

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 -

Bernal Enterprises Ltd. operating as Country Style Donuts
("Bernal")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 2000/668

DATE OF DECISION: January 2, 2001

DECISION

OVERVIEW

The appeal is pursuant to section 112 of the *Employment Standards Act* (“the Act”) and by Bernal Enterprises Ltd. operating as Country Style Donuts (which I will henceforth refer to as “Bernal” or “the employer”). Bernal is seeking to appeal a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 11, 2000.

The appeal was received after the statutory period for appealing the Determination had expired. Bernal is asking that the Tribunal waive the time limit for filing the appeal.

ISSUE TO BE DECIDED

The sole issue before me is whether the Tribunal should or should not exercise its discretion to extend the time period for appealing the Determination.

FACTS

Bernal operates as Country Style Donuts. At one time it had two restaurants but it was forced to close the restaurant on 88th Avenue in Langley.

The Determination is a penalty determination which imposes a \$500 penalty for what is said to be a failure to produce payroll records.

The Determination advises Bernal of its right to appeal. And it is also stated in the Determination, under the heading of “Appeal Information”, that the appeal had to be “delivered to the Tribunal no later than 4:30 PM on September 6, 2000.

The deadline for appealing the Determination passed without an appeal having been filed.

On September 14, 2000, the Director moved to collect the amount of the penalty. Glen Briones, who owns all or part of Bernal, was advised by a delegate that a third party demand for \$500 had been forwarded to his bank. On being advised of that, Briones said that he would produce the payroll records which had been requested by the Director and that he would do so on the 18th of September. No records were produced.

Bernal’s appeal was received on September 27, 2000. He claims that he was unable to produce the records as and when requested because of his need to attend to other, more pressing matters. He explains that he was forced to close the restaurant on 88th Avenue in Langley on July 28, 2000 (bankruptcy). According to Briones, it was not until the 20th of the September that he could direct his attention to the matter of the penalty determination and the appeal.

Bernal asks for time so that it can “sort this issue out and move on”.

Bernal also asks that the penalty be “reversed”. I assume that the employer is not asking that the Tribunal order the Director to pay Bernal \$500, but that what is sought is cancellation of the penalty determination. Bernal states only that it cannot afford it and that the delegate has been informed that Bernal is going through a bankruptcy “at the other store”.

The Tribunal, through a letter dated September 28, 2000, notified the parties that the Tribunal would consider exercising its discretion to extend the time limit for the appeal and submissions were invited on the issue. The Director responded by way of written submission. The Director asks that the appeal be dismissed for two reasons. One, because Bernal was given numerous opportunities to comply with the order to produce records but did not produce the records. Two, Bernal showed no interest in appealing the Determination until the Director acted to enforce the Determination.

The Director’s submission was sent to Bernal and the employee and written submissions were invited. The deadline for submissions was November 1, 2000. No further submissions have been received.

CLAIMS AND ANALYSIS

Section 112 of the *Act* establishes a 15 day period for appealing Determinations.

- 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).

But the Tribunal is expected to waive the time limit for requesting appeals in certain circumstances.

- 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 Director’s delegate argues that the time limit for the appeal should not be waived in this case. According to the Director, Bernal had ample opportunity to produce the records which it was ordered to produce but did not. The Director also complains of the fact that there is no appeal until after the Director has acted to collect the amount of the Determination.

The Tribunal requires that reasonable diligence be exercised in filing appeals and it has indicated through decisions that the statutory period for appeals will not be overridden lightly but only where there is a compelling reason to do so. Underlying those decisions is a concern for fair and efficient procedures, a purpose of the *Act*.

2 The purposes of this Act are as follows:

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

Where the time limit for an appeal is missed by only a few days, the Tribunal has in the past year or so indicated that it will be inclined to exercise its discretion to extend the period for the appeal where there is some explanation for the delay, no apparent prejudice results from doing so, and a preliminary analysis of the appeal material indicates that there is a fair question to be addressed [716318 *Alberta Ltd.* et al, BCEST No. D144/99, also *Bernardi Humidors Ltd.*, BCEST #D141/00].

I am prepared to overlook the fact that appeal is two weeks late. I accept that the appeal is late simply because Bernal faced a number of serious problems and it could not address all of them at once. The Director is not arguing that an extension of time limits would be prejudicial to the Director. I find, however, that there is not a fair question to address.

Bernal is claiming that the amount of the Determination should be reduced because it is unable to pay the amount of the Determination. That is to assume, however, that the Tribunal has a discretionary power to vary a penalty determination where an inability to pay is demonstrated. It does not. There is in fact no element of discretion in assessing the amount of any penalty imposed for a failure to produce records [*CDJ Enterprises Ltd.*, BCEST No. D203/00]. The amount is set in the *Employment Standards Regulation* at \$500.

28 The penalty for contravening any of the following provisions is \$500 for each contravention:

(a) section 25(2)(c), 27, 28, 29, 37(5) or 48(3) of the *Act*;

(b) section 3, 13, 37.6(2) or 46 of this regulation.

In summary, Bernal was ordered to produce records which are required by section 28 of the *Act*. It did not produce those records. And a penalty of \$500 was imposed as the Director may do.

Bernal appealed the Determination which imposed the penalty but it did not do so before the deadline for an appeal of the Determination. I have considered whether to extend the time limit for the appeal and I have decided against doing so because there is not a fair question to address.

ORDER

I order, pursuant to section 115 of the *Act*, that the appeal be dismissed and that the Determination dated August 11, 2000, be confirmed.

LORNE D. COLLINGWOOD

**Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal**