

An Application for Reconsideration

- by -

Amrik S. Nijjar
("Nijjar")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2010A/30

DATE OF DECISION: May 4, 2010

DECISION

SUBMISSIONS

Ken Neville on behalf of Amrik S. Nijjar

Ravi Sandhu on behalf of the Director of Employment Standards

INTRODUCTION AND BACKGROUND FACTS

1. I have before me an application to reconsider BC EST # D021/10 issued on February 18, 2010. By way of this decision, Tribunal Member Hart dismissed the applicant's request to extend the time for filing an appeal to the Tribunal.
2. The relevant background facts are as follows. On July 24, 2009, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under ER No. 161-811 ordering Amrik S. Nijjar to pay a \$500 monetary penalty pursuant to section 98 of the *Employment Standards Act* (the "*Act*"). The delegate's accompanying "Reasons for the Determination" indicate that on July 17 2009, during normal working hours, the delegate (and members of his compliance team) attempted to enter a Surrey blueberry farm owned by Amrik S. Nijjar (the present applicant) and Surinder K. Nijjar for the purposes of conducting a site visit pursuant to section 85(1)(a) of the *Act* but was denied entry – a presumptive violation of section 46(2) of the *Employment Standards Regulation*. Section 85 sets out the Director's entry and inspection powers and section 46(2) states that "no person may restrict or attempt to restrict the director from making an entry under section 85(1)(a) of the Act".
3. The full details regarding the delegate's attempts to gain access to the farm, and his efforts to inform the farm owner about the consequences of denying entry, are set out at pages R2 – R4 of the delegate's reasons. The delegate's reasons reveal that the farm owner was uncooperative and not the least bit interested in allowing the Employment Standards Branch investigating team access to his property. Thus, a \$500 penalty was issued against Mr. Nijjar.
4. The Determination, served on Mr. Nijjar by registered mail, included a text box headed "Appeal Information" containing a notice stating that any appeal must be filed with the Employment Standards Tribunal by 4:30 pm on August 19, 2009 (see *Act* sections 112(3)(a) and 122).
5. On November 27, 2009, over three months after the governing appeal period expired, the Appellant filed an Appeal Form seeking to have the Determination cancelled on the grounds that the delegate erred in law (section 112(1)(a)) and failed to observe the principles of natural justice in making the Determination (section 112(1)(b)). The parties filed written submissions regarding whether the Tribunal should extend the appeal period (section 109(1)(b)) and, after considering those submissions, Tribunal Member Hart refused to extend the appeal period and, accordingly, dismissed the appeal and confirmed the Determination.
6. As noted above, Mr. Nijjar now seeks to have Member Hart's decision reconsidered.

THE RECONSIDERATION APPLICATION

7. The application for reconsideration is supported by a 3 ½ page letter prepared by Mr. Ken Neville, a certified general accountant. Mr. Neville also prepared the submissions that were filed on Mr. Nijjar's behalf in the

original application to extend the appeal period. The thrust of Mr. Neville's submission is captured in the following final comments: "...Mr. Nijjar had every legal right under the Labour Standards Act [sic] to refuse entry to [the delegate] and his team. As there is a prima facie case, I request that you allow the appeal."

8. These above quoted comments misconstrue the nature of the application that was before Member Hart. She was not addressing the merits of the appeal, rather she was dealing with a much narrower question – namely, whether the clearly late appeal would proceed to a hearing on the merits. The sole explanation the appellant advanced for having filed a late appeal was that he was too busy with his farming activities to file a timely appeal.
9. In the course of rendering her decision Member Hart addressed a number of factors that the Tribunal has held to be relevant when assessing whether an appeal period should be extended. Among other things, Member Hart observed that the 3-month delay was quite lengthy and that the appellant did not provide a reasonable explanation regarding why it had taken him so long to file his appeal nor was there any evidence before her that Mr. Nijjar – at any time – advised the delegate of his intention to appeal. The appeal was predicated, in part, on an allegation that the delegate failed to observe the principles of natural justice; however, the appellant's appeal documents did not contain any particulars supporting this allegation.
10. The appellant's principal attack appeared to be centered on the merits of his case; however, the uncontested evidence appeared to confirm each and every element of a section 46(2) contravention. The site visit was at a farm; it occurred during the blueberry harvesting period and during normal working hours; there were several farm workers observed actively involved in harvesting; the owner of the property clearly refused entry, would not identify himself, and was fully informed of the legal basis for the visit and the likely consequences that would ensue if he refused to allow site access. Member Hart did not find that the aborted site visit was in regard to a private residence (see *Act*, section 85(2)) and thus a section 120 warrant was not required. In short, the appellant's assertion that he had a "strong prima facie case" was simply untenable.
11. Thus, in the face of a lengthy delay, no explanation for it, no evidence of an ongoing *bona fide* intention to appeal and a seemingly meritless case, Member Hart exercised her discretion and refused to extend the appeal period. I would have done the same.
12. Mr. Neville, on behalf of Mr. Nijjar, now asks the Tribunal to overturn Member Hart's decision. I see no basis for doing so. Mr. Neville agrees with the delegate that the harvest was concluded by September 2009 but fails to adequately account for the further delay to November 27, 2009, when the appeal was finally filed. Mr. Neville continues to insist that a section 120 warrant was required but I fail to be convinced by his argument as the intended search was not in regard to a private residence – the purpose of the visit was to speak with the workers at the farm (presumably to obtain information about their pay and employment conditions in order to determine if the provisions of the *Act* were being respected). In sum, Mr. Neville is simply rearguing points that were considered and, in my view, rightly rejected by Member Hart.
13. The Tribunal follows a two-stage analysis when reviewing section 116 reconsideration applications. At the first stage, the Tribunal must consider whether i) the application is simply an attempt to reargue the original case, or ii) does it raise a serious new issue that must be addressed such as a breach of the principles of natural justice by the Tribunal or a serious manifest error in the Tribunal's decision regarding the interpretation or application of the relevant provisions of the *Act* (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98)? If the application falls into the former category, the application is simply dismissed; if it falls into latter category, the Tribunal will embark on a more detailed analysis of the merits of the application. In my judgment, this application clearly falls into the first category. Accordingly, it does not pass the threshold for further review.

ORDER

- ¹⁴. The application to reconsider the Tribunal's decision in this matter is refused. It follows that pursuant to section 116(1)(b) of the *Act*, BC EST # D021/10, issued by Member Hart on February 18, 2010, is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal