

An appeal

- by -

RFR Penticton Project Inc. operating as Ricky's Restaurant

- 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 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2005A/140

DATE OF DECISION: October 6, 2005

DECISION

OVERVIEW

1. This is an appeal by RFR Penticton Project Inc., operating as Ricky's Restaurant ("RFR"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a determination (the "Determination") originally issued by a delegate of the Director of Employment Standards (the "Delegate") on April 7, 2005, and subsequently amended on April 13, 2005, in favour of one Jamie Plamondon ("Plamondon").
2. Having made a finding in the Determination that RFR had contravened section 63 of the *Act*, the Delegate ordered RFR to pay \$1,538.46 in respect of compensation for length of service, \$61.53 in annual vacation pay, accrued interest of \$41.74, and an administrative penalty of \$500.00, for a total of \$2,141.73.
3. The time limit for filing an appeal of the Determination appears to have expired on May 16, 2005. The Tribunal received an Appeal Form from RFR at 4:12pm on July 29, 2005.
4. It being thought that RFR had filed its appeal late, the Tribunal wrote to the Delegate and Plamondon on August 2, 2005, inviting them to make submissions on the question whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and extend the time period for requesting an appeal. Plamondon replied by letter dated August 5, 2005 ("Plamondon's Reply"). The Delegate delivered a submission dated August 12, 2005, enclosing the record (the "Delegate's Submission"). Both these parties took the position that the appeal was untimely, and that no extension of time should be granted.
5. By letter dated August 24, 2005, the Tribunal forwarded copies of Plamondon's Reply and the Delegate's Submission to the parties and advised that any further replies were to be received no later than September 8, 2005. Frank Di Benedetto ("Di Benedetto"), the President and CEO of RFR, delivered a letter reply dated September 8, 2005. No other replies were received.
6. By letter dated September 9, 2005, the Tribunal informed the parties that the issue of the timeliness of RFR's appeal would be decided by a Member based on the written submissions received, and that if the late appeal was accepted by the Tribunal, the parties would have an opportunity to respond on the merits.

ISSUE TO BE DECIDED

7. The following are the issues I consider I must decide on this appeal at this time:
 - Was RFR's appeal filed late?
 - If so, should the Tribunal extend the time within which RFR may request an appeal, so as to permit RFR to proceed with its appeal on the merits?

FACTS

8. RFR operates a family restaurant in Penticton, at which location Plamondon was employed as manager commencing on October 16, 2002. On August 15, 2004, Plamondon's employment came to an end in circumstances that are in dispute. RFR says that Plamondon resigned. Plamondon asserts that he was discharged.

9. Plamondon filed a complaint with the Employment Standards Branch (the “Branch”) alleging that RFR had contravened section 63 of the *Act* by failing to pay compensation for length of service.
10. Following a hearing by teleconference conducted on February 8, 2005, the Delegate issued his original Determination on April 7, 2005, which stated that the amount of \$2,552.17 was payable by RFR. As is usual, the Determination contained the following information:

Appeal Information:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30pm on May 16, 2005. Information on the Tribunal and how to appeal a Determination can be found at the Tribunal’s website: www.bcest.bc.ca or by contacting the Employment Standards Tribunal at (604) 775-3512. The Tribunal is separate and independent from the Employment Standards Branch.

11. The Delegate’s Submission states that the Determination was mailed via Canada Post Xpress Post on April 7, 2005. The copy of the Determination contained within the record indicates on its face that it was “Sent by Registered Mail” to the same address for RFR that appears on RFR’s Appeal Form.
12. On April 13, 2005 one Jerry Inkster, an employee in RFR’s accounting department, telephoned the Delegate to acknowledge receipt of the Determination. Mr. Inkster indicated that RFR intended to pay the amount owed, but questioned the accuracy of the arithmetical calculation of the quantum the Determination stated was payable. On further review, the Delegate agreed that his calculation was in error. He informed Mr. Inkster that he would forward an amended Determination. The Delegate then corrected his mistake, so that the amount payable would read \$2,141.73, and forwarded the amended Determination, again by Canada Post Xpress Post, this time to the RFR business office address and its registered and records office.
13. On June 16, 2005 the Branch forwarded correspondence to RFR advising that the period for appealing the Determination had expired and that collection proceedings would be taken failing payment by June 23, 2005. On June 20, 2005, Di Benedetto telephoned the Branch and advised that RFR intended to appeal the Determination. Branch staff informed him that any appeal would need to be directed to the Tribunal and that “time was of the essence”. Di Benedetto agreed that he would pay the outstanding amount of the Determination to the Branch in trust pending the disposition of RFR’s appeal. On the same day, Di Benedetto wrote a letter to the Branch containing, in part, the following:

Further to our conversation, enclosed is a trust account payment of \$2,146.01 regarding Mr. Plamondon. We intend to submit a late appeal to the Tribunal regarding this matter.

Please confirm you have received this payment and that it will be held in trust until a final ruling is completed.

14. On June 22, 2005 Branch staff wrote to RFR confirming receipt of the monies to be held in trust, and again advising that the deadline for the filing of RFR’s appeal had expired on May 16, 2005. The letter went on to inform RFR that the Tribunal had established its own rules for considering appeals filed late, and urged RFR to file its appeal “as quickly as possible”.

15. The Branch forwarded a further letter to RFR dated July 15, 2005, the relevant portions of which read:

This will confirm our telephone conversation on June 20, 2005 regarding payment of wages to Jamie Plamondon. On that date you indicated that you would be filing a late appeal of the Determination issued by the director of Employment Standards on April 7, 2005 (amended on April 13, 2005) that ordered the payment of wages to Jamie Plamondon.

To avoid further collections action, you agreed to pay the wages into the director's trust account pending the outcome of your appeal. Your payment of \$2146.01 for wages and penalties owed was deposited in the account on June 28, 2005, however, as of July 14, 2005 the Employment Standards Tribunal had not received your appeal.

Please note that if I have not received notification from the Tribunal, by July 29, 2005, that you have filed your appeal for their consideration, I will disburse the funds without further notice to you.

16. On July 29, 2005, RFR filed its Appeal Form with the Tribunal.

ANALYSIS

Was RFR's appeal filed late?

17. Section 81(1) of the *Act* requires that on the making of a determination, the Director must serve any person named in the determination with a copy of the determination. One of the items that must be included in the determination served is a notification of the time limit and process for appealing the determination to the Tribunal. As I have noted, the Determination here includes information advising that RFR might appeal the Determination to the Tribunal by 4:30pm on May 16, 2005.
18. Section 122(1) of the *Act* provides that a determination that is required to be served on a person under the *Act* is deemed to have been served if it is served on the person, or sent by registered mail to the person's last known address. Section 122(2) of the *Act* provides that if service is by registered mail, the determination is deemed to be served 8 days after the determination is deposited in a Canada Post Office.
19. Section 112(3) of the *Act* sets out the time periods within which a person may appeal a determination. A person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, section 112(3)(a) mandates that the time period is 30 days after the date of service. Pursuant to section 112(3)(b), the time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically by fax machine.
20. Notwithstanding that the record does not include documentation from Canada Post showing that the Determination was served on RFR by "registered mail", in the sense that a signature was required, and obtained, on delivery, I am prepared to infer from the fact that the copy of the Determination states "Sent by Registered Mail", and from Mr. Inkster's acknowledgement that the Determination had been received in his telephone discussion with the Delegate on April 13, 2005, that the Determination was properly served on RFR by that date.

21. Further, I infer from Di Benedetto's June 20, 2005 correspondence that RFR also received the amended Determination, as it was a sum based on the revised calculation of the original amount payable which accompanied that letter for deposit in trust.
22. RFR did not deliver an Appeal Form to the Tribunal until July 29, 2005, over five weeks later. The appeal is therefore untimely.

Should the Tribunal extend the time within which RFR may request an appeal, so as to permit RFR to proceed with its appeal on the merits?

23. The time limits within which one must file an appeal are consistent with one of the purposes of the *Act*, which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.
24. Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time period for requesting an appeal even though the period has expired. That provision gives the Tribunal a discretion to extend the time limits for an appeal. However, the Tribunal will not grant an extension as a matter of course. Indeed, an extension is only granted where there are compelling reasons to do so. In every case the burden is on the appellant to show that the time period for an appeal should be extended. See in this regard *Niemisto* BCEST #D099/96 and *Tang* BCEST #D211/96.
25. The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered on applications of this sort:
- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 - There has been a genuine and ongoing bone fide intention to appeal the determination;
 - The respondent party and the Director have been made aware of the appellant's intention to appeal the determination;
 - The respondent party will not be unduly prejudiced by the granting of an extension; and
 - There is a strong prima facie case in favour of the appellant.
26. Having regard to these factors, it is my view that RFR's request for an extension of time within which to file its appeal must be denied.
27. First, I am not persuaded that RFR has provided a reasonable explanation for the failure to request an appeal within the statutory time limits. RFR received the original Determination no later than April 13, 2005. Di Benedetto's September 8, 2005 correspondence confirms that after the Determination was received RFR personnel made a conscious decision not to appeal. In Di Benedetto's words, they "decided to make the payment and leave it at that."
28. Thereafter, it appears Di Benedetto, as the President of the company, decided that an appeal should be launched. It is unclear when this change of heart occurred, but the record shows that it was not until June 20, 2005, more than a month after the appeal period expired, that Di Benedetto wrote to the Branch advising that RFR intended to submit a "late appeal" to the Tribunal.

29. It was not, however, until July 29, 2005, that RFR delivered its Appeal Form to the Tribunal. The explanation for this further delay provided by Di Benedetto in his September 8, 2005 correspondence appears to be that “work load” prevented earlier delivery.
30. In my opinion, a senior representative of RFR’s choosing to override a decision not to appeal the Determination previously taken on behalf of the company, and then his failing to file an Appeal Form for a further five weeks due to the pressure of other work unrelated to the appeal, do not constitute a reasonable explanation for the purposes of the test. It is the responsibility of an appellant to pay attention to the time limit set out in the *Act*, and to respond to it conscientiously. RFR’s response to the time limit was far from reasonable. Indeed, it was cavalier.
31. Second, it cannot be said that there was a genuine and ongoing bona fide intention to appeal the Determination. Rather, the RFR personnel who were responsible for Plamondon’s discharge initially decided that no appeal would be filed. It was not until their superior, Di Benedetto, became involved that the position of the company changed. That change of position was not communicated to anyone at the Branch until the original appeal period had been exceeded by at least a month, and then it took an additional five weeks for RFR to file its Appeal Form. In no way does this history support an inference that RFR had a genuine and ongoing bona fide intention to appeal.
32. Third, it cannot be said that Plamondon and the Director were made aware in a timely way that RFR intended to appeal. Indeed, for some weeks RFR’s position was stated to be that it would not appeal.
33. Fourth, while Plamondon has conceded that the delay will not harm his case, it is trite to say that any delay causes prejudice, and the delay in this case was inordinate.
34. Fifth, I am in no way persuaded that RFR has shown a strong prima facie case on the appeal. The materials RFR has filed in support of its appeal suggest that RFR wishes to assert that what transpired at the time Plamondon departed his employment is more consistent with his resigning, than his being discharged. In my view, such an attack on the Determination raises a question of mixed law and fact. There are many decisions of the Tribunal pointing out how difficult it is for an appellant to demonstrate that a determination is wrong in law because of an error concerning a finding of fact. Indeed, in such cases the appellant must show that the factual conclusions are “palpable and overriding”, in the sense that they are inadequately supported, or are wholly unsupported, by the evidentiary record. It is not apparent to me in reading RFR’s submissions that errors of that type occurred in this instance, or that the Delegate applied the relevant tests incorrectly. While I cannot say that RFR’s appeal is frivolous, I am not satisfied that the case presented is strong.
35. For the above reasons, I have decided that it would be inappropriate for me to exercise my discretion to extend the time period for RFR to request an appeal.

ORDER

36. The request of RFR to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to section 114 of the *Act*. I order under section 115 of the *Act* that the Determination dated April 7, 2005, as amended, be confirmed.

Robert Groves
Member
Employment Standards Tribunal