

An appeal

- by -

Tarlok Kooner and Harjit Kooner operating as
Kooner Framing and Kooner Framing Ltd
("Kooner")

- 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: April D. Katz

FILE No.: 2002/465

DATE OF DECISION: November 12, 2002

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") issued a Determination against Tarlok Kooner, Harjit Kooner operating as Kooner Framing and Kooner Framing Ltd. ("Kooner") on August 6, 2002. A copy of the Determination was forwarded by mail to Kooner's counsel the same day. The Determination found that Kooner owed Roop S. Ghuman ("Ghuman") \$5,169.62 in unpaid wages contrary to section 18(2) of the *Employment Standards Act* ("Act"). The Determination provided that the deadline for appealing the Determination was Thursday, August 29, 2002 at 4:30 PM. This Appeal was filed by fax on Tuesday, September 3, 2002 at 3:10 PM, two business days after the deadline. This Decision deals with the issue of timeliness of the appeal. The matter proceeded on the basis of written submissions.

ISSUE - TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from August 29, 2002 to September 3, 2002 and this decision deals only with that issue.

ARGUMENTS

Kooner, through counsel, argues that the Kooner was not 'medically well' the week the appeal was due and was therefore unable to submit the documents for the appeal prior to the labour day long weekend. Kooner submits that he sees his doctor regularly and the doctor provided a note stating he had seen T Kooner on July 26, 2002 when chest xrays and lab tests were ordered. Kooner argues that the delay was not 'inordinate and lengthy' and there would be no prejudice to Ghuman to allow the appeal after the appeal date. Kooner submits that the case has strong merits.

Ghuman argues that he has already responded to the appeal issues.

The Director argues that the Determination was sent on August 6, 2002 to all the parties and their counsel. The Director submits that the Delegate dealt with counsel throughout the investigation. The Director's Delegate points out that counsel requested the Delegate to proceed to making a Determination. The Director's Delegate submits that Kooner's counsel would have received the Determination within a few days and could have appealed in a timely fashion. The Director submits that Kooner had delayed responding during the investigation. The Director submits that Kooner's pattern was to ask for last minute extensions of deadlines. The Director submits that there is nothing in the appeal that raises new issues that were not raised and addressed in the Determination and that the appeal is therefore without merit.

FACTS

Ghuman was employed by Tarlok Kooner as a labourer for \$8.00 per hour from March 28, 2001. Ghuman's last day of work was September 20, 2001. Tarlok Kooner and Harjit Kooner operated Kooner framing until August 21, 2001 when the business was incorporated as Kooner Framing Ltd. Ghuman received a car from Harjit Kooner in partial payment of wages owed and was paid a cheque by Kooner Framing Ltd. in partial payment of wages owed. Kooner hired and paid Ghuman as an employee.

Counsel for Kooner argues that Kooner Framing Ltd. and Harjit Kooner were not Ghuman's employers. The fact that they paid him for work leads me to accept the Director's finding that they were employers within the meaning of the *Act*.

Ghuman kept records of his hours worked. Kooner has not provided any records of Ghuman's employment. Ghuman accepted a car from Harjit Kooner in lieu of \$3200 wages. Kooner Framing Ltd. paid Ghuman \$700 towards his wages owed. Kooner argues this was payment in full. The Director's Delegate found that based on the hours worked Ghuman was owed a further \$4,983.62 in unpaid wages plus interest. Kooner denied owing more money but did not have any evidence to refute the hours of work claimed.

Tarlok Kooner attended his doctor's office on July 26, 2002 complaining of chest pain. Tests were ordered. Kooner was sent the Determination on August 6, 2002 by registered mail and did not file an appeal until the afternoon of September 3, 2002.

LAW AND ANALYSIS

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

The Tribunal has been asked to extend the time to file an appeal on many occasions. In each case the Tribunal is mindful of the purpose of the *Employment Standards Act* (the "*Act*") under section 2 (d) is "to provide fair and efficient procedures for resolving disputes". The Act imposes an appeal deadline to ensure appeals are dealt with promptly. Under section 109(1)(b) of the Act, the Tribunal may extend the time for requesting an appeal, even though the appeal period has expired.

The Tribunal must ensure that there are compelling reasons to extend a time limit for an appeal. The Tribunal set out the six criteria for determining timeliness of appeals based on previous cases in Bravo Cucina Restaurante Italiano Ltd. BC EST #D343/00. The criteria were sent to the parties to assist them in filing their appeal documents for this appeal. The criteria are set out below.

"Appellants who are seeking a time extension for an appeal, should satisfy the Tribunal on balance that:

1. there is a good reason they could not appeal before the deadline;
2. there is not an unreasonably long delay in appealing;
3. they always intended to appeal the determination;
4. the other parties (the respondent and the Director) are aware of the intent to appeal;
5. the respondent will not be harmed by an extension; and
6. they have a strong case that might succeed, if they get an extension."

In *Suter (Re)*, BC EST #D177/00, the Tribunal considered a request for extension of time for filing an appeal where the Determination was made and mailed on November 23, 1999. The appeal was to be filed by December 16, 1999 and was actually filed December 23, 1999. The mail had not been claimed by the Employer and had been returned to the Employment Standards Branch on December 14, 2000. The

appeal was filed when the Employer received a demand notice from her bank. An extension of time was denied after citing the statutory requirements for timeliness of appeals.

I will consider the six factors described as they apply to the facts in this appeal.

1. "There is a good reason they could not appeal before the deadline"

Kooner's reason for the delay was that he was not well. The evidence in support of this claim suggests that one member of the Kooner family had been experiencing poor health for over a month prior to the appeal deadline. There was no specific evidence related to the week before the appeal deadline.

2. "There is not an unreasonably long delay in appealing"

The two business day delay was not unreasonable.

3. "They always intended to appeal the determination"

There is no evidence that suggests Kooner did anything that showed an intention to appeal or not.

4. "The other parties (the respondent and the Director) are aware of the intent to appeal"

There is no evidence on this criteria. There is no evidence that Kooner had expressed an intention to appeal to the Delegate or Ghuman.

5. "The respondent will not be harmed by an extension"

Ghuman's employment for which wages were found to be owed ended on September 20, 2001 almost a year before the appeal deadline. The delay from August 29, 2002 until September 3, 2002 was not long but the total time frame has been long. The Delegate's submission suggests that Kooner has caused delays and contributed to making this process longer than necessary throughout the investigation.

6. "They have a strong case that might succeed, if they get an extension."

The final factor relates to the merits of the Appeal. All of the issues raised in the appeal were raised with the Director's Delegate and the Determination analysed the evidence and concluded the evidence did not support Kooner's position. There is nothing new in the appeal documents which would suggest a different conclusion.

Specifically, Kooner submits that Harijit Kooner and Kooner Framing Ltd. did not employ Ghuman. From the Delegate's findings and findings on this appeal it is clear that Harjit Kooner and Kooner Framing Ltd. paid Ghuman and acted as an employer in concert with Tarlok Kooner, who hired Ghuman.

Kooner submits that Ghuman worked at another location on some of the days he claims he worked for Kooner. The Delegate found that the hours working for Kooner did not conflict with hours Ghuman worked elsewhere.

Kooner claims the hours claimed were not accurate as some are in excess of eight hours a day and Kooner denies that Ghuman worked more than an eight hours on any day. Kooner denies the claim but could not produce any records to contradict Ghuman's records.

Finally Kooner argued that the transfer of the car and payment of \$700 constituted a final settlement of wages owed. Ghuman denies this and his conduct in filing the claim and working after he received these payments supports the Delegate's conclusion that Ghuman did not accept these payments as 'final settlement'.

On this criteria alone there does not appear that any change would occur in the findings in the Determination if an extension of time were granted.

The onus is on Kooner to provide the evidentiary basis for an appeal which would result in varying or canceling the Determination. There is nothing in the documentation filed by Kooner to suggest that the Director erred in the Determination.

CONCLUSION

Kooner has failed to provide compelling reasons to extend the time for appeal under section 109(1)(b) of the *Act*. I therefore deny the application for an extension of time to file an appeal.

ORDER

Kooner's request for an extension of the appeal period is denied. Accordingly, pursuant to subsection 114(1)(a) of the *Act*, this appeal is dismissed.

April D. Katz
Adjudicator
Employment Standards Tribunal