

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 -

482852 B.C. Ltd.
operating as Race Trac Gas
("Race Trac")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/528

DATE OF DECISION: October 3, 2000

DECISION

This is a decision based on written submissions by A. T. Fortner, President of 482852 B.C. Ltd. operating as Race Trac Gas (“Race Trac”), and Karin Doucette for the Director of Employment Standards.

OVERVIEW

On July 6, 2000, a delegate of Director of Employment Standards (“the Director”) determined that Race Trac had contravened Sections 34, 40 and 46 of the *Employment Standards Act* (“the Act”) in failing to pay Veronica Saul (“Saul”) wages, overtime pay and vacation pay. The Director’s delegate ordered Race Trac to pay \$523.01 to the Director on behalf of Saul.

Race Trac’s Notice of Appeal of the Determination was received by the Tribunal on August 2, 2000, two days after the time provided under Section 112 of the *Act*.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS

It is unnecessary to set out the facts of the Determination, since the sole issue to be determined is one of timeliness. The Determination, dated July 6, 2000, was mailed to the business address of Mr. Fortner, the sole director of Race Trac, and Race Trac’s registered office that day. It was acknowledged received by the registered office on July 7. Mr. Fortner contacted the Director’s delegate, Ms. Doucette, on July 10 to discuss the Determination with her.

In his letter of appeal, Mr. Fortner stated that the appeal had been prepared and delivered to the Prince George offices of the Employment Standards Branch on August 1. There he was advised that the appeal had to be filed with the Tribunal, and it was faxed to the Tribunal office the following day. Mr. Fortner states that his office staff were instructed to submit the documents in advance of the July 31 deadline, but because of a misunderstanding, the documents were not filed in the correct office by that date. He argues that the appeal instructions did not specify an address for delivery of the appeal documents, and that the Tribunal ought now allow the appeal.

The Director’s delegate argues that the Tribunal should not consider the late appeal. She states that the Determination was received in sufficient time to meet the appeal deadline of July 31.

ANALYSIS

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing bona fide intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension;
and
- (5) there is a strong prima facie case in favour of the appellant.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.* BC EST #D298/96.)

Having reviewed the submissions, I allow the application.

The appeal was received, although in the incorrect office, less than 24 hours past the appeal deadline. I accept that there was a bona fide intention to appeal the Determination on time, and all steps had been taken to do so. Furthermore, the Director had notice of Race Trac's intention to do so since August 1.

Furthermore, the Director has shown no prejudice to the late filing of the appeal, and I infer that, since the Director had notice of the appeal at least two days after the appeal deadline if not sooner, that there is none.

Furthermore, I also find that there is a strong prima facie case in favour of the appellant. Race Trac appears not to dispute the majority of the amount determined owing, and has provided documentation to suggest that it has paid the balance.

I allow the application to extend the time to file the appeal.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal