

An appeal

- by -

Mike French
("French or Employee")

- 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: Paul E. Love

FILE No.: 2001/90

DATE OF DECISION: April 2, 2001

DECISION

OVERVIEW

This is an application by Mike French (the “employee” or “appellant”) to extend time to permit the filing of a late appeal. The deadline for filing the appeal was December 5, 2000. The employee filed his appeal as a “cross-appeal” after learning that the employer filed an appeal of the Determination. The employee advanced no reasonable excuse for the late filing of the appeal. The appeal raised issues attacking the findings of fact made by the Delegate, which were based in part upon the Delegate’s assessment of credibility. I dismissed the application for an extension of time as there was no bona fide intention to appeal within the appeal period, there was no reasonable explanation for the delay in appealing, and the appeal was devoid of merit. Further, I am concerned that “cross-appeals” should not be permitted, as this is a procedure which is not provided for in the *Employment Standards Act* (the “Act”), and if granted, may tend to encourage frivolous and vexatious appeals.

FACTS

This is an application by the employee for extension of time to file an appeal. The Determination in this matter was issued on December 5, 2000 in the amount of \$2,693.88 for wages and interest in the amount of \$184.75. The deadline for the filing of the appeal was December 29, 2000.

The appeal was filed on January 25, 2001, and is filed outside the 15 day time limit provided in s. 112(2) of the *Act*. The appeal was filed by Mr. French in response to an appeal filed by the employer.

The reason advanced for the late filing of the appeal is set out below:

This cross appeal is late because the ICBC involvement prompted me to get legal advise first. John Dafoe told me that Nancy was appealing so Cori & I let Nancy get the paperwork going (sic)

The appellant filed a further written submission on March 22, 2001, but this submission does not address the issue of why the appeal was filed late.

The grounds advanced in the appeal consist primarily of disputes the employee has with the findings of fact made by the Delegate. In particular, the employee believes that the Delegate erred in failing to find that the employee was promised full time work, promised payment of moving expenses, erred in failing to find that the employer misrepresented the amount of work available, and erred in finding that Mr. French quit his job.

Mr. French has a journeyman qualifications in Automotive Body Repair. The Delegate found that the employee moved from Nakusp to Smithers to take up work at a bodyshop owned and operated by the employer in July of 1999. In September or October of 1999 Mr. French took up employment with a heli-logging company based in Kitimat. The Delegate investigated six issues raised by Mr. French including a determination of the amount of wages paid to the employee, any entitlement to regular wages, overtime wages, annual vacation pay and statutory holiday pay, compensation for length of service, whether the employer made false representations concerning the conditions of employment to entice Mr. French to take up employment, and whether the employer made unauthorized deductions.

The Delegate made findings of fact based on the evidence provided to him. Some of these findings preferred and relied on the employer's evidence, and some of the statements preferred and relied on the employee's evidence. The principle appeal issue appears to relate to s. 8 of the *Act*, and alleged pre-contract representations concerning the conditions of employment.

It was apparently common ground, that at the time the employment offer was made, the employer was in a serious dispute with ICBC that jeopardized its ability to offer full time employment to the employee. The employer's ICBC billing number was withdrawn by ICBC. There was a civil action involving the employer and ICBC, wherein ICBC had sued the employer for damages. The Delegate also found that the evidence presented by Mr. French fell short of proof required to show that the employer represented falsely the hiring conditions. I quote from the Determination:

The fifth issue is whether M. French is due compensation on the basis that the Employer falsely represented the conditions of employment in order to entice him to work for them. The two parties gave vastly different versions of the course of events which led to M. French's coming to work for the Employer. The one shared aspect of the two versions is that the Employer was in a serious dispute with ICBC which could have jeopardized their ability to offer ongoing employment to M. French. Indeed the billing number was withdrawn and this did affect the available hours of work in the winter months. There is simply not sufficient evidence to prove that the Employer promised M. French permanent full-time employment such that this would constitute false representation. There is similarly little evidence to substantiate what other promises were made with respect to conditions of employment to find the Employer in contravention of Section 8.

The employer opposes the late filing of the appeal on the basis that there was no good reason for the late filing of the appeal, that the appellant did not form any intention to appeal until they saw the employer's appeal, and that if the time extension is granted the employee will be permitted to "confuse the issues in the determination. The Delegate also opposes an extension to permit the late filing of the appeal because no reason has been advanced by the appellant for the late filing,

that there was no bona fide intention to file within the appeal period, that the evidence sought to be provided on appeal should have been provided at the time of the investigation.

ISSUE:

Should the Tribunal grant an extension of time to the employer to file this appeal?

ANALYSIS

The *Act* provides, in section 114(1) that the Tribunal may dismiss an appeal, without a hearing, if the Tribunal is satisfied that the appeal was not requested within the time limits provided, the appeal is not within the Tribunal's jurisdiction, or if the appeal is frivolous, vexatious, or not brought in good faith. I also have the power to extend the time for the filing of an appeal, to permit a late filing of the appeal, pursuant to s. 109(1)(b) of the *Act*.

In determining whether to grant an extension of time, I must consider whether the appellant formed the intention to appeal within the appeal period, that the appellant has a reasonable excuse for failing to file the appeal within the time limits set out in the Determination and that there is no prejudice to the respondent from the late filing of the appeal. I must also consider whether the appeal contains sufficient merit. The degree of merit required is that necessary to raise a serious issue. The burden rests on the appellant to persuade me that there are compelling reasons to grant an extension of time to file an appeal.

I am not satisfied that the appellant formed any intention to appeal the determination within the appeal period. Further, the appellant has not advanced any reasonable excuse for failing to file the appeal within the time limit set forth in the *Act*. I am satisfied that the appellant filed this appeal because the employer filed an appeal.

This appeal has little prospect for success, as it rests on asking the adjudicator to "re-weigh" the evidence before the Delegate, and come to a different conclusion on issues of a factual nature. While I see no prejudice to the respondent employer, from the lateness of the appeal, this appeal has little prospect of success on the merits. The appellant has, therefore, not met the usual test for the Tribunal to exercise its discretion to permit the late filing of an appeal.

I am concerned with the policy implications of permitting an extension of time for the appellant to file, what he has referred to as a "cross appeal". The *Act* does not provide for cross appeals, it provides an appeal scheme with a time limit for the parties to consider the Determination and file an appeal. The *Act* is designed to provide an inexpensive, and efficient procedure to resolve employment standards issues. Both parties have, in essence, a fairly short period in which to consider the Determination and form an intention to appeal, and submit an appeal. A policy which allows an appellant to chose to file an appeal only to file an appeal after first seeing if the other party appeals may encourage frivolous and vexatious use of the appeal process.

For all the above reasons, I therefore refuse to allow the late filing of the appeal.

ORDER

Pursuant to section 109(1)(b) and 114 of the *Act*, I dismiss Michael French's application to extend time for the filing of this appeal.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal