

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 -

Bernardi Humidors Ltd. and Acry Tech Plastics Inc.
(" Humidors ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 2000/31

DATE OF DECISION: March 30, 2000

DECISION

OVERVIEW

Bernardi Humidors Ltd. and Acry Tech Plastics Inc. are found to be associated entities pursuant to Section 95 of the *Employment Standards Act* (the “Act”) and “the employer” of Andrea Fage and Alan Fage (“the employees”) in a Determination by a delegate of the Director of Employment Standards (the “Director”) dated December 23, 1999. The employer is ordered to pay the employees \$5,757.52 in wages and interest. The appeal is pursuant to section 112 of the *Act* and by Malcolm Williams of Acry Tech Plastics Inc. (“Acry Tech”).

The appeal was received after the statutory period for appealing the Determination had expired. The Tribunal is asked to waive the time limit for appealing the Determination.

ISSUE

My task in this case is to decide whether the Tribunal should or should not exercise its discretionary power to waive the time limit for appealing the Determination.

THE FACTS

The Determination advises Acry Tech that the decision could be appealed. And it clearly advises that the appeal “*must be delivered to the Tribunal no later than 4:30 PM on January 17, 2000*”.

It was not until the 19th of January that the appeal was received by the Tribunal.

Acry Tech ceased operations. Williams gave up his residence in Abbotsford and moved in with friends at #7 – 46191 Cessna Drive in Chilliwack. While he took steps to see that Canada Post would redirect his mail, Williams claims that it was not until the 17th of January that he received a copy of the Determination.

On the 17th or possibly the 18th, Williams contacted the delegate and asked for additional time for an appeal. He was told to contact the Tribunal. He promptly did that and was told that he could pick up an appeal form at the Abbotsford office of the Employment Standards Branch and that he should then fax the appeal to the Tribunal as soon as possible.

The appeal is dated January 18th, 2000. As drafted, it would have taken a day or so to prepare.

In the Determination, Bernardi and Acry Tech are found to be parts of a business whole and associated pursuant to section 95 of the *Act* for the reasons that Andrea Fage and Alan Fage worked for both Bernardi and Acry Tech; the companies manufactured items at the same site; they manufactured parts of the same product; Williams had direction and control over Bernardi’s employees; the two companies had common directors and there was common financial control.

Williams and Acry Tech, on appeal, claim that the delegate is wrong on the facts and that Acry Tech is quite separate and independent of Bernardi Humidors (“Bernardi”). As I understand it, Williams is claiming that the Determination is wrong for the following reasons,

- Bernardi and Acry Tech are actually separate business entities;
- the employees did not work for Acry Tech, but Bernardi alone;
- while Bernardi had Acry Tech supply it with various acrylic items, Bernardi was not Acry Tech’s only source of business;
- Williams is not a director of Bernardi;
- Williams himself was employed by Bernardi;
- Andrew Bernardi, the owner of Bernardi, helped Williams set up Acry Tech and, in return for doing so, was given part ownership of Acry Tech, but he did not control Acry Tech or direct its operations in any important way;
- Williams did not control or direct the business that is Bernardi beyond providing shop-floor supervision.

The evidence before me does not establish that the employees did in fact work for both companies, although that may have been the case. I am not provided with evidence which clearly shows that the companies were just parts of a business whole or under common control.

ANALYSIS

Among the purposes of the *Act* is the provision of fair, efficient procedures.

2 The purposes of this Act are as follows:

- (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
-

And the *Act*, at section 112, establishes a period for appealing Determinations.

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).

The Tribunal may waive the time limit for requesting an appeal.

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;

....

But through various decisions starting with *Liisa Tia Anneli Niemisto*, BCEST No. 099/96, the Tribunal has said that the statutory period for appeals will not be overridden lightly but only in certain circumstances. Where the time limit for an appeal is missed by only a few days, the Tribunal has recently said that if there is a reasonable explanation for the delay and no apparent prejudice to any party, the Tribunal will be inclined to exercise its discretion in favour of the appellant if a preliminary analysis of the appeal material indicates that there is a fair question to be addressed [*716318 Alberta et al*, BCEST No. D144/99].

In this case, there is no apparent prejudice to any party from what I can see and I am inclined to believe that there is a reasonable explanation for the delay in filing the appeal in this case. My own experience is that, even when Canada Post is properly advised that mail should be redirected to a new address, it cannot be relied on to redirect mail quickly if at all.

It may be that Bernardi and Acry Tech are parts of the same business whole and/or under common control and direction and that there is reason to consider the two companies as one and the same for the purposes of the *Act* but the Determination does not make that absolutely clear to me. Williams has raised sufficient doubt in my mind regarding the Determination and the status of Acry Tech that it would I think be unfair to deny him his appeal for the sole reason that he was late in filing it by a day or two.

ORDER

I have decided, pursuant to section 109 (1)(b) of the *Act*, to extend the period for appealing the Determination dated December 23, 1999 and allow the appeal by Williams and Acry Tech.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal