

**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 -

Mary Rink

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Carol L. Roberts

**FILE No:** 1999/721

**DATE OF DECISION:** March 17, 2000

## DECISION

### OVERVIEW

This is a decision based on written submissions by Gerald J. Fahey ("Fahey"), Barrister and Solicitor, for Mary Rink ("Rink"), Jeff. W. Yuan, articled student at Dusevic & Co., Barristers and Solicitors, for Quizno's Canada Corporation ("Quizno's"). This decision is on the issue of the timeliness of the appeal only.

### OVERVIEW

Mary Rink filed a complaint with the Director of Employment Standards ("the Director") alleging that she was owed overtime wages by Quizno's. A delegate of the Director investigated Rink's complaint, and on November 2, 1999, *issued a determination in which Quizno's was found to have contravened the Employment Standards Act* ("the Act"), in which Quizno's was ordered to pay Rink overtime wages.

Counsel for Rink filed a Notice of Appeal of the Determination at 5:21 p.m. November 25, 1999. Fahey acknowledged that the appeal was filed 51 minutes late, and could therefore be considered out of time. In his submission however, he contended that the Tribunal could and should extend the time period pursuant to section 109(1)(b) of the *Act*.

Counsel for Quizno's opposes the application.

### ISSUE TO BE DECIDED

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

### FACTS

As noted above, the Determination was issued November 2, 1999. The Determination indicated that the appeal deadline was 4:30 p.m. November 25, 1999.

Fahey contacted the Tribunal on November 9, indicating that he would be appealing the Determination, and sought information about filing an appeal. An appeal package, including the appeal form and Tribunal Rules, was faxed to Fahey on November 10.

On November 24, Fahey faxed a letter (which was incorrectly dated November 9, 1999) to the Tribunal, seeking an extension to file an appeal to November 26. The Registrar denied the request.

Fahey argues that the Tribunal ought to consider the following information in exercising its discretion to extend the time:

\* he notified the Tribunal on November 9, 1999 of his intention to appeal the determination, and requested that the Tribunal fax him the proper forms to perfect the appeal;

\* he had several discussions with his client, specifically advising her to obtain statements supporting the basis for her claim;

\*on November 22, he began a five-day jury trial, for which he had to spend a great deal of time leading up to the trial to prepare;

\* he recognized the "impending" deadline of November 25 at 4:30, and at 5:25 p.m. November 24 sent a fax to the Tribunal seeking an extension to the end of the business day on November 25th to file the appeal;

\*he contacted the Tribunal on November 25 at approximately 9:00 a.m., and was advised by staff that his request had been received but that no decision had been made. Fahey requested that a message be left on his telephone answering machine regarding the decision;

\*No one at the Tribunal left a message on his machine about his request on November 25.

\*He did not return to his office until 4:30 p.m., November 25, and did not receive the Tribunal's fax of the same date denying his request to extend the time period to file an appeal until then. Upon receipt of that fax, he immediately completed the appeal form, drafted a separate sheet setting out the information requested in Sections C and D, and sent that in to the Tribunal. A subsequent letter explaining the delay was also sent under separate fax cover;

\* he was unaware of any prejudice to the employer as a result of the delay.

Fahey contended that the appeal ought to be accepted based on the Tribunal's decision *in 716318 Alberta Ltd. (c.o.b. Dollar Rent A Car) (Re)* [1999], BCESTD No. 134.

Fahey argues that he missed the deadline for filing the appeal by 48 minutes - an extremely short period of time. He contended that he wanted to ensure that his client's case was as complete as possible before filing the documents, as he understood there was a risk in providing incomplete documentation. He also argued that he would have made appropriate arrangements to have the appeal filed on November 25 at 4:30 had he been advised by staff at the Tribunal that his request for an extension had been rejected.

Fahey also argues that the delay creates no prejudice to Quizno's, nor to the Tribunal.

Finally, Fahey argues that the Determination turned on the credibility of the parties, and that the Tribunal was required to "take all necessary steps to ensure that the complainant has a full and fair opportunity to present her case," which did not occur. Fahey contends that the Director's

delegate failed to address the part of the claim dealing with car expenses, that it was based on an improper balancing of the facts, and in particular, "did not deal properly with the lack of records presented by the employer." Fahey further alleges that the delegate failed to comply with the rules of natural justice, specifically not advising Rink of the "nature of the issues" or the opportunity to adduce evidence.

Fahey states that he is now in possession of statements from individuals who can verify Rink's overtime hours, and that Rink is transcribing a computer program that has a detailed listing of all business activities during the relevant time period.

Fahey further argues that there has been a genuine and ongoing *bona fide* intention to appeal the determination, and that, in light of all these factors, the Tribunal ought to exercise its discretion to extend the time for filing the appeal.

Counsel for Quizno's argues that two of the three factors set out in *Dollar Rent A Car* have not been met, and that the Tribunal should not consider the late appeal.

## **ANALYSIS**

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. The party seeking an extension must satisfy the tribunal that:

- (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, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this 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.

(see: *Niemisto v. British Columbia (Director of Employment Standards)* (BCESTD#099/96) and *Pacholak v. British Columbia (Director of Employment Standards)* (BCESTD# 526/97))

Furthermore, extensions will only be granted where there are compelling reasons present. (*Moen and Sagh Contracting Ltd.*, BCESTD#298/96)

***Bona fide intention to appeal the determination and notice to the parties of this intention***

There is no dispute that Rink had a *bona fide* intention to appeal the Determination and that the Director was notified of that intention. The information does not disclose that Quizno's was made aware of this intention.

***Reasonable explanation for the failure to request an appeal within the time limits***

I am unable to conclude, on the submissions presented, that there is a reasonable explanation for the delay. The reasons put forth by Fahey to file a timely appeal relate substantially to his workload. I do not find this constitutes extenuating circumstances over which he has no control. Counsel's work ought not to prevent him from requesting an extension well in advance of the deadline, since he was no doubt aware of the upcoming jury trial by November 10.

In *Moen and Sagh Contracting Ltd.* the reasons for the delay were sudden or serious illness or some other extenuating circumstances over which the appellant had no control. In *Hnidan* (BCESTD#025/98), the employee filed his appeal one week out of time because, he stated, he had cancer and was under considerable stress. The Tribunal denied the extension request, finding that the employee could have contacted the Tribunal and sought an extension. There is no evidence any extenuating circumstances existed.

***Strong prima facie case***

Fahey contends that the Director's delegate failed to address the part of the claim dealing with car expenses. As the Determination does not deal with car expenses, there is no decision to review. If Rink's original complaint raised this issue, the matter must be referred to the Director's delegate to address that portion of the complaint.

Fahey also argues that Rink was denied natural justice in that she was not properly advised of the nature of the issue or the opportunity to adduce evidence. He further argues that the Determination was based on an improper balancing of the facts.

I find that these are serious issues that ought to be dealt with on appeal.

***Prejudice to the Respondent***

Quizno's takes no position on the issue of prejudice to any party as a result of the late filing of the appeal, and I have assumed, given that the appeal was filed less than one hour late, that there is none.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the extension should be granted. Although I find that there is no good reason for the delay, the appeal was filed within one hour of the statutory deadline. There is

no information that Quizno's will be prejudiced by the extension. I also accept that there is a fair question to be addressed on appeal.

**ORDER**

I allow Rink's application for an extension of time to file the appeal.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**