

An appeal

- by -

Gerhard Walter
("Walter")

- 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: David B. Stevenson

FILE No.: 2005A/97

DATE OF DECISION: August 17, 2005

DECISION

SUBMISSIONS

Gerhard Walter	on his own behalf
Peter J. Roberts	on behalf of Kispiox Forest Products Ltd.
Amanda Welch	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal under Section 112 of the *Employment Standards Act* (the “Act”) by Gerhard Walter (“Walter”) of a Determination that was issued on April 14, 2005 by a delegate of the Director of Employment Standards (the “Director”).
2. Walter had filed a complaint with the Director claiming entitlement to length of service compensation from Kispiox Forest Products Ltd. (“Kispiox”). The Determination found that Walter had not filed his complaint within the time limits specified in Section 74 of the *Act* and refused to accept the complaint.
3. Walter says the Director erred in law and failed to observe principles of natural justice in making the Determination.

PRELIMINARY ISSUE

4. A preliminary issue relating to the timeliness of the appeal has arisen. On June 1, 2005, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal.

THE FACTS

5. The facts relating to the preliminary issue are:
 - The Determination was issued on April 14, 2005 and was sent to Walter by registered mail.
 - On May 19, 2005 Walter sent an appeal of the Determination, comprising an Employment Standards Tribunal Appeal Form, a copy of the Determination and an attached letter, by registered mail and by fax to the Employment Standards Branch office in Victoria.
 - The Appeal Form and attachments were forwarded by fax from the Employment Standards Branch office in Victoria through Kelowna to the Employment Standards Branch office in Terrace on May 19, 2005.

- Other copies of the Appeal Form and attachments arrived by mail at Employment Standards Branch offices in Victoria and Terrace over the next few days.
- On May 31, 2005, the Employment Standards Branch office in Terrace forwarded a copy of the Appeal Form and attachments to the Tribunal.
- On June 1, 2005, the Tribunal notified the parties that a late appeal had been received and sought submissions on whether to extend the time for filing the appeal.

ARGUMENT AND ANALYSIS

6. The Tribunal has established a non-exhaustive list of criteria for the exercise of discretion extending the time to file an appeal. 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 is not an unreasonable delay in filing the appeal;
 - (3) there has been a genuine, ongoing bona fide intention to appeal the determination;
 - (4) the respondent and the director has been made aware of this intention;
 - (5) the respondent will not be unduly prejudiced by the granting of an extension; and
 - (6) the appellant has a strong prima facie case that might succeed.
7. Walter says it is appropriate to extend the time for filing his appeal as the delay was the result of an honest mistake. He says he decided to appeal as soon as he read the Determination it and advised the Director of that decision within the time limits. He argues that he has a strong case on appeal.
8. Counsel for Kispiox takes the position that the Tribunal should not extend the time limits. He argues Walter has not provided a reasonable explanation for the delay in filing his appeal, that Kispiox was not aware of Walter's intention to file an appeal until it received the Tribunal's June 1, 2005 letter, that Kispiox is prejudiced by the delay in filing the appeal and the merits of the claim are weak.
9. The Director takes no position on whether the time limits should be extended.
10. I have decided to extend the time limits for appeal in this case. This decision is based on my view that Walter has provided a reasonable and credible explanation for the delay, that the delay in filing was only one week, that there was a genuine intention to appeal the Determination and the respondent Kispiox will not be unduly prejudiced by the granting of an extension. There is no suggestion the appeal is frivolous. The appeal has raised some questions about the correctness of the Determination that should be addressed, but it is not appropriate to comment further on the merits of the appeal at this stage (see *Round Table Enterprises Ltd. operating as The Troller Pub*, BC EST #D052/05)
11. In response to Kispiox' submission on prejudice, while I appreciate their concern that the complaint process has been continuing for a considerable period of time and the delay in processing the complaint

may have affected their ability to respond, there is no indication that the delay in filing the appeal has added unduly to that concern.

ORDER

12. Pursuant to Section 109(1)(b), I extend the time for filing an appeal of the Determination dated April 14, 2005 to June 1, 2005.

David B. Stevenson
Member
Employment Standards Tribunal