

An appeal

- by -

Walter E. Johnson
("Johnson")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/22

DATE OF DECISION: May 3, 2004

DECISION

OVERVIEW

This is an appeal filed by Walter E. Johnson (“Johnson”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Mr. Johnson appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 17th, 2003 (the “Determination”). The Determination was issued following an oral hearing held on September 23rd, 2003.

The Director’s delegate’s reasons for decision disclose that Mr. Johnson alleged his former employer, Orbital Technologies Inc. (“Orbital”), owed him unpaid commissions and vacation pay. The delegate held that Orbital fully complied with the parties’ agreement with respect to the payment of commissions and that no additional vacation pay was owing. Indeed, the delegate concluded that Orbital had “overpaid” Mr. Johnson with respect to his vacation pay entitlement. Thus, the delegate dismissed Mr. Johnson’s complaint since the *Act* “has not been contravened” and “no wages are outstanding”.

Mr. Johnson filed an appeal with the Tribunal on February 18th, 2004. In his appeal form, Mr. Johnson alleges that the Director erred in law particularly regarding the interpretation of the parties’ written employment contract.

These reasons for decision do not address the merits of Ms. Short’s appeal; they only address the timeliness of the appeal, a matter to which I now turn.

EXTENSION OF THE APPEAL PERIOD

An appellant must file an appeal with the Tribunal within “30 days after the date of service of the determination, if the person was served by registered mail” [see section 112(3)(a) of the *Act*]. Section 122(2) states that a determination served by registered mail “is deemed to be served 8 days after the determination...is deposited in a Canada Post Office”.

If an appeal is filed after the expiration of the applicable appeal period, the Tribunal may extend the appeal period pursuant to section 109(1)(b) of the *Act*. The criteria governing an extension application have been set out in many Tribunal decisions commencing with *Niemisto*, B.C.E.S.T. Decision No. D099/96, and include:

- Has there been unreasonable delay in filing the appeal?
- Is there a reasonable and credible explanation for the tardy appeal?
- Will other parties be prejudiced if the appeal period is extended?
- Does the appeal raise a *bona fide* and *prima facie* meritorious issue?

SUBMISSIONS AND FINDINGS

The Determination, at page 2, contains a notice indicating that any appeal must be filed with the Tribunal by no later than 4:30 P.M. on December 29th, 2003. As noted above, Mr. Johnson’s appeal was filed on February 18th, 2004. Accordingly, the Tribunal’s vice-chair wrote to the parties on February 18th, 2004 requesting their written submissions regarding the timeliness of the appeal.

I have before me Mr. Johnson's affidavit, sworn February 14th, 2004, setting out his explanation for the late appeal. This latter affidavit was appended to Mr. Johnson's appeal form. In addition, Mr. Johnson filed a further submission dated March 18th, 2004. The Director's position, set out her delegate's letter dated February 27th, 2004, is that "the Director of Employment Standards does not object to the extension of the deadline for appeal of the Determination in question given the complainant's proof of non-delivery of same by Canada Post". Counsel for Orbital, in her submission dated March 10th, 2004, submits that the appeal period should not be extended and that the appeal, on its face, does not disclose any "errors of law".

Mr. Johnson's explanation

In his affidavit Mr. Johnson avers that following the conclusion of the oral hearing before the delegate (held on September 23rd, 2003), he asked the delegate to forward the Determination, when it was available, to Mr. Johnson's Post Office Box located at the Vancouver Main Post Office and was assured by the delegate that the Determination would be so directed. Mr. Johnson did not want the Determination to be sent to his residential address since he was in the process of moving and was concerned that the Determination might get lost or delayed.

During the period following the oral hearing up until January 21st, 2003, Mr. Johnson regularly contacted both the Post Office and the Employment Standards Branch to determine if the Determination had been forwarded by registered mail. On January 21st, 2004, Mr. Johnson spoke, by telephone, with the delegate who had been the case manager on his file (not the delegate who heard the case) and was told that the Determination had been mailed, by registered mail, to his post office address on November 17th, 2003 but was subsequently returned to the Branch (on November 20th) with a notation that the addressee had "moved". The delegate indicated that she would forward a copy of the Determination to Mr. Johnson's post office box "right away". On January 29th, 2004 Mr. Johnson received a copy of the Determination--the delegate's letter is dated January 23rd and postmarked January 27th, 2004.

After making the requisite inquiries, Mr. Johnson was advised by a Canada Post official that the Branch's registered letter was mistakenly returned to the Branch due to "human error". This same Canada Post official also wrote a letter to Mr. Johnson, appended as Exhibit E to his affidavit, attesting to the error (this letter specifically identifies, by a traceable number, the Branch envelope within which the Determination was enclosed).

Mr. Johnson says that the further delay in filing his appeal (approximately 3 weeks after his receipt of the Determination on January 29th, 2003) is attributable to his lack of familiarity with the appeal process and time spent considering, researching and then preparing his appeal documents.

Orbital's Submission

Counsel for Orbital submits that the Determination was presumed to have been served under subsections 122(1)(b) and (2) of the *Act*; that Mr. Johnson has not adequately explained the further 3-week delay after receiving the Determination in late January; that Mr. Johnson has not shown an ongoing intention to appeal; and that his case lacks presumptive merit.

Findings

First, although the section 122(2) “deemed service” provision seemingly governs, I cannot ignore the uncontested fact that the registered envelope containing the Determination never reached Mr. Johnson due to an administrative error by Canada Post. I do not accept counsel’s suggestion that Mr. Johnson should “bear the consequences of his choice” to have the Determination mailed to a post office box. To hold otherwise would not, in my view, amount to “fair treatment” toward Mr. Johnson [see section 2(b) of the *Act*].

Second, I am satisfied that the further delay during 3-week period from January 29th (actual receipt of Determination) to February 18th (date appeal filed), 2004 has been properly accounted for by Mr. Johnson. I might also note that counsel for Orbital has not suggested that her client would be prejudiced in any way if the appeal period were to be extended.

Third, and without passing comment on the likely outcome of this appeal, I would say that the appeal documents, as I read them, do raise *bona fide* issues of law, including whether the delegate correctly determined, interpreted and applied the parties’ employment contract; the appeal does not obviously lack merit.

I am satisfied that this is an appropriate case to order an extension of the appeal period.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period governing the filing of an appeal of the Determination be extended to February 18th, 2004. Accordingly, this appeal is properly before the Tribunal and thus will now be adjudicated on its merits.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal