

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 -

Shalandra Singh Dasanje
also known as Alan Dasanje operating as Waste Control Services Inc.
("Dasanje")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 1999/558

DATE OF DECISION: November 19, 1999

DECISION

OVERVIEW

Shalandra Singh Dasanje also known as Alan Dasanje, operating as Waste Control Services Inc. (“Dasanje” or “the Appellant”) appeals a Determination by a delegate of the Director of Employment Standards dated August 17, 1999. The appeal is pursuant to section 112 of the *Employment Standards Act* (the “Act”).

The appeal was received after the time limit for filing an appeal of the Determination had passed. On receiving the appeal, the Tribunal indicated that it would consider exercising its discretion to allow the appeal even though it is out of time. The parties were invited to make written submissions on the issue.

ISSUE TO BE DECIDED

My task in this case is to decide whether the Tribunal should exercise its discretionary power to extend the time limit for appealing the Determination.

FACTS

Section 112 of the *Act* is as follows:

- 112** (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
- (2) The request must be delivered within
- (a) **15 days after the date of service**, if the person was served by registered mail, and
 - (b) 8 days after the date of service, if the person was personally served or served under section 122 (3).
- (3) The filing of a determination under section 91 does not prevent the determination being appealed.
- (4) This section does not apply to a determination made under section 119. (my emphasis)

It is stated right in the Determination that the appeal was to be filed by September 9, 1999. The appeal is dated September 14, 1999. It was faxed to the Tribunal on September 15, 1999.

Section 109 (1)(b) of the *Act* provides the Tribunal with the power to extend the time limit for requesting an appeal.

109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

(b) extend the time period for requesting an appeal even though the period has expired;

....

The Registrar of the Tribunal invited submissions on the matter of whether to allow the appeal even though it is late. The parties were asked to have their submissions in by 4:00 p.m., October 6, 1999.

The only submission which was received from the parties was one by Danny Trudel, the Complainant. He objected to an extending of the time limit. He complained that 17 months had passed since his Complaint against Dasanje.

Dasanje was sent Trudel's submission. That prompted him to make one of his own. It is dated October 20, 1999. Dasanje states that the claim began on 7th of October, 1998. He then goes on to say that he has some questions that he would like answered and, on asking his questions, he outlines his position on Determination. To quote:

When I met with (the delegate), I was very co-operative. I also had some questions that I wanted answers to, but I never received any answers. I wanted these questions answered: 1) When did Mr. Trudel start banking hours? 2) Why was Mr. Trudel banking hours, and at the same time claiming overtime on his timesheet? 3) How could he bank hours while being a subcontractor? To this day, I did not get any response, only a determination that I have to pay \$3,873.34.

When I met with (the delegate), I told him that I was willing to pay overtime from June 1997 to October 1997 because that is the period when Mr. Trudel was an employee. As of November 1, 1997 he became a subcontractor. I did not ask Mr. Trudel to become a subcontractor, but in fact he approached me. None of our employees are subcontractors. Regarding the ski trip in 1997, you will notice that I paid Mr. Trudel his wages plus GST, only because he threatened to quit. If he was an employee, I would have taken deductions from his pay cheques. Please find attached our calculations of what we think we owe Mr. Trudel. Mr Trudel already has a copy of this.

The matter of whether Trudel was or was not an independent contractor is considered by the delegate in the Determination. The delegate has decided that Trudel was at all times an "employee" as that term is defined in the *Act*. The delegate also considered such matters as control and direction, power to discipline, who provided the tools, chance of profit and loss and whether Trudel was an integral part of Dasanje. The appeal neither makes reference to the

Act's definition of employee, speaks of the delegate's analysis, nor refers to any of the tests that are often used to distinguish employees from independent contractors.

ANALYSIS

The amount of time given Dasanje for an appeal is consistent with section 112 of the *Act*.

In considering whether to exercise or not exercise the discretion to extend the time period for filing this particular appeal, I adopt the approach taken in a leading decision of the Tribunal, namely, *Liisa Tia Anneli Niemisto*, (1996) BCEST No. 099/96. The *Niemisto* decision recognises that:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

In the *Niemisto* decision, it is recognised that the above is not intended to be an exhaustive list: That, in particular cases, there may be certain other, perhaps unique factors which ought to be considered.

The appellant in this case does not make any case for an extension of the time limits. He has not given any explanation for his failure to request an appeal in the time given for appeals, never mind one which is reasonable and credible, nor does he make a strong *prima facie* case in favour of the appeal.

There is not a compelling reason to grant an extension in this case. I will not allow the appeal for that reason.

ORDER

I order, pursuant to section 114 of the *Act*, that the request for an extension of the time for filing the appeal be denied. The appeal of the Determination dated August 17, 1999 is dismissed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal