

**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 -

Kahlon Farms Ltd.  
("Kahlon")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Ib S. Petersen

**FILE NO.:** 1999/483

**DECISION DATE:** October 21, 1999

## DECISION

### SUBMISSIONS

Mr. Peter Keighley on behalf of Kahlon

Mr. Jim Walton on behalf of the Director

### OVERVIEW

This is an application for extension of time under Section 109(1)(b) of the *Employment Standards Act* (the “Act”) in respect of an appeal by Kahlon pursuant to Section 112 of the *Employment Standards Act* (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on July 23, 1999. The Determination held that Kahlon had contravened Section 85 of the Act and Section 46 of the Regulation when it denied the delegate access to the work place. The delegate issued a \$500.00 penalty.

### FACTS AND ANALYSIS

Kahlon’s appeal form was filed on August 4, 1999. The ground of appeal is that Kahlon did not deny the delegate access to the work place and the employees. It wanted the interviews to take place at the end of the day to avoid disruption of he operations. In a subsequent letter dated August 5, 1999, counsel for Kahlon expanded on the grounds of appeal. Kahlon denies that it denied officers of the Employment Standards Branch, including Walton, access to the work place and says that:

1. the farm labour contractor would be on site the following day and available for an interview with the delegate; and
2. the employees would be available for interview either later that day, after working hours or the following day before working hours. Kahlon “saw no reason why the investigation should disrupt picking operations when it might be conducted at a more reasonable time.”

In the result, Kahlon says, it did not restrict access to the work place or the employees. Kahlon says that the power under Section 85 violates Sections 8 of the Canadian Charter of Rights and Freedoms. Kahlon also argues that the process which resulted in the Determination violates Section 11 of the Charter and denied Kahlon a hearing in accordance with the principles of natural justice.

The appeal was filed outside the time limit set out in the Act. A letter dated August 5, 1999 to the Tribunal sets out the ground for an extension of the time for filing a appeal:

“The delay in filing the appeal resulted from a miscalculation as to time. I was not aware, until yesterday, that Mr. Kahlon had been served with the Determination, rather than having received it through the post.”

The delegate opposes the application to extend time. He says that the Determination was served personally; that the reasons for the Determination--and the rights to appeal--were explained to Kahlon; that Kahlon indicated its intention to appeal; and that the appeal, therefore, should have been made within the time limit.

Kahlon does not respond to the delegate's submissions.

Section 112 provides that an appeal must be delivered to the Tribunal within 15 days after the date of service if the person was served by registered mail and within 8 days after the date of service if the person was served personally or transmitted via fax or electronically (see also Section 122(3)). The Determination clearly states that “any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by August 3, 1999.” Service does not appear to be an issue in this case. The Determination was served personally. As well, the an information sheet with respect to appeal procedure was attached to the Determination. This sheet stated: “A completed appeal form must be delivered to the Tribunal **on or before the appeal deadline shown on the Determination.**” Ultimately, and in any event, whether or not an appeal is filed in a timely manner depends on whether or not the appeal is filed in accordance with Section 112 of the Act. It is clear that the appeal is not filed in a timely manner.

In *Blue World It Consulting Inc.* (BC EST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

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 and ongoing bona fide intention to appeal the Determination;
3. the respondent party (i.e., the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
4. the respondent party will not be unduly prejudiced by the granting of the extension; and
5. there is a strong prima facie case in favour of the appellant.”

In my view, the application fails to satisfy these criteria.

In particular, I am of the view, that Kahlon has not provided any reasonable explanation for failing to file the appeal in time. The deadline and the procedure for filing the appeal is set out clearly on the face of the Determination and the attached information. In the circumstances, I do not accept Kahlon's explanation that it "miscalculated" the deadline for filing the appeal. In my view, it is not a reasonable and credible explanation.

Moreover, there is no strong *prima facie* case made out here. As mentioned in *Narang Farms and Processors Ltd.*, BC EST #D482/98:

"..... penalty determinations involve a three-step process. First, the Director must be satisfied that a person has contravened the Act or the Regulation. Second, if that is the case, it is then necessary for the Director to exercise her discretion to determine whether a penalty is appropriate in the circumstances. Third, if the Director is of that view, the penalty must be determined in accordance with the Regulation."

Kahlon's argument focuses on the first element, the contravention of the Act and Regulation. Section 85(1)(a) provides that the Director may enter the place of work "during regular working hours". Section 46(2) of the Regulation states that "no person may restrict or attempt to restrict the Director from making entry under Section 85(1)(a) of the Act." The Director may "question a person about any work" (Section 85(1)(b)).

First, Kahlon says it did not deny Walton access to the work place and the employees. It is clear from the Determination that Walton sought access to the property for the purpose of questioning the employees of the farm labour contractor to ascertain compliance the Act and the Regulation. He sought access at the time the request was made. I accept that he had bona fide reasons for requesting access: there is no dispute that the vehicles used by the farm labour contractor to transport the employees was not registered with the Employment Standards Branch as required, and that the daily log was incomplete. The employees were on the farm property, i.e., in the work place. Assuming for the present purposes that Kahlon did, in fact, simply advise Walton that the farm labour contractor and the employees would be available later, the following day or after working hours, that could well support a conclusion that Kahlon restricted or attempted to restrict Walton's entry to the work place contrary to Section 46 of the Regulation. Kahlon's submission state "saw no reason why the investigation should disrupt picking operations when it might be conducted at a more reasonable time." While I can appreciate Kahlon's concern for its operations and, as a matter of courtesy, I would expect the delegate to interfere as little as possible with the Kahlon's operations, in my view, the Director is not required to wait. Quite the contrary, as noted in Section 85(1)(a), the Director may enter the work place "during regular working hours. On the facts, as alleged, Kahlon does not have a strong *prima facie* case.

Second, Kahlon's argument that Section 85 violates the Canadian Charter of Rights and Freedoms does not present a strong *prima facie* case in favour of it. Section 8 of the Constitution Question Act requires that notice be given to the Attorneys General, where the constitutionality of a statute is challenged. This requirement is mandatory (*Eaton v. Brandt County Board of Education* (1997),

142 D.L.R. (4th) 385 (S.C.C.)). There is nothing to suggest that Kahlon has given the required notice. The Tribunal may address Charter issues if it has the jurisdiction over the whole of the matter before it (*Cuddy Chicks v. Ontario (Labour Relations Board)*, <1991> 81 D.L.R. (4th) 121 (S.C.C.)). In this case, all of the issues arose out the Act and Regulation. The Tribunal has broad powers to “decide all questions of fact or law arising in the course of an appeal or review” (Section 107(2)). However, I am not prepared to allow Kahlon to challenge the constitutionality of Section 85--whether the challenge is based on Section 8 or 11 of the Charter--due to defective notice pursuant to the Constitution Question Act. Moreover, the nature and prima facie merits of the constitutional argument is unclear. It is by no means obvious that Section 85 of the Act offends the Charter. As the appellant in this matter, Kahlon has the burden to persuade me that its claim was not frivolous. Kahlon has not met that burden.

Third, Kahlon argues that the process resulting in the Determination violated Section 11 of the Charter and denied it a hearing in accordance with natural justice. I do not understand this to be a constitutional challenge to specific provisions of the Act, rather I understand the appellant to be suggesting that it was not administered in accordance with Charter values. The nature and prima facie merits of this argument is unclear. It is by no means obvious that the process offends Section 11 of the Charter. As the appellant in this matter, Kahlon has the burden to persuade me that its claim was not frivolous. Kahlon has not met that burden.

Fourth, Kahlon also says it was denied a fair hearing because the first opportunity to respond to the “allegation” was by filing the appeal without prior opportunity to meet the case against it. The Determination sets out in detail the conversation between Walton and Kahlon. The latter, it would appear, agrees that a conversation occurred concerning Walton’s access to the work place. Walton says that he requested access under the Act (and explained the consequences of failing to comply with his request). Kahlon does not specifically deny that Walton, in fact, made a request for access to the work place and, therefore, the employees. Kahlon could have, and it seems to me, in fact, did address its concern with the requirement for access to the work place. Section 85 provides the Director with access to a work place “during regular working hours”. Section 46(2) of the Regulation prohibits a person from restricting or attempting to restrict the Director from making entry under Section 85(1)(a). Kahlon says that Walton could have access to the employees in the work place later, i.e., not at the time of the request. The delegate concluded that Kahlon’s conduct contravened the Act and Regulation. Kahlon denies this. Kahlon simply disagrees with the delegate’s conclusions. That does not constitute a denial of natural justice. The issue of whether the Act and Regulation had been contravened could be addressed and decided on-- a timely--appeal to the Tribunal. In view of the alleged facts, there is not a strong prima facie case that Kahlon was dealt with contrary to the principles of natural justice.

While this decision does not deal with the merits of the appeal, but only the timeliness issue, I would like to add that--in my view--the powers of the Director under Section 85 are important tools in the investigatory process under the Act and, therefore, to deny the Branch access to the work place and employees is a serious matter.

In the circumstances, I dismiss the application for extension of time to file the appeal.

**ORDER**

The application to extend time to file an appeal of the Determination dated July 23, 1999 is dismissed.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**