

An appeal

- by -

Nanoworld Projects Canada Inc.
(“Nanoworld”)

- 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: Carol L. Roberts

FILE No.: 2001/677

DATE OF DECISION: October 25, 2001

DECISION

This is a decision based on written submissions by Robert Papalia, Chairman of Nanoworld Projects Ltd. ("Nanoworld").

OVERVIEW

Sheldon Benjamin and Rosemary Galte, two former employees of Nanoworld, filed complaints with the Director of Employment Standards, alleging that they were each owed regular wages. Ms. Galte also alleged that she was owed termination pay and reimbursement for business expenses.

A delegate of the Director of Employment Standards ("the Director") investigated the complaints, and, as part of that investigation, sought information from Nanoworld. Nanoworld did not respond to requests for information and demands for documents issued to its last known addresses in Vancouver and New York. None of the telephone numbers were in service. The delegate was unable to contact Mr. Papalia, and all correspondence sent to his residence was returned unclaimed and unopened.

On August 31, 2001, following the investigation, the delegate determined that Nanoworld had contravened the Act, and issued a Determination in the amount of \$5,898.64.

The Determination indicated an appeal deadline of 4:30 p.m. September 24, 2001. The Tribunal received Nanoworld's notice of appeal on September 26, 2001.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the Act and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

Mr. Papalia does not address the issue as set out above, even though the Vice-Chair of the Tribunal wrote to Mr. Papalia on September 26, 2001, indicating that his appeal was late, and asking him to provide reasons why the Tribunal should extend the deadline. The deadline set for the submissions on the issue of timeliness was 4:00 p.m. October 5, 2001.

Mr. Papalia's letter of appeal indicates that Nanoworld "is about to undergo a review by the Securities Commission", the outcome of which "will determine whether Nanoworld will seek bankruptcy protection". Mr. Papalia asserts that it is in the best interests of the parties to let those proceedings run their course. He also notes that Nanoworld has no personnel available to assist in providing documentation on the matters at issue.

Mr. Papalia seeks an "extension" to the proceedings as he "fully intends to challenge the allegations of [Mr.] Benjamin and [Ms.] Galte."

The Director's delegate made no submissions.

ANALYSIS

Section 112 of the Act provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing bona fide intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong prima facie case in favour of the appellant.

Having reviewed Mr. Papalia's submissions, I deny the application to extend the time in which the appeal may be filed.

Bona fide intention to appeal the determination and notice to the parties of this intention

There is no evidence that Nanoworld had a bona fide intention to appeal the Determination before the time period expired.

Reasonable explanation for the failure to request an appeal within the time limits

The Tribunal has held that extensions will be granted only in extenuating circumstances. Mr. Papalia offered no reasons why Nanoworld failed to request an appeal within the statutory time period.

Strong prima facie case

Nanoworld's appeal letter sets out no basis for the appeal. Mr. Papalia does not allege that there is an error in the facts or an error in law, or that there were facts that were not considered. Furthermore, he did not identify what he wanted the Tribunal to do about the Determination. Consequently, there is no identification of the issues that underlie the appeal. Mr. Papalia merely states that he is unable to locate personnel to assist him in finding "proper documentation", without saying what that documentation is, or how it would assist Nanoworld in this matter.

Nanoworld neglected or refused to participate in the delegate's investigation of this complaint. An appeal is not an opportunity for an employer who is dissatisfied with a Determination to put forward evidence it ought to have provided at the first instance. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see Tri-west Tractor Ltd. BC ESTD# 268/96 and Kaiser Stables Ltd. BC EST #D058/97). Any evidence offered by Nanoworld that was available at the time of the investigation, therefore, will not be considered in any event.

I find no evidence that Nanoworld has a strong prima facie case. In fact, it has simply failed to set out any case at all.

Prejudice to the Respondent

There are no submissions on the issue of prejudice to any party as a result of the late filing of the appeal. However, Mr. Papalia states that Nanoworld may seek bankruptcy protection after a review by the Securities Commission. In my view, it would be of significant prejudice to Ms. Galte and Mr. Benjamin if the Tribunal were to "extend these proceedings" until some time in 2002, as Mr. Papalia argues.

ORDER

The application for an extension of time to file an appeal is denied.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal