

An appeal

- by -

Ajit Singh

- 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: John M. Orr

FILE No.: 2005A/156

DATE OF DECISION: November 15, 2005

DECISION

APPLICATION

1. This is a consideration of an application by Ajit Singh (“Singh”) pursuant to Section 109 of the Employment Standards Act (the “Act”) to extend the time period for requesting an appeal from a Determination dated July 12, 2005 by the Director of Employment Standards (the “Director”) even though the time period for requesting an appeal has expired.
2. Ajit Singh was employed by Glenwood Label & Box Manufacturing Ltd. (“Glenwood”) from June 1998 to December 21, 2000. After his employment terminated Singh filed a complaint under section 74 of the Act alleging that Glenwood had failed to pay him compensation for length of service.
3. A delegate of the Director held a hearing on May 27, 2005 and subsequently issued a Determination in which he concluded that the Act had not been contravened, that Singh had “quit” his employment and that there was no liability for compensation for length of service.
4. Singh has filed an appeal to the Tribunal but the appeal was filed outside of the time required. This decision addresses his application to extend the time so that the appeal may be heard. The Director’s delegate takes no position on the application to extend the time for filing the appeal. Glenwood opposes any extension pointing out that Singh is simply seeking a re-hearing of the same issues addressed by the delegate.
5. The grounds for appeal and the time limits for requesting an appeal are set out in Section 112 of the Act as follows:

Appeal of director's determination

112.(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

- (a) the director erred in law;*
 - (b) the director failed to observe the principles of natural justice in making the determination;*
 - (c) evidence has become available that was not available at the time the determination was being made.*
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),*
- (a) deliver to the office of the tribunal*
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),*
 - (i.1) a copy of the director’s written reasons for the determination, and*
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and*
 - (b) deliver a copy of the request under paragraph (a)(i) to the director.*
- (3) The appeal period referred to in subsection (2) is*
- (a) 30 days after the date of service of the determination, if the person was served by registered mail, and*
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).*

6. The Determination is dated July 12, 2005 and was deposited with Canada Post for registered mailing the same day. The cover letter 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 4:30 pm on August 19, 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.

7. The date of August 19, 2005 referred to by the Director for filing the appeal is based on the latest date allowed following a deemed service under section 122 of the *Act* which 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. Accordingly, the Determination was deemed to have been served on July 20th and the last day for filing an appeal was Friday August 19th.
8. The Tribunal received Singh's appeal at 2:20 pm on Tuesday August 23rd, 2005, two business days after the deadline imposed by the *Act*.
9. The Tribunal has authority under Section 109(1)(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles in exercising the discretion granted in this section which include that:
1. Is there a good reason why the person appealing could not meet the deadline?
 2. Was there an unreasonably long delay in filing the appeal?
 3. Did the person appealing always intend to appeal the Determination?
 4. Were the other parties aware of the intent to appeal?
 5. Would extending the appeal deadline harm the Respondent's case?
 6. If the Tribunal grants an extension, does the person appealing have a strong case that might succeed?
10. In this case the request for the appeal was filed some 4 days late or two business days late. Singh explains the delay in requesting his appeal by alleging that his mail was sent to him at the wrong address. He says that he asked the tribunal to re-send new forms and that he didn't receive them until August 23rd. He alleges that the Director sent the Determination using the wrong postal code.
11. While it may be correct that the wrong postal code was used the Canada Post tracking records show that Ajit Singh signed for receipt of the Determination on July 18th at 17:35 hours. Accordingly, Singh had in fact more than the 30 days in which to file his request for an appeal. The forms necessary for filing a request for an appeal are widely available on the internet, from the tribunal or any government agent's office. The information about the Internet address was provided to Singh on the cover letter that accompanied the Determination. Given that Singh had all the relevant information on how and where to file an appeal, he must exercise reasonable diligence in pursuing the appeal: *Roseg Management Corp.* [2004] BCEST #D127/04.

12. The explanation for the delay is short of demonstrating due diligence in making every effort to request the appeal within the time limits. This, of course, must be weighed against the fact that the delay in this case was not extensive. In weighing whether to grant the extension under these circumstances I have looked at the other factors that the Tribunal has generally considered relevant.
13. While it may always have been Mr. Singh's intention to appeal there is no indication that his intention was shared with the Director or the respondent at any time before his request was sent to the Tribunal. On the other hand there is little indication that the short delay will have prejudiced the respondent's position in any way. In my opinion these factors are relatively neutral.
14. The most significant other factor that needs to be considered is the likelihood of success if an extension of time is granted. This aspect of the appeal weighs strongly against extending the time. The request for appeal sets out many aspects of the evidence heard by the delegate that Singh alleges were untrue. He claims that witnesses lied and that the delegate failed to adequately assess the credibility of the witnesses. He claims that weight should have been given to evidence provided by letter or that witnesses should have been contacted by telephone.
15. Unfortunately, Singh does not raise any issue of law and fails to demonstrate that the delegate failed to observe the principles of natural justice. While Singh disagrees with the delegate's assessment of the evidence there is no indication that Singh was not given every reasonable opportunity to present his case to the delegate and to examine and cross-examine witnesses. The onus is on the claimant to ensure that all of the relevant evidence is presented and that all material witnesses are present to give their evidence. The onus is not on the delegate to make sure that witnesses are present.
16. Many cases depend on the credibility of witnesses and it is certainly not always an easy task to establish who should be believed where evidence clearly conflicts. In this case the delegate understood the need to be careful and he applied established legal principles in weighing the evidence and coming to his conclusions. While it may be that another delegate or tribunal member might have come to a different conclusion the appeal process is not intended to be used as an opportunity to re-argue a case that has been fully made before the delegate or to get a "second opinion": *Masev Communications* [2004] BCEST #D205/04. In this case the delegate was careful in his analysis and gave reasons why he came his conclusions of fact. It is a well-reasoned and carefully analysed determination. Little would be served by having the matter re-heard.
17. Singh also claims to have new evidence but there is nothing to indicate that the evidence was not available at the time the determination was being heard. His allegation about new evidence is also refuted by the respondent and it is likely that this new evidence would have little or no weight with the delegate.
18. Overall, there was not an overly unreasonable delay in filing the appeal and it is noted that the Director is not opposed to the extension of time. However, there is no real explanation as to why the appeal could not have been filed within the 30 or more days that the appellant had to file his application. It cannot be said that the appellant has acted diligently in pursuing his appeal. In addition, in my opinion, no purpose would be served by granting the extension in this case. The substance of the appeal relates back to the credibility of witnesses and the findings of fact made by the delegate. There is no ground of appeal that falls within the mandate for the Tribunal in the legislation. Essentially, there is no substantive ground of appeal alleged that would have any likelihood of success.

- ^{19.} In conclusion, the application for an extension of time for requesting an appeal pursuant to s.109 (1)(b) is denied and the appeal is dismissed without a hearing in accordance with s. 114 (1)(b) as I am satisfied that the appeal has not been filed within the time limit in section 112 of the *Act*.

ORDER

- ^{20.} Accordingly, pursuant to section 109(1)(b), I decline to extend the time for filing of the appeal herein. The appeal is dismissed without a hearing pursuant to section 114(1)(b).

John M. Orr
Member
Employment Standards Tribunal