

An appeal

- by -

The Three King's Head Inn Ltd.

- 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: Norma Edelman

FILE No.: 2001/568

DATE OF DECISION: October 15, 2001

DECISION

OVERVIEW

This is an appeal by The Three King's Head Inn Ltd. ("Three King's") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on November 9, 1999. The Director's delegate found that Three King's owed Satnam Gill ("Gill") \$27,149.62 in wages, including interest. The Determination indicated that an appeal of it had to be delivered to the Tribunal by December 2, 1999. The Tribunal received an appeal on August 3, 2001. Three King's effectively requested that the Tribunal extend the deadline to file an appeal. The Director's delegate and Gill made submissions on a possible extension of the deadline under Section 109(1)(b) of the *Act*. Three King's provided a reply to those submissions. This appeal was decided based on the written submissions of the parties.

ISSUE TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

FACTS

The Determination issued on November 9, 1999 concluded that Three King's owed Gill overtime and statutory holiday pay in the amount of \$27, 149.62, including interest, for the period January 1997 to January 1999.

The Determination was sent to Three King's with a copy to Gill and a copy to Frederick Valdes ("Valdes"), a Director/Officer of King's Head.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than December 2, 1999.

The Tribunal received an appeal from Kim M Shears ("Shears") on August 3, 2001. Shears effectively requested that the Tribunal extend the deadline to file an appeal. She said Valdes had two strokes during 1997 and 1998 and was not active in the company and that "...Valdes was relieved as the Director for The Three King's...during the Determination regarding ...Gill...(and she) was the acting officers (sic) for ...Valdes and the company". She said the company's accountant was asked to review the Determination and file an appeal. When she left her employment and position at Three King's, the accountant confirmed he would be filing an appeal. In July 2001 Valdes informed her that he was still liable for the Determination and no appeal had been filed. At that time Shears requested a copy of the Determination from the Director's delegate and subsequently filed the appeal.

Shears' reasons for the appeal include the following: she says there are errors with respect to the delegate's calculations and the facts as reported by Gill; she disputes the delegate's findings regarding Gill's hours of work and the amount of wages paid to him; and she says Gill was an executive and a manager and therefore would not be entitled to overtime and statutory holiday pay.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109(1)(b) of the *Act*.

The Tribunal received a submission from the Director's delegate dated August 24, 2001. The delegate said Shears has not provided a reasonable explanation for the delay in filing the appeal. Further, the company was placed in bankruptcy on May 30, 2000 and, as per Tribunal Decisions BC EST #D080/00 and BC EST #D410/01, the appeal filed by Shears was not validly commenced because a Director of a corporation in bankruptcy does not have the right to appeal a corporate Determination. Rather, it is the Trustee in bankruptcy, in this case, Bottom & Associates, that would be able to commence an appeal on behalf of King's Head. The delegate said the Determination and a Proof of Claim was filed with the Trustee in June 2000 and there is no indication that the Trustee has assigned any authority to Shears in this matter. Accordingly the appeal should be dismissed.

The Tribunal also received a submission dated August 16, 2001 from Gill. He said the appeal, filed over a year late, should not be accepted because there is no good reason why Shears could not meet the deadline. He said if the Tribunal decides to grant the appeal, Shears does not have a case, and it will be a waste of time for him and the Tribunal.

In a reply submission dated September 17, 2001, Shears said:

Mr. Valdes is under Doctor & family care for rehabilitation from suffering disabilities after his Two Strokes during 1997 and 1998. Mr. Valdes returned to his Business on August 1999 until November 1999.

Mr. Valdes was removed from His Business by Police at the request of a Court order of her Magistry and Mr Valdes family doctor and his family members to hospitalize him for Health reasons.

Mr. Valdes request Kim Shears to help him with the late appeal letter.

Bottom & Associates are aware of the appeal By Mr. Valdes and The Three Kings Head Inn Prepared by Kim Shears.

Mr. John Bottom Trustees for the Business and Mr. Valdes has received copies of timeliness dated August 31-01.

Mr. Bottom is away and will be speaking with Mr. Fred Valdes and Kim Shears when he returns to his office.

Monday Sept 17/01 left message for Mr. Bottom to respond to the Tribunal to issue his authority to the request of review of Determination.

(reproduced as written)

ANALYSIS

Section 109(1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limit for an appeal. Shears has effectively requested that the Tribunal extend the deadline to file an appeal.

In my view, neither Shears nor Valdes have standing to bring this matter before the Tribunal. The company is in bankruptcy. There is nothing in the appeal to suggest that Shears and Valdes have authority to act on behalf of the trustee in bankruptcy (*McCulloch Bros. Landscape Contracting Inc.* BC EST #D410/01). In *Canadian Neon Ltd.* BC EST #D080/00, the Adjudicator noted:

Section 71(2) of the federal Bankruptcy and Insolvency *Act* states that "on assignment [into bankruptcy], a bankrupt ceases to have any capacity to dispose or otherwise deal with his property, which shall, subject to this *Act* and to the rights of the secured creditors, forthwith pass to and vest in the trustee named in the...assignment...". The trustee, in turn, is given wide authority to deal with the bankrupt's property. For example, the trustee may, with the permission of the inspectors, "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt" (see Section 30(1)(d)). Thus, on bankruptcy, the bankrupt's property...vests in the trustee who is given, for the most part, exclusive authority to deal with that property.

Accordingly, Canadian Neon does not have the legal authority to appeal the Determination as that right lies solely with Canadian Neon's licensed trustee...Whether this appeal was filed by Fyfe in his personal capacity, or as an agent of Canadian Neon, the same result holds: the appeal is simply not properly before the Tribunal and thus the appeal must be dismissed..."

The above principles are applicable to the instant case. Shears and Valdes do not have standing to bring this matter before the Tribunal. The appeal is simply not properly before the Tribunal.

In any event, even if the appeal was properly before the Tribunal, I am of the view that this is not an appropriate case to extend the appeal period.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal has identified several material considerations including:

- 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 ongoing bona fide intention to appeal the Determination;
- iii. the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of the extension; and
- v. there is a strong prima facie case in favour of the appellant.

I have considered the circumstances of the late filing of this appeal and I am not satisfied that Shears has provided a reasonable and credible explanation for the failure to request an appeal before December 2, 1999. Shears does not dispute the Determination was received on or about the time it was issued by the delegate. Clear instructions were included in the Determination about how and when to file an appeal. An information sheet was also attached to the Determination, which stated that an appeal had to be delivered to the Tribunal on or before the deadline shown on the Determination. Shears said the company's accountant was asked to file an appeal, but he did not. She offers no explanation why the accountant failed to file a timely appeal or why she, in her capacity as "acting officers" (sic), failed to file a timely appeal or why neither, at a minimum, contacted the Tribunal at the time to discuss the situation and request additional time, if necessary, to file an appeal. Moreover, there is no explanation why Valdes could not file an appeal in November 1999 when, according to Shears, he returned to his business.

Nor am I satisfied that there has been an ongoing bona fide intention to appeal the Determination. Approximately one and one-half years after the deadline to file an appeal, Shears asked the delegate to send her copies of the Determinations issued against Valdes and Three King's. A few weeks later the Tribunal received an appeal of the Determination issued against the company. There is no evidence to support the view that Shears, the accountant or Valdes intended to appeal before that time. Further, the first the delegate and Gill knew of an actual appeal was when they received notification from the Tribunal in August 2001 that an appeal had been received from Shears.

The delay in filing this appeal is lengthy. In my view it is not in Gill's interest to have this matter further delayed by granting an extension to the appeal deadline. One of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.

Finally, while the issues raised regarding the merits of this case are not obviously frivolous, that factor does not outweigh the other factors listed above. I repeat that this appeal was filed one and one-half years after the deadline to file an appeal. There is no satisfactory explanation for such a lengthy delay and Gill and the delegate were never notified of an actual appeal until the Tribunal advised them in August 2001. Moreover, it appears likely that the real reason this appeal was launched was due to the delegate commencing collection activities against Valdes in his personal capacity as a director of officer of Three King's (see my decision BC EST #D538/01 which has been issued concurrent with this decision). On balance, if this appeal were properly before the Tribunal (and for the reasons given above, I say it is not), I would decline to extend the appeal period in this case. The obligation is on the appellant, Three King's, to exercise reasonable diligence in the pursuit of an appeal. The appellant has failed to persuade me it has done so and as a result I find no compelling reasons to extend the appeal deadline.

ORDER

Shears' application (on behalf of Three King's) under Section 109(1)(b) of the *Act* to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) and (b) of the *Act* the appeal is dismissed and accordingly the Determination is confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal