Employment Standards TRIBUNAL

An appeal

\- by -

Flora Faqiri
("Employee")

\- 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 (as amended)

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2005A/79

DATE OF DECISION: July 19, 2005

DECISION

1. This Decision relates to the timeliness of an appeal of a Determination dated December 22, 2004 (the "Determination") issued by a Delegate of the Director (the "Delegate"). In the Determination, the Delegate dismissed a complaint filed by Flora Faqiri (the "Employee") alleging that her former employer, Value Village Stores Inc. (the "Employer") contravened the *Employment Standards Act* (the "*Act*") by failing to pay her compensation for length of service when her employment was terminated.

2. The Employee has asked for an oral hearing of her appeal on the basis that she has problems with written communications. However, given that the issue at this point is the timeliness of the appeal and not its merits, and in light of the fact that the Employee is capable of expressing herself in writing, I find that I am able to determine this matter on the basis of the written submissions and, therefore, an oral hearing is not required.

FACTS

3. Information in the record that was before the Delegate and in the Determination indicates that the Employee initiated her complaint on or about September 3, 2004. The parties attended a mediation and reached an Agreed Statement of Facts, signed on October 29, 2004, in which they achieved agreements respecting issues, facts and documents that would be put before a Delegate who would hear and decide the complaint.

4. The Employee was contacted approximately three days prior to the scheduled hearing, at which time she confirmed that she would be attending. However, she did not appear at the time appointed for hearing. The commencement of the hearing was delayed and a mediator from the Employment Standards Branch attempted to contact the Employee by phone to determine whether she was going to be attending, but there was no answer to his phone calls. The Delegate then proceeded with the hearing.

5. As noted, the Determination was issued on December 22, 2004. It records the Delegate's reasons in support of his decision to dismiss the Employee's complaint. The Determination was sent to the Employee by expresspost mail.

6. The issue before the Delegate was whether or not the Employer was relieved from its obligation to provide the Employee with compensation for length of service when terminating her employment, because it had just cause for the termination. The Employer's evidence consisted of the oral testimony of three witnesses, as well as the notes and written statements of some of its employees, including one statement signed by the Employee. (I note that the Employee later contended, in the Agreed Statement of Facts, that she was coerced to give this statement in order to save her job.) The other evidence before the Delegate included the Agreed Statement of Facts, and the documents appended to that Statement, as well as the Employee's Complaint and Information Form and her Problem Description Form. These latter two documents contained the Employee's written statements describing her allegations. The Employer's version of events conflicted with the Employee's. The Delegate preferred the Employer's version and its evidence. He noted that the Employee was absent from the hearing and therefore provided no explanation to contradict the Employer's version, except her written explanations, which contained inconsistencies and timing errors.

7. Briefly, the Delegate accepted the Employer's assertions that the Employee had contravened the Employer's Employee Purchasing Policy on two occasions. After the first occasion, in accordance with that Policy, she had been given a final warning in writing advising that her employment would be terminated if she committed another contravention. Additionally, her employee shopping privileges were suspended for a month. During the suspension, she committed a second breach in which she colluded with a co-worker to purchase merchandise in contravention of the Policy. The Employee was clearly aware of the Employer's Employee Purchasing Policy at the time of each contravention and she was duly warned that a further violation would result in her termination. The Delegate concluded that the Employer's warnings and discipline met the test for establishing just cause and, therefore, the Employee was not entitled to compensation for length of service.

8. According to Section 112 (3) of the *Act*, a person wishing to appeal a Determination has 30 days to do so after the date of service of the Determination, if the person was served by registered mail, and 21 days to do so after the date of the Determination, if the person was either personally served or, at that person's request, served electronically or by fax machine. According to Section 122(2), if service is by registered mail, the Determination is deemed to be served 8 days after it is deposited in a Canada Post Office.

9. I have not been provided with information indicating when the Determination was deposited with Canada Post or when the Employee received the Determination. However, materials before me include a letter dated February 7, 2005 to the Delegate from Dr. L.A. (Lee) Cowley, who was counsel for the Employee in a Small Claims Court action against the Employer with respect to a wrongful dismissal matter. Dr. Cowley advised in that letter that he did not act for the Employee in connection with her Employment Standards complaint. However, he wrote to advise that the Employee wished to appeal the Determination. He indicated that the reason she had not already done so was that she thought she had delivered a copy of the Determination to his office. He also indicated that on February 2, 2005, he obtained a copy of the Determination, as well as a copy of a cover letter which stated that if the Employee wished to appeal the Determination, she was required to do so by January 31, 2005.

10. Despite Dr. Cowley's letter, the Employee did not file her appeal until May 2, 2005. In her Appeal Form, she says that her grounds for appeal are that the Director erred in fact in not considering the entirety of the evidence. In explanation of the lateness of her appeal, she attaches a copy of Dr. Cowley's February 7, 2005 letter.

ARGUMENT

11. As noted, the Employee appeals the Determination on the ground that the Delegate committed an error of fact by failing to consider the entirety of the evidence. She provides no further explanation of this allegation. In the space provided on the Appeal Form to explain why her appeal was filed late, she refers only to an attached copy of Dr. Cowley's February 7, 2005 letter. The Employee provides no explanation whatsoever of why she failed to attend the hearing before the Delegate.

12. The Employer submits that the Tribunal should dismiss the Employee's appeal on the basis that there has been excessive delay. It says that to allow her appeal at this late date would be incorrect as a matter of law and policy under the *Act*. The appeal was filed approximately 4.5 months after the Determination. Although Section 109 of the *Act* allows the Tribunal to extend the time period for appealing, there are no compelling reasons to do so in this case.

13. The Employer notes that Dr. Cowley's February 7, 2005 letter does not explain why the Employee could not or did not appeal the Determination before the deadline for appeals. Nor does it explain why she did not file an appeal between the date when Dr. Cowley received a copy of the Determination, February 2, 2005, and the date of the letter itself, February 7, 2005. Additionally, the Employer points out that there is no explanation why the Employee took a further three months to file her appeal.

14. The Employer notes that it was not advised that the Employee had any intention of filing an appeal until it received the late appeal, dated May 2, 2005. It was not provided with a copy of Dr. Cowley's letter.

15. Further, the Employer says, the Employee's appeal cannot succeed. The Employee relies on a ground (error of fact) not listed in the grounds permitted for appealing a Determination under Section 112(1) of the *Act*. Even if she had filed a proper appeal, it says, the Delegate thoroughly canvassed the relevant issues and relied on the appropriate case law in coming to his decision. The Employee has not adduced any evidence that would impugn the correctness of the Determination.

16. Additionally, the Employer submits that the Tribunal will only exercise its power to allow an appeal after the deadline expires when compelling reasons exist to do so. No reasonable explanation for the 4.5 month delay in this case has been given. This delay, the Employer says, significantly prejudices it in preparing for any further hearing. Accordingly, it asks that the late appeal be dismissed.

17. The Director also submits the appeal ought to be dismissed. He notes that the Tribunal looks at various factors when considering late appeals and that the Employee has failed to address two of them. First, she does not explain why she failed to meet the time limit of January 31, 2005. Second, she does not explain why her appeal was filed three months late. The Delegate acknowledges receipt of Dr. Cowley's letter, which it notes was addressed to him, not to the Tribunal, and confirms that this letter was not shared with the Employer.

18. In response to the Employee's grounds of appeal, the Delegate says that errors of fact are not among the permissible grounds of appeal under Section 112 of the *Act*. Moreover, he notes that the Employee failed to attend the hearing and has not provided any additional evidence other than that which was contained in her Complaint Form. He says that the Employee has not provided any compelling reason for the Tribunal to extend the appeal period.

19. In reply, the Employee writes a letter attaching a letter of reference dated September 11, 2001 from one of the Employer's store managers. The Employee makes no further comment in response to the submissions of the Employer or the Delegate. More particularly, she provides no further explanation of the tardiness of her appeal.

REASONS

20. In the instant case, there is no doubt that the Employee's appeal is untimely. Although I am not informed of the precise date on which the Employee received a mailed copy of the Determination, the February 7, 2005 letter from Dr. Cowley indicates that she was in possession of it before that time. Her lawyer obtained a copy of it on February 2, 2005. The cover letter enclosed with it that was sent to her lawyer indicated that she had until January 31, 2005 to file her appeal. That date is not disputed. The appeal itself was not filed until May 2, 2005. As noted above, Section 112(3) obliged the Employee to file her appeal within 30 days after the date she was served with the Determination by registered mail. That period had long elapsed by the time she filed her appeal.

21. Accordingly, the issue at this point in this case is whether or not the appeal period ought to be extended pursuant to Section 109(1)(b) of the *Act*. Unless and until an extension is granted, the merits of the appeal are not to be considered, except to the limited degree necessary to determine whether the extension ought to be granted (i.e., whether there is a "strong *prima facie* case" favouring the appellant on the merits of the appeal), as described below.

22. The Tribunal has said it will only grant extensions of the statutory time limit where there are compelling reasons to do so (*Re Roseg Management Corp.*, BC EST #D127/04). The Tribunal has considered the following non-exhaustive factors in deciding when, and under what circumstances, an appeal period should be extended (see *Re Unity Wireless Systems Corp.*, BC EST #RD041/05, *Re Nature's Choice Foods*, BC EST #D206/04, *Re Niemisto*, BC EST #D099/96 and *Re Pacholok*, BC EST #D511/97):

(1) is there a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

(2) was there an unreasonable delay in appealing;

(3) has there been a genuine and on-going *bona fide* intention to appeal the Determination;

(4) was the respondent party (i.e., the employer or employee), as well as the Director, made aware of this intention;

(5) will the respondent party be unduly prejudiced by the granting of an extension; and

(6) is there a strong *prima facie* case in favour of the appellant.

23. In my view, this case can be decided on the basis of the first two and the last factors. That is, the Employee has failed to provide a reasonable and credible explanation for her failure to file her appeal within the statutory time limit, or in a timely way thereafter, and there is not a strong *prima facie* case in favour of the Employee on the merits. As the case can be decided on the basis of these principles, I need not address the remaining principles.

no reasonable and credible explanation for failure to file within time limits or in a timely way

24. The Employee has provided no explanation for her failure to file her appeal within the statutory time limits. She supplies no information as to when she received the Determination. She says nothing about whether or not she knew of, or disputes, the statement in the cover letter to the Determination that the appeal period ended on January 31, 2005. She had her lawyer in the Small Claims Court matter convey her intention to appeal the Determination by letter dated February 7, 2005. She does not suggest that she was not in possession of the Determination by that date. Moreover, the Employee provides no explanation whatsoever as to why she waited almost three months beyond the date of her lawyer's letter to file her appeal.

25. Accordingly, I am unable to conclude that there is a reasonable and credible explanation for her failure to request an appeal within the statutory time limit or in a timely way thereafter.

strong prima facie case

26. In addition to the foregoing, there is no strong *prima facie* case in favour of the Employee on the merits of her appeal.

27. Section 112(1) of the *Act* states:

> **112** (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

28. The Employee relies on a ground of appeal, error of fact, which is not specifically provided for in Section 112(1) of the *Act*. She alleges that the Director committed an error of fact in not considering the entirety of the evidence. However, in making this allegation, she provides no explanation in support. She does not point to any evidence that the Delegate failed to consider.

29. As has been noted elsewhere, an error of fact can give rise to an error of law in some circumstances, such as where there is no evidence to support a finding of fact or where a determination is reached on a view of the facts which could not reasonably be entertained (*Re Gutierrez* (an as yet unnumbered decision of the Tribunal), *Re Lambert*, BC EST #D199/04, *Re Philp*, BC EST #D058/04, *Re Leader*, BC EST #D007/04). The Employee does not make such allegations in the instant case. Rather, she simply asserts that the Director failed to consider the entirety of the evidence.

30. A failure to consider relevant evidence may amount to a breach of natural justice (*Re Britco Structures*, BC EST #D260/03). Although the Employee has not described her allegations as a breach of natural justice, which is one of the grounds on which a Determination may be reviewed, I find I ought not to dispense with considering the issues before me simply because an unsophisticated appellant may not have correctly characterized the ground of appeal (*Re Philp*, BC EST #D058/99, *Re J.C. Creations Ltd.*, BC EST #RD317/03).

31. Having done so, however, there appears to me to be no basis on which to conclude that the Delegate failed to consider the entirety of the evidence. He directed his mind to the evidence supplied by the Employee, in the form of her complaint documentation containing her written statements, the Agreed Statement of Facts and the documents appended thereto. He considered them in light of the contrary evidence supplied by or on behalf of the Employer. He noted that the Employee failed to attend the hearing. As a result, the Employee supplied no evidence, in addition to her documentary evidence, to contradict the Employer's case.

32. For instance, he noted that, in her complaint, the Employee set out her version of the first contravention of the Employer's Employee Purchasing Policy. Her version differed from the Employer's version. Among other things, she said the incident took place on April 5, 2004. However, she signed a Corrective Action Form on April 4, 2004, which referred to the incident. Therefore, he noted, the incident could not have taken place on the days and dates she alleged. Further, the Delegate observed that in the Agreed

Statement of Facts, the Employee contended that she was coerced into making a statement concerning the second contravention in order to save her job, but she provided no reasons explaining this contention.

33. Additionally, in the course of his reasons, the Delegate noted that, in light of the Employee's absence from the hearing, there was nothing before him to contradict the Employer's evidence. Nor was there anything before him to explain discrepancies between her written statements and the Employer's evidence.

34. Clearly, the Employee's absence from the hearing put her at a disadvantage. However, in view of the lack of any explanation for her failure to appear, the Employee must bear the consequences of that failure. For instance, the Employee must bear the consequences of her failure to attend and provide better and more fulsome evidence and explanations than her written statements and the Agreed Statement of Facts. In the circumstances, the Delegate was entitled to weigh the evidence, such as it was, and come to a conclusion.

35. My review of the record and the Determination indicates that the Delegate considered all of the relevant evidence before him, including the Employee's written statements, the Agreed Statement of Facts, and the documents appended thereto. He weighed that evidence against the Employer's evidence and concluded, as he was entitled to do, that the Employer had proved its case that the Employee had been dismissed for just cause. Accordingly, the Employee was not entitled to compensation for length of service. In my view, the Employee has failed to show a strong *prima facie* case that the Delegate committed an error of fact that gave rise to an error of law or a breach of natural justice in so doing. Further, in my view, the Delegate did not err as alleged.

OUTCOME

36. The Employee's appeal is dismissed.

Alison H. Narod
Member
Employment Standards Tribunal