudiced by the granting of an extension; and
 - (6) the appellant has a strong prima facie case that might succeed.
- (see: Niemisto v. British Columbia (Director of Employment Standards) (BC EST #D099/96) and Pacholak v. British Columbia (Director of Employment Standards) (BC EST #D526/97)*
6. Counsel for Black Forest says the delay in filing an appeal, and the failure of Black Forest to participate in a hearing on the complaint and to make any submission or response to the Director during the investigation of the complaint, is explained entirely by the assertion that Ms. Sangha was under the care of a psychiatrist for depression.
7. In reply, the Director says this is not a proper case for extending the time limits for filing the appeal, citing the long delay, the absence of any indication Ms. Sangha was medically unable to participate in any activity relating to the complaint, the absence of any indication to file an appeal and the weakness of their case on appeal.
8. Mr. Leask has also filed a reply, saying he had met with Ms. Sangha and her brother twice at the offices of the Director in respect of his complaint and she was capable of formulating a response to it on those occasions. He expresses some skepticism at the suggestion Ms. Sangha was so sick she was unable to get her son and brothers - who were also involved in the operation of Black Forest - to help her make a reply to his complaint or to file an appeal.
9. In reviewing the circumstances of this case, I am satisfied the time limited for appeal should not be extended. There has been a delay in excess of seven months in filing this appeal. That amount of delay is clearly unreasonable and is the most compelling reason for denying any extension of the time limits.

10. No reasonable and credible explanation for such a lengthy delay has been provided. The notes from Ms. Sangha's psychiatrist, one of which was presented to and considered by the Director, say nothing more than Ms. Sangha was depressed, had been prescribed antidepressant medication and could not handle a hearing. They do not say she is entirely disabled from addressing matters relating to the business of Black Forest, either individually or together with her son and brothers. The Determination and the material indicate that Ms. Sangha's brother, Jaswinder Sandher, was a key figure in operating the business, had participated in hiring Mr. Leask and had represented Black Forest along with Ms. Sangha, in the mediation process.
11. The appeal does not say Ms. Sangha did not receive the Determination - which clearly sets out the time limit for filing an appeal - or that she was medically incapable of appreciating what it was. In the appeal submission, counsel for Black Forest says Ms. Sangha "only became fully aware that a Determination had been made" when the Director commenced collection proceedings. I find that submission to be quite unhelpful as it suggests Ms. Sangha could be partially aware the Determination had been made without telling me how that is possible. It seems to me that Ms. Sangha either knew the Determination had been made or she did not. In the absence of evidence that Ms. Sangha was not aware the Determination had been made, I am entitled to conclude she received the Determination, understood what it was and chose to do nothing about it until the Director began collection proceedings.
12. There was no evidence that Black Forest had any ongoing intention to appeal the Determination.
13. Finally, the appeal does not show a case that might succeed. The reasons for appeal state:

Due to medical reasons the Employer did not participate in that determination. As a result the determination violates principles of natural justice in failing to consider both parties positions. The Employer is now in a position to provide information that could lead to a different result.
14. There are three responses to those reasons. First, as indicated above, there is no evidence indicating Black Forest was unable, because of Ms. Sangha's depressed state, to respond to the claim made by Mr. Leask. In fact, Black Forest, through Ms. Sangha and Mr. Sandher participated in a mediation process, during which they undoubtedly made a response to the claim.
15. Second, there is no indication the Director breached any principles of natural justice in making the Determination. During the investigation, the Director provided Black Forest, through Ms. Sangha, with two opportunities to respond to the complaint, providing her with very specific allegations, set out in a letter dated July 9, 2004 which also attached the evidence provided by Mr. Leask in support of the allegations, and a letter dated August 9, 2004 setting out the Director's preliminary findings on the complaint. Black Forest failed to respond to either opportunity. It is not a breach of principles of natural justice for the Director to make a Determination on the evidence provided by one party where the other party was offered a reasonable opportunity to respond and without good reason failed or refused to do so.
16. Third, even though counsel for Black Forest says information can be provided which would lead to a different result, no such "information" is included with the appeal nor is there any indication in the appeal what this additional "information" might be and how it would alter the findings and conclusions reached by the Director in the Determination. The allegations made by Mr. Leask and the findings of fact made by the Director are sufficiently well defined that some particulars of this "information" is required if the Tribunal is to accept that it might affect the correctness of the Determination.

17. For the above reasons, the appeal is denied as being filed outside the time limited for appeal in Section 112 of the *Act*.

ORDER

18. Pursuant to Section 115 of the *Act*, I order the Determination dated September 8, 2004 be confirmed in the total amount of \$11,464.43, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal