

An appeal

- by -

Tyler Wilbur operating Mainline Irrigation and Landscaping

- 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: John Savage

FILE No.: 2005A/148

DATE OF DECISION: October 26, 2005

DECISION

SUBMISSIONS

Tyler Wilbur, for the Employer, Tyler Wilbur operating as Mainline Irrigation and Landscaping

Chris Baker, for the Employee

J.R. Gould, for the Director of Employment Standards

OVERVIEW

1. This is an appeal by Tyler Shawn Wilbur, operating as Mainline Irrigation and Landscaping (the “Employer”), from a determination of a delegate of the Director of Employment Standards (the “Director”) pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. Chris Baker (the “Complainant”) filed a complaint under the *Act* alleging that the Employer contravened section 74 by failing to pay wages. As a result, an investigation was conducted and on June 23, 2005 the Director issued a written decision finding that (1) wages were owing in the amount of \$3216.10 and (2) imposing administrative penalties in the amount of \$1500.00 for three contraventions of the *Act*.
3. The Employer sought to appeal this decision alleging that, contrary to subsections 112(1)(a) and (b) of the *Act*, the Delegate erred in law and failed to observe the principles of natural justice in making the determination.
4. Pursuant to s.112(c) of the *Act*, the deadline for filing an appeal is 30 days after the date of the determination, if the person was served by registered mail or 21 days after the date of service if the person was personally served or served under section 122(3). In addition, pursuant to s.112(b) of the *Act*, a person who wishes to appeal a determination of the Director must deliver the appeal within the stated time limit to the office of the Employment Standards Tribunal. A copy of the grounds for the appeal must also be delivered to the office of the Director.
5. An Appeal Form was received by the office of the Director on July 27, 2005. The Appeal Form was not received by the Employment Standards Tribunal until August 23, 2005.

ISSUE

6. Should the Tribunal extend the time for requesting an appeal pursuant to section 109(1)(b) of the *Employment Standards Act* in the circumstances of this case?

FACTS

7. It appears that the crux of the proposed appeal is that the Director failed to hear from the Employer before rendering his decision. It is clear from the evidence that the Delegate made various efforts to contact the Employer but the Employer either did not learn of or did not respond to those efforts. Thus, the Delegate

was left with the information received from the Complainant and rendered a decision based on this evidence.

8. In any event, when the Employer sought to appeal the decision he faxed his appeal to the office of the Director of Employment Standards but failed to send it to the Employment Standards Tribunal. The Appeal Form received by the Director is dated July 27, 2005 and the accompanying letter is dated July 26, 2005. The Director acknowledges that the Appeal Form was received by him before expiration of the statutory appeal period.
9. On August 23, 2005 the Employment Standards Tribunal received the appeal together with reasons explaining why it was late. The Employer stated it was a simple oversight that the Appeal Form and letter were sent only to the Director of Employment Standards and not the Employment Standards Tribunal.
10. The Employee objects to extending the time on the basis that the appeal is simply a stalling tactic. The Director does not oppose the extension of time.

DISCUSSION AND ANALYSIS

11. Under section 109(1)(b) of the *Act* this Tribunal may extend the time for requesting an appeal. The only issue in this appeal is whether the Tribunal should extend the time for filing the appeal.
12. In considering whether an extension of time should be granted this Tribunal looks at a number of different factors:
 - (1) whether there is a reasonable and credible explanation for the failure to appeal on a timely basis,
 - (2) whether there is a genuine ongoing *bona fide* intention to appeal the determination,
 - (3) whether the Respondent and the Director have been made aware of the intention to appeal,
 - (4) whether the Respondent will be unduly prejudiced by the extension, and
 - (5) whether there is a strong *prima facie* case

see: *Niemesto* (EST D# 099/96), *Round Table Enterprises* (EST D# 052/05), *MAC's Convenience Store* (EST D# 066/05).
13. In this case I am satisfied that the Applicant has established a reasonable and credible explanation for the failure to appeal on a timely basis. There was a genuine ongoing *bona fide* intention to appeal the determination, the Director, if not the Respondent, was aware of the intention to appeal, and the Respondent would not be unduly prejudiced by the extension.
14. With respect to the merits of the appeal, in my opinion the appeal is not frivolous, and in circumstances such as these, it is inappropriate to delve further into the merits *Round Table Enterprises* (EST D# 052/05), *Zonia Kernested* (EST D#051/04).

15. Pursuant to subsection 109(1)(b) of the *Employment Standards Act* I would grant the extension of time requested.

ORDER

16. The extension of time to appeal is granted pursuant to subsection 109(1)(b) of the *Employment Standards Act* until August 23, 2005. Accordingly, this appeal is properly before the Tribunal and thus will now be adjudicated on its merits.
17. The parties are directed to address the merits of the appeal, and in particular, to address the question of whether there was a breach of natural justice in the circumstances giving rise to the Determination of the Delegate.
18. The Tribunal will establish a schedule to receive the written submissions of the parties.

John Savage
Member
Employment Standards Tribunal