

An appeal

- by -

Ingrid Dueck operating as Chantrell Family Daycare
(“Dueck”)

- 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

TRIBUNAL MEMBER: Carol-Ann Hart

FILE No.: 2004A/121

DATE OF DECISION: September 7, 2004

DECISION

SUBMISSIONS

Ingrid Dueck, operating as Chantrell Family Daycare

Christina Wiebe

former employee of Dueck (“Wiebe”)

Richard Saunders

on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Ingrid Dueck, operating as Chantrelle Family Daycare (“Dueck”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued on May 7 2004 by Richard Saunders, Delegate of the Director of Employment Standards (the “Director”).

The time limit for filing the appeal expired on 14 June 2004. The Tribunal received an appeal from Dueck on 9 July 2004.

By letter from the Employment Standards Tribunal dated 12 July 2004 the Delegate of the Director, Dueck and Wiebe were invited to make submissions on the question of whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and extend the time period for requesting an appeal.

The Tribunal has decided that an oral hearing is not required and that the matter can be properly addressed through written submissions.

ISSUE

The issue in this case is whether the time period for filing an appeal should be extended. This decision is confined to this issue.

PREVIOUS PROCEEDINGS

Wiebe filed a complaint under section 74 of the *Employment Standards Act* alleging that Dueck had contravened the *Act* by failing to pay vacation pay and severance pay, and making illegal deductions from her wages owed from her employment as a daycare assistant.

The Delegate of the Director indicated in the Determination that Dueck did not attend the mediation on 6 October 2003, or the adjudication hearing on 7 November 2003 despite receiving sufficient notice of those proceedings.

In the Determination, the Delegate of the Director found that Dueck had contravened section 21(1) of the *Act* by making deductions from Wiebe’s wages. He further found that Dueck had contravened section 63 of the *Act* in failing to pay compensation for length of service after the termination of Wiebe’s employment. Finally, the Delegate of the Director concluded that Dueck had contravened 58(3) of the *Act* in failing to pay vacation pay. An administrative penalty of \$500.00 with respect to each of the

contraventions was imposed pursuant to section 29(1) of the *Employment Standards Regulation*, B.C. Reg. 369/95, as amended.

EVIDENCE AND ARGUMENTS

On the Appeal Form received by the Employment Standards Tribunal on 9 July 2004 Dueck indicated that appeal was based on the allegation that the Director had failed to observe the principles of natural justice in making the Determination.

Dueck stated in her written submissions that she did not know that she was required to send the appeal forms to the Employment Standards Tribunal. She wrote that she had been unemployed, and had not received any income since March 2003. Dueck explained that she had invested in a business with a partner, and was now involved in litigation concerning the loss of her investment in the business. In addition, Dueck wrote that her husband had suffered a serious construction accident in December 2003, and was unemployed for four months. He was self-employed, and had no insurance for the wage loss resulting from his accident. Dueck indicated that she had been under tremendous stress concerning future income for her family.

Wiebe argued that there was no good reason why Dueck could not meet the deadline for filing the appeal. She maintained that Dueck's case was not a strong one, and would not succeed.

The Director's delegate submitted that there was no good reason why Ms. Dueck could not meet the deadline for filing the appeal. According to the Director's delegate, Ms. Dueck was given notice regarding the appeal process and the time frame in which to file an appeal in the Determination dated 7 May 2004; a fax from the tribunal dated 13 May 2004; and in the Appeal Form itself.

ANALYSIS

In deciding whether to extend the period in which to file an appeal in this case, I am mindful that the purpose of the *Employment Standards Act*, as set out in section 2(d), is "to provide fair and efficient procedures for resolving disputes". The *Act* provides for a period in which appeals may be filed to ensure that appeals are dealt with efficiently. Pursuant to section 109(1)(b) of the *Act*, in a situation in which the appeal period has expired, the Tribunal may extend the time frame for the filing of an appeal. The appellant has the onus of establishing that the period in which to file an appeal should be extended.

Various courts and tribunals have established the following main principles concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BCEST #D099/96 and *Re Pacholok* [1997] BCEST #D511/97).

- i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii. the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
- v. there is a strong *prima facie* case in favour of the appellant.

The parties were advised of the criteria to assist them in filing their documents for this appeal.

I turn first to Dueck's assertion that she was not aware that she was to send the appeal forms to the Employment Standards Tribunal.

Information concerning filing an appeal was contained in the Determination dated 7 May 2004 which was addressed to Ingrid Dueck operating as Chatrell Family Daycare from Richard Saunders, Delegate of the Director. The 14 June 2004 deadline for filing an appeal was clearly set out. It was also specified that the appeal was to be delivered to the Employment Standards Tribunal, which is separate and independent from the Employment Standards Branch.

In addition, a copy of the Appeal Form and "Your Right to Appeal" fact sheet were sent to Dueck on 13 May 2004 by the Employment Standards Tribunal. At the top of the Appeal Form completed by Dueck the following notification appears:

This Appeal Form must be delivered to the office of the Tribunal (Suite 650, 1066 West Hastings Street, Vancouver, B.C. V6E 3X1 or by fax at 604-775-3372) by the deadline for the appeal as stated on the Determination.

I further note that the Appeal Form document is produced by the Employment Standards Tribunal, and the address and other contact information on the bottom of each page are for the Employment Standards Tribunal, and not the Employment Standards Branch.

Dueck also wrote that she and her husband had experienced considerable stress concerning their financial situation following periods of unemployment, and an accident suffered by her husband.

According to Dueck, the loss of income had commenced in March 2003. The time limit for filing the appeal expired on 14 June 2004. There was insufficient information provided to demonstrate that Dueck's concerns about her family's financial situation, which had been on-going for a significant period of time, constituted a reasonable and credible explanation for failing to file the appeal on time.

From the documentation on the file, it appears that Dueck did send a completed Appeal Form to the Employment Standards Branch, and it was received on 25 May 2004. There was nothing on the file to indicate that Dueck had made Wiebe aware of her intention to file an appeal.

In my view, it is relevant to take into account the fact that Dueck did not participate in the mediation or the adjudication hearing although duly notified of those proceedings.

I turn now to an examination of the merits of the appeal to determine whether there is a strong *prima facie* case in favour of the appellant.

On the Appeal Form received by the Employment Standards Tribunal on 9 July 2004 Dueck indicated that she had appealed the Determination on the grounds that the Director had failed to observe the principles of natural justice.

The term natural justice encompasses the principles that parties are to be provided an opportunity to know the case against them and to respond to that case. Dueck failed to attend or send a representative to the mediation and the adjudication which were conducted in this matter. Dueck did not indicate in her submissions that natural justice was denied-- for example that she had not been notified of the

adjudication hearing, or had not been given the opportunity to be heard. Rather, it appeared that Dueck disagreed with the findings of fact made by the adjudicator. The Director's delegate conducted an oral hearing, and considered documentation provided by Dueck in the Determination.

The information provided by Dueck falls far short of demonstrating that the Delegate of the Director had failed to observe the principles of natural justice in making the Determination.

It was not shown by Dueck that any change would occur in the Determination if an extension of time to file the appeal were granted.

For all of the above reasons, I deny the application for an extension of time to file the appeal.

ORDER

Dueck's application brought under section 109(1)(b) of the *Act* for an extension of time to file the appeal is denied. Pursuant to Section 114 of the *Act*, the appeal is dismissed.

Carol-Ann Hart
Member
Employment Standards Tribunal