



An appeal

- by -

Gurdeep Enterprises Ltd.
("Gurdeep Enterprises")

- 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

ADJUDICATOR: Ib S. Petersen

FILE No.: 2001/401 and 2001/402

DATE OF DECISION: August 23, 2001

DECISION

SUBMISSIONS:

Mr. Gurdeep Sekhon	on behalf of the Employer
Mr. Kulwant Singh Virk	on behalf of himself
Ms. Lynne Fanthorpe	on behalf of the Director

OVERVIEW

This matter concerns two applications.

First, there 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 Gurdeep Enterprises pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “*Director*”) issued on April 27, 2001 which determined that Gurdeep Enterprises owed Sandeep Benipal \$1,940.96 on account of overtime wages, vacation pay and statutory holiday pay. The Determination stated that an appeal had to be filed by May 22, 2001. The appeal with respect to this Determination was not filed until May 23, 2001.

Second, there is an appeal by the Gurdeep Enterprises pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director issued on April 30, 2001. The Determination concluded that Gurdeep Enterprises had contravened Section 17(1) of the *Act* and imposed a penalty of \$250 under Section 98 of the *Act* and Section 29 of the *Employment Standards Regulation* (the “*Regulation*”). The nub of this Determination was that Gurdeep Enterprises had failed to pay an employee, Benipal, at least semi-monthly, all wages owing in a pay period. The Determination stated that an appeal had to be filed by May 22, 2001. The appeal with respect to this Determination was not filed until May 23, 2001. There is, thus, no question that this appeal is timely.

FACTS AND ANALYSIS

a. The April 27 Determination

As noted there is a timeliness issue with respect to this Determination. The Employer’s appeal was filed by letter dated May 23, 2001, one day after the deadline.

Briefly, in the Determination, the Delegate found that Benipal, who worked for the Employer, a farm contractor, as a driver (and worker). He was hired to drive employees to and from designated work sites and, there, worked alongside these employees. He was employed from

November 29, 1999, was laid-off on February 26, 2000 and re-hired on March 17, 2000. He was paid at the rate of \$7.49, including vacation pay.

During the period between March 17 and July 28, Benipal was only paid for the time worked at the work sites (Vantro Soils Inc., Hazelmere Vision and Cloverdale Produce Farm) and not for the extra 3 hours per day driving. According to the determination, the Employer eventually agreed that Benipal was entitled to be paid for the driving, except to Vantro Soils Inc. According to the Determination, the employer stated that it had “a verbal contract with [the complainant] stating that he could use [the Employer’s] van to go to work [at] Vantro [Soils Inc.] but [it] was not going to pay him for driving to Vantro [Soils Inc.]”

Benipal denied that there was an arrangement as described by the Employer and told the Delegate that he was required to transport employees to the work sites, including Vantro Soils Inc., in the Employer’s vehicle. He maintained that he was entitled to be paid for the 3 hours per day.

The Delegate found that Benipal had not been paid the statutory holiday pay he was entitled to under the *Act*. He noted that the Employer acknowledged that Benipal picked up employees and transported them to Vantro Soils Inc. The Employer also acknowledged that its vehicle was being used and that it paid for the fuel. Finally, the Employer acknowledged that it was part of Benipal’s duties to drive employees to the Vantro Soils Inc. work site. In the circumstances, the Delegate concluded that Benipal was entitled to be paid and, even if there was an agreement that he waive his entitlement, such an agreement contravened Section 4 of the *Act*.

The Employer filed an appeal of the Determination. The basis for the appeal is that there was, indeed, an agreement with Benipal that he not be paid for the driving to and from Vantro Soils Inc. and that the Employer has a witness to this agreement. The Employer complains that the Delegate failed to interview this witness.

As it happened, the appeal was filed one day late. The Tribunal invited submissions from the parties as to whether an extension should be granted.

The Employer argues that the appeal was late because it had difficulties getting in contact with its witness and did not ‘get hold’ of him until May 22, in the evening. The Employer also explains that it believed the deadline was May 23 for both Determinations.

The delegate opposes the request for an extension of time. The Determination was properly served and the Employer had ample time to appeal. Moreover, the Delegate notes that there is no basis for the appeal. Even if the Employer is correct, that there was an agreement between Benipal and the Employer, and that there was a witness to that agreement, any agreement to waive the minimum requirements is of no effect (Section 4).

In *Blue World It Consulting Inc.* (BCEST #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.”

I agree with the Delegate. In particular, I am of the view, that there is no strong *prima facie* case in favour of the appellant Employer. In fact, based on the material submitted on appeal, there is no case in favour of the Employer. To allow the appeal to proceed in these circumstances would simply delay the inevitable. In brief, in the circumstances, I am not prepared to exercise my discretion to extend the time for filing the appeal.

b. The April 30 Determination

As mentioned above, the nub of this Determination was that Gurdeep Enterprises had failed to pay an employee, Benipal, at least semi-monthly, all wages owing in a pay period and that, based on previous contraventions of the *Act*, a penalty was warranted.

In *Narang Farms and Processors Ltd.*, BCEST #D482/98, the penalty process is summarized as follows:

“... the 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*.”

The Employer’s appeal is based on the argument that it did, in fact, pay Benipal semi-monthly. It should not, therefore, be subject to a penalty.

The Delegate argues that the Employer failed to Benipal for the additional 3 hours driving time with respect to the Hazelmere Vision work site and that the Employer acknowledged that “it was

an oversight.” As well, the Delegate concluded in the April 27 Determination that it had not paid for the driving time with respect to Vantro Soils Inc. based on an agreement with Benipal that was in contravention of the *Act*. The Delegate decided to exercise his discretion to issue the penalty because of the Employer’s history of contraventions.

Not to put too fine a point on it, I agree with the Delegate. There is nothing before me to support an argument that the Delegate did not exercise his discretion in a *bona fide* manner. There was a contravention of the *Act*. The Delegate exercised his discretion in light of the Employer’s previous contraventions. The penalty amount was correct.

In brief, the appeal of the Determination, dated April 30, 2001, is dismissed.

ORDER

The application to extend time to file an appeal of the Determination dated April 27, 2001 is denied.

Under Section 115, the appeal of the Determination, dated April 30, 2001, is denied and the Determination is confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal