

An appeal

- by -

KS Labour Contractors Ltd.
(“KSLC”)

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2009A/066

DATE OF DECISION: July 14, 2009

DECISION

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Kulvir Samra (“Samra”) on May 21, 2009 on behalf of KS Labour Contractors Ltd. (“KSLC”) of a determination that was issued against the latter on May 12, 2008 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”). The Determination found that KSLC contravened Section 40.2 of the Regulation by failing to pay all wages to farm workers it employed by direct deposit to the credit of the employees’ accounts in a savings institution and levied an administrative penalty pursuant to Section 29 of the *Employment Standards Regulation*, B.C. Reg. 396/95 (the “*Regulation*”). As this was KSLC’s second contravention of Section 40.2 of the *Regulation* within three years, the Director imposed an administrative penalty of \$2,500.00 against KSLC.
2. KSLC has appealed the Determination on the new evidence ground of appeal in Section 112(1)(c) of the *Act*, namely, that evidence has become available that was not available at the time the Determination was being made.
3. As a remedy, KSLC is seeking a cancellation of the Determination.
4. Before considering the parties’ submissions on KSLC’s substantive ground of appeal, there is a preliminary issue of the timeliness of the appeal. More specifically, the Determination was made on May 12, 2008 and the appeal of the Determination was filed on May 21, 2009, in excess of 11 months after the expiry of the appeal date delineated in Section 112(3)(a) of the *Act*.
5. Having said this, Section 109(1)(b) clothes the Tribunal with the power to extend the deadline for requesting an appeal even though the appeal period has expired. In this decision, the Tribunal will only consider the issue of whether or not it should exercise its discretion and extend the deadline to appeal even though the period for seeking an appeal has expired. If the Tribunal grants an extension of time to appeal to KSLC then the Tribunal will afford the parties a full opportunity to respond to the merits of the appeal, although the parties appear to have made some submissions on the merits already.
6. Pursuant to Section 36 of the *Administrative Tribunal’s Act* (the “*ATA*”), which is incorporated into the *Act* (S. 103) and Rule 17 of the *Tribunal’s Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issue in this appeal can be adjudicated on the basis of a Section 112(5) “record” and the written submissions of the parties as well as the Reasons for the Determination to the extent they are of assistance.

ISSUE

7. Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the period for seeking an appeal has expired?

FACTS

8. The Determination was issued on May 12, 2008 and on the same date sent by registered mail to both KSLC and Samra at KSLC’s registered and records office address at 11604 – 74 Avenue, Delta, British Columbia.

9. While the Section 112(5) “record” does not contain a corporate search of KSLC and I am not certain as to the position of Samra vis-à-vis KSLC, there is no issue with his standing to appeal as he is a person served with the Determination and therefore has a standing to appeal the Determination pursuant to Section 112 of the *Act*.
10. A close review of the Section 112(5) “record” shows that the delegate, during his investigation of the matter, contacted Samra by correspondence dated April 3, 2008 delineating his preliminary conclusion in the matter and providing KSLC an opportunity to respond with its position by April 17, 2008. It appears that Samra or KSLC turned the matter over to the latter’s accountant, Ranjit Sandhu (“Sandhu”). Sandhu subsequently responded to the delegate with KSLC’s position on April 17, 2008, the last day set by the delegate for a response from KSLC.
11. Approximately a month after Sandhu’s response, the delegate issued his Determination and sent it by registered mail to both KSLC as well as Samra at the registered and records office address of KSLC. Samra and KSLC do not deny receiving the Determination.
12. Samra, in his appeal submissions, on the issue of the timeliness of the appeal, states:

Please be advised that I was ignorant about the time span in which we have to respond. Our previous Accountant was dealing with this matter and I came to know about it in recent months when I was told to pay \$2,500.00. That is why we are late in filing Appeal [sic].
13. In response to Samra’s submission on the timeliness issue, the Director opposes KSLC’s request for an extension of time to appeal and submits that KSLC’s explanation for filing a late appeal does not satisfy any of the factors the Tribunal considers in granting an extension of time for an appeal. The Director further submits that “a disincentive is needed to promote compliance with the *Act* and to prevent a repeat contravention” on the part of KSLC.
14. In a final reply to the Director’s submissions, Samra states:

This is to request that all our Appeal material was being dealt [sic] and prepared by our Account, Mr. Ranjit Sandhu. He told us that he has filed an appeal on the Labour board decision. But in reality he failed to do so. We came to know very recently about it. That is why we are late in appealing.

ANALYSIS

15. Section 112 of the *Act* provides that a person served with a determination may appeal the determination to the Tribunal within the appeal period established under subsection (3). Subsection (3) provides that the appeal period, where the person is served with the determination by registered mail, is “30 days after the date of service of the determination”. In this case, the Determination, as previously indicated, was made on May 12, 2008 and sent out the same day by registered mail to KSLC and Samra and therefore, the appeal of the Determination by Samra on May 21, 2009 was in excess of 11 months after the expiry of the appeal period.
16. As indicated earlier, Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time to appeal has expired. However, the onus is on the party seeking an extension of time to appeal to show that there compelling reasons before the Tribunal will exercise its discretion under the said provision in the *Act* to grant an extension of the appeal period. The specific, non-exhaustive, factors the Tribunal may consider in deciding whether to grant an extension of the appeal period are set out in the Tribunal’s decision in *Blue World It Consulting Inc.*, BC EST. # D516/98:

- (1) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 - (2) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - (3) The respondent party (i.e., the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
 - (4) The respondent party will not be unduly prejudiced by the granting of the extension; and
 - (5) There is a strong *prima facie* case in favour of the appellant.
17. I have reviewed all these considerations in context of the facts in this case and for the reasons delineated below, I find that KSLC fails to satisfy the criteria for granting an extension of time to file an appeal.
18. First, the Determination was served on KSLC and Samra at the registered and records office of KSLC and neither KSLC nor Samra deny receiving it. Samra states, in his initial appeal submissions, that he was “ignorant” of the appeal period and only “came to know about it in recent months [w]hen ... told to pay the \$2,500”. In my view ignorance of the time to appeal a determination is not a proper justification for the Tribunal to exercise its discretion to extend the appeal period under Section 109(1)(b). However, in addition to his ignorance of the time to appeal, Samra explains that he and KSLC understood that the latter’s accountant Sandhu was preparing and dealing with the appeal and that the latter had advised him or KSLC that he had filed an appeal of the Determination but failed to do so and thus the late appeal. I do not find this explanation credible at all for several reasons. Surely if Sandhu or KSLC instructed Sandhu to prepare an appeal of the Determination after they were served with the Determination in mid May 2008, one would think that Samra or KSLC would follow up with Sandhu to ensure that the appeal was filed or obtain a copy of the filed appeal from their accountant at some point well in advance of May 21, 2009. However, Samra does not explain what efforts he or KSLC made to find out if the appeal was filed except to say that Sandhu said that he had filed an appeal. Samra also does not provide any indication of when Sandhu told him or KSLC that he had filed an appeal of the Determination nor is there any statement or letter from Sandhu in the appeal acknowledging that he was instructed (in a timely fashion by Samra or KSLC) the appeal and failed to do so. Further, if Samra and KSLC understood that Sandhu filed the appeal then would Samra and KSLC not want to know and enquire of Sandhu the outcome of the appeal at some point well in advance of almost 12 months after the Determination? I would have thought that Samra and KSLC would have actively taken some steps much earlier than 12 months after the Determination to discover the outcome of the appeal, particularly when they instructed their accountant to lodge an appeal. For all these reasons, I find incredible Samra’s explanation for not filing the appeal of the Determination within the statutory limits.
19. Second, there is no evidence of a genuine and on-going *bona fide* intention on the part of Samra or KSLC to appeal the Determination during the appeal period. It appears that the first time KSLC or Samra showed their intention to appeal is when the latter “came to know about [the Determination] in recent months when [he] was told to pay \$2,500.00”.
20. Third, the Director was never aware of Samra or KSLC’s intention to appeal during the appeal period. It was only after Samra filed the appeal in excess of 11 months after the expiry of the appeal period that the Director first discovered Samra or KSLC’s intention to appeal the Determination.
21. Fourth, while, *prima facie*, there is no undue prejudice to employees of KSLC in granting the latter an extension of time to appeal, I am mindful of the need for a timely disposition of an appeal and the stated purpose in Section 2(c) of the *Act* “to provide fair and efficient procedures for resolving disputes over the

application and interpretation of this Act”. In this case, even if I were to find in favour of KSLC on this factor or consideration, in light of the limited or no prospect of success of KLSC’s appeal on the merits discussed below, I do not think a finding of no prejudice to employees of KLSC assists the latter on the balance, particularly when all relevant factors are considered in determining whether an extension of time for appealing the Determination should be granted in this case.

22. Finally, with respect to the merits of KLSC’s appeal, it should be noted that except to the extent necessary to determine if there is a “strong prima facie case that might succeed”, the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re Owolabi (c.o.b.) Just Beauty*), BC EST # RD193/04, *Re BNN Enterprises Ltd.*, BC EST # D165/04). In this case, while I have not delineated the substantive arguments of Samra on behalf of KSLC based on the “new evidence” ground of appeal, I have reviewed them carefully and I find that Samra has not adduced any new evidence whatsoever. He largely repeats the submissions of Sandhu adduced to the delegate during the latter’s investigation of the matter and adds a letter from KSLC’s new payroll company to explain why cheques were issued directly to employees of KSLC which evidence appears to have existed during the investigation but for some unexplained reason not produced by Samra or KSLC to the delegate. This evidence, in my view, would not satisfy the test for adducing “new evidence” under Section 112(1)(c) of the *Act* set out in *Re Merilus Technologies Inc.*, BC EST # D171/03. I am for the said reasons unconvinced that Samra has shown a strong *prima facie* case in favour of KLSC and convinced that the prospects of KLSC succeeding on appeal are very limited to none.

ORDER

23. I find that KSLC has not met its burden of showing that the time limit for appealing the Determination dated May 12, 2008 should be extended in this case. Therefore, I decline to exercise my discretion to extend the appeal period. Accordingly, pursuant to section 114(1)(b) of the *Act*, this appeal is dismissed.

Shafik Bhalloo
Member
Employment Standards Tribunal