

An appeal

- by -

Kurt Giddings

- 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.: 2002/62

DATE OF DECISION: April 26, 2002

DECISION

This is a decision based on written submissions by Kurt Giddings, Barry Rowland on behalf of Mr. Giddings, Henry Lutz on behalf of Lutz Consulting & Contracting Ltd., and Sandra Bowman on behalf of the Director of Employment Standards.

This decision is on the issue of the timeliness of the appeal only.

OVERVIEW

Mr. Giddings filed a complaint with the Director of Employment Standards ("the Director") alleging that Lutz Consulting & Contracting Ltd. ("Lutz") owed him wages, statutory holiday and vacation pay. A delegate of the Director investigated Mr. Giddings' complaint, and on December 11, 2001, issued a determination finding that Lutz had contravened the Employment Standards Act ("the Act"), and awarding Mr. Giddings wages and vacation pay.

Enclosed with the Determination was appeal deadline information, and a fact sheet entitled "Your Right to Appeal". The appeal deadline was January 3, 2002.

Lutz filed an appeal of the Determination on January 3, 2002.

Mr. Giddings filed his Notice of Appeal of the Determination on February 12, 2002, along with an explanation of why the appeal was late.

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

Both the delegate and Lutz oppose 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

At issue before the delegate was whether Mr. Giddings was owed overtime wages, vacation pay and statutory holiday pay. Lutz contended that Mr. Giddings was an independent contractor. After reviewing the evidence of the parties and several witnesses, the delegate concluded that Mr. Giddings was an employee. She then turned to the issue of wages owed to Mr. Giddings. There was no dispute that Mr. Giddings was fired when he questioned Mr. Lutz about the amount he was paid, and asked him to review his hours.

The delegate reviewed the records of hours of work maintained by the parties, and concluded that Mr. Giddings' records were unreliable. Although the delegate did not find Lutz' hours credible either because Lutz wrote out the invoices of Mr. Giddings' daily hours of work, they were not original records, and did not appear to be kept contemporaneously, she preferred Lutz's records over those provided by Mr.

Giddings. She preferred Lutz's records for a number of reasons, including the fact that Mr. Giddings failed to provide her with his original records. She was of the view that Mr. Giddings was less than honest with her in responding to her request.

Mr. Giddings contends that, although he was dissatisfied with the Determination with respect to the hours of work used by the delegate to calculate his wages, he did not pursue the matter. Because the delegate found him not to be credible, in Mr. Gidding's view it was not worth pursuing an appeal since it would be a matter of trying to persuade the delegate of a matter on which she had already made up her mind. Mr. Giddings contends that he only became aware of the delegate's reasons for preferring the employer's records in calculating the wages owing when he saw documents provided by the delegate in response to Lutz's appeal of the same Determination.

Mr. Gidding contends that, had the documents been available to him sooner, he would have filed his appeal before the time period had expired. Mr. Rowland states that he offered to act for Mr. Gidding after reviewing the documentation provided by Lutz in support of its appeal on February 4, 2002. He states that he encouraged Mr. Giddings to file his appeal based on his understanding of Tribunal jurisprudence, the Tribunal's independence and the evidence. He contends that the delegate erred in seeking to have Mr. Gidding produce his original records, when it is an employer's obligation to maintain records. He further contends that the original records were provided to an employee of the Employment Standards Branch in Kelowna, who photocopied them for the purposes of the complaint. He suggests that if they are not complete, some pages may have been lost in the transfer of the file to the Penticton office, or by the Branch staff.

Mr. Giddings contends that his sister attempted to make the records more presentable by transferring them to a computer sheet. He contends that it is now the only record of the hours of work, and that his sister in law is prepared to swear to the truthfulness of those hours.

Ms. Bowman states that she addressed the issue of Mr. Gidding's records in the Determination, and that they did not contain the hours worked through the entire employment period. She states that she repeatedly requested original records, and that they were not produced. The delegate contends that Mr. Giddings merely wishes to have his case re-heard.

Mr. Lutz argues that Mr. Giddings was well aware of the delegate's determination before it was issued, and that Mr. Giddings had many conversations with Ms. Bowman regarding the hours in question. Mr. Lutz says that the delegate found Mr. Gidding's evidence not to be credible, and that he ought not have the opportunity to file his appeal after the deadline. Further, Mr. Lutz contends that Mr. Giddings did not always have the intent of appealing the Determination since he seriously considered settling the matter with him in October, 2001.

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

The evidence does not disclose a bona fide intention to appeal the Determination. Mr. Rowland says that he encouraged Mr. Giddings to file an appeal only after he received the delegate's documentation in response to Lutz's appeal. This was well over one month past the deadline for filing an appeal. Mr. Giddings did not seek outside advice with respect to the Determination until this time. In fact, as Mr. Giddings himself states, he felt he had no chance of succeeding on appeal, so he took no steps whatsoever to appeal the decision. This does not show a bona fide intention.

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

There is no explanation for Mr. Gidding's failure to file an appeal within the time period other than he felt he would not succeed on appeal.

I am unable to conclude that this constitutes a reasonable explanation for the delay.

Will the respondent be unduly prejudiced by the granting of an extension?

Neither Lutz nor the delegate made any submissions on this point. Given that Lutz has filed its own appeal, and this appeal could be heard simultaneously, I infer that there is no prejudice to the parties.

Strong prima facie case

The delegate carefully weighed the evidence of both of the parties and their witnesses on the issue of whether Mr. Giddings was an employee or a contractor. After concluding that Mr. Giddings was an employee, she concluded that Mr. Giddings had not established, to her satisfaction, that he worked the

hours he claimed to have. She preferred Lutz's records, primarily because Mr. Giddings failed to provide her with his original records. Mr. Giddings originally provided the delegate with copies of his records, which she concluded were unreliable. The delegate states that she sought the production of Mr. Giddings' original records on August 20, 2001, September 14, and October 5. In her determination, the delegate states that Mr. Giddings originally advised her that his original records were in storage in Kelowna, and that he had relocated to the lower mainland and could not afford to go back to Kelowna to get them. On October 5, Mr. Giddings advised the delegate that he had in fact been to Kelowna on two occasions and had obtained his records two months earlier, but that they had been stolen out of his car. The delegate stated that Mr. Giddings was well aware she wanted the originals, that she had been in regular contact with him for those two months, and that he never advised her that he either had them, or that they had been stolen. The delegate found Mr. Giddings to be less than truthful, and in the absence of reliable records, used Lutz's hours of work.

It is not clear to me why Mr. Giddings would not have advised the delegate that the documents had been photocopied from the original by an employee of the Branch at the commencement of the appeal. It appears that the reasons he gave to the delegate about why he couldn't produce the original records were less than satisfactory, and that this led to her conclusion about the unreliability of his records. However, in my view, there is a strong prima facie case in Mr. Giddings' favour.

The burden of persuading the delegate as to the accuracy of the hours work rests with Lutz, since an employer has the statutory obligation of maintaining records of an employee's hours of work. The delegate appeared to place the burden of providing true records on Mr. Giddings. Even if Mr. Giddings was unable to produce his original records, that ought not necessarily be fatal to his claim. It does not appear that the delegate asked any of the witnesses about Mr. Giddings' hours of work, even though one of them was a foreman on one of the worksites, or attempted to verify his claims other than to review his and the employer's records. In my view, Mr. Giddings raises a serious issue as to whether the delegate correctly placed the burden of establishing the claim on Mr. Giddings.

Mr. Giddings also contends that the delegate failed to address the issue of compensation for length of service. As this did not form part of Mr. Giddings' complaint, it was not a matter for investigation, and cannot be addressed 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 application should be allowed.

The request for an extension of time to file the appeal is granted.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal