

EMPLOYMENT STANDARDS ACT

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Robert Pacholok and David Grexton Operating As
Stonecoat Aggregate Products
("Stonecoat")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 97/678

DATE OF **D**ECISION: November 19, 1997

DECISION

OVERVIEW

This is an application under Section 112 of the *Employment Standards Act* (the “*Act*”) by Robert Pacholok and David Grexton operating as Stonecoat Aggregate Products (“Stonecoat”) from a Determination of a delegate of the Director of Employment Standards (the “Director”) dated June 30, 1997. In that Determination, the Director concluded Stonecoat had contravened Sections 40, 45 and 58 of the *Act* and ordered Stonecoat to pay an amount of \$1714.26 in respect of the employment of Niels Ksonzek (“Ksonzek”).

Stonecoat informed the Tribunal it wished to appeal the Determination on August 28, 1997 and filed an appeal on September 9, 1997.

ISSUE TO BE DECIDED

The issue to be decided is whether the Tribunal should extend the time period for requesting an appeal.

FACTS

The facts relative to the issue are as follows:

1. On June 30, 1997, the Director issued a Determination that Stonecoat had contravened sections of the *Act* and was required to pay an amount of \$1714.26. The Director had concluded Stonecoat had allowed Ksonzek to work overtime without payment of wages at the overtime rates found in the *Act*. The employer admitted Ksonzek had worked overtime hours and had not received overtime rates for that work. Stonecoat says there was an “agreement” with their employees, including Ksonzek, that employees could work overtime if they requested it, but overtime rates would not be paid.
2. Between July 5, 1997 and September 5, 1997, Robert Pacholok (“Pacholok”) was out of the province, in Haverhill, Maine.
3. Stonecoat continued to maintain an office at Suite 216 - 955 West Broadway Street, in the City of Vancouver. From the information on file, it appears the office was staffed by one person, but all office administration was done by Pacholok. David Grexton had moved to the United States in April, 1997.
4. The Determination was issued June 30, 1997 and was served on Stonecoat shortly thereafter. The appeal form Stonecoat was received by the Tribunal on September 9, 1997. The reasons for the appeal are stated as:
 1. Mr. Ksonzek had a contract with Stonecoat Aggregate Products to perform work for an agreed amount of money.

2. We do not feel Mr. Ksonzek is eligible for money he has not earned based on our agreement with him.
3. Mr. Ksonzek lied to Mr. McLean regarding our contract agreement to facilitate a favourable judgement. The determination [sic] was arrived at with erroneous information.
4. The remedy I am seeking from the Tribunal is that the Determination be dismissed.
5. Stonecoat was advised on September 10, 1997 that the appeal did not contain sufficient information. Stonecoat was given until September 15, 1997 to forward the required information. The information was forwarded to the Tribunal September 16, 1997. On October 16, 1997 Stonecoat supplemented the appeal with additional information.

ANALYSIS

The *Act* contains short time frames within which an appeal must be filed. Depending upon the form of service, either personal or by registered mail, Subsection 112(2) of the *Act* requires persons seeking to appeal a Determination of the Director to file that appeal within 8 or 15 days of service. Subsection 109(1)(b) gives discretion to the Tribunal to consider an appeal even though the time period for filing the appeal has expired.

The Tribunal does not exercise that discretion automatically. Consistent with the approach of other tribunals and various courts, the Tribunal has identified five criteria that appellants seeking to advance an appeal outside of established time periods must satisfy:

1. There is reasonable and credible explanation for the failure to request an appeal within the time period fixed by the legislation;
2. There has been a genuine and on-going *bona fide* intention to appeal the Determination;
3. The respondent party (in this case the employee) and the Director have been made aware of that intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension of time; and
5. There is a strong *prima facie* case in favour of the appellant.

It is also noted the list is not exhaustive.

In the circumstances of this case I am not satisfied the Tribunal should hear this appeal. I reach this conclusion primarily on my assessment of the merits of the appeal. The appeal is based exclusively on the enforceability of an agreement which Stonecoat alleges it had with Ksonzek that no employee would be required to work overtime unless he or she requested it and, if overtime was worked at the employee's request, no overtime rates would be paid for the work performed. Section 4 of the *Act* says such agreements are to be given no effect. That Section states:

4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.

It follows that the appeal, as it has been framed, cannot be successful. Stonecoat also says that Ksonzek lied about the agreement in order to gain a favourable determination. What Ksonzek told the delegate, while it may be relevant to whether the complaint was accepted by the Director, has no bearing on either the conclusion required by the *Act* or on the appeal. Even if Ksonzek lied about its existence, and no conclusion is made, or required to be made, about that, the agreement would still have no effect and accordingly would have no relevance to the conclusion of the delegate that Stonecoat had contravened minimum requirements of the *Act*.

ORDER

Pursuant to the authority found in paragraph 109(1)(b), the Tribunal denies the application of Stonecoat to extend the time period established in the *Act* for requesting an appeal.

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David Stevenson
Adjudicator
Employment Standards Tribunal