



An appeal

- by -

Unity Wireless Systems Corporation
(“Unity”)

- 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

TRIBUNAL MEMBER: Carol Ann Hart

FILE No.: 2004A/166

DATE OF DECISION: November 15, 2004



DECISION

SUBMISSIONS

Cora Salvador on behalf of Unity

Joyce Graham on behalf of the Director

OVERVIEW

This is an appeal by Unity Wireless Systems Corp. ("Unity") pursuant to section 112 of the Employment Standards Act (the "Act") of a Determination issued on August 6, 2004 by Joyce Graham, a delegate of the Director of Employment Standards (the "Director").

In the Determination, the Delegate of the Director ordered that Unity pay vacation pay in the total amount of \$2380.08 as required under section 58 of the *Act* and interest in the amount of \$116.05 pursuant to section 88 of the *Act*. An administrative penalty of \$500.00 with respect to the contravention was imposed pursuant to section 29(1) of the *Employment Standards Regulation*, B.C. Reg. 369/95, as amended.

The appeal is brought on the grounds that the director erred in law.

The time limit for filing the appeal expired on September 13, 2004. The Tribunal received an appeal from Unity on September 16, 2004.

By letter from the Employment Standards Tribunal dated September 17, 2004, the delegate of the Director and Unity were invited to make submissions on the question of whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and extend the time period for requesting an appeal.

The Tribunal has decided that an oral hearing is not required and that the matter can be properly addressed through written submissions.

ISSUE

The issue in this case is whether the time limit for requesting an appeal, as set out in section 112 of the Act, should be extended in this case.

ARGUMENT

Cora Salvador, Unity's Manager Accounting and Human Resources, acknowledged that the Determination was received and that she was aware of the deadline for filing the appeal. Ms. Salvador indicated that Unity had always intended to appeal the Determination, but because she was on vacation from August 4-9, and September 9-15 (during which time she was ill) she had not filed the appeal within the permitted time frame.



The Director's delegate submitted that Unity had not demonstrated that there was a good reason for the Tribunal to extend the time period for filing an appeal. According to the Director's delegate, she had been contacted by Mr. Dallas Pretty, CFO of Unity on August 23, 2004, and had given him information regarding the appeal process and the time frame in which to file an appeal of the Determination. Unity was also notified of the deadline for filing an appeal in the Determination dated August 6, 2004. The Delegate indicated that no appeal was filed until after she had contacted Unity to advise that the time frame in which to file an appeal had expired, and the Branch would be proceeding with collections.

ANALYSIS

In deciding whether to extend the period in which to file an appeal in this case, I note that the purpose of the *Employment Standards Act*, as set out in section 2(d), is “to provide fair and efficient procedures for resolving disputes”. The *Act* provides a time frame in which to appeal to ensure that appeals are dealt with efficiently. Pursuant to section 109(1)(b) of the *Act*, in a situation in which the appeal period has expired, the Tribunal may extend the time frame for the filing of an appeal. The appellant has the onus of establishing that the period in which to file an appeal should be extended.

Various courts and tribunals have established the following non-exhaustive list of principles concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BCEST #D099/96 and *Re Pacholok*, BCEST #D511/97).

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

The parties were advised of the above criteria to assist them in filing their documents for this appeal.

On the Appeal Form, it was indicated that the person who signed the form had filed late “due to extenuating circumstances and illness”.

Cora Salvador indicated in her letter dated 30 September 2004 that she was on vacation from August 4-9 and September 9-15 (during which time she was ill).

There was no information provided by Ms. Salvador concerning the nature of her illness, or the “extenuating circumstances” to which she had referred on the Appeal Form. Ms. Salvador did not state why she could not have filed the appeal during the period of approximately one month from August 9 and September 8, 2004 when she was apparently not on vacation or ill. Based on the submissions, I cannot conclude that there is a reasonable explanation for the delay.



Despite the fact that Unity had received the Determination and was made aware of the time frame in which to file an appeal, no *bona fide* intention to appeal the Determination was demonstrated. There was no evidence to show that Unity had advised the respondent party or the Director that it intended to appeal.

I turn now to an examination of the merits of the appeal to determine whether there is a strong *prima facie* case in favour of the appellants.

On the Appeal Form, the appellants provided the following explanation for the allegation that the Director had erred in law:

2002 gross earnings \$57,031.56 included vacation pay. Vacation taken (June 10-28, 2002) 15 days Aug 1 & Sept. 11.

2003 gross earnings per T4 2003=\$30, 896.59, not \$33,199.90 as stated.

Supporting documentation was submitted by the appellants with the Appeal Form.

In the Determination, the Delegate wrote in part as follows:

During the investigation the employer did not respond to phone calls and a fax requesting additional information and records on whether vacation pay had been calculated on all wages including overtime pay and compensation for length of service. On June 17th 2004 a letter was sent to the employer outlining the complainants (sic.) allegation of vacation pay not paid in accordance with the Act and the employer was advised if a response was not received by July 6, 2004 a determination would be issued on the information in the file.

The employer's Manager of Accounting and Human Resources Cora Salvador (Salvador) faxed a response on July 6 2004 indicating she had been on vacation and would send a response by Friday July 9, 2004. No response was received from the employer on July 9, 2004. The employer was called Friday, July 9, 2004 at 2:50 p.m. Salvador indicated she was in a meeting and would call back. No return call was received and no written response to the June 17, 2004 letter was received....

The employer did not provide any evidence they paid the complainant vacation pay on all wages earned for 2002 and 2003 including overtime and compensation for length.

Given that the appellants chose not to submit information when it was requested, they cannot now provide evidence on appeal which they failed to submit in the investigation. The Tribunal will not consider new evidence in the context of an appeal which could have been provided by the employer at the investigation stage (see *Kaiser Stables Ltd.* BC EST #D058/97 and *Tri-West Tractor Ltd.* BC ESTD #268/96). Consequently, any evidence the appellants sought to present which was available at the time of the investigation would not be considered on appeal. It was not shown that the appellants had a strong *prima facie* case.

For all of the above reasons, I deny the application for an extension of time to file the appeal.

**ORDER**

Unity's application brought under section 109(1)(b) of the *Act* for an extension of time to file the appeal is denied. Pursuant to Section 114(1)(b) of the Act, the appeal is dismissed. The Determination dated August 6, 2004 is confirmed.

Carol Ann Hart
Member
Employment Standards Tribunal