

An appeal

- by -

Thomas Clark, Daniel Illy and Ross Milenchuck operating
The West Coast Kayaking Co.

- 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: Carol L. Roberts

FILE No.: 2002/54

DATE OF DECISION: April 26, 2002

DECISION

This is a decision based on written submissions by Daniel Illy on behalf of West Coast Kayaking Co., Sandy Wormald, and Rod Bianchini on behalf of the Director of Employment Standards. This decision is on the issue of the timeliness of the appeal only.

OVERVIEW

Sandy Wormald filed a complaint with the Director of Employment Standards ("the Director") alleging that she was owed regular wages and vacation pay by Mr. Illy, Thomas Clark and Ross Milenchuck operating The West Coast Kayaking Co. ("West Coast"). A delegate of the Director investigated Wormald's complaint, and on October 23, 2001, issued a determination in which West Coast was found to have contravened the Employment Standards Act ("the Act"), and was Ordered to pay Wormald wages.

Mr. Illy seeks an extension of the time to file an appeal the Determination pursuant to section 109(1)(b) of the Act.

The delegate opposes the application.

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.

FACTS AND ARGUMENT

The Determination was issued October 23, 2001. Attached to the Determination was appeal deadline information, and a "Your Right to Appeal" fact sheet. The documents indicated that the appeal deadline was 4:30 p.m. November 15, 2001.

Mr. Illy filed the Notice of Appeal of the Determination on February 11, 2002, along with an explanation of why the appeal was late. He wrote that he asked the delegate to call him after he received \$1000.00 certified cheque from Mr. Thomas Clark. "I was in regular contact with [the delegate] by telephone and always promptly returned any of his calls.... Even with the regular phone contact I do not know why [the delegate] never mentioned that he was sending a Determination to me. I never received the Determination and was unaware it was sent to me."

The delegate states that he discussed Ms. Wormald's allegations with Mr. Illy on July 10, 2001, and again on July 16. Also on July 16, the delegate faxed Mr. Illy a copy of Ms. Wormald's hours of work and the corporate registry showing the proprietors of West Coast Kayaking. The delegate sent the Determination to the address of all three proprietors. All were returned, including Mr. Illy's copy, despite it being sent by registered mail to the home address he provided to the delegate. The delegate contends that Mr. Illy was well aware of Ms. Wormald's allegations, and was afforded "ample opportunity" to respond.

Ms. Wormald contends that Mr. Illy and Mr. Clark were fully aware of her claim, and that they both attempted to deny it and that the extension should not be allowed.

ANALYSIS

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

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

The Tribunal has established a number 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 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.

(see: *Niemisto v. British Columbia (Director of Employment Standards)* (BCESTD#099/96) and *Pacholak v. British Columbia (Director of Employment Standards)*(BCESTD# 526/97)

Furthermore, extensions will only be granted where there are compelling reasons present. (*Moen and Sagh Contracting Ltd.*, BCESTD#298/96)

Bona fide intention to appeal the determination and notice to the parties of this intention

I find no evidence of a bona fide intention to appeal the Determination. Further, while there is no evidence of any attempt to appeal the Determination, there was no dispute of liability for wages by one of the partners of West Coast at the time of the investigation.

The delegate's evidence discloses that the Determination was sent to Mr. Illy's home address, which is the same address on the appeal documents. The Determination was sent back to the Branch "unclaimed". If Mr. Illy was truly unaware of the Determination, it can only be a result of his failure or refusal to accept it.

Reasonable explanation for the failure to request an appeal within the time limits

Mr. Illy sets out no reasons why he did not file his appeal for 3 months after the time period provided other than saying he did not receive the Determination and was unaware it was sent to him. Clearly, Mr. Illy, by virtue of filing the appeal, is aware of the Determination. However, he does not say how the Determination came to his attention, or when.

I am unable to conclude, on the submissions presented, that there is a reasonable explanation for the delay.

Strong prima facie case

The Determination notes that Mr. Clark did not dispute that wages were owed to Ms. Wormald. Mr. Illy, on the other hand, denied he was associated with West Coast, although it appeared that he signed cheques on behalf of the company. Only when faced with evidence that he was in a partnership with Mr. Clark and Mr. Milenchuck did Mr. Illy acknowledge that he was involved with the company. Mr. Illy then claimed that he and Mr. Milenchuck had been tricked by Mr. Thomas.

Mr. Illy has failed to demonstrate that there are serious issues to be dealt with on appeal.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the extension should not be granted. The application is denied.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal