



An appeal

- by -

Marchesi Marblecraft Ltd.  
("Marchesi or employer")

- 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:** Paul E. Love

**FILE No.:** 2001/121

**DATE OF DECISION:** April 23, 2001

## DECISION

### OVERVIEW

This is an application by Marchesi Marblecraft Ltd. (the “employer” or “Marchesi”) to extend time to permit the filing of a late appeal of a Determination issued by a Delegate of the Director of Employment Standards. The deadline for filing the appeal was December 29, 2000. The employer filed an appeal on February 14, 2001, after the Director commenced collection proceedings against the Directors, after the issuance of determinations against Marchesi’s directors. On December 14, 2000, prior to the expiration of the appeal period, the employer notified the Delegate of errors in the Determination, and asked the Delegate to cancel the Determination. The Delegate did not correspond with the employer until the Delegate issued personal determinations against the employer’s directors. I am concerned that the failure of the Delegate to correspond with the employer following the employer’s request to cancel the Determination, may have mislead the employer, and at the very least it is a reasonable explanation for the delay in filing the appeal. The appellant raised an issue involving the opportunity to participate in the Delegate’s investigation which may have impacted the Delegate’s assessment of credibility of the parties. The Delegate resolved the Determination against the employer on the basis of credibility. There appears to be a serious issue advanced by the employer, and since the employer paid to the Delegate the full amount of the Determination, there was no prejudice to the employee from the late filing of the appeal. The issue concerned the whether the employer gave of written notice of termination to an employee, Giovanni Mucci, thereby discharging any obligation to pay compensation for length of service, pursuant to s. 63(3) of the *Act*. I, therefore granted leave to the employer to late file the appeal, and directed that the matter be set for an oral hearing.

### FACTS

This is an application by the employer, Marchesi Marblecraft Ltd. (the “employer” or “Marchesi”) for extension of time to file an appeal, pursuant to s. 109(1)(b) of the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the “*Act*”) I decided this application upon the written submissions, and affidavits filed by the parties. The Determination was issued on December 6, 2000 in favour of Giovanni Mucci in the amount of \$7,871.33, inclusive of interest. In the Determination of December 6, 2000 the Delegate found that Mr. Mucci had not been given notice of termination, and was entitled to compensation for length of service. Mr. Mucci had served 22 years with the employer.

After receiving the Determination on December 14, 2000, the employer wrote a letter to the Delegate identifying errors in the Determination, and asking the Delegate to cancel the Determination. The employer did not file an appeal within the deadline provided in the *Act*. The deadline for the filing of the appeal was December 29, 2000. The Delegate did not answer the employer’s letter of December 14, 2000. Determinations were issued against Luigi Marchesi

and Johanna Marchesi as corporate officers of Marchesi (“personal determinations”) on January 22, 2001. After receiving the personal determinations, the employer filed an appeal of the personal determinations, and this determination. The appeals of the personal determinations were filed in time. By way of a written submission dated February 21, 2001, the Delegate says that the employer received the Determination, was aware of the appeal process from another matter, and that the appeal was not filed until after collection proceedings commenced. The Delegate opposes an extension of time. The employee opposes an extension of time, and affidavit material and a statutory declaration was filed on behalf of the employee. The employee argues that the employer gave no written notice of termination, and that the case on the merits is based upon evidence which the employer contrived after the appeal period expired. It is difficult for me to assess the validity of this argument without oral evidence.

**Employer’s Argument:**

The employer claims that it did give written notice to Mr. Mucci and a group of other employees, on or about May 7, 1999 of termination of employment to occur on July 16, 1999. The employer filed with its appeal a note from an employee, which may or may not be entirely accurate. The employer has, however, filed through counsel, an affidavit of an employee in the group who was terminated who deposes that he received written notice.

The employer says it was not made aware of Mr. Mucci’s complaint until December 5, 2000, and the date of termination was July 16, 1999. The employer sent a copy of the notice of termination to the Delegate, and claimed that it was expecting to hear back from the Delegate if she required further information. The employer says that on or about December 14, 2000 it received a copy of the Determination dated December 6, 2000. The employer says its plant closed on December 18, 2000 to December 28, 2000 for Christmas. The employer says it sent a letter to the Delegate on December 14, 2000 asking the Delegate to cancel the Determination. The employer says that a letter from Marchesi to the Delegate dated December 14, 2000 constitutes “notice” that the employer was unhappy with the Determination and intended to appeal. The letter asks the Delegate to cancel the Determination, because notice was given. The employer says that it was waiting for a response from the Delegate, and the Delegate did not respond within the appeal period. The employer scheduled a meeting with the Delegate after receiving the personal determinations issued on January 22, 2001.

I note that Mr. Marchesi deposed that he emigrated from Italy in 1962, and deposed that his first language is not English, although he has a working knowledge of English, that he is 70 years old, and that he did not consult a lawyer until March of 2001.

The employer’s counsel argues that the employer was not given a fair or adequate opportunity to participate in the investigation. Further the employer will argue that the Delegate erred in preferring the information of Mr. Mucci, over the evidence of the employer, on the issue of whether Mr. Mucci received a notice of termination. The employer alleges that the Delegate should have interviewed other persons. The employer says that the Delegate placed some weight

in assessing credibility on the fact that the employer's notice of termination indicates a plant closure, but that at the time of the investigation the employer operated at the same location. The employer says that the Delegate failed to give an opportunity to the employer to reconcile this information, and that there was an explanation which might have made a difference to the credibility assessment made by the Delegate.

The employer says that there is a strong prima facie case on the merits, as the Determination was issued on the very day that the only conversation of any substance took place between the Delegate and the employer. The employer says that there is no prejudice to the employee if a time extension is granted, and Mr. Mucci is fully secured for his claim.

### **ISSUE:**

Should the Tribunal grant an extension of time to the employer to file this appeal?

### **ANALYSIS**

The appeal in this matter was filed out of time, however, the Tribunal has a discretion to extend the time for the filing of an appeal (see s. 109(1)(b) of the *Act*). In determining whether to grant an extension of time, I must consider the following issues:

Did the appellant form the intention to appeal within the appeal period?

Does the appellant has a reasonable excuse for failing to file the appeal within the time limits set out in the Determination?

Is there any prejudice to the respondent from the late filing of the appeal?

Is there is a "strong prima facie case" or a serious issue on the merits?

I must bear in mind the unique factors of this case, and the purposes of this *Act*, which include fair and efficient procedures for resolving disputes under the *Act*.

### **Application of the Test:**

I am satisfied that the appellant did form an intention to appeal within the time period. The employer's letter of December 14, 2000 puts the Director on notice of errors in the Determination. I am satisfied that the employer had a reasonable excuse for not filing an appeal with the Tribunal, as it had corresponded with the Delegate, and was awaiting an answer from the Delegate concerning the Determination. The employer does have an excuse for not filing an appeal until after Mr. Marchesi received the personal determinations, and the Delegate has not provided me with any explanation as to why she failed to answer the employer's written communication of December 14, 2000. I am particularly concerned that the Director does have

the power to vary or cancel a Determination under s. 86 of the *Act*, and that the failure to communicate with the employer, may have misled the employer. At the very least, awaiting communication, in these circumstances, does provide a reasonable excuse for the delay in filing the appeal. The employer has deposited with the Director, the full amount set out in the Determination, and I am satisfied that there is no prejudice to the employee, which cannot be compensated, by the payment of interest.

There are two different stories on the issue of notice, and credibility is a significant issue. If this matter proceeds to an appeal the issue of notice will turn on credibility. The employer will be required to demonstrate that the Delegate erred in finding that the employer had not given notice of termination to Mr. Mucci. The employer will be required to demonstrate that it was not given an adequate opportunity to participate in the investigation. I do not wish to comment further on the credibility issue, but it appears that the employer and the employee have different views on whether notice was given.

The notice issue before the Delegate appears to have turned purely on a credibility assessment. I note that the employer had a previous Determination involving a compensation for length of service and notice issue involving another employee (“Esposito Determination”) which was resolved against the employer both by the Delegate and by the Tribunal. The Delegate who issued the Esposito Determination, was involved in the investigation of this Determination, but was not the person who issued this Determination. I note, however, that the Delegate issuing this Determination appears to have been aware of the earlier Determination.

I note that there is nothing in the Delegate’s letter to the Tribunal dated February 21, 2001, which comments on the allegations made by the employer concerning the investigation made by the Delegate prior to the issuance of the Determination. I am not informed of the efforts made by the Delegate to afford the employer an opportunity to participate in the investigation. In this case, I see no evidence that the Director issued a demand for production of documents, with which the employer failed to comply. There is no evidence before me that the employer failed to cooperate in the investigation. There is no evidence before me that the Delegate issued a letter setting out her preliminary views, before proceeding to issue a Determination. On the basis of the material presented on this application, a very short time period elapsed between initial contact with the employer, and the issuance of the Determination. Further, there appears to be some evidence supporting the employer’s assertion that notice was given to a group of employees from two employees, one of whom was the book keeper. In the absence of information from the Delegate, and on the basis of the information submitted by the employer, I am satisfied that the employer has raised a serious issue with regard to s. 77 of the *Act*.

This is a case, which requires an oral hearing to assess the issues of credibility and there is a serious issue presented by the employer for consideration on appeal. Given that there is no prejudice to the employee, and that the Director received notice of allegations by the employer that the Determination was flawed prior to the expiration of the appeal period, and that the

Director did not respond to the employer before issuing personal determinations, I am prepared to grant an extension of time for the filing of the appeal.

The employer appears to have filed an appeal by February 14, 2001 and the written submissions made up to and including April 3, 2001 appear to contain the substance of the appeal by the employer.

### **ORDER**

Pursuant to section 109(1)(b) of the *Act*, I extend the time for the employer to file the appeal until the close of business on April 3, 2001. I direct that the Registrar set this matter for an oral hearing.

***PAUL E. LOVE***

---

**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**