

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Patricia Cottingham
("Cottingham")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/857

DATE OF DECISION: February 23, 1998

DECISION

OVERVIEW

This is an application by Cottingham under section 109(1)(b) of the *Employment Standards Act* (the "Act") for an extension of time to appeal a Determination dated October 14, 1997 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether Cottingham is entitled to an extension of time under section 109(1)(b) of the *Act*.

FACTS

On October 14, 1997, the Director issued a Determination ordering Cottingham to pay \$6693.77 for unpaid wages, vacation pay and overtime pay to Renata Steinova ("Steinova"). Steinova had been employed by Cottingham as a nanny to her children. Steinova filed a complaint with the Employment Standards Branch and following an investigation, the Director's delegate concluded that Steinova worked for Cottingham between March 15 and June 6, 1997; was owed overtime wages for work in excess of eight hours or 40 hours in a week; and for unpaid vacation pay.

The Director's delegate had been in touch with Cottingham during the investigation and considered the written evidence submitted by Cottingham. On October 6, 1997, negotiations for a settlement between Steinova and Cottingham broke down; the delegate then left a message on Cottingham's answering machine that Steinova did not wish to settle and that a Determination would be issued. On October 14, 1997, she issued the Determination referred to above and deposited the letter with Canada Post on that date. By virtue of section 122 of the *Act* a Determination served in this way is deemed to have been received 8 days following deposit with Canada Post. This meant that Cottingham was deemed to have received the Determination on October 22, 1997; the time limit for an appeal of the Determination to this Tribunal expired on November 6, 1997.

In fact, Cottingham did not pick up the letter until November 10, 1997, four days after the appeal limit had expired. On November 11, 1997, Cottingham couriered a letter to the Employment Standards Branch, expressing her extreme dissatisfaction with the Determination and seeking an appeal. That document was received at the Branch on November 13, 1997. On Monday November 17 an Industrial Relations Officer (IRO) left a message for Cottingham to contact the Tribunal about an appeal. According to Cottingham, she contacted the Tribunal on November 17 and that information for her was faxed on that

date to the house of a friend. She was able to retrieve the information on Thursday November 20, prepare her response on Friday November 21 and courier it to the Tribunal on Monday November 24.

Steinova says that the Director's delegate contacted her to advise that a Determination and registered letter were "in the system", and that a similar call had been made to Cottingham. She is also critical of Cottingham's inability to retrieve her mail sooner as she lives only four blocks from a full postal outlet. She points out that Cottingham did not file a Record of Employment was not issued until June 26, 1997, after the complaint had been filed with Employment Standards. She argues that none of the witnesses brought forth by Cottingham are impartial as they all have a special relationship (family or friends) to Cottingham. Steinova says that Lynda Darling, Janet McDonald and Carol Ann McKinley all support her case. Finally, she denies receiving "any gifts in compensation for unpaid salary" or "the level of gifts" described by Cottingham.

ANALYSIS

The sole question in this appeal is whether Cottingham is entitled to an extension of time to file her appeal. This is not a decision on the merits of her dispute with Steinova (except as required by the test enunciated below) or whether Steinova is in fact owed the money stated in the Determination. Section 109(1)(b) confers power on the Tribunal to "extend the time period for requesting an appeal even though the period has expired". Requirements for an extension of time were outlined in *Niemisto B.C.E.S.T. #D099/96*; the appellant must satisfy the Tribunal that

There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
There has been a genuine ongoing bona fide intention to appeal the determination;
The respondent as well as the Director has been made aware of this intention;
The respondent will not be unduly prejudiced by the granting of an extension; and
There is a strong *prima facie* case in favour of the appellant

Cottingham says that she was unable to file her appeal in time because she did not receive the Determination before the expiry of the statutory time limit. She says that she was not aware that a Determination was waiting for her and that extensive personal obligations made it difficult to retrieve the package from the Post Office until the last day of pick up. (She is a single parent of two children; does not own a car; and is away from home, attending university classes, until 6 p.m. each evening.)

I find that this is a credible explanation for failing to file before expiry of the deadline. At most, Cottingham had received a general warning from the Director's delegate that a Determination against her would be issued but was not given a precise date of when it would be issued. Steinova argues that Cottingham ought to have known about the Determination since both of them received a call from the Director's delegate advising that

a Determination was "in the system". This differs significantly from actual notice that a Determination had been mailed; Cottingham could not be expected to respond to her mail just in case it was the Determination that had been "in the system" some weeks earlier. There is no evidence that she purposefully avoided picking up her mail to avoid being notified of the Determination, only evidence of a hectic personal schedule with many pressing responsibilities which kept her from dealing with her mail in an expeditious way. Steinova points out that Cottingham's children are 6 and 9 and that Cottingham lives within a few blocks of the postal outlet. In the circumstances, I find that neither of those facts leads me to find that Cottingham's explanation for the failure to file within the statutory time limit was anything but reasonable and credible.

It is also clear that Cottingham had always been unhappy with the conclusions drawn by the Director's delegate and had discussed the prospect of an appeal with the Director's delegate during the investigation process, even before the Determination had been issued. This desire also clearly expressed itself in the dispatch with which she dealt with her appeal once she had actually received the Determination. (As a lay person, she could not be expected to understand all of the nuances of the system but nonetheless acted with dispatch in preparing submissions and sending them to the appropriate office. The Director's delegate argues that Cottingham signed for the Determination on November 10th but did not actually file an appeal until November 24, so that she did not move with dispatch. But I note that November 11th was a holiday and that the events spanned two weekends when neither the Tribunal nor the Branch can be contacted.) Thus, I find that her desire to appeal was genuine and ongoing. Given her discussions with the Director's delegate throughout the whole process, there is no doubt that the Director was aware of her intention to appeal. Steinova's submissions say nothing about a surprise or prejudice to her resulting from the appeal and I can find none, beyond the passage of a brief period. Prejudice can flow to a respondent simply by passage of time, but in this case less than a week elapsed between the actual expiry of the statutory deadline and the date when Cottingham made her intention to appeal very clear to the Director's delegate.

Finally, Cottingham outlined a strong prima facie case on the merits of her appeal. She pointed to credible evidence that was disregarded in the Determination and to less convincing evidence that was preferred. It is not necessary to outline all of the arguments here, but there is evidence to challenge the conclusion that Steinova was employed by Cottingham's after March 31, 1997 and even if Steinova remained in Cottingham's employ after March 31, on its face the Determination fails to take into account days when Steinova was working for another family. Steinova argues that none of the witnesses on Cottingham's behalf are credible, but I disagree they are not credible simply because they are related to Cottingham or are a friend. It is the nature of the evidence which they offer that must be judged. In any event, the precise weight to place on their testimony is a matter to be decided on the merits of the appeal and not in this preliminary application.

ORDER

An extension of time to appeal the Determination dated October 14, 1997 is hereby granted under section 109(1)(b) of the *Act*.

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Lorna Pawluk
Adjudicator
Employment Standards Tribunal