

An appeal

- by -

504166 BC Ltd. operating as AALL Tech Transmission
("AALL ")

- 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: Norma Edelman

FILE No.: 2002/116

DATE OF DECISION: May 7, 2002

DECISION

OVERVIEW

This is an appeal by 504166 BC Ltd. operating as AALL Tech Transmission ("AALL") pursuant to the Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on January 17, 2002. The Delegate found that AALL owed Shamim Abdul ("Abdul") \$2142.66 representing compensation for length of service. The Determination indicated an appeal of it had to be delivered to the Tribunal by February 11, 2002. The Tribunal received an appeal on March 7, 2002. AALL requested that the Tribunal extend the deadline to file an appeal. The Delegate and Abdul made submissions on a possible extension of the deadline under Section 109 (1)(b) of the *Act*. This appeal was decided based on the written submissions of the parties.

ISSUE TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

FACTS

On January 17, 2002, the Delegate issued a Determination against AALL. The Delegate found that AALL substantially altered Abdul's conditions of employment by reducing his hours of work, which caused Abdul to quit his job. The Delegate determined that Abdul's employment had therefore been terminated (see Section 66 of the *Act*) and he was owed compensation for length of service in the amount of \$2142.66.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than February 11, 2002.

The Tribunal received an appeal from Rob Litke ("Litke"), President of AALL, on March 7, 2002. Litke enclosed a copy of a letter dated February 22, 2002 sent by him to the Delegate which says:

Please accept this as our formal request to extend from Feb 11, 2002 to March 11, 2002 the deadline for appeal of the Determination dated Jan 17, 2002

We have found the demands of business to be unusually onerous during that last month, and although we have been preparing our appeal response in the above noted matter, the Feb 11 deadline has escaped our attention.

We do believe however, that our appeal is significant and would succeed should you allow our requested extension.

Litke also enclosed a fax sheet dated February 26, 2002 from the delegate to Daniel Tremblay ("Tremblay") at AALL which says in part:

As per your request enclosed please find copies of the Appeal information document, the letter I received from Rob Litke and the Employment Standards Appeal Form. I will hold off doing collection for another week.

Also enclosed with the appeal, was a submission made by Tremblay, Secretary and Manager of AALL. Tremblay effectively requested that the Tribunal extend the deadline to file an appeal. Tremblay says the company now has information that was not available during the investigation process to support its position that the reduction in Abdul's hours of work were due to his voluntarily asking for the time off to attend to personal matters.

In a further submission dated March 21, 2001, Tremblay says he was not given the opportunity to review the Delegate's findings prior to the issuance of the Determination. After reviewing the Determination he was able, for the first time, to "fully appreciate and formulate a more complete response". He further said as follows:

I believe that the information we have provided in the Appeal strongly supports our position and will succeed. Please accept my apology for my misunderstanding and our delay in providing this information to you. However, I have not been involved in any previous Labour Relation Disputes, so this is new for me. Business has been more demanding than usual and supporting information took time to collect as others were unable to provide information as quickly as I would have preferred.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109 (1)(b) of the *Act*. Both the Delegate and Abdul replied to the appeal.

The Delegate said he received Litke's February 22, 2002 fax on Friday at 6:40 pm, ten days after the deadline to appeal. He attempted to contact Litke on the following Tuesday and was informed he was on vacation. He did manage to speak with Tremblay on Tuesday and he invited him to submit a request for an extension to the Tribunal. He also informed him he would hold off collection proceedings until March 5, 2002. When no appeal was received by that date, he commenced collection proceedings by way of Third Party Demands faxed on March 7 at 10:30 am to two companies he believed might be doing business with AALL. The Delegate said that Litke was a director or officer of these two companies, as well as AALL, and Litke contacted him shortly after receiving the faxes and asked for more time to prepare an appeal. The Delegate said he informed Litke, like he had previously informed Tremblay, he had to make the request to the Tribunal as it was not a matter over which he had any control.

The Delegate said he has no objection to granting the extension, but AALL should pay the money assessed against it to the Director's Trust Fund as a gesture of good faith. This would also eliminate the need for collection proceedings if the Determination is confirmed.

Abdul stated that the Determination is correct; AALL had a year to respond during the investigation; and any further delay in bringing closure to the matter would be an injustice. He said that AALL had plenty of opportunity to respond, but chose not to. The appeal should not be considered as it is beyond the deadline and the company should immediately pay the judgment amount.

ANALYSIS

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limit for an appeal. AALL has requested that the Tribunal extend the deadline to file an appeal.

The Tribunal has consistently held that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BC EST # D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal has identified several material considerations including:

- 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 ongoing bona fide intention to appeal the Determination;
- iii. the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must be aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of the extension; and
- v. there is a strong prima facie case in favor of the appellant.

I have considered the circumstances of the late filing of this appeal and I am not satisfied that AALL has provided a reasonable and credible explanation for the failure to deliver an appeal to the Tribunal by February 11, 2002. AALL does not dispute that it received the Determination before February 11. Clear instructions were included in the Determination about how and when to file an appeal. Even if the demands of the business were unusually onerous at the time, AALL nevertheless had ample time prior to the expiry of the deadline to contact the Tribunal to discuss the situation and request additional time, if necessary, to file an appeal.

Nor am I satisfied there has been an ongoing bona fide intention to appeal the Determination. AALL received the Determination before the deadline to appeal. 10 days after the deadline expired it made a request for an extension to the Delegate despite instructions contained in the Determination that an appeal had to be made to the Tribunal. Then, after receiving further appeal information from the Delegate on February 26, it still did not file an appeal for nine days, which was when the Delegate commenced collections. I do not accept that AALL genuinely intended to appeal prior to March 7, 2002. Rather, I find that AALL was motivated to file this appeal due to the Delegate's collective activities.

Further, the first time the Delegate and Abdul knew of an actual appeal was when they received notification from the Tribunal on or about March 12, 2002 that an appeal had been received from AALL. As well, in my view, it is not in Abdul's interest to have this matter further delayed by granting an extension to the appeal deadline. One of the purposes of the *Act* 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.

Finally, although the appeal is not obviously frivolous, AALL has not established a strong case in its favour. The Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BC EST # D570/98). In this case, I am not satisfied that AALL was unable to provide its "new" information to the Delegate during the

investigation process, or that it lacked sufficient opportunity to express its views during the investigation process. According to the Delegate (and this is not disputed by AALL), AALL was aware of Abdul's complaint at least 8 months prior to the issuance of the Determination and during that time, there were various communications between the delegate and AALL, including communications with Tremblay where he claimed Abdul's reduction in hours were caused by Abdul taking time off for personal reasons. This indicates, in my view, that AALL had plenty of time to provide its "new" information to the Delegate (at a minimum it could have advised the delegate it was seeking additional information and needed more time to make its case, but it did not) and it belies Tremblay's statement on appeal that he did not "fully appreciate" the issue until after the Determination was issued. Accordingly, if the appeal were accepted, AALL would likely not be allowed to present the evidence it seeks to present on the appeal with the result the appeal would be dismissed.

For the above reasons, I decline to extend the appeal period. The obligation is on the Appellant, AALL, to exercise reasonable diligence in the pursuit of an appeal. In this case, the Appellant has failed to persuade me it has done so and I find no compelling reasons to extend the time limit for requesting an appeal in this case.

ORDER

AALL's application under Section 109(1)(b) of the *Act* to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the *Act* the appeal is dismissed and accordingly the Determination is confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal