

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 -

Samuel Barillec operating as Four Corner Roofing
("Four Corner")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C.L. Roberts

FILE No.: 2000/627

DATE OF DECISION: November 29, 2000

DECISION

This is a decision based on written submissions by Samuel Barillec and Ed Wall, a delegate of the Director of Employment Standards. This decision is on the issue of the timeliness of the appeal only.

OVERVIEW

This is an appeal by Samuel Barillec operating Four Corner Roofing (“Four Corner”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued November 12, 1999. The Director found that Four Corner contravened Sections 18(1), 27(1), 34(2)(a), 40(1) and (2), 45(b) and 58(3) of the *Act* in failing to pay Bradley Fraser (“Fraser”) wages, overtime wages, statutory holiday pay and vacation pay, and Ordered that Four Corner pay \$1,179.29 to the Director on Fraser’s behalf.

Mr. Barillec’s letter of appeal was received by the Tribunal on September 13, 2000.

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

Mr. Barillec operates a roofing business. Fraser worked as a roofer’s helper from September 9, 1998 to November 12, 1998. On November 24, Fraser filed a complaint with the Employment Standards Branch claiming that he had not been paid minimum daily pay, overtime, statutory holiday pay, or for travel time.

Fraser alleged that he drove to the work site with the employer on November 12, 1998, but work was suspended because of rain. The employer decided to check on some previous work sites, travelling to Vernon, Peachland and returning home. Fraser traveled with the employer. His final cheque was for 4 hours worked on November 10, but he claimed he was not paid for November 12 for statutory holiday pay on November 11, or for vacation pay. In addition, Fraser alleged that Four Corner did not pay him for time spent travelling from the employer’s residence, where tools would be loaded onto the work truck, to the work site.

Mr. Barillec did not respond to the delegate’s request for information, despite several written requests that he do so. A Demand for Records was sent to the employer by certified and regular mail. The certified mail was returned unclaimed. Wage statements showed that vacation pay was not paid.

The Director’s delegate determined that Fraser was owed wages for travel time, wages, overtime statutory holiday pay and vacation pay.

ARGUMENT

Mr. Barillec contends that he knew nothing about the Determination until he was served with it by a process server.

He further alleges that Fraser “misinterperated (sic) his hours of work during his employment with this company”, and tried to exaggerate his hours of work. Mr. Barillec further contends that Fraser was hired on the basis that he would have his own tools and transportation, and that “he was informed that we did not deduct for vacation pay”. Mr. Barillec states that the foreman supplied Fraser with a means of transportation to the job site by car pooling, and that, with respect to the travel time determined owing by the delegate, Fraser did not use his own vehicle or drive a company vehicle, and the travel was not work related.

Mr. Barillec stated that Fraser’s holiday pay was “questionable” and, with respect to the overtime determination, stated “we believe he did not meet the minimum required hours”.

The Director’s delegate set out the chronology of relevant events with respect to the Determination as follows:

- November 24, 1998 - Complaint received
- February 19, 1999 - Employment Standards Branch letter sent to employer requesting information
- March 8, 17, 18 - delegate attempts to call employer
- March 9, 1999 - delegate sends reminder letter to employer
- March 18, 1999 - Demand for Employer Records sent to employer
- June 14, 1999 - \$500.00 penalty determination issued for failure to respond to Demand
- September 3, 1999 - Penalty determination registered in B.C. Supreme Court
- November 12, 1999 - Corporate determination issued
- December 7, 1999 - Corporate determination registered in B.C. Supreme Court
- December 8, 1999 - Demand notices sent to number of banks in Nelson area
- January 11, 2000 - Westbank branch of Toronto - Dominion bank forwards \$107.34
- January 18, 2000 - File referred to Vernon Bailiff for collection

- March 30, 2000 - Writs of Seizure and Sale for both determinations registered in B.C. Supreme Court
- April 6, 2000 - Vernon bailiffs determine employer working as subcontractor with Madge Contracting Ltd. and place a demand with Madge.
- June 8, 2000 - Bailiffs make contact with employer, and provide him with copies of Determination. Employer agrees to make payments, and commenced making payments of \$200.00 per month.

The delegate argues that Four Corner was aware of the complaint and investigation process, as none of the letters sent by regular mail were returned, and several telephone messages had been received. Further, the delegate argues that the penalty determinations that were sent by regular mail were not returned to the Director, and should be deemed received.

Money was received from Four Corner's bank account in January, and it made payments in partial satisfaction of the Determination after June 8. Four Corner argues, in filing its appeal, that it did not receive the Determination until June 8. The delegate argues that, between June 8, the date the Determination was received, and September 11, the date the appeal was filed, the employer had 3 months to file an appeal and did nothing. The delegate argues that the Tribunal should not exercise its discretion to extend the time to allow an appeal.

Mr. Barillec, in response, contends that he was not aware of either the letters sent to him or the telephone calls. He acknowledges that he was aware of the withdrawal of \$107.34 from his account, but states that he was under the impression it had to do with "Taxation".

Mr. Barillec asserted that, upon being served with the Determination on June 8, he had a long discussion with the bailiff, who told him that he was unable to appeal the matter. It was only then that he agreed to pay \$200.00 per month toward the Determination. He then states that he contacted a lawyer to find out what his rights were.

Mr. Barillec also alleges that, when he received notices of the withdrawal from his Toronto-Dominion account, and Madge Contracting was given with a demand to hold his paycheque, he was not told that the reason for the dispute was a result of Fraser's complaint.

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.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. 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.

(see: *Niemisto v. British Columbia (Director of Employment Standards BC EST #D099/96* and *Pacholak v. British Columbia (Director of Employment Standards BC EST #D526/97)*)

Furthermore, extensions will only be granted where there are compelling reasons present.

Bona fide intention to appeal the determination and notice to the parties of this intention

Mr. Barillec has not demonstrated a bona fide intention to appeal the Determination until well after he began making payments to satisfy it.

Reasonable explanation for the failure to request an appeal within the time limits

I am unable to conclude, on the submissions presented, that there is a reasonable explanation for the delay. Mr. Barillec's bank account was debited in January, 2000, for reasons Mr. Barillec assumed related to "taxation". He made no attempt to ascertain the true reason. However, even if Mr. Barillec made an honest mistake in assuming that the reason for the withdrawal were tax related, he was served with the Determination on June 8. He contends that the bailiff told him that he was unable to appeal. While it is not clear what documents Mr. Barillec was provided with, if he received a copy of the Determination, attached to that Determination is a document containing information on how to appeal it. If Mr. Barillec did not receive the Determination or the information sheet, he appears to have exercised little diligence in obtaining a copy. He did not contact a lawyer until some unspecified later date. There is no evidence as to when Mr. Barillec received legal advice, or what steps he took upon receiving it.

I find insufficient evidence of any extenuating circumstances in Mr. Barillec's case.

Strong prima facie case

Mr. Barillec provides no evidence of a strong prima facie case. He suggests Fraser's holiday pay is "questionable", that vacation pay was not deducted although an employer is required to pay an employee vacation pay pursuant to section 58 of the *Act*, and, with respect to the overtime issue, that he "believes he did not meet the minimum required hours". There is no evidence provided to suggest that the Determination is incorrect in respect of any of these issues.

Prejudice to the Respondent

The Director has already commenced collection proceedings and has incurred costs enforcing the Determination. Although no submissions were made on this point, I am prepared to accept that there would be some prejudice to the Respondent if the extension were allowed.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the extension should not be granted..

ORDER

I deny Mr. Barillec's application for an extension of time to file the appeal.

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal

CLR/bls