

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 -

Royal Oak Mines Inc.

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NOS:. 1999/29, 30, 31, & 32

DATE OF DECISION: April 21, 1999

DECISION

OVERVIEW

This is an application by Royal Oak Mines Inc. ("Royal Oak") to extend the time for filing an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") in relation to four (4) Determinations by the Director of Employment Standards (the "Director").

The four determinations all show as Director's File No. 079-130 but are more specifically identified as follows:

Tribunal file #1999/29 - Dale Wilson ("Wilson") - dated December 08, 1998;

Tribunal file #1999/30 - Anna Mosdell ("Mosdell") - December 09, 1998;

Tribunal file #1999/31 - George Delanghe ("Delanghe") - dated December 09, 1998;

Tribunal file # 1999/32 - Martin Skog ("Skog") - dated December 10, 1998.

The determinations all relate to the issue of the proper rates of pay and overtime for salaried employees who were working at a remote mine site on a special work schedule of three weeks on - one week off with extended working days. Royal Oak had applied for and was granted a variance for hourly workers but there were issues in regard to the application of this variance to the salaried workers including the four who are the subject of these determinations.

The Director ruled against Royal Oak and issued the four determinations referred to above which result in substantial payments to these four employees. Royal Oak has appealed all four determinations but the applications for appeal were filed with the Tribunal beyond the time allowed for such appeals.

Royal Oak now applies, pursuant to section 109(1)(b) of the *Act*, to extend the time for the filing of these appeals.

ISSUE TO BE DECIDED

The issue to be decided is whether the Tribunal should grant an extension of time to allow for the consideration of the Royal Oak appeals.

FACTS

From reviewing the file information provided to me the chronology of events and timelines are as follows:

Wilson was employed by Royal Oak from November 10, 1996 to September 09, 1997;

Mosdell was employed from November 19, 1996 to June 14, 1997;

Delanghe was employed March 14, 1997 to July 24, 1997;

Skog was employed January 31, 1997 to July 07, 1997.

Delanghe submitted a complaint to the Director September 03, 1997. I do not have specific information about the date of filing of the other three complaints but Wilson refers to the fact that in January it had been over 1 1/2 years since his complaint. It appears that all these complaints were in the hands of the Director by early Fall 1997.

The determinations were issued on December 08, 09, & 10, 1998 - over a year after the complaints were initiated.

Each determination contains a boxed notice entitled "Appeal Information" which explains to the recipient how to appeal and the limitation date for the appeal. The notice contained in the Wilson determination reads, for example, as follows:

Appeal Information

Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal not later than 31 December 1998. Complete information on the appeal procedures is attached. Appeal forms are available at Employment Standards Branch offices.

The appeal deadline for the other three determinations is stated to be January 04, 1999.

The determinations were served on Royal Oak's registered office at the law firm of Lang Michener Lawrence & Shaw but no-one has provided evidence (or proof) of the date of service or method of service. This is a significant piece of missing information.

On December 16, 1998 Dennis Ryan ("Ryan"), Director of Legal Affairs for Royal Oak contacted John Dafoe ("Dafoe"), the Director's delegate, from his office in Kirkland, Washington. Ryan indicated that he had been made aware of the determinations and told Dafoe that Royal Oak intended to appeal the determinations. Dafoe says that he referred Ryan to the appeal forms and referred him to the "Appeal Information" (above) set out on the back page of the determination. Ryan explained that he had only been faxed the front page of each determination.

On December 30, 1998 Ryan faxed a letter to Dafoe which states, in part, "*Royal Oak hereby appeals each of the determinations for the employees set out ...*".

On December 31, 1998 Rachel Pineault, the Human Resources Manager for Royal Oak, contacted the Director's Terrace office and spoke to a Kevin Molnar ("Molnar") who was another delegate of the Director working out of the Terrace Field Office. Ms Pineault confirmed that Royal Oak

intended to appeal and told Molnar that Royal Oak wished to apply for an extension of time to file the appeals. Molnar says that he explained to Ms Pineault that any application to extend the time would have to be made to the Tribunal and that he had no authority to grant or deny an extension.

On January 07, 1999 Dafoe returned to the office and, upon reading Ryan's faxed letter dated December 30, 1998, immediately telephoned Ryan and explained again that the appeal must be filed with the Tribunal in the proper form.

On January 08, 1999 the Tribunal received a faxed letter from Lang Michener Lawrence & Shaw, Barristers and Solicitors, indicating that they represented Royal Oak and attaching a copy of Ryan's letter of December 30, 1998. The January 8th letter goes on to state that:

Royal Oak became aware today of the requirements that an appeal must be filed using the form provided by the Employment Standards Tribunal. Consequently we are writing this letter to advise that the appeals, in proper form, will be filed as early as possible next week and in any event, no later than Friday, January 15, 1999.

I note that, over and above the notice contained in the determinations, Royal Oak had been made aware of the requirements, through direct person to person contact, on December 16, 1998 and on December 31, 1998.

By letter dated January 15, 1999 Royal Oak filed their full appeals of all four determinations together with this application to extend the time for filing. This material was not stamped received by the Tribunal until Monday January 18, 1999.

ANALYSIS

The relevant provisions of the *Act* are as follows:

- 112** (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*
- (2) *The request must be delivered within*
- (a) *15 days after the date of service, if the person was served by registered mail, and*
- (b) *8 days after the date of service, if the person was personally served or served under section 122(3).*
- 122** (1) *A determination or demand 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 is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*

- 109** (1) *In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:*
- (b) *extend the time period for requesting an appeal even though the period has expired;*

In addition to these statutory provisions, the Tribunal has promulgated rules of procedure governing appeals. The rules require that a written request must be in a prescribed form, *Form I*, and must contain certain specified information and set out the reasons for the appeal including certain specific matters. The rules also provide that the request for an appeal must be filed with the Tribunal.

Rule 10 provides that the Tribunal may refuse to accept any request that does not comply with the rules and Rule 11 states that, unless otherwise permitted by the Tribunal, a written request will be processed only if it complies with the *Act* and the Rules.

Clearly the letters by Royal Oak of December 30, 1998 and January 08, 1999 did not comply with the Rules and were not sufficient to constitute a proper request for appeal. They were not in the prescribed form and did not contain the specified information. The requests for appeal were not submitted in proper form until January 18, 1999 when they were received by the Tribunal.

The appeal deadline dates set out in the determinations are a generous interpretation of the provisions of the *Act* as they allow for the maximum time for delivery and submission of the request provided that the date for mailing is known.

In this case I have no information about the method of service or, if mailed, the date for mailing of the determinations and therefore it is not possible to establish the deadline from a fixed date. However, it is apparent that Ryan had received at least the front page of each determination by December 16, 1998. I can only infer that he had received this from the registered office in Vancouver. This would indicate that the registered office had received all the determinations by December 16, 1998.

If indeed the determinations were received by December 16, 1998 then the time limit for filing an appeal on all files would have been December 31, 1998. They were received, as stated before, on January 18, 1999.

The short appeal time limits set out in the *Act* are consistent with the stated purpose of the *Act* to provide fair and efficient procedures for resolving disputes but I do note that in this case the determinations were not issued for over a year and the delay in filing the appeals is eighteen days.

The Tribunal has held that to seek an extension, appellants should satisfy the following criteria:

1. there is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
2. there has been a genuine and ongoing bona fide intention to appeal the determination;
3. the respondent party and the Director have been made aware of this intention;
4. the respondent party will not be unduly prejudiced by the extension; and
5. there is a strong *prima facie* case in favour of the appellant.

Re: Niemisto [1996] BCEST #D099/96, *et al.*

The Tribunal has also held that extensions of time for filing appeals should be granted only for compelling reasons, and the burden is on the appellant to show that the time period for an appeal should be extended, *Re Bergman* [1997] BCEST #D088/97 *et al.*

Although this is not a consideration of the appeals themselves, it is necessary to take into consideration the substance of the appeals in order to consider whether there is a compelling reason and a strong *prima facie* case. I do not intend to go into detail in this decision about the substance of the appeal as that may be considered in the future by the Tribunal and I do not want my comments to any way reflect upon the ultimate outcome of any such decisions. However some comment is necessary.

In my opinion, there are real and substantial issues raised in the notice of appeal if the allegations made are established. There are important points of law in terms of the exercise of discretion and the effect of officially induced error and the availability of the equitable remedy of estoppel against a public regulatory body. In addition, there appears to be a very real miscalculation of the quantum of wages which would result in a substantial windfall to the respondents.

I am not very satisfied about the reasons for the nearly three week delay in filing these appeals but I note that the Human Resources Office is in Terrace, the lawyers and registered office in Vancouver, and the legal department in Washington. I also note that the deadlines occurred over the Christmas and New Year periods.

I am satisfied that Royal Oak clearly demonstrated a *bona fide* intention to file an appeal from the moment they received notice of the determinations. As the deadline approached they faxed a letter to notify the Director of their intent and Ms Pineault sought out information, before the time expired, about how to apply for an extension of time.

Any delay is, naturally, prejudicial to the respondents if they are owed unpaid wages. However in this case, payment, without consideration of the appeals, could result in a wrongful windfall to the respondents.

Overall, I conclude that there are compelling reasons to extend the time for appeal in relation to these four appeals. Although the reasons for the delay are not well set-out, it is clear that there was a genuine and ongoing *bona fide* intention to appeal. The Director was notified throughout of the intent to appeal. The prejudice to the respondents is balanced by the potential for a windfall and there is a strong *prima facie* case, on the quantum ground at least, in favour of the appellants.

ORDER

I order, under Section 109(1)(b) of the *Act*, that the time period for requesting the four (4) appeals herein be extended up to and including January 18, 1999. In addition, I grant a further extension to the time period for filing the appeals for as long as the Order made by the Ontario Court General Division under the *Company's Creditors Arrangement Act* R.S.C. 1985 c. C36 continues to be in force.

John M. Orr
Adjudicator
Employment Standards Tribunal