



An appeal

- by -

Easy Ways Drywall Inc. operating as Easy Way Inc and Easy Way USA Inc.
("Easy Way or employer")

- 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: Paul E. Love

FILE No.: 2000/861

DATE OF DECISION: March 5, 2001

DECISION

OVERVIEW

This is an application by Easy Ways Drywall Inc. operating as Easy Way Inc. and Easy Way USA Inc (the “employer” or “Easy Way”) to extend time to permit the filing of a late appeal. The deadline for filing the appeal was December 4, 2000. The employer filed the appeal on December 15, 2000. The employer did not form an intention to appeal within the appeal period. The employer did not advance any reason for the delay in filing an appeal, apart from his own neglect. The employer failed to show a serious issue or a strong case on the merits related to the appeal. While there could be said to be little additional prejudice flowing from the late filing of the appeal, there was some prejudice to the employee given the substantial amount of wages at issue. Given that the Delegate extended to the employer a reasonable opportunity to participate in the investigation, and the employer refused or neglected to participate, and the grounds advanced which were contradicted by a written contract of employment, the appeal could be said to have little prospect of success, and therefore I refused the application to extend time to file the appeal.

FACTS

This is an application by the employer for extension of time to file an appeal. The Delegate issued the Determination in this matter on November 9, 2000 in the amount of \$42,337.05. The deadline for the filing of the appeal was December 4, 2000. The employer claims to have located the Determination in a box on or about December 3, 2000. It was sent to him in Alberta, by the occupant of a house that he used to live at, which also is the registered and records office for his company. The appellant filed his appeal on December 15, 2000. The employer’s intention to appeal was not formed until after the expiration of the appeal period.

At the time of the investigation, the principal of Easy Way, John Albert, resided in the province of Alberta. The Delegate attempted to obtain the employer’s version of events. In a telephone call with John Albert, Albert advised the Delegate that Chapman was a subcontractor but didn’t do any work. The Delegate arranged, by telephone, a personal meeting with Albert, but Albert neglected or refused to attend. Albert indicated in his appeal submission that there was no possibility of his attending the meeting as he was “a province away” in Banff, Alberta at that time. The telephone call did not concern Mr. Albert as he believed that it was a “UIC matter”, and that Chapman did not work for him. I accept that Albert agreed to attend a meeting with the Delegate, when he did not ever intend to attend that meeting.

On the basis of the employee's evidence, the Delegate determined that David Chapman was employed as a vice president of sales and marketing between May 25, 1998 to December 21, 1999 at a rate of \$200.00 per day. Chapman was to market a product called "Painter's Pal". The employee's complaint to the Delegate was substantiated by a written contract of employment, and other evidence.

The grounds of appeal advanced by the appellant are that

- (a) the principal, John Albert, has limited reading ability and was drunk at the time he signed the employment contract;
- (b) that Chapman took him to court for expenses and he thought it was the end of the matter;
- (c) Chapman was to be paid on a commission basis, and he did not generate any sales, and did not request payment

The appellant indicates in his appeal submission that he is entitled to advance his side of the story.

I note that the contract between the parties is typed and consists of three pages. There is no evidence before me concerning who prepared the agreement.

In this case it is quite clear that:

- (a) the appellant neglected or refused to participate in the investigation and the matter was determined upon the evidence of the employee;
- (b) the "story" advanced by the employer that Chapman was a contractor on commission only, is inconsistent with the terms of the written employment contract;
- (c) the appellant would have a significant and uphill battle in attempting to persuade any trier of fact on a "non-est-factum" type of argument related to the employment contract, particularly given that this argument was not presented to the Delegate at the time of the investigation

ISSUE:

Should the Tribunal grant an extension of time to the employer to file this appeal?

ANALYSIS

In determining whether to grant an extension of time, I must consider whether;

- (a) the appellant formed the intention to appeal within the appeal period,
- (b) the appellant has a reasonable excuse for failing to file the appeal within the time limits set out in the Determinatio;
- (c) there is prejudice to the respondent from the late filing of the appeal;
- (d) the appellant has raised a serious issue or a strong case on the merits.

This is not a case where the appellant can show that the Delegate failed to afford to the employer a reasonable opportunity to participate in the investigation, pursuant to s. 77 of the *Employment Standards Act* (the “Act”). The employer appears to have refused or neglected to participate in the investigation. I note that any party who fails to participate in an investigation is in a very difficult position, as a party cannot “lie in the weeds”, and then make a case on appeal that should have been made to the Delegate. The Tribunal has an error correction function, and it is difficult for a party to allege delegate error where that party failed to participate in the investigation: *Triwest Tractor Ltd, BCEST # D286/96*.

The time for the employer to “tell his story” to a person charged with the investigation of the complaint is now passed. The question is whether time should be extended to the employer to attempt to show an error by the Delegate in a Determination, arising from an investigation in which the employer refused or neglected to participate.

It is apparent that the appellant did not form an intention to appeal within the appeal period. The Delegate became aware of the appeal when the appeal was filed with the Tribunal. I am not persuaded that the appellant has shown any reasonable excuse for failing to file within the time limits. This Tribunal has held in the past, that the failure of an appellant to update its address for corporate records, should not expect a special dispensation when they have neglected to ensure that they receive documents in a timely manner: *Ajuila, BCEST # D012/99*. In any event, it appears that the employer did receive the Determination within the appeal period, and no excuse has been advanced for the balance of the delay.

I am not persuaded that the appellant has raised a serious issue, let alone a “strong case” on the merits concerning this Determination. I note that the Determination was issued on November 9, 2000 for work which had ceased on December 21, 1999. I accept that the employee has been prejudiced in this case, and is out of pocket for a substantial amount of money. While there is little additional prejudice which would flow from the late filing of the appeal, I am satisfied that there is some prejudice. Given that the appellant did not form any intention to appeal within the appeal period, has no real cogent explanation for the delay in filing the appeal, and that the

appellant has little chance of succeeding on this appeal, I do not extend time for the filing of the appeal.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I dismiss the application of the employer to extend time for the filing of the appeal.

PAUL E. LOVE

**Paul E. Love
Adjudicator
Employment Standards Tribunal**