

An appeal

- by -

Lawn Genius Manufacturing (Canada) Inc. dba Drain Master
("Drain Master")

- 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: Ib S. Petersen

FILE No.: 2001/391

DATE OF DECISION: August 15, 2001

21. Nothing in these Rules is intended to limit the power enjoyed by the Tribunal under the Act. (emphasis added)

From the correspondence it appears that, on April 17, an employee of the Tribunal contacted Drain Master and informed it that a copy of the Determination was required to complete the appeal. This was confirmed in writing by the tribunal, also on April 17. Correspondence from the Tribunal to Drain Master, dated May 8, 2001, indicates that the file was closed. On May 17, 2001, the Tribunal received a partial copy of the determination, a couple of pages were missing. On May 18, the Tribunal received the balance of the pages from the Determination. On May 23, 2001, the Tribunal then opened a file as a “late appeal” and requested submission from the parties with respect to the issue of timeliness.

In *Blue World It Consulting Inc.* (BCEST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

- “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 and ongoing *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.”

Drain Master explains the failure to attach a copy of the Determination as a clerical error and says that the *complete* appeal was filed as soon as Drain Master’s accountant, Pineau, who is representing it in this appeal, became aware of the error. Pineau explains that Drain Master is unfamiliar with appeal process, and that up until recently its office was not staffed on a regular basis during normal business hours. Rather calls to the office were relayed to a dispatcher who, it appears, was the person dealing with the April 17 communications with the Tribunal. Apparently, the dispatcher believed that the Tribunal’s April 17 letter indicated that the matter had been resolved. Drain Master’s principal did not become aware that was not the case until he received the letter from the Tribunal dated May 8, 2001, indicating the file had been closed due to the failure to attach a copy of the Determination. Drain Master says it was always its intention to appeal. It is not clear from the submissions when the May 8 letter was received by Drain Master. However, on May 17, Drain master filed a copy of the Determination, except the last two pages. The balance of the Determination, was as noted filed the following day.

The Delegate opposes the request for an extension of time. The Delegate says, among others, that Drain Master was, in fact, put on notice by the Tribunal on April 17 that it must provide a copy of the Determination in order to complete the appeal. There is no valid reason for the delay--which is caused by Drain Master's "business incompetence and procrastination". The Delegate says that the delay is almost two months, namely to June 15, 2001 (when Drain Master filed its submissions on the timeliness issue). The delegate also says that the time limits are mandatory, subject only to a very limited discretion.

I do not accept the delegate characterization of the delay. The delay was about one month before the *completed* appeal was filed, *i.e.*, including a copy of the Determination. However, I also consider that the appeal form including the reasons for the appeal" were, in fact, filed within the time limit (Section 112). It is, therefore, clear that the appellant had a *bona fide* intention to appeal. The appeal did identify the Determinations under appeal. Moreover, under the *Rules*, set out above, the Tribunal did, in fact, have the discretion to allow the appeal to proceed despite the fact that a copy of the Determination was not attached (see Section 10 of the *Rules*).

In these particular circumstances, I am prepared to accept that there is a reasonable and credible explanation for the failure to perfect the appeal in time, namely a *bona fide* misunderstanding and clerical error on Drain Master's with respect to the appeal and the correspondence. While it is the company's responsibility to organize its affairs so as to be able to meet the requirements of its business, including its ability to respond to regulatory agencies, in the circumstances, it would not, in my view, be in keeping with the objects of the *Act*--which includes providing "fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*"--to preclude Drain Master from dealing with the merits of the penalty Determination (see, for example, *D. Hall & Associates Ltd.*, BCEST #D354/99). The evidence before me is that the principal of Drain Master acted with reasonable haste in responding and "reactivating" the appeal once he learned, following the May 8 letter from the Tribunal, that the appeal file had been closed due to the failure to attach a copy of the Determination.

I am not satisfied that there is any undue prejudice to the respondent(s) arising from this delay. I am not persuaded by the fact that the Delegate has already acted on the Determination and seized the penalty amount constitutes undue prejudice to the Director. Moreover, I am of the view, that there is a strong *prima facie* case in favour of the appellant. Clearly, if Gonzales is found not to be an employee, there is no requirement to keep the records that is the basis for the penalty.

In the circumstances, I am prepared to grant the extension. In my view, Drain Master's application meets the criteria discussed in *Blue World*.

In brief, in the circumstances, I am prepared to exercise my discretion to extend the time for filing the appeal.

ORDER

The application to extend time to file an appeal of the Determination dated March 23, 2001 is granted.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal