

An appeal

- by -

Carla Callegaro
("Callegaro")

- 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: April Katz

FILE No.: 2003/98

DATE OF DECISION: June 9, 2003

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") issued a Determination dismissing the claim of Carla Callegaro ("Callegaro"), the Appellant, after a hearing on January 23, 2003. The written Determination was dated February 14, 2003 and was mailed to Callegaro specifying a deadline of March 24, 2003 for the Tribunal to receive an appeal.

Callegaro's appeal is dated March 27, 2003 and was received by the Tribunal on April 1, 2003. This Decision deals with the issue of timeliness of the appeal. The matter proceeded on the basis of written submissions.

ISSUE - TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from March 24, 2003 to March 27, 2003 and this decision is confined to this issue.

ARGUMENTS

Callegaro submits she was under extraordinary time pressures during the appeal period that prevented her from submitting her appeal on time. She indicates that she was asked to work double shifts and was preparing for a 3 hour examination for a competition for different position with her employer. She had intended to file the appeal on time but the night she had set aside to prepare her appeal, her son was injured and in hospital. Due to the situation Callegaro indicates she lost track of the exact deadline and asks for an extension of time.

John Brownbill and Donna Brownbill argue that six weeks seemed an ample amount of time for an appeal to be filed.

The Director's delegate confirms that Callegaro notified him that she intended to appeal two weeks after the Determination was sent to her. The Director takes the position that there is nothing in the appeal that raises new issues that were not raised and addressed in the Determination and that the appeal is therefore without merit.

FACTS

LAW AND ANALYSIS

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

The Tribunal has been asked to extend the time to file an appeal on many occasions. In each case the Tribunal is mindful of 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. Under section 109(1)(b) of the Act, the Tribunal may extend the time for requesting an appeal, where the appeal period has expired.

The Tribunal must ensure that there are compelling reasons to extend a time limit for an appeal. The Tribunal set out the six criteria for determining timeliness of appeals based on previous cases in Bravo Cucina Ristorante Italiano Ltd. BC EST #D343/00. The criteria were sent to the parties to assist them in filing their appeal documents for this appeal. The criteria are set out below.

"Appellants who are seeking a time extension for an appeal, should satisfy the Tribunal on balance that:

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."

In *Suter (Re)*, BC EST #D177/00, the Tribunal considered a request for extension of time for filing an appeal where the Determination was made and mailed on November 23, 1999. The appeal was to be filed by December 16, 1999 and was actually filed December 23, 1999. The mail had not been claimed by the Employer and had been returned to the Employment Standards Branch on December 14, 2000. The appeal was filed when the Employer received a demand notice from her bank. An extension of time was denied after citing the statutory requirements for timeliness of appeals.

I will consider the six criteria as they apply to the facts in this appeal.

1. "There is a good reason they could not appeal before the deadline"

Callegaro's reason for the delay is that she had no time to prepare the appeal because of her work assignments and her son's injury. None of the parties disputes Callegaro's evidence but they do question if this was the reality throughout the 6 week period from the date of the Determination to the appeal deadline. It appears that Callegaro's evidence in this regard applies most particularly to the last two weeks before the deadline and perhaps not for the full period.

2. "There is not an unreasonably long delay in appealing"

The three business day delay was not unreasonable.

3. "They always intended to appeal the determination"

The Director's evidence supports the conclusion that Callegaro intended to appeal throughout the appeal period.

4. "The other parties (the respondent and the Director) are aware of the intent to appeal"

The Director confirms that Callegaro had notified the Delegate of her intention to appeal within the first two weeks of the decision being issued.

5. "The respondent will not be harmed by an extension"

None of the parties has suggested that there is any harm in a delay of this appeal. The parties do not dispute that there is money owed to Callegaro for her work. The issue in dispute is whether Callegaro was Brownbills' employee.

6. "They have a strong case that might succeed, if they get an extension."

The final factor relates to the merits of the Appeal. All of the issues raised in the appeal were raised with the Director's Delegate and the Determination analysed the evidence and concluded the evidence did not support Callegaro's position. There is nothing new in the appeal documents, which would suggest a different conclusion.

Issues of whether a person is an employee or an independent contractor are determined primarily on the facts in the specific situation. In an appeal to the Tribunal the onus is on the Appellant to show that the Director erred.

The Director's Delegate conducted a hearing and heard from all the parties. The Delegate concluded that the Brownbills were not Callegaro's employer. The Delegate concluded that there was no direct relationship between Callegaro and the Brownbills.

The Delegate found that Gerard Marleau ("Marleau") was hired as an independent contractor to perform the work. Marleau recruited Callegaro and paid her. Marleau filed a lien on Brownbills' property to recover the money owed under the contract for the work.

The Delegate looked to the four fold test: degree of control, ownership of tools, risk of loss and chance of profit as determining factors for Marleau's relationship with the Brownbills. The Delegate determined that in applying the test to the evidence that Marleau was an independent contractor and that Callegaro was Marleau's employee.

The Brownbills agreed that Marleau was owed money for the work done. They disputed their status as an employer. The Delegate concluded on the evidence presented that Marleau and Callegaro were not Brownbills' employees.

In the material submitted with this appeal Callegaro's evidence is that the Brownbills gave her specific direction on her work. She was directed to do specific tasks on occasion and to add extra coats of paint. The Delegate concluded that this direction was not as an employer but as a quality inspection. Callegaro does not suggest that the Brownbills set her hours of work, adjusted her rate of payment, or provided her with the tools of her trade. She set her rate of pay and assumed it would provide her with a profit on her time.

Based on my analysis of the merits of the appeal there does not appear that any change would occur in the findings or the result if an extension of time were granted.

The onus is on Callegaro to provide the evidentiary basis for an appeal, which would result in varying or canceling the Determination. There is nothing in the documentation filed to support a conclusion that the Director erred in the Determination.

CONCLUSION

While the Appellant has demonstrated that there may be justification to allow an extension of time on the first 4 criteria for granting an extension there is no evidence to suggest that the Determination should be varied or cancelled on the merits. I therefore deny the application for an extension of time to file an appeal under section 109(1)(b) of the *Employment Standards Act*.

ORDER

Callegaro's request for an extension of the appeal period is denied. Accordingly, pursuant to subsection 114(1)(a) of the *Act*, this appeal is dismissed.

April Katz
Adjudicator
Employment Standards Tribunal