

An appeal

- by -

Kenny Sekhon Contracting 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: Carol L. Roberts

FILE No.: 2001/628

DATE OF DECISION: November 7, 2001

DECISION

This is a decision based on written submissions by Ronnie Gill of LRS Solutions on behalf of Kenny Sekhon Contracting Ltd. (KSC), and Judy Reekie on behalf of the Director of Employment Standards. This decision is only on the issue of the timeliness of the appeal.

OVERVIEW

Sukhpinder Gill filed a complaint with the Director of Employment Standards ("the Director") alleging that KSC owed him overtime wages, statutory holiday pay and vacation pay. A delegate of the Director investigated Mr. Gill's complaint, and on June 22, 2001, issued a determination finding that KSC had contravened the Employment Standards Act ("the Act"), and awarding Mr. Gill \$3,762.31 for wages, overtime wages, statutory holiday pay and vacation pay.

LRS filed a Notice of Appeal of the Determination on September 6, 2001, after the time period for seeking an appeal had passed.

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.

FACTS

The Determination was issued June 22, 2001. On July 16th, LRS forwarded information regarding wage calculations to the Employment Standards Branch in Abbotsford. On July 31, 2001, LRS wrote to the Tribunal indicating that it had been advised that the information had been sent to the wrong place, and sought an extension of time to file an appeal. It stated that the information regarding the address and time to file an appeal and the appeal form, although faxed to it by KSC, had never been received. Upon discovering its error, LRS says that it mailed the appeal information to the Tribunal on July 31, 2001. That information was never received. The appeal material was re-sent by express post, and received by the Tribunal on September 6, 2001.

The Director's delegate does not oppose the granting of an extension to file the appeal on the basis that it appeared there was a miscommunication between LRS and KSC.

ANALYSIS

Section 112 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 office 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.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. 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.

(see: Niemisto v. British Columbia (Director of Employment Standards) (BCEST#D099/96) and Pacholak v. British Columbia (Director of Employment Standards)(BCEST #D526/97)

I accept that there is a reasonable explanation for the delay. Although there was a delay in filing the appeal, that delay resulted only because KSC sent the appeal documents to the wrong address, that being the Employment Standards Branch. Therefore, I also accept that KSC had a bona fide intention to appeal the Determination and that the Director was notified of that intention within the appeal deadline.

I further accept that there are serious issues that ought to be dealt with on appeal.

Since the delegate does not oppose the application, and Mr. Gill makes no submission on the issue of the extension of time, I have assumed that there is no prejudice to the parties by the granting of the extension.

I allow KSC's application for an extension of time to file the appeal.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal