

An appeal

- by -

Jeffrey Walker

- 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.: 2005A/119

DATE OF DECISION: September 13, 2005

DECISION

SUBMISSIONS

Jeffrey Mark Walker	on his own behalf
Rick Sakhon	on behalf of Quality Paving Ltd.
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Jeffrey Mark Walker pursuant to section 112 of the *Employment Standards Act* (the “Act”) of a Determination issued on May 13, 2005 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. In the Determination, the delegate for the Director found that Quality Paving Ltd. had contravened sections 40, and 63 of the *Act*, and ordered that Quality Paving Ltd. pay the amount of \$11 435.86 for overtime, compensation for length of service, and accrued interest required under section 88 of the *Act*. It was further ordered that Quality Paving Ltd. pay two administrative penalties in the amount of \$500.00 each for the contraventions of sections 40 and 63 of the *Act*.
3. The appeal was brought on the grounds that there was new evidence which was not available at the time the Determination was made.
4. The time limit for filing the appeal expired on June 20, 2005. Quality Paving Ltd. filed an appeal of the Determination within the prescribed time frame. The Tribunal also received an appeal of the Determination which was filed by Mr. Walker after the appeal period had expired, on July 12, 2005.
5. By letter from the Employment Standards Tribunal dated July 12, 2005 the Delegate for the Director, Jeffrey Walker, and Quality Paving Ltd. were invited to make submissions on the question of whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and extend the time period for requesting an appeal.
6. The Tribunal has decided that an oral hearing is not required and that the matter can be properly addressed through written submissions.

ISSUE

7. The issue in this case is whether the time period for filing an appeal should be extended. This decision is confined to this issue.
8. The Tribunal has concluded that an oral hearing is not required in this matter and that the appeal can be properly addressed through written submissions.

THE FACTS

9. Jeffrey Walker worked for Quality Paving Ltd. as a Paver journeyman from June 15, 2003 to February 28, 2004. Mr. Walker filed a complaint under the *Employment Standards Act* alleging that Quality Paving Ltd. had failed to pay him overtime; and that his employment was terminated without notice or compensation for length of service.

ARGUMENT

10. Mr. Walker wrote that he had been late in filing his appeal because he had moved his place of residence during the time between the mediation and the adjudication hearing, and had misplaced some of the evidence pertaining to his case.
11. Mr. Sakhon submitted that the late appeal should not be accepted by the Tribunal. According to Mr. Sakhon, the new evidence (the gas receipts) which Mr. Walker wished to submit did not prove his working hours, for reasons which he outlined in his letter. Mr. Sakhon also maintained that the calendar entries made by Mr. Walker were not accurate.
12. Amanda Clark Welder filed submissions as the Director's delegate. Ms. Welder wrote that Graham Jickling, the delegate for the Director who had issued the Determination, was away from the office, and she was unable to comment on whether he was aware of Mr. Walker's intention to appeal the Determination. Further information would be required from Mr. Walker concerning his reasons for filing a late appeal. Ms. Welder noted, however, that Quality Paving Ltd. had filed an appeal of the Determination within the time limits, and because the Tribunal would be reviewing the Determination, there would not appear to be any prejudice in allowing Mr. Walker's appeal to proceed.

ANALYSIS

13. Section 109(1)(b) of the *Act* provides that, in a situation in which the appeal period has expired, the Tribunal may extend the time frame for the filing of an appeal. The appellant has the onus of establishing that the period in which to file an appeal should be extended.
14. Various courts and tribunals have established the following main factors which should be taken into consideration concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BCEST #D099/96 and *Re Pacholok* [1997] BCEST #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 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.

15. The parties were advised of the criteria to assist them in filing their documents for this appeal.
16. The appellant wrote that since the hearing, additional receipts for gasoline purchased in 2003 were found which demonstrated that there were many days on which he had in fact worked, but Quality Paving Ltd. had claimed that he had not worked. A cassette tape recording of a conversation between Mr. Walker's wife, and Mr. Sakhon's secretary had also been found. Mr. Walker indicated that he had thought that the receipts and tape had been lost during his move, but they had later been found. The receipts had been inadvertently kept for tax purposes with his 2002 gasoline receipts.
17. The explanation of Mr. Walker as to why the appeal was filed late appears to be reasonable and credible. He had misplaced the receipts for gasoline during his move, and had not been able to locate them until after the Determination was issued, and after the appeal period had expired.
18. The appeal was filed 22 days late. The deadline for filing the appeal prescribed by the legislation was exceeded.
19. As to whether Mr. Walker had an on-going *bona fide*, or good faith intention to appeal the Determination, the only evidence was provided by Mr. Walker. In his submission dated August 9, 2005, Mr. Walker wrote that his wife had telephoned the delegate for the Director after the adjudication hearing to find out if a decision had been made. Mr. Jickling had advised Mrs. Walker that the decision would be mailed. Mr. Walker further wrote:
- My wife had let him know that if the decision wasn't fairly close to what was owed, that we would be appealing the decision as we had found some evidence that we did not have for the adjudication hearing. Mr. Jickling informed my wife that there will be an appeal form mailed out with the decision.*
20. Based on the evidence before me, I find on a balance of probabilities that the Director was aware of Mr. Walker's intention to appeal. There was no indication in any of the submissions on file as to whether Mr. Walker had advised Quality Paving Ltd. that he intended to file an appeal of the Determination.
21. It is difficult to assess whether the facts alleged in the documents filed with the appeal together with the new evidence would result in a successful appeal. A full review on the merits would ensure that all of the information which is now available is taken into consideration before a final decision is made. The Determination was based on evidence before the delegate for the Director at the time, which did not include the new evidence the appellant now seeks to provide.
22. As Quality Paving Ltd. has filed an appeal which will be adjudicated by the Tribunal, there would be no prejudice to the parties if the time frame for filing the appeal were extended.
23. Despite the delay in filing the appeal, the appellant did demonstrate a *bona fide* intention to appeal the Determination, and it was not shown that there would be any real prejudice to any party by extending the appeal period. I allow the request for an extension of time to file the appeal in this case.

CONCLUSION

24. The requested extension of time to file the appeal is allowed pursuant to section 109(1)(b) of the *Act*. This appeal is therefore properly before the Tribunal, and will now be adjudicated on its merits.

Carol Ann Hart
Member
Employment Standards Tribunal