Employment Standards TRIBUNAL

An appeal

- by -

Roseg Management Corp.
("Roseg")

- 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: Carol L. Roberts

FILE No.: 2004A/95

DATE OF DECISION: July 23, 2004

DECISION

SUBMISSIONS

Reidar Ostensen:	On behalf of Roseg Management Corp.
Ken Elchuk:	On behalf of the Director
Ana Renton:	On her own behalf

OVERVIEW

This is an appeal by Roseg Management Corp. (Roseg) pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued April 7, 2004.

Ana Renton filed a complaint with the Employment Standards Branch alleging that Roseg had contravened the Act in failing to pay her overtime wages, vacation pay and compensation for length of service.

A delegate of Director of Employment Standards ("the Director") mediated the complaint, and the parties resolved the issues of overtime and vacation pay. On March 19, 2004, the delegate held a hearing on the issue of Ms. Renton's complaint regarding compensation for length of service. Mr. Ostensen and his wife, Georgina appeared on behalf of Roseg, and Ms. Renton appeared on her own behalf. Roseg's position at the hearing was that Ms. Renton quit. In addition to his oral testimony, Mr. Ostensen entered into evidence a December 8, 2002 letter from Stephen Ostensen, who identified himself as the acting Quality Control Manager. In his letter, Stephen Ostensen indicated that in August, 2002, Ms. Renton informed him that she was leaving her job and would not be returning.

Ms. Renton's evidence was that Mr. Ostensen refused to schedule work for her and gave her job to another person. She denied telling Stephen Ostensen that she would not come back to work.

Following the hearing, the delegate concluded, on a balance of probabilities, that Ms. Renton did not quit her position. He preferred Ms. Renton's direct evidence over Stephen Ostensen's unsworn document on the basis that Stephen Ostensen's evidence could not be tested in cross- examination. The delegate applied the test for determining whether an employee quit or was fired established by the Tribunal in *Burnaby Select Taxi* (BC EST #D091/96), and concluded that Ms. Renton did not quit.

The delegate also then determined that Ms. Renton had been laid off for more than a temporary period. He further determined that Roseg had not given Ms. Renton written notice of her termination or equivalent termination pay. The delegate found that Roseg did not have just cause for Ms. Renton's termination.

The delegate determined that Roseg owed Ms. Renton $2,864.03 in wages and vacation pay. He further imposed a $500.00 penalty for Roseg's contravention of section 63 of the Act.

The Determination contained a large box within which appeal information was set out, including information that an appeal of the Determination was to be delivered to the Employment Standards Tribunal by 4:30 p.m., May 13, 2004. The box also included the Tribunal's telephone number and web site. The information also states that the Tribunal is separate and independent from the Employment Standards Branch.

The Employment Standards Branch received a copy of an appeal form and letter attachment from Roseg on May 13, 2004. Roseg did not deliver the appeal documents to the Tribunal until June 5, 2004. Enclosed with the appeal form was a letter from Mr. Ostensen which read as follows:

> Tribunal
>
> Understand that our appeal was mailed to the wrong department. Upon writing the appeal we contacted the Employment Standards Office here in Surrey and were informed to mail the appeal to their main office in Victoria.
>
> We contacted the Employment standards twice firstly to find out when the cheque should be issued and was told to include with the appeal.
>
> ….
>
> [reproduced as written]

The grounds of appeal are that the delegate erred in law. Specifically, Roseg contends that the delegate erred in his "dismissal of signed evidence by Stephen Ostensen who was physically unable to attend the hearing". Roseg seeks to have Stephen Ostensen be allowed to give oral evidence.

Roseg also objects to the assessment of the administrative penalty.

These reasons for decision address only the timeliness of Roseg's appeal.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

There is no evidence as to when Roseg was served with the Determination.

Although the appeal form is dated May 4, 2004, the documents demonstrate that the appeal was faxed directly to the delegate, rather than the Tribunal, on May 13, 2004. The Tribunal received the appeal on June 4, 2004, 18 days after the statutory time period.

In his letter of appeal, Mr. Ostensen contends that he was never provided with an address to which the appeal should be sent.

The Director's delegate submits that the appeal should not be accepted. He says that the Determination clearly sets out where an appeal is to be sent, and contact information. He also says that the appeal form itself clearly sets out the address and fax number of the Tribunal.

The delegate also contends that Mr. Ostensen has not set out good reasons why he failed to comply with the time frame in which to file an appeal.

The delegate further contends that the appeal was delivered eighteen days after the expiry of the appeal period, and that this constitutes an unreasonably long delay.

The delegate says that, although the evidence suggests that Mr. Ostensen always intended to appeal the Determination, it is odd that, despite clear direction to deliver the appeal to the Tribunal, Mr. Ostensen chose not to do so.

The delegate submits that the only harm to the Director would be further delay in obtaining the wages owed to Ms. Renton.

Finally, the delegate submits that Roseg does not have a strong case that can succeed on appeal. He submits that the issue at the hearing was whether Ms. Renton quit her employment or was terminated, and that Roseg took the position that Ms. Renton quit. He says that the key piece of evidence relied on at the hearing for this position was Stephen Ostensen's letter. Although Stephen is not identified in the Determination, it is clear from the submissions that Stephen is Mr. Ostensen's son, and a Roseg Director/Officer. The delegate says that Mr. Ostensen declined the opportunity to request an adjournment of the hearing in order to arrange for Stephen Ostensen's evidence to be given in person, and that he cannot now, on appeal, present "new evidence" in support of Roseg's position that Ms. Renton quit.

The delegate submits that the facts of this case closely parallel those in *Ocean City Realty Ltd.* (BC EST #D277/03) in which the issue was whether the complainant quit her employment or was terminated by her employer. The employer did not attend the adjudication hearing but made written submissions. After the delegate found against the employer, the employer appealed, claiming it ought to have the opportunity to present new evidence. The Tribunal found that it would have been an error on the part of the delegate to accept the written submission of the employer over the oral evidence of the employee. The delegate submits that it is not now open to Roseg to present oral evidence that was available at the time of the hearing to correct the problem.

Ms. Renton also submits that the Tribunal should not consider the late appeal. She notes that the appeal information, complete with the phone number, web site and appeal deadline, is clearly indicated on the Determination. She also notes that the matter had been delayed on several occasions previously due to Mr. Ostensen's failure to prepare necessary documents, and his delay in getting her record of employment to her. She says that the delays have caused her stress and financial discomfort.

In reply, Mr. Ostensen says that the appeal information does not contain an actual mailing address, and that, when he contacted the Employment Standards Office in Surrey, he was told to mail the letter to the Victoria office. He suggests that, if the letter was received by the wrong department, that department ought to have contacted the Tribunal or returned the letter.

Mr. Ostensen also contends that Roseg was not given an opportunity to request an adjournment so that Stephen Ostensen could have given evidence in person. In fact, he says, given that Stephen Ostensen was in the United Kingdom, he would have asked for that opportunity. Rather, he submits that the delegate stated that Stephen Ostensen's letter was not credible since he was the son of Roseg's owners.

ANALYSIS

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:

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

(2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;

(3) the respondent party as well as the director has been made aware of this intention;

(4) the respondent party will not be unduly prejudiced by the granting of an extension; and

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

These criteria are not exhaustive. (see also Pacholak (BC EST #D526/97)

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.)* BC EST #D298/96)

I am not persuaded that Roseg has demonstrated reasons for extending the time in which it may file an appeal.

I find no basis to conclude that Roseg has a reasonable explanation for the failure to request an appeal within the statutory time limit.

There is some evidence that Roseg had a genuine, ongoing intention to file an appeal of the Determination. The appeal letter is dated May 4, 2004, and the appeal documents were faxed to the delegate on May 13, 2004. Nevertheless, the appeal documents were not delivered to the Tribunal until June 4, 2004.

Mr. Ostensen says simply that the appeal was not filed in time because he sent it to the wrong address, and suggests that the Branch had a duty to advise him that the appeal documentation had been sent to the Branch in error. I am unable to agree that the Branch is under any such duty.

In *Re Matty M. Tang* (BC EST #D211/96) the Tribunal held that an appellant had an obligation to exercise reasonable diligence in pursuing an appeal. Given that the Determination contained all the relevant information on how and where to file an appeal, I find that Roseg did not exercise reasonable diligence in pursuing the appeal.

Although the Director was aware that Roseg intended to file an appeal, there is no evidence Ms. Renton was aware of Roseg's intent.

While I accept that Ms. Renton will be inconvenienced by a delay if an extension is granted, I am unable to find that either she or the Director would be unduly prejudiced if one was granted.

Finally, I find no strong *prima facie* case in Roseg's favour.

Roseg submitted an unsworn statement from Stephen Ostensen, the son of Mr. Ostensen and an Officer/Director of Roseg, at the hearing in support of its position that Ms. Renton quit. Ms. Renton denied that she quit. The delegate, in the face of two conflicting statements, had to prefer one version of events over another. He chose the oral evidence of Ms. Renton over the unsworn document signed by Stephen Ostensen. The basis for Roseg's appeal is that the delegate erred in preferring the oral evidence over unsworn documentary evidence. I find no error of law in this conclusion.

Roseg submits that Stephen Ostensen should now be entitled to give oral evidence. Even if an extension of time to file an appeal was allowed, Roseg would not be entitled to present this "new evidence". The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see Tri-west Tractor Ltd. BC EST #D268/96 and Kaiser Stables Ltd. BC EST #D058/97). In any event, Stephen Ostensen's evidence was clearly available at the time of the hearing.

There is nothing in the Determination that suggests that Stephen Ostensen was out of the country at the time the hearing was held, or that Roseg asked to have the hearing adjourned, or Stephen Ostensen contacted by telephone to present his evidence. Although Roseg submits that it was not given the opportunity to seek an adjournment, there is no indication it asked for one. Roseg also presents no explanation why a letter signed by Stephen Ostensen on December 8, 2003 regarding events that occurred in August, 2003, would be presented at a hearing before the delegate on March 19, 2004.

ORDER

Pursuant to section 109(1)(a) of the *Act*, I deny Roseg's application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal