

An appeal

- by -

Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/130

DATE OF DECISION: August 31, 2004

DECISION

INTRODUCTION

This is an appeal filed by Nick DiMambro (“DiMambro”) and 518820 B.C. Ltd. (the “Numbered Company”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). I shall refer to these latter parties jointly as the “Appellants”.

The Appellants appeal a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on May 18th, 2004 (the “Determination”). The Determination was issued following an investigation by the Director’s delegate and pursuant to the Determination the Appellants were jointly ordered to pay their former employee, Stephen G. Funk (“Funk”), the sum of \$2,792.73 on account of unpaid wages and section 88 interest. The Appellants say that the delegate erred in law and also failed to observe the principles of natural justice in making the Determination.

The Appellants’ notice of appeal, dated May 25th, 2004, was filed with the Tribunal on July 6th, 2004. The appeal period expired as of the close of business on June 25th, 2004. Accordingly, since this appeal was filed slightly less than two weeks after the applicable appeal period expired [see section 112(3) of the *Act*], the Appellants now apply, pursuant to section 109(1)(b) of the *Act*, for an order extending the appeal period. These reasons for decision address only this latter application.

THE APPLICATION TO EXTEND THE APPEAL PERIOD

On July 24th, 2004 the Tribunal’s Vice-Chair invited the parties to file written submissions with respect to the Appellants’ application for an extension of the appeal period. I might add that the Vice-Chair’s July 24th letter provided significant guidance to the parties since it summarized the relevant considerations in an application such as this as developed by the Tribunal over the course of the last several years.

I now have before me submissions filed by the Appellants (dated August 10th, 2004), Mr. Funk (dated July 29th, 2004) and the Director’s delegate (dated July 27th, 2004).

As noted above, the Appellants’ notice of appeal was not filed with the Tribunal until July 6th, 2004, some two weeks after the appeal period expired (the last day for filing the appeal was June 25th, 2004). Mr. DiMambro says that he filed the notice of appeal, by fax, on June 10th, 2004 and he has also provided a fax confirmation form corroborating that latter statement. Unfortunately, the Tribunal’s records do not indicate that the Appellants’ appeal form was received, by fax, on June 10th, 2004, however, the Tribunal’s fax log does not now extend as far back as June 10th, 2004. I do note, however, that the Appellants’ appeal form was received (and date stamped) at the office of the Director of Employment Standards on June 15th, 2004.

The Director’s delegate does not take any position with respect to the Appellants’ application to extend the appeal period.

Mr. Funk, for his part, raises some concern about the legitimacy of the Appellants’ June 10th fax delivery record. However, I cannot conclude that the Appellants’ fax record is a fraudulent document. This

appeal may well have been filed within the statutory appeal period although the Tribunal's records do not indicate that the appeal was filed on June 10th.

The appeal is not obviously lacking in merit--there is a bona fide dispute about whether Mr. Funk was an employee and the nature and extent of his duties if he was employed by one or both of the Appellants. Further, there is some question surrounding the legal status of the Numbered Company at the material time. There is no obvious prejudice to Mr. Funk that flows from the fact that this appeal was filed less than two weeks after the expiration of the statutory appeal period (even assuming the appeal was, in fact, filed out of time). It is clear that as early as June 10th (well before the expiration of the appeal period), the Director was served with the Appellants' notice of appeal. I note that Mr. Funk has also appealed the Determination and it would be appropriate for both appeals to be adjudicated concurrently.

In light of the foregoing circumstances, I am satisfied that the appeal period should be extended. The parties were advised by the Tribunal's Vice-Chair, by letter, on August 19th, 2004 that they would be invited to file submissions with respect to the merits of the appeal if the Appellants' application to extend the appeal period was successful. Accordingly, the parties will be given the opportunity to file written submissions regarding the merits of the Appellants appeal.

As noted above, I think it appropriate that both the Appellants' appeal and Mr. Funk's be adjudicated concurrently.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period governing the filing of an appeal of the Determination be extended to July 6th, 2004. Accordingly, this appeal is properly before the Tribunal and thus will now be adjudicated on its merits.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal