Employment Standards TRIBUNAL

An appeal

- by -

B.C. Highvoltage Industrial Services Ltd.
(the "Appellant")

- 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.: 2010A/133

DATE OF DECISION: December 13, 2010

DECISION

SUBMISSIONS

Richard Murphy	on behalf of B.C. Highvoltage Industrial Services Ltd.
Scott Uphill	on his own behalf
Marc Hale	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by B.C. Highvoltage Industrial Services Ltd. (the "Appellant"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), of a Determination of the Director of Employment Standards (the "Director") issued on May 14, 2010 (the "Determination").

2. In the Determination, the Delegate for the Director (the "Delegate") found that B.C. Highvoltage Industrial Services Ltd. ("Highvoltage") had contravened sections 58 and 63 of the *Act*; and annual vacation pay, compensation for length of service, and accrued interest were awarded. Mandatory administrative penalties were also assessed against Highvoltage.

3. The Appellant contends that the Delegate failed to observe the principles of natural justice in making the Determination, and that evidence had become available which was not available at the time the Determination was made.

4. The appeal period for the Determination expired on June 21, 20l0. The appeal was filed with the Tribunal on September 28, 2010. Because the appeal was filed outside of the appeal period, the matter of the timeliness of the filing of the appeal must be addressed.

ISSUE

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

BACKGROUND

6. The Delegate conducted an adjudication hearing concerning the complaint of Scott Uphill on April 27, 2010. Both parties attended the hearing and presented evidence. The Determination was issued on May 14, 2010.

7. The period for appealing the Determination expired on June 21, 2010. The appeal was filed with the Employment Standards Tribunal (the "Tribunal") on September 28, 2010. The Appellant seeks an extension of time to file the appeal.

ARGUMENT

For the Appellant

8. The Appellant maintained that he had not received the Determination until August 18, 2010. He contended that the Delegate had advised him that a pre-determination meeting would be available in this matter, but no meeting was set.

9. The Appellant wrote in his submissions that he believed that the Determination had been sent to his ex-wife's company address (BC Highvoltage Services Ltd. on Sunvalley Crescent in Abbotsford, B.C.).

10. The Appellant indicated that he had "*new information and witnesses that will prove Mr. Uphill did work on a contract basis as a Mechanic / Maintenance Contractor*", and he wished to "*prove the true facts regarding Mr. Uphill's complaint*".

For the Respondent

11. Scott Uphill submitted that there was no reason why the Appellant could not meet the deadline for filing the appeal, and that there was an unreasonably long delay in filing the appeal. Mr. Uphill indicated that he did not know of the appellant's intention to appeal the Determination. He maintained that there was no change in evidence and the appeal was an attempt to avoid paying the amounts owing to him.

For the Director

12. The Delegate wrote that the parties were informed at the adjudication hearing that a Determination would be issued within 4 to 6 weeks of the hearing, and the adjudicator did not make any offer of a "pre-determination mediation".

13. The Delegate wrote that the employer had first advised that the Determination had not been received on August 11, 2010, and on that same date, the Determination was sent to the employer by facsimile. The Appellant had first made the Delegate aware of the intention to appeal the Determination on August 18, 2010, which was almost two months after the appeal period had ended. However, it was not until after the Employment Standards Branch had served a Demand Notice on the employer's bank account on November 21, 2010, that the appeal was filed with the Tribunal on November 28, 2010.

14. The Delegate submitted that a period of three months after the expiry of the appeal period was an unreasonably long delay in filing the appeal. A decision to extend the appeal deadline would only harm the respondent's case insofar as it would delay the payment of wages owed since April 2009.

15. The Delegate's position was that the Appellant would not have a strong case that would succeed on appeal. All of the testimony of the parties had been considered, and the Determination contained findings of fact and reasons on all of the issues in dispute.

ANALYSIS

16. 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 thought the appeal period has expired. 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*".

17. The Appellant has the onus of establishing that the period in which to file an appeal should be extended.

18. The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course, and it should exercise its discretionary powers only where there are compelling reasons to do so. The following is a non-exhaustive list of principles established by the Tribunal concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BC EST # D099/96, and *Pacholok*, BC EST # 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;

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.

19. The Tribunal advised the parties of the above criteria to assist them in filing their documents for this appeal; and the parties directed their submissions to those criteria. I will outline my findings on each of the criteria in turn below.

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

20. I turn first to the Appellant's claim that the Determination was not received until after the expiry of the appeal period.

21. In a letter to a Delegate of the Director dated August 18, 2010, which was submitted with the Appeal Form, Mr. Murphy wrote as follows: "*The mediator promised that there would be a pre-judgment mediation meeting with your self (sic) and that has not occurred.*" The Appellant also made reference in his submission for the appeal to a "*pre-determination mediation*".

22. The Determination shows that the Delegate, Mr. Marc Hale, conducted an adjudication hearing on March 9, 2010, and April 27, 2010. The Delegate, in his submissions, denied that he had provided the option of mediation.

23. It would not be normal procedure for the Delegate, an adjudicator, to advise the parties at the end of an adjudication hearing that there would be a mediation. In the context of the Employment Standards Branch following an adjudication hearing, there is no process known as a "*pre-judgment mediation meeting*" or a "*pre-determination mediation*".

24. The end result of an adjudication hearing is a written determination, which is made by the delegate for the Director after hearing the evidence and submissions of the parties. The purpose of a mediation process is for a mediator to work with the parties to assist them in reaching their own agreement, or settlement of the matter.

25. In this case, the adjudication hearing was conducted by the Delegate, and the Determination was issued. There was no mediation of this case. I do not accept the assertion of the Appellant that mediation had been promised.

26. The Delegate indicated that the Determination was sent to the address for the employer by registered mail, and it was "unclaimed". The Determination was also sent to the sole director of the employer by registered mail, and it was "refused". The Determination sent by regular mail to the employer's registered and records address was not returned.

27. The main address (on Downes Road in Abbotsford, B.C.) to which the Determination was addressed (which appears below the date on the front page of the Determination) was the address used by Mr. Murphy on his correspondence as the letterhead for B.C. High Voltage Industrial Ltd. and on the Appeal Form he sent to the Tribunal. Mr. Murphy also referred in his submissions (see Exhibit "3" on the Record) to the address on Downes Road in Abbotsford, B.C., as being the address for his "shop". Mr. Murphy is the President of B.C. Highvoltage Industrial Services Ltd., and he is also a director of that corporation.

28. It is indicated on the final page of the Determination that the Employment Standards Branch also sent a copy (a cc) of the Determination to Mr. Murphy at the address where Mr. Murphy indicates that his ex-wife resides in Abbotsford, B.C.; and to the Registered and Records Office of B.C. Highvoltage Industrial Services Ltd., c/o Greenway Legal Centre in Langley, B.C.

29. Section 122 of the *Act* is the relevant provision concerning service of a determination. That section provides as follows:

> **Service of determinations, demands and notices**
>
> **122** (1) A determination or demand or a notice under section 30.1 (2) that is required to be served on a person under this Act is deemed to have been served if
>
> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand or the notice under section 30.1 (2) is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.

30. If a person fails or refuses to pick-up registered mail, it is at his or her own peril where legislative deemed service provisions are applicable. (See the decision of the Supreme Court of B.C. in *Whitta v. McSheffrey*, Unreported, (August 15, 1995), Nanaimo Registry, No. S10398; and the decisions of the Tribunal in *#1 Low-Cost Moving & Hauling Ltd.*, BC EST # D484/02; and *Nature's Choice Foods Ltd.*, BC EST # D206/04). The consequences of section 122 of the *Act* cannot be avoided by failing, neglecting, or refusing to pick up registered mail.

31. In the face of the deemed service provisions in section 122 of the *Act*, the Appellant has not established that the Determination was not, in fact, received. There was no other explanation provided for the failure of the Appellant to request the appeal within the statutory time limit.

ii) there has not been an unreasonably long delay in filing the appeal;

32. The appeal was filed more than three months after the expiry of the appeal period. I find that this delay was unreasonably long.

iii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

33. The Appellant did not make any attempt to appeal the Determination until after the Demand Notice had been served on the employer's bank and the bank had remitted the amount awarded in the Determination. Although Mr. Murphy admits having received the Determination on August 11, 2010, and indicating shortly after that point in time that he intended to appeal the Determination, the appeal was not filed until September 28, 2010. I do not find that there was 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;

34. The respondent was not made aware of the Appellant's intention to appeal the Determination; and the Director was not advised until approximately August 18, 2010, which was almost two months after the expiry of the appeal period.

v) the respondent party will not be unduly prejudiced by the granting of an extension;

35. The respondent would be prejudiced in terms of not receiving wages which have been owing to him for more than one and one-half years.

vi) there is a strong *prima facie* case in favour of the appellant.

36. The Appellant referred in his appeal to the documentation and testimony already presented to the Delegate, and then indicated that he had "new information and witnesses". He did not indicate what the new information was, or what evidence the witnesses in question would provide.

37. The document provided with the appeal pertains to a Provincial Court of B.C. matter which does not relate to the employment standards issues or the employment relationship between the parties. As set out by the Delegate at page R2 of the Determination, the Provincial Court of B.C. case to which the Appellant was referring related to a personal loan.

38. There was no reference in the appeal or the documentation presented with the appeal to the reasons why the Appellant had alleged that the Delegate had failed to comply with the principles of natural justice in making the Determination.

39. It was not shown that the appellant had a strong *prima facie* case.

40. In summary, I can find no compelling reason to extend the time limit for requesting an appeal in this case.

41. For all of the above reasons, the application for an extension of time for requesting an appeal pursuant to s.109 (1)(b) of the *Act* is denied, and the appeal is dismissed, as I am satisfied that the appeal has not been requested within the time limit set out in section 112(3) of the *Act*.

ORDER

42. I Order, pursuant to Section 115 of the *Act*, that the Determination dated May 14, 2010, is confirmed.

Carol-Ann Hart
Member
Employment Standards Tribunal