Employment Standards TRIBUNAL

An appeal

- by -

Mini Move Inc.

- 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.: 2003A/59

DATE OF DECISION: April 28, 2003

DECISION

OVERVIEW

This is an appeal by Mini Move Inc. ("Mini Move") pursuant to section 112 of the Employment Standards *Act* (the "*Act*") against a Determination issued by the Director of Employment Standards (the "Director") on December 4, 2002. The Determination found that a former employee of Mini Move, Mr. Victor Hill ("Hill"), was owed $1,228.05. The amount alleged to be owing was composed of compensation for length of service in accordance with section 63 of the *Act* plus related vacation pay and interest.

The deadline for filing an appeal of the Determination was January 13, 2003. The appeal was received by the Tribunal on February 20, 2003. The implication of filing a late appeal is that the Appellant wishes an extension of the deadline for appeal so that the appeal can be conisdered on its merits. This Decision on the timeliness issue is based on the written submisions from the parties.

ISSUE

The only issue to be addressed in this 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*.

EVIDENCE AND ARGUMENT

On the bottom of the first page of the appeal form dated January 12, 2003 there is a notation, "Sent Jan 12 Again Feb 19". On the first page of the documents submitted with the appeal there is a further notation ,"Sent late January/again Feb 19". The appeal documents bear Mini Move's fax machine imprint for Febraury 20, 2003 and were received by the Tribunal on that date. In an e-mail message sent to the Tribunal and dated March 4, 2003 Mini Move said that it had received the appeal application form requested from the Tribunal on Jauary 7, 2003. Mini Move stated that the appeal had been sent to the Tribunal on January 12 and went on to say, "My impression now is that the appeal sent back to her was not the correct destination."

In its reply to the timeliness issue on this appeal the Delegate of the Director stated that, "…the appeal should be summarily dismissed as it was not filed in the time allowed under the *Act*." The Delegate also stated that, "…there has been no reasons provided why the appeal was late. The Tribunal has consistently held that if no good reason is brought forward for the delay in filing the appeal after the deadline then the appeal is dismissed." The Delegate also pointed out that in filing the appeal Mini Move had selectively deleted the deadline information that was part of the Determination.

The response to the appeal by the Respondent Hill points out that no evidence, such as a fax confirmation slip, has been produced to show that Mini Move sent the appeal, within the time limit, to a wrong fax number as claimed.

THE FACTS AND ANALYSIS

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 are 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 succceed if an extension were granted.

In the present appeal it has not been suggested that something prevented Mini Move from appealing within the time limit. Instead Mini Move had advanced the proposition that an appeal was sent within the time limit but that it was sent to a wrong fax number by error. While such an error is quite possible no actual evidence of such an error has been produced.

The deadline for appeal was January 13, 2003 and the appeal was received on February 20, 2003. The delay of over five weeks, approximately the same as the normal period allowed for appeal, seems unreasonable, particularly in the absence of any reason that would have prevented Mini Move from appealing in a timely manner.

It could be inferred from the fact that Mini Move obtained an appeal form, according to its assertion, before the deadline had expired, that Mini Move did have an intention to appeal within the deadline, despite the fact that it failed to do so. The date on which the appeal form was obtained has not been proven. Neither the Respondent, Hill, nor the Director's Delegate report receiving any information in advance that Mini Move intended to appeal, nevertheless, I am prepared to believe that the appeal form was obtained before the appeal deadline, thus indicating some intention to appeal.

Hill did not address the question of the effect of extension of the appeal deadline on his interests. It can be inferred, however, that the effect would be to somewhat delay final resolution of the matter and this would be contrary to his interests.

The final criterion listed above is the question of whether the Appellant has a strong case. The *Act*, section 63, creates a legal liability on employers for compensation for length of service under certain defined circumstances. The Director found that the liability applied in the circumstances that exist in this case. Mini Move argues that Hill terminated his employment by declining to return to work. If an employee terminates employment then under section 63(3)(c) there is no liability for compensation for length of service.

In weighing the evidence submitted by both Mini Move and Hill, the Delegate concluded that Hill had not terminated his own employment but rather that he had been laid off and not recalled. In coming to this

conclusion the Delegate referred to the Record of Employement issued by Mini Move on June 2, 2001 indicating that Hill would not be returning to work with Mini Move.

Mini Move, in its appeal, argues that it entered misleading information on the Record of Employment showing Hill as being "laid off for lack of work" rather than for medical reasons, or as having quit, so as to facilitate a claim by Hill for Employment Insurance benefits. It says it did this at Hill's request. This may be so, however Mini Move has no explanation for why it checked "not returning" instead of "unknown" under the question about the expected date of recall on the Record of Employment. The obvious inference is that Mini Move, not Hill, was terminating the employment relationship, as of the date of the Record of Employment.

On balance, nothing that Mini Move has produced in its appeal in the way of argument or evidence can be considered a credible challenge to the judgement of the Delegate in reaching his conclusion that Hill's employment was terminated by Mini Move under circumstances that lead to a liability for compensation for length of service. Mini Mover, therefore, does not appear to have a strong case that might succeed.

After considering all the criteria listed above, as well as the evidence and arguments submitted, I do not believe that compelling reasons exist for the Tribunal to exercise its power to extend the appeal deadline. I, therefore, decline to do so.

ORDER

The Appellant Mini Move's request to extend the time allowed for making an appeal is denied. The appeal is dismissed pursuant to sectiuon 114(1) of the *Act*. Pursuant to section 115(1) of the *Act* the Determination dated December 4, 2002 is confirmed.

William Reeve
Adjudicator
Employment Standards Tribunal