

An appeal

- by -

Cross Current Divers Ltd. operating as Diver's World
(“Cross-Current”)

- 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: William Reeve

FILE No.: 2003/013

DATE OF DECISION: April 15, 2003

DECISION

OVERVIEW

This is an appeal by Cross Current Divers Ltd. operating as Diver's World ("Cross-Current") pursuant to section 112 of the *Employment Standards Act* (the "Act") from a Determination issued by the Director of Employment Standards (the "Director") on October 8, 2002. The Determination found that Cross-Current had contravened sections 18(1) and 21(1) of the *Act* and that employee Brian Barry ("Barry") was owed \$1,279.13. The amount was composed of regular wages, commission wages, unauthorized deductions, vacation pay and interest.

The deadline for appeal fell on or about October 31, 2002. The appeal was received by the Tribunal on February 26, 2003. The appeal included reasons why the appeal was late. The appellant, Cross-Current, seeks an extension of the deadline to allow the appeal to be considered on its merits.

The issue of whether to extend the deadline is decided on the basis of the written submissions of the parties.

ISSUE

The only issue to be addressed in the Decision is whether the Tribunal should extend the deadline for requesting an appeal in accordance with the powers of the Tribunal under section 109(1)(b) of the *Act*.

ARGUMENT

The appeal by Cross-Current states that the business closed on June 17, 2003 [sic] and that on September 12, 2003 [sic] the principal of the business, Robert Rodvik ("Rodvik") left for Eastern Canada where he was not readily accessible. It is assumed that the appellant intended to refer to the year 2002, not 2003, in these assertions. Cross-Current, in its appeal and in its final reply, explains that it was under the mistaken impression that on its request the process that led to collection action on the Determination had been postponed.

The Delegate of the Director provides a chronology of attempts to advise Cross-Current of the complaint and of the Determination. According to the chronology, which is not disputed by Cross-Current, the firm's Registered and Records office received a copy of the Determination on October 9, 2002. The Delegate points out that it was not until its Registered and Records Office was served with a writ of seizure and sale, on January 27, 2003, that Cross-Current chose to take steps to respond to the matter.

THE FACTS AND ANALYSIS

The *Act* imposes an appeal deadline to ensure that appeals are dealt with promptly. This is consistent with one of the purposes of the *Act*, which is to provide fair and efficient procedures for resolving disputes. Under section 109(1)(b) of the *Act*, the Tribunal can extend the time for requesting an appeal, even though the appeal period has expired.

The Tribunal does not grant extensions automatically but it may extend a time limit if there are compelling reasons to do so. To help it decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria. They are the following:

1. is there a good reason why the appeal could not be filed before the deadline;
2. was there an unreasonable delay in appealing;
3. did the appellant always intend to appeal the determination;
4. were the other parties aware of the intent to appeal;
5. is an extension of the appeal deadline harmful to the interests of the respondent; and
6. does the Appellant have a strong case that might succeed if an extension were granted.

There is no dispute that the Determination was sent to the last known address for Cross-Current as provided in section 122(1)(b) of the *Act*. It was also sent to the home address of the Corporate Director and to the Registered and Records office of the firm. Section 122 reads as follows.

- 122** (1) A determination or demand that is required to be served on a person under this Act is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.
- (3) At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.
- (4) A determination or demand transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgment of the transmission from the person served.

Barry's employment, according to the Determination, ended on May 19, 2002. Four weeks later, according to the appeal, the business where Barry had been employed was closed and on September 12, 2002, the principal of Cross-Current left BC to pursue other endeavours. After efforts to contact Cross-Current were unsuccessful the Delegate issued the Determination on October 8, 2002 and it was served as provided in the *Act*. The agent at the firm's Registered and Records office attempted to bring the Determination to the attention of the principal of Cross-Current however no attempt was made to file an appeal within the time allowed. A writ of Seizure and Sale was served on the firm's Registered and Records office on January 27, 2003. Only on January 28, 2003, the day after the writ of seizure and sale was served, did Cross-Current repond to the matter. Even then, it took almost a month for Cross-Current to file its appeal.

As the Delegate points out, Cross-Current failed to set in place processes to respond to its obligations after terminating Barry's employment or after Rodvik left the province. The Determination was served as

required by the *Act* but because of Cross-Current's failure to make adequate arrangements or, apparently, to take the Determination seriously, nothing was done until collection action commenced. Nothing that has been submitted suggests that Cross-Current was prevented from filing an appeal in a timely manner by any circumstance beyond its control or that there was a good reason for the delay. To the contrary, the evidence and argument suggest that Cross-Current's failure to either make adequate arrangements to fulfill its obligations or to take seriously the Determination until collection action commenced are the only reasons that the appeal was filed late.

The submissions of Cross-Current refer to a belief that the process has been "postponed" or that "the process was on hold". No evidence has been adduced to support this proposition. It is denied by the Delegate who asserts, quite to the contrary, that she informed the agent that the matter would proceed, as in fact it did. The contention that there was some agreement to postpone the process is also not supported by the statement from the agent at the firm's Registered and Records office through whom such information would have been relayed. I do not believe that the Delegate agreed to such a postponement.

The appeal was filed almost seventeen weeks after the deadline. In the absence of any good reason this would appear to be an unreasonably long delay.

There is no evidence that Cross-Current gave any indication to anyone of intending to appeal the Determination until after collection action commenced.

Though the respondent, Barry, made no submission it can be assumed that acceptance of the appeal would be contrary to his interests in that it would delay disbursement of the wages found owing to him.

The final criterion of the six listed above is the question of whether the appellant has a strong case. No evidence has been provided that would cast any doubt on the correctness of the Determination in its calculation of liability for wages owed.

For all these reasons the request to extend the deadline for appeal cannot succeed.

ORDER

Cross-Current's request to extend the time limit for making an appeal is denied. The appeal is dismissed pursuant to section 114(1) of the *Act*. Pursuant to section 115(1) of the *Act* the Determination dated October 8, 2002 is confirmed.

William Reeve
Adjudicator
Employment Standards Tribunal