

An appeal

- by -

The Weathergard Shop Ltd.
("Weathergard")

- 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: M. Gwendolynne Taylor

FILE No.: 2000/818

DATE OF DECISION: April 4, 2001

DECISION

WRITTEN SUBMISSIONS RECEIVED BY:

John Neuman and Connie Mayo on behalf of Weathergard

Allan Carlson on behalf of the Director

OVERVIEW

On November 3, 2000, a delegate of the Director of Employment Standards (the “Director”) issued a Determination against The Weathergard Shop Ltd. (“Weathergard”). This Determination awarded \$1,063.61 to Tom Desuler (“Desuler”), a former employee, for overtime wages, vacation pay, statutory holiday pay, compensation for length of service and interest.

On November 17, 2000, Weathergard wrote to the Director indicating disagreement with some of the calculations. According to Weathergard’s calculations, there was no money owing to Desuler. Part of Weathergard’s calculations included deductions from wages for Canada Pension Plan (CPP) contributions, Employment Insurance (EI) premiums and Income Tax.

On November 24, the Director responded with an Addendum to Determination reducing the total amount owed to \$883.55. The Director’s amendment corrected credits for two days Desuler did not work. The Director noted that deductions for arrears of CPP, EI and Income Tax are governed by the respective legislation and that Weathergard would not be entitled to deduct the amounts indicated.

The final paragraph of the Addendum directs that an appeal of the November 3, 2000 Determination and the Addendum must be filed at the Employment Standards Tribunal office by November 27, 2000.

Weathergard filed an appeal with the Tribunal on November 28, 2000. The grounds for appeal are

- a) because Desuler was caught stealing the decision allowing one week notice is not valid; and
- b) because Desuler was in police custody on July 1, holiday pay is not owing.

ISSUE

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.

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

The purpose of the *Employment Standards Act* (the “Act”) under section 2(d) is “to provide fair and efficient procedures for resolving disputes”. The Act imposes an appeal deadline to ensure appeals are dealt with promptly. The Tribunal requires parties to file their own appeals even if this means multiple appeals from one Determination.

Under section 109(1)(b) of the Act, the Tribunal can extend the time for requesting an appeal if there are compelling reasons. To decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria which Appellants must satisfy:

- (1) there is a good reason they could not appeal before the deadline;
- (2) there is not an unreasonably long delay in appealing;
- (3) they always intended to appeal the Determination;
- (4) the other parties (the respondent and the Director) are aware of the intent to appeal;
- (5) the respondent will not be harmed by an extension; and
- (6) they have a strong case that might succeed, if they get an extension.

THE FACTS AND ANALYSIS

Desuler worked from April 8, 2000 to June 29 or July 1, 2000 as receptionist/telemarketer at the rate of \$10.00 per hour. Before the Director, there was a dispute over the termination date and the Director found it to be July 1, 2000.

The Director’s Determination dealt with a number of issues that are not raised before the Tribunal. I shall deal only with the facts and submissions that touch on the grounds of appeal for the purpose of considering the principles for extending the appeal deadline.

My main consideration is whether Weathergard has a strong case that might succeed. On the other considerations, it is apparent that this is not a lengthy delay and that the delay, at least in part, resulted from settlement discussions. The basis of the settlement discussions differs from the arguments in this appeal. Therefore, it could be inferred that there was not always an intent to appeal, or that the other parties would not have been aware of the intent to appeal.

The main ground of appeal is whether Desuler should be awarded compensation for length of service. I have reviewed the Director’s calculations on the Determination and the Addendum. It seems to me that the Director has not included compensation for length of service, although it appears that was the intent. As far as I can see, the last day for which wages were calculated was June 29 (as amended by the Addendum), plus the statutory holiday pay.

I have reviewed Desuler's submissions. It is not apparent that he ever requested compensation for length of service in lieu of termination notice. This is not itemized in his Complaint and Information Form and it is not part of his submission of August 10, 2000. Further, he has not appealed the Director's determination.

If I am correct in my reading of the Director's calculations, there is no need to consider this ground of appeal. Continuing with the appeal could result in Weathergard being ordered to pay a higher amount.

In the event I have erred in interpreting the calculations, I have considered whether Weathergard has a strong case on this ground of appeal.

The facts are clear that Desuler worked until June 29. On June 30, a friend phoned Weathergard to report that Desuler was ill and would not be working. Acting on information from the same person, Mr. Neuman went to Desuler's residence on July 1, and removed office supplies and telemarketing lists belonging to Weathergard. On the same day, Weathergard had the office locks changed so Desuler could not use his key.

It seems that Weathergard's argument is that Desuler was terminated for just cause. At page 7 of the Determination, the Director says "the employer has not provided evidence of theft on the part of the employee. Simple custody of employer letterhead and customer lists can be easily attributed to the complainant's former job functions as a telemarketer as suggested by the complainant." At page 13, the Director determines that Weathergard did not meet the threshold of just cause for termination.

The Director found that as of July 1, Weathergard had decided to terminate Desuler's employment. Since Weathergard did not substantiate just cause, the Director found the statutory one week compensation applied.

Weathergard's disagreement with the Director's findings seems to be that the Director did not adequately investigate what occurred on June 30 and July 1. I can appreciate that Weathergard may have thought Desuler's circumstances on June 30 and July 1 were alarming, based on the allegations from Desuler's friend. Notwithstanding the circumstances, the Director determined that the evidence did not substantiate a finding of termination for just cause.

In order to succeed on this point before the Tribunal, Weathergard would have to present new evidence, which could not have been presented to the Director. The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BC EST #D058/98, and *Tri West Tractor Ltd.* BC EST #D268/96).

Weathergard has not satisfied me that there is a strong case for succeeding on this ground.

I have also considered whether there is strong case on the second ground of appeal - whether Desuler is entitled to statutory holiday pay for July 1, 2000.

The Director determined that Desuler was entitled to wages for July 1, 2000 because it was a statutory holiday, it was Desuler's regularly scheduled day and Desuler was not compensated with a day off with pay. Accordingly, section 47 applies to require Weathergard to compensate Desuler.

Weathergard maintains that Desuler was not available for work and, therefore, is not entitled.

Weathergard does not address the Director's finding that July 1 was Desuler's regularly scheduled day off. If it was, then it is irrelevant whether he was available for work. Weathergard has not satisfied me that it has a strong prima facie case of succeeding on the appeal on this point.

Given that there is little chance of Weathergard succeeding on appeal, I decline to extend the time under Section 109.

ORDER

I confirm the Director's Determination dated November 3, 2000, with the Addendum dated November 24, 2000.

M. GWENDOLYNNE TAYLOR

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal