

An appeal

- by -

B N N Enterprises Ltd.
("B N N")

- 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: Matthew Westphal

FILE No.: 2004A/104

DATE OF DECISION: September 15, 2004

DECISION

OVERVIEW

This is an appeal by B N N Enterprises Ltd. (“B N N”) under section 112 of the *Employment Standards Act* (the “*Act*”) of Determination ER # 122222, dated February 25, 2004 (the “Determination”), issued by a delegate (the “Delegate”) of the Director of Employment Standards. The Delegate found that B N N had contravened section 28 of the *Act*, ordered that B N N cease contravening the *Act*, and imposed an administrative penalty of \$500 with respect to that contravention. B N N did not perfect its appeal of the Determination within the prescribed appeal period, which raises the issue of whether the Tribunal should extend the time period for requesting an appeal.

The Tribunal invited the parties to this appeal to make submissions on the issue of whether the Tribunal should exercise its discretion, under section 109(1)(b) of the *Act*, to extend the time limit for requesting an appeal. The Tribunal has decided that this case can be decided without an oral hearing. Based on my review of the Determination and the written evidence and submissions of B N N and the Delegate, I have decided not to extend the time limit for requesting an appeal.

ISSUE

Should the Tribunal, pursuant to s. 109(1)(b) of the *Act*, extend the time period for B N N to request an appeal of the Determination?

BACKGROUND

B N N, whose principal is Mr. Baldev Dhuga, is a blueberry producer in Pitt Meadows. This case arises from a visit to B N N’s farm by the Director’s Agricultural Compliance Team (the “Compliance Team”) on August 28, 2003. I understand that the visit was prompted by a tip that this farm was employing the services of an unlicensed farm labour contractor, but nothing turns on this fact.

During the site visit the Compliance Team interviewed a number of workers concerning the terms and conditions of their employment on the farm, and all but one stated that B N N was their employer. B N N denied having used an unlicensed farm labour contractor, and maintained that it employed all of the employees interviewed by the Compliance Team. The Delegate held that at least some of the workers had been employed by an unlicensed farm labour contractor, and that B N N was deemed to be their employer under s. 13(2) of the *Act*. She found that regardless of whether B N N had employed the employees directly, or through an unlicensed farm labour contractor, s. 28 of the *Act* required B N N to maintain detailed payroll records. B N N told the Delegate that it paid all its employees in cash, and could produce proof of payment upon the employees’ return to Canada, but, as the Delegate notes in her Determination, that does not affect B N N’s obligation to maintain payroll records, which the Delegate found it had not done. Accordingly, she issued the Determination on February 25, 2004, finding that B N N had contravened s. 28, and imposing an administrative penalty of \$500 under s. 98 of the *Act*.

The Delegate’s investigation also indicated the B N N had not complied with the *Act*’s requirements concerning pay periods and vacation pay. I understand that the Delegate issued a second determination against B N N on May 14, 2004, concerning the issue of vacation pay, at least. The issue of whether B N

N has breached the *Act* in these respects is not before me on this appeal, although some of Mr. Dhuga's submissions address the issue of vacation pay, rather than that of B N N's payroll records.

The deadline for B N N to submit its appeal of the Determination concerning payroll records to this Tribunal was April 5, 2004. In fact, the Tribunal did receive an appeal form from Mr. Dhuga, on behalf of B N N, on April 4, 2004. Mr. Dhuga indicated on the form that he was appealing the Determination (ER # 122-222). Although he indicated his grounds for appeal as relating to a failure by the Delegate to observe the principles of natural justice, he did not explain how the Delegate had failed to observe these principles, as required by the appeal form. Mr. Dhuga also did not attach a copy of the Determination, as the appeal form indicated he was required to do.

The Tribunal informed Mr. Dhuga in a letter dated April 8, 2004 that his appeal was incomplete because he had not included a copy of the Determination or adequate reasons why B N N was appealing the Determination. The Tribunal set a new deadline of April 16, 2004 for B N N to perfect its appeal by providing this material and information. When B N N did not do so, the Tribunal informed Mr. Dhuga in a letter dated April 23, 2004 that it was closing the file.

B N N filed a new appeal form that the Tribunal received on June 24, 2004. Mr. Dhuga did not indicate which determination he was appealing. Although he attached a statement relating to vacation pay, which would only have been relevant to the determination of May 14, 2004, he attached a copy of the Determination relating to payroll records.

Although the initial investigation concerned whether B N N was using an unlicensed farm labour contractor, that is not the issue before me. Rather, the only issue for me to decide at this point, is whether to extend the time limit for B N N to bring its appeal of the Delegate's finding that it contravened s. 28 of the *Act* by failing to maintain employee records, and the Delegate's imposition of a \$500 penalty with respect to this contravention.

ANALYSIS

B N N seeks to have the Tribunal accept its appeal although it did not perfect it within the appropriate time limits. The deadline for B N N to appeal the Determination fell on April 5, 2004. As the facts above indicate, B N N did indeed file an appeal form before its deadline, but it did not provide the Tribunal with an explanation of how the Delegate failed to observe the principles of natural justice, nor with a copy of the Determination, by April 16, 2004, as required by the Tribunal.

Section 112(1) entitles a person served with a determination to appeal it to the Tribunal on three grounds, including that "the director failed to observe the principles of natural justice in making the determination." Section 112(2) then sets out the requirements for filing an appeal:

- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
 - (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
 - (i.1) a copy of the director's written reasons for the determination, and
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (b) deliver a copy of the request under paragraph (a)(i) to the director.

The use of the word “must” in s. 112(2) indicates that the requirements of the subsection are mandatory: that is, an appeal must both specify the grounds on which the appeal is based and include a copy of the director’s written reasons for the determination. These materials must be delivered to the Tribunal before the end of the appeal period, which is “30 days after the date of service of the determination, if the person was served by registered mail” (s. 112(3)). The failure to include a copy of the determination under appeal before the appeal deadline means that the appeal has not been perfected, and cannot proceed unless the Tribunal decides to extend the deadline: see, for example, *Canadian Motor Inn Ltd. (Re)*, BC EST #D236/03. Since Mr. Dhuga did not deliver a copy of the Determination until June 24, 2004, his appeal of the Determination is out of time.

The Tribunal does have discretion, under s. 109(1)(b) of the *Act*, to extend the time period for a party to appeal a determination. Previous decisions of the Tribunal have established it will not grant time extensions as a matter of course (*Liisa Niemisto*, BC EST # D099/96), and that it will only do so if there are compelling reasons (*Metty M. Tang*, BC EST #D211/96). In determining whether to extend the appeal deadline, the Tribunal considers the following factors:

1. Is there a good reason why the appellant could not submit an appeal by the deadline?
2. Is there an unreasonably long delay in filing the appeal?
3. Did the appellant always intend to appeal the Determination?
4. Were other parties – such as the Delegate – aware that the appellant intended to appeal?
5. If the Tribunal grants an extension, does the appellant have a strong case that might succeed?

The Delegate opposes the granting of an extension. She states that the appeal process and deadline was made clear to B N N in the Determination, and that “The appellant has in the past been through the appeal process and is aware of the timelines for filing an appeal. The Tribunal has previously granted the appellant an extension beyond the deadline for filing an appeal (BC EST #D082/98).”

I will now address each of these factors in turn.

Mr. Dhuga’s explanation for B N N’s failure to file its appeal on time is that his health did not permit it. He submitted a copy of a “Physician’s Initial Statement”, completed by Dr. Robert Grist, and submitted to Canada Life. The “diagnosis” is “rotator cuff surgery right shoulder”, and complications include two surgeries for other ailments. Dr. Grist, who had recently consulted Mr. Dhuga twice a month in each of April, May and June 2004, stated that Mr. Dhuga was “not capable of any remunerable work activity at this time,” and has been “work disabled since Nov. 28, 2003.” On this form, Mr. Dhuga wrote that “due to surgeries I was unable to meet deadline of appeal.” This form does not provide detail about precisely when Mr. Dhuga underwent surgery: for example, it does not state whether he was hospitalized between early February 2004, when the Determination was served upon B N N, and April 5, 2004, or indeed April 16, 2004, the later deadline provided by the Tribunal for B N N to perfect the appeal. While Mr. Dhuga may have been incapable of performing physical labour during this period, I have considerable doubt, based on the evidence he has submitted, that he was unable to perfect his appeal by April 16, 2004. On the contrary, he was able to submit an appeal form, but neglected to explain his grounds of appeal and attach a copy of the Determination. I find, therefore, that Mr. Dhuga has not established a good reason why he did not perfect the appeal of B N N on time.

Related to Mr. Dhuga's reasons for not appealing in time is that B N N's delay was not minor, or a matter of inadvertence. It did not submit a copy of the Determination until 71 days after April 16, 2004. A minor delay might be acceptable, given medical difficulties, but a substantial delay requires more evidence and explanation than Mr. Dhuga has provided.

Mr. Dhuga's attempt to file an appeal on April 4, 2004 demonstrates that it was B N N's intention to appeal the Determination. Also, given that B N N filed an appeal form on April 4, 2004, the Delegate would have been aware of an intention to appeal. Since this Determination involves a penalty for failing to maintain payroll records, no employees are parties to this appeal.

Finally, I do not find that B N N has adduced a strong *prima facie* case that its appeal might succeed. Neither appeal form submitted by Mr. Dhuga contested the Delegate's finding that B N N had failed to maintain adequate payroll records. His earlier appeal form from April 4, 2004 only stated, in the context of requesting an oral hearing, "...many things in explanation they was not ready to hear or accept." His second appeal form addresses the issue of vacation pay. While Mr. Dhuga indicated, by selecting a box, that B N N's grounds for appeal were that the Director had failed to observe the principles of natural justice in making the Determination, he did not explain how the Director treated B N N unfairly, as required on the form. The most that he said, on the second appeal form concerning vacation pay, was "I tried many times to explain them in a simple way, but was ignored." As the appellant, he bears the onus of demonstrating a failure on the part of the Delegate to observe the principles of natural justice. Nothing in the materials Mr. Dhuga has provided to the Tribunal provides any support for his assertion, and based on the materials before me, I see nothing to support his claim. In the circumstances, therefore, I find that B N N has not provide the Tribunal with anything in its appeal submission from which I can conclude that its appeal against the finding that it failed to maintain the payroll records required by the *Act* could succeed.

Having weighed the factors established by the Tribunal regarding the appeal deadlines, I find that this is not an appropriate case in which to extend the time for bringing an appeal.

ORDER

I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be confirmed.

Matthew Westphal
Member
Employment Standards Tribunal