



An appeal

- by -

Yves A. Ouellette operating as OB Paints Cabinets & Glass
("Ouellette")

- 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: W. Grant Sheard

FILE No.: 2000/777

DATE OF DECISION: January 23, 2001

DECISION

SUBMISSIONS:

Roger W. Haines	counsel on behalf of the employer
Theo Stavinger	the employee, on his own behalf
Alan Phillips	on behalf of the Director

OVERVIEW

This is an appeal based on written submissions by the Employer, Ouellette, pursuant to Section 112 of the Employment Standards Act (the “Act”), against a Determination of the Director of Employment Standards (the “Director”) issued on October 20, 2000. The Director’s delegate found that the Employer had contravened Sections 34, 40, 45, 46 and 58 of the Act regarding minimum daily pay, overtime wages, statutory holiday pay and vacation pay, and ordered the Employer to pay the Employee \$7,393.95. The Employer delivered its request for appeal one day beyond the limitation prescribed in Section 112(2) of the Act. This decision is limited to the issue of the timeliness of delivery of the request for appeal and whether the discretion available under section 109(1)(b) of the Act should be exercised in favour of extending the time for requesting an appeal.

ISSUE

Should the discretion available pursuant to Section 109(1)(b) of the Act be exercised in favour of extending the time for requesting an appeal delivered one day beyond the limitation period established by Section 112(2) of the Act?

ARGUMENT

The Employer’s Position

In written submissions on the issue of timeliness dated November 17, 2000 and December 11, 2000, counsel for the Employer submits that (paraphrasing) due to essentially three extenuating circumstances, the time for appeal should be extended. First the Employer suffered a heart attack about 6 months earlier, he has worked only sporadically since and, second, he left for a holiday about 12 days before the deadline; the Employer instructed his manager within the appropriate time to request the appeal, but that manager was delayed in doing so by searching for and gathering certain payroll and WCB records. Third, counsel for the Employer received the “instruction letter to appeal on November 14, 2000” (the last day for delivery of the appeal), but counsel did not review that letter until the next day due to a partnership meeting and other commitments “whereupon we faxed the appeal”. Counsel for

the employer states this demonstrates that the Employer did intend “to appeal within the applicable time limit, however, the appeal was not filed until one day late due to the unavailability of counsel”.

The Employee’s Position

In written submissions dated November 25, 2000, Mr. Stavinger says that the Employer had “plenty of time and a lawyer working for him”. He also expresses sympathy for the Employer having suffered a heart attack, but notes that this occurred 6 months earlier. The Employee maintains that the request for appeal was delivered out of time and should not be allowed.

The Director’s Position

In written submissions dated November 23, 2000 the Director’s delegate, Mr. Alan Phillips, says that, in order to afford the Employer an opportunity to negotiate a settlement with the Employee, the Employer was informed about three months before the determination was formally issued that he would be required to compensate the Employee and that he could appeal the Determination if and when it was issued. Further, that the Employer was clearly advised in the determination of October 20, 2000 that an appeal must be made by November 14, 2000. Mr. Phillips also submits that the appellant has not provided any compelling reason for the appeal to be allowed. He says that the appeal should be dismissed.

THE FACTS

The Employer operates a business in the retail sales of home care products. He is also involved in residential and commercial building construction. The Employee worked for the Employer as a carpenter’s helper from 1992 to 1999. The Employee resigned and claimed overtime wages and statutory holiday pay. The Employer provided the records requested showing the hours worked by and wages paid to the Employee. The delegate (or his agent) entered this data into the “Ministry of Labour’s Overtime Calculation program” which demonstrated the Employee’s entitlement. The Employer chose not to make any such offer and the delegate issued his determination accordingly on October 20, 2000 requiring the Employer to pay the Employee \$7,393.95.

On the final page of the determination in a format enhanced by being enclosed within its own borderline, the parties were advised that, in part, “any person....may appeal....the appeal must be delivered to the Tribunal no later that 4:30 p.m. on November 14, 2000”. Further information on how to appeal was appended to the determination.

In his written submissions dated November 23, 2000, the delegate says (and I accept) that, “One copy of the Determination was sent to the Employer by Canada Post Registered Mail. Canada Post confirmed that the Employer picked up the Registered Mail on October 23,

2000. A copy of the Determination was also sent to the Employer's legal counsel. As noted in his submissions, counsel for the Employer is in Prince George, while the Employer is in Fort St. James, 160 kms. away.

As recited above under "The Employer's Position", the Employer did not deliver the request for appeal until it was sent by fax on November 15, 2000 - one day beyond the statutory time limit in Section 112(2) of the Act for doing so.

ANALYSIS

The time limit for delivering a request for appeal is found in Section 112 of the Act which reads as follows:

- 112(1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for appeal.
- 112(2) The request must be delivered within
 - (a) 15 days after the date of service, if the person was served by registered mail....

Although Section 114(1) provides that the tribunal may dismiss an appeal without a hearing of any kind where not requested within the time limit of Section 112(2), this matter has been given to me to consider whether, on the written submissions filed, a discretion should be exercised in favour of extending the time for requesting an appeal. That discretion is found in Section 109 of the Act which says as follows:

- 109(1) In addition to its powers under Section 108 and Part 13, the tribunal may do one or more of the following:
 - (b) extend the time period for requesting an appeal even though the period has expired;

In Employment Standards in British Columbia Annotated Legislation and Commentary, Cascadden, Allison, and Corwin, The C.L.E. Society of B.C., Vancouver, 1998, the case of *Re Niemisto*, [1996] BC EST #D099/96 ("*Niemisto*"), is cited for the following proposition:

To seek an extension, appellants should satisfy the following criteria: (1) there is a reasonable and credible explanation for failing to request an appeal within the statutory limit; (2) there has been a genuine and ongoing bona fide intention to appeal the determination; (3) the respondent party and the Director have been made aware of the 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. This is not an exhaustive list of the criteria that the Tribunal will consider.

The criteria enumerated in *Niemisto* were considered and applied in *Re Oriental Tea Garden Restaurant Ltd.* (24 September 1997), BC EST #D450/97 (“*Oriental*”). That case involved a number of similarities to the present one. There, the request for appeal was the responsibility of a manager and it was delivered just 2 days beyond the statutory time limit. In addition, the solicitors engaged for the purposes of the appeal were in Victoria while the employer and manager were in Vancouver.

In *Oriental*, it was said at paragraph 15 as follows:

Sections 112 and 122 of the Act set out the time periods for the filing of appeals. The time frames are short but that is not unusual in legislation that is administered by a tribunal. This tribunal has consistently stated that time limits will not be extended as a matter of course, (see *Niemisto* (supra)). Furthermore, the tribunal has stated that extensions will only be granted where there are compelling reasons present (see *Moen and Singh Contracting Ltd. v. British Columbia (Director of Employment Standards)* BC EST #D298/96. I do not find compelling reasons present in this case.

Further, at Paragraph 16:

I am not prepared to find that delay caused by the employer’s management situation and absence of certain employees is a reasonable basis to grant an extension of time. Furthermore, I am concerned that the request for an extension was not received until after the time for filing had expired. I do not accept that the employer has shown a bona fide intention to appeal the determination despite not being able to file its material within the specified period.

Similarly, in the present case, considering the first criteria in *Niemisto* (whether there is a reasonable and credible explanation for failing to request an appeal within the statutory limit) I do not find that delay caused by the Employer’s manager is a reasonable basis to grant an extension of time. I do not find there has been any relevance established to the Employer’s heart attack and I lay no fault at the feet of counsel for the Employer (he faxed the request within one day of receiving instructions). The Employer could have telephoned or faxed counsel to instruct him to request an appeal. The manager could have done the same. The Employer knew the determination would be adverse to his position several months before it was even issued. He was told of the appeal period and could easily have instructed counsel in a timely manner if he had been diligent to do so. I also note that the Request for Appeal

and written submissions in support of it are apparently signed by the Employer, notwithstanding his absence.

Regarding the second criteria for a genuine and ongoing bona fide intention to appeal the determination, the only evidence is that on the final day of the appeal period the Employer delivered a letter of instruction to its counsel. I do not find this to be evidence of an “ongoing” intention and I question the bona fides of it when it does not appear that the Employer’s agent even phoned the solicitor to ensure he was aware the instructions were coming in this tardy fashion.

Turning to the third criteria, the Employer did not make the Employee and the delegate aware of his intention to appeal within the relevant time period. Dealing with the fourth criteria of prejudice in granting an extension, while I do not find any evidence of undue prejudice to the Employee, to grant the extension would cause further delay to him in receiving his award and be contrary to one of the purposes of the Act as set out in Section 2(d); that is, to provide fair and efficient procedures for resolving disputes.

The fifth criteria requires that the appellant have a strong *prima facie* case. The Employer simply requests a recalculation be performed on a rather bare assertion that the original calculation was in error. A plethora of time slips and a summary of them were subsequently submitted by the Employer on appeal, but there is no clear direction to anything in them that differs from the payroll and time records originally given to the delegate.

I find that the employer has not demonstrated a strong *prima facie* case in his favour.

The burden is on the appellant to show that the time period for an appeal should be extended: *Re Wright (c.o.b. Advanced Carpet Cleaning)*, (20 March 1997), BC EST #D132/97. For all of the foregoing reasons, I find that the Employer has failed to meet that burden and I decline to exercise my discretion to abridge the time limit for the consideration of this appeal.

ORDER

Pursuant to section 115 of the Act, I order that the Determination of this matter, dated October 20, 2000, be confirmed.

W. GRANT SHEARD

**W. Grant Sheard
Adjudicator
Employment Standards Tribunal**