

An appeal

- by -

David Sawatzky carrying on business as D.A.T.S. Contracting
(“Sawatzky”)

- 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: Margaret Ostrowski, Q.C.

FILE No.: 2009A/113

DATE OF DECISION: November 19, 2009

DECISION

SUBMISSIONS

David Sawatzky	on behalf of himself carrying on business as D.A.T.S. Contracting
Paul Burgess (“Burgess”)	on his own behalf
Ian MacNeill	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Sawatzky 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 June 5, 2009. In that decision, the Director ordered Sawatzky to pay to Paul Burgess, wages and annual vacation pay (pursuant to section 18 of the *Act*) in the amount of \$2,402.00, accrued interest (pursuant to section 88 of the *Act*), and an administrative penalty of \$500 under section 29 of the *Employment Standards Regulation* (the “*Regulation*”) for contravention of section 18 of the *Act*.
2. Sawatzky has appealed the Determination of the Director on the grounds that the Director erred in law and also failed to observe the principles of natural justice in making the Determination. The appeal was required to be delivered to the Employment Standards Tribunal by 4:30 pm on July 13, 2009. It was in fact received by the Employment Standards Tribunal on August 28, 2009.
3. The reasons given by Sawatzky for the delay in filing the appeal was that he was temporarily relocated “out of province” and that he had just received his mail from B.C. which took nineteen days to arrive and furthermore, he had not been available for signature for the registered mail. He stated that he relies on his mother who is 86 years old to drive to Merville to pick up his mail and that she does not like to do it very often. He said that he was very distressed by the loss of the money as he needed it for bills, rent and to eat. He said that “a delay in forwarding my mail and the isolation of a new job prevented me from receiving the notification of this decision”.
4. In regards to the substance of the appeal, Sawatzky submitted, *inter alia*, that he was at the hearing location on April 22, 2009, and waited until 10:15 and then left. The Director set out in the Determination that the hearing on April 22, 2009, was to commence at 9:30 am but both Sawatzky and Burgess had to be called as neither was there. The Director stated therein that Burgess arrived at the hearing but that contact was not made with Sawatzky and the hearing took place without Sawatzky present. The Director further set out that “I found that Mr. Burgess and Ms. Smith testified in a forthright manner and I have no reason to question their credibility. In the absence of contradictory information, I accept the evidence provided by Mr. Burgess as an accurate reflection of his conditions of employment”.
5. As part of my analysis on whether the appeal period should be extended, I consider whether there is a strong *prima facie* case for the appellant. I was troubled that it appeared Sawatzky could have been present and available for the hearing but that somehow his presence was overlooked. I asked for further submissions from both parties on this issue.

ISSUE

6. The issue to be determined by the Tribunal at this time is as follows: should the Tribunal use its power under section 109 of the *Act* and extend the time period for requesting an appeal even though the period has expired.

ANALYSIS

7. A determination that is required to be served on a person under the *Act* is deemed to have been served pursuant to section 122 (1)(b) of the *Act* if sent by registered mail to the person's last known address. And if the service is by registered mail, the determination is deemed to be served 8 days after the Determination is deposited in a Canada Post Office (section 122(2)). Section 112(3) sets out the time periods for appealing a determination: in the case of service by registered mail, the time period is 30 days after the date of service of the determination. These time periods are consistent with one of the purposes of the *Act* set out in section 2 to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
8. Section 109(1)(b) of the *Act* gives the Tribunal the power to extend the time period for requesting an appeal even though the period has expired. The Employment Standards Tribunal has previously considered some or all of the following factors in determining whether to extend an appeal period¹:
 - a. Is there a good reason why the Appellant could not meet the deadline?
 - b. Was there an unreasonably long delay in filing the appeal?
 - c. Did the Appellant always intend to appeal the Determination?
 - d. Were the other parties – such as the Respondent (Paul Burgess) and the delegate who wrote the Determination – aware of the intent to appeal?
 - e. Would extending the appeal deadline harm the Respondent's case?
 - f. Does the Appellant have a strong case that might succeed if the Tribunal grants an extension?
9. The above factors do not constitute an exhaustive list and some of those factors are more relevant than others given the particular circumstances of the case.
10. I will first consider the reasons given by Sawatzky for the late submission of the appeal. He gave as reasons for the lateness of the appeal that he had been temporarily relocated out of the province, that his mail took 19 days to receive and that he was not available to sign for registered mail, and that he was relying on his mother, an 86 year old woman, who did not like to drive to Merville very often to pick up the mail and forward it to him.
11. However, there are contradictory submissions and evidence given by the Director in his submissions of September 18, 2009. In that submission, the Director states:

All documents relating to this complaint were mailed to the employer's address at 1340 Williams Beach Rd., Merville B.C. The Determination, issued June 5, 2009 and forwarded by registered mail to that

¹ See for instance *Niemesto*, BC EST # D099/96, and *Frenay*, BC EST # D130/04.

address was received and signed for by David Sawatzky at 3.30 pm on June 24, 2009. The attached documentation from Canada Post confirms the dates noted above. The signature, confirming receipt of the Determination challenges the credibility of any Appeal based on the lack of proper service of the document on Mr. Sawatzky.

12. In evidence from the Director is a copy of a tracking number search that indicates that the item was successfully delivered and that there exists a signature image recorded for online viewing of David Sawatzky's signature. The Director stated that the "item" was a copy of the Determination. I have reviewed the submissions of Sawatzky dated October 13, 2009, and there is no argument whatsoever to rebut this particular evidence from the Director. I therefore find that Sawatzky received a copy of the Determination on June 24, 2009, and do not accept his submission on this point – that he did not receive a copy of the Determination due to a delay in forwarding mail and isolation of a new job. Accordingly I find that he did not have a good reason for the delay in filing his appeal.
13. I note that Burgess has been paid out and accept the submission that he would be prejudiced if the filing of the late appeal was accepted. I do not accept the argument of the Director that he, the Director, would be prejudiced in these circumstances as he gives me no particulars as to how he would be prejudiced and I take judicial note that the Director has access to institutional funds if the penalty had to be returned.
14. There is no information for me to conclude one way or another regarding whether Sawatzky always intended to appeal. I made a finding that he had received the Determination on June 24, 2009, but he only registered distress when his bank account was garnished for payment out to Burgess.
15. I find it important to consider whether Sawatzky has a strong *prima facie* case which might succeed if an extension were granted. Pursuant to amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are limited to the following as set out in section 112(1):
 112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was made.
16. Sawatzky has appealed on ground (a) and ground (b).
17. Ground (b) requires the Director to observe the principles of natural justice in making the Determination. Natural justice requires that a party has an opportunity to know the case against him or her, the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice.
18. In the second set of submissions received, the Director set out that he went to the Access Centre lobby on April 22, 2009, at the appointed time, 9:30 am, and called out in a voice loud enough for all to hear "[is] there ... anyone here for either the Ministry of Labour Hearing, ... or the Employment Standards Hearing". He submitted that when the parties are present, this has always been effective in having them step forward. He said that there were very few people in the Access Centre that morning. He made a second call ten minutes

later and received no response. He then phoned both the complainant and the employer; he reached the complainant who said he would be there at 10 am but did not reach the employer and there was no message machine to take a message at his number. When the complainant arrived, the Director asked him if he had seen Sawatzky in the Courtenay/Comox area and he said no. The Director submitted that if Sawatzky had been in the Centre, he would have heard his calls for persons to attend the hearing and he would have also seen the complainant and his wife walk through the lobby. The Director also stated that it was his understanding that both parties met with a mediator at the same location as the hearing was held in December 2008 so that it was not foreign to them. He further submitted that the copy of the date stamp on the self-help kit is blurred such that it does not indicate a location of the Government Agent's office, nor does it indicate a time.

19. There were no submissions from Sawatzky in response to this submission from the Director. I therefore rely on the Director's submissions and find that Sawatzky was not present in the Access Centre before or at the time that the hearing was scheduled and that he had been given a chance to know the case against him. Accordingly I find that there is little evidence of a failure by the Director to observe the principles of natural justice.
20. Regarding ground (a) that the Director erred in law, Sawatzky could be arguing in his submission of October 14, 2009, that Burgess was an independent contractor and therefore not subject to the jurisdiction of the *Act*. However as he did not attend the hearing and give evidence in this regard, and contrary evidence was given at the hearing, there is little likelihood of success on this ground.
21. In conclusion, I am not satisfied from an analysis of the factors that I find to be most relevant in this case, that an extension of the appeal period should be granted. There is strong evidence that leads me to believe that Sawatzky received the Determination on June 24, 2009, but did not appeal that decision until August 28, 2009, when he found his bank account had been garnished. There is little evidence that there is a case which might succeed if an extension were granted.

ORDER

22. The request by Sawatzky to extend the time period for an appeal is **denied**.

Margaret Ostrowski, Q.C.
Member
Employment Standards Tribunal