Employment Standards TRIBUNAL

An appeal

- by -

Caralee Jennings

- 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: Norma Edelman

FILE No.: 2001/047

DATE OF DECISION: March 12, 2001

DECISION

OVERVIEW

This is an appeal by Caralee Jennings, now Caralee Klein ("Klein"), pursuant to Section 112 of the Employment Standards Act (the "Act") against a Determination issued by a delegate of the Director of Employment Standards on November 27, 2000. The Director's delegate found that Old English Window Cleaning and Pressure Washing Ltd. ("Old English") did not owe Klein wages. The Determination stated that an appeal of it had to be delivered to the Tribunal by December 20, 2000. The Tribunal received an appeal on January 8, 2001. Klein effectively requested that the Tribunal extend the deadline to file an appeal. The Director's delegate and Old English made submissions on a possible extension of the deadline under Section 109(1)(b) of the Act. Klein provided a reply to those submissions. This appeal was decided based on the written submissions of the parties.

ISSUE TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the Act to extend the deadline for filing an appeal.

FACTS AND ANALYSIS

The Determination issued on November 27, 2000 found that Old English did not owe Klein wages. The Director's delegate did not accept Klein's position that she made herself available for work during her lunch and smoke breaks and therefore was owed one hour of pay for each day worked during her last two years of employment. In arriving at that conclusion the delegate accepted Old English's records for the twenty four-month period in question. Those records consisted of timesheets and pay statements kept contemporaneously and filled out and signed by Klein as accurate. Old English claimed that Klein did not work during her breaks and therefore the breaks were not included as time worked in its records. The delegate did not accept Klein's records, which consisted of a l998 and l999 personal calendar of hours. Klein's calendar showed total hours worked without deductions for breaks. The delegate said she could not rely on Klein's calendar. She questioned whether the calendar had been maintained contemporaneously as each entry was recorded in the same ink and had a very consistent appearance. Moreover, while each daily entry showed "no lunch" and there were no entries regarding smoke breaks, Klein had admitted, during a fact finding conference with all parties in October, 2000, that she received and sometimes left the office on lunch breaks and had taken smoke breaks during the day. The delegate concluded: "Without credible evidence disputing the employer's records and indicating the exact dates Jennings did and did not allegedly take a lunch break, I am not in a position to ascertain what wages, if any, are outstanding to her."

The Determination indicated that an appeal of it had to be received by the Tribunal no later than December 20, 2000. The Determination was sent by registered mail to Klein and Old English. I accept that Klein received the Determination on December 1, 2000. The delegate provided a confirmation sheet from Canada Post that indicates the Determination was delivered on December 1, 2000. Klein did not dispute that she received the Determination on that date.

The Tribunal received an appeal from Klein on January 8, 2001.

Klein effectively requested that the Tribunal extend the deadline to file an appeal. She provided the following explanation why the appeal was late:

> At the time the papers were served my family was dealing with the death of a close family friend. The situation was quite intense and the concerns continued over the holiday period. I apologize but I did not feel able to deal effectively with my appeal and did not pick up the necessary appeal forms I was in Nelson BC with my family over the Christmas break. As soon as I returned I typed out all the documents that would be needed to file my review.
>
> I realize that you may not accept my reasons but they are sincere and I do appologise. I did do the best I could with the time I had. I hope you will at least look at my reasons for a review if they don't seem to you that it's not worth the review then I thank you for your time. (reproduced as written)

Klein's reasons for the appeal include the following: she has concerns the delegate favoured the employer; she says she raised the subject of overtime with the Office Manager at Old English and was told overtime was not paid and she was not to show it on her time sheets; although she had lunch breaks prior to her last two years of employment, she did not have a lunch break during her last two years of employment and ate her lunch at her desk and performed work during this time; and, although, she took smoke breaks, she worked during this time. Klein enclosed statements from Brian Searle ("Searle") and Stewart Hamilton ("Hamilton"), which were previously provided to the delegate, which state that Klein would answer the phone during her smoke breaks. Searle further said Klein would eat at her desk and Hamilton said Klein worked through her lunch and ate at her desk.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109(1)(b) of the Act.

The Tribunal received a submission dated January 31, 2001 from the Director's delegate. The delegate suggests that Klein sent a copy of the Determination to a retired employee at the Employment Standards Branch office in Nelson on December 1, 2000 for her review. She said Klein had told her she had a "friend" who worked at the Employment Standards Branch and was aware of the workings of the Branch. Further, the delegate said that Klein could have obtained the appeal forms when she was in Nelson given she knew an Employment Standards Branch office was located in that town. Finally, the delegate said the appeal period expired prior to the

commencement of the "holiday period" in question and Klein had more than sufficient time and opportunity to advise the Tribunal of her intentions to appeal and to request a "stay" so that she could prepare her reasons for the appeal at a later date if so permitted by the Tribunal.

The Tribunal also received a submission dated January 15, 200l from David Clissold, on behalf of Old English. He stated that the delegate, at the time of the inquest (which I take to be the fact finding conference in October 2000), explained to him and his Office Manager, as well as Klein, the procedures for filing an appeal and she clarified the fact that all appeals must be filed no later than the date which was specified. The directions were clear and concise as to the ramifications resulting should an appeal not be filed by this time. Clissold said they all understood and stated so during their meeting. He further said Klein has attempted to falsify records with respect to her hours of work and this appears obvious given the exact same style and penmanship used on her calendar. Clissold also said that Klein's witnesses are ex-employees that have personal axes to grind with the company for termination of their employment and their written statements are hardly credible. Clissold contends that an extension to the appeal period would be a travesty of justice.

In a reply submission dated February 13, 2001, Klein says "It may well have been nervousness on my part, however, I did not leave the (fact finding conference) with the same understanding that Mr. Clissold seems to have." With regard to her records, she agrees that the same make and colour of "company" pen was used for the purpose of recording and that the style reflects the fact that these records were taken from her calendars upon which she kept track of her hours. Her pay stubs did not show hours worked from day to day, therefore, the only records she has are her calendars. She further said Hamilton was not terminated but quit his employment and after Clissold heard Searle's statement at the fact finding conference, Clissold said he would "…be taking care of him", and approximately three days later Searle was laid off work. In response to the delegate's submission, Klein said she could not argue with the timeline stated, however, she was not aware of the possibility of a "stay" and was not as clear in her understanding of the timeline as she should have been.

On February 14, 2000, the Tribunal received a submission from Hamilton, which states that Klein continued to work at lunch and when she went on a smoke break she would answer the phones. He said he quit his employment and was not dismissed. He enclosed two Records of Employment that indicate he quit Old English Home Services.

Section 109(1)(b) of the Act provides the Tribunal with the discretion to extend the time limit for an appeal.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, Metty M. Tang BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal has identified several material considerations including:

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 ongoing bona fide intention to appeal the Determination;

iii.) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been aware of this intention;

iv.) the respondent party will not be unduly prejudiced by the granting of the extension; and

v.) there is a strong prima facie case in favour of the appellant.

(see Niemiesto BC EST #D099/96)

I have considered the circumstances of the late filing of this appeal and I am not satisfied that Klein has provided a reasonable and credible explanation for her failure to deliver an appeal to the Tribunal before December 20, 2000. She was properly served with the Determination and she received it on December 1, 2000, well in advance of the deadline to file an appeal. I do not accept that Klein was unclear in her understanding of the deadline to file an appeal and that she was unable to contact the Tribunal in a timely fashion. Clear instructions were included on the Determination about how and when to file an appeal. An information sheet was also attached to the Determination, which stated that an appeal had to be delivered to the Tribunal on or before the deadline shown on the Determination. In her submission, the delegate suggested that Klein faxed a copy of the Determination to a friend in the Employment Standards Branch office in Nelson on December 1, 2000 for her review. Klein did not dispute this. If Klein was able to do this, she could have also contacted the Tribunal. Accordingly, I am not satisfied that her situation prevented her from contacting the Tribunal prior to December 20, 2000 to file an appeal or to explain her situation and request additional time, if necessary, to file her appeal.

Nor am I satisfied that there has been an ongoing bona fide intention to appeal the Determination in a timely fashion. There is no evidence Klein intended to appeal prior to her mailing the appeal form to the Tribunal some 36 days after she received the Determination. Further, Klein never notified the Director's delegate or Old English of her intention to make an appeal. The first they knew of the appeal was when they received notification from the Tribunal that an appeal had been received from Klein.

Although there is no evidence Old English would be unduly prejudiced by an extension of the deadline to file an appeal, in my view, it would not be in the interest of Old English to have this matter further delayed during the appeal process. One of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act. It is in the interest of all parties to have complaints and appeals dealt with promptly.

Finally, Klein has not established that she has a strong case that the delegate erred in finding Old English did not owe her wages. I make no decision about the merits, but the following factors

cause me to conclude there is not a strong prima facie case. First, there is no foundation for Klein's claim that the delegate "favoured" Old English. The fact that the delegate may have had prior dealings with Old English does not establish she was biased in her investigation. Second, Klein has not shown that the delegate erred in concluding that her records were not made contemporaneously. Third, Klein's position regarding when she had her lunch breaks is not convincing. She says she only had lunch breaks prior to her last two years of employment. Thus, the time period for when she never had breaks exactly matches the time period for when she can claim wages under the Act. Without some explanation of why things changed at the time she claims, the coincidental cut off period causes me to doubt her position. My doubt concerning this matter is enhanced when I consider Hamilton's evidence. Hamilton, who worked at Old English for 12 years, made no mention of Klein taking breaks prior to her last two years of employment. Finally, I did not find Searle's information to be helpful because he only partially worked the same hours as Klein.

The obligation is on the appellant to exercise reasonable diligence in the pursuit of an appeal. In this case, the appellant has failed to persuade me that she has done so. I find no compelling reasons to allow Klein's appeal.

For the above reasons, I have decided not to extend the time limit for requesting an appeal in this case.

ORDER

Klein's application under Section 109(1)(b) of the Act to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the Act the appeal is dismissed and accordingly the Determination is confirmed.

NORMA EDELMAN

Norma Edelman
Adjudicator
Employment Standards Tribunal