

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 -

Jeanne L. Massei

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 99/046

DATE OF DECISION: March 16, 1999

DECISION

OVERVIEW

This is an appeal, under Section 112 of the *Employment Standards Act* (the “Act”), by Jeanne L. Massei against a Determination issued by a delegate of Director of Employment Standards (the “Director”) on January 8, 1999. In that Determination, the Director concluded that there was insufficient evidence that Ms Massei’s pregnancy was a factor in her former employer’s decision to terminate her employment on April 29, 1998.

The Determination (which she received on January 21, 1999) informed Ms. Massei that any appeal must be delivered to the Tribunal “...no later than February 1, 1999.” At her request, the Director sent Ms. Massei an appeal form by facsimile on January 24, 1999. Ms. Massei delivered her appeal to the Tribunal on February 2, 1999 with a letter which contained the following reasons for requesting an extension to deliver her appeal and for not delivering it on February 1, 1999:

I had planned to come down to your office and deliver this letter in person yesterday, but my husband was called into work and he couldn’t stay with the baby. As my baby is still very young and is bit a difficult, I couldn’t consider the trip into Vancouver, with the baby, from Bowen Island without an automobile.

Ms. Massei lives on Bowen Island. Her baby was born on September 11, 1998 and was, therefore, 5 months old in February, 1999.

The Director opposes Ms. Massei’s request for an extension on the ground that she had ample time to prepare and deliver an appeal in a timely manner and she could have delivered her appeal by facsimile.

Ms. Massei’s former employer, Club Plaza Enterprises Ltd., also submits that the Tribunal should not grant the request to extend the time period for appealing the Determination.

ISSUE TO BE DECIDED

The sole issue to be decided now is whether the Tribunal should exercise its discretion, under Section 109 of the *Act*, to grant Ms. Massei’s request for an extension of the time for filing her appeal.

ANALYSIS

Section 109 (1)(b) of the *Act* gives the Tribunal the authority to extend the time period for requesting an appeal even though the period has expired.

In deciding whether to grant such an extension, the Tribunal has consistently required appellants to establish that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

[See, for example, *Mega Tire Inc.* (BC EST #D406/97, *Robert Pacholok et al* (BC EST #D526/97) and *Niemisto* (BC EST #D099/96)] This is not an exhaustive list of criteria which may be applied by the Tribunal and other factors may be considered in the circumstances of a particular appeal.

In addition, the appellant (Ms. Massei in this case) bears the onus of satisfying the Tribunal that it should exercise its discretion. However, compelling reasons are required for an extension to be granted (*Moen and Sagh Contracting Ltd.*, (BC EST #D298/96).

To establish a strong *prima facie* case, the appeal must have some merit on its face and must not be obviously frivolous: *Astrolabe Marine Inc.*, (BC EST #D304/97); *Douglas K. Berg* (BC EST #D212/97).

I find that Ms. Massei, in the circumstances of this case, has satisfied me that the Tribunal ought to grant the time extension which she has requested and to hear the merits of her appeal.

The material before me shows that she had an on-going and *bona fide* intention to file a timely appeal. She received the Determination on January 21, 1999 and requested that the Director send her appeal forms on January 24, 1999. Were it not for her child-caring

responsibilities, she would have delivered her appeal to the Tribunal in person on February 1, 1999. The appeal was delivered only one day after the February 1st deadline.

Neither the submission by Club Plaza nor the Director establishes any undue prejudice by extending the appeal period by one day.

Ms Massei's reasons for delivering her appeal on February 2nd are reasonable and credible in the context of her responsibilities to care for her young infant. Section 126(4)(b) of the *Act* is unusual in that it places a 'reverse onus' on an employer to show that an employee's pregnancy is not the reason for terminating her employment or changing a condition of her employment unilaterally. As a result, evidentiary and credibility issues are of particular importance in deciding the merits of an appeal which turns on an interpretation or application of Section 54 of the *Act*. Ms. Massei has raised some compelling arguments about the findings of fact which were made by the Director in the Determination and about how those facts were applied to interpret the *Act*.

While I acknowledge that Ms. Massei could have delivered her appeal to the Tribunal by facsimile, on balance I am persuaded that delivering it one day late is outweighed by the other factors which I have set out above.

For all of these reasons, I find that I should grant the time extension requested by Ms. Massei.

ORDER

I order, under Section 116 and 109(1) of the *Act*, that Ms. Massei's appeal was filed within the extended time period and, thus, will be adjudicated in due course as directed by the Registrar.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sa