

An appeal

- by -

Daniel Lawlor operating as Windsong
("Lawlor")

- 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.: 2002/163

DATE OF DECISION: May 15, 2002

DECISION

OVERVIEW

This is an appeal by Daniel Lawlor operating as Windsong ("Lawlor") 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 February 18, 2002. The delegate found that Lawlor owed Dana-Lee Young ("Young") \$676.99 representing overtime and statutory holiday pay, vacation pay and interest. The Determination indicated an appeal of it had to be delivered to the Tribunal by March 14, 2002. The Tribunal received an appeal on March 28, 2002. Lawlor effectively requested that the Tribunal extend the deadline to file an appeal. 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 February 18, 2002 the delegate issued a Determination against Lawlor in which she found that Young was owed \$676.99 representing overtime and statutory holiday pay, vacation pay and interest. The delegate based her decision on a review of the employer's records which showed that Young did not receive statutory holiday pay or overtime wages when overtime hours were worked at the florist shop and on the fact the employer provided no evidence to show it had paid Young vacation pay.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than March 14, 2002.

The Tribunal received an appeal from Lawlor on March 28, 2002 (dated March 27). His explanation for why the appeal is late is as follows:

With the determination was enclosed a letter which in part read, "Determination dated Febuary (sic) 18, 2002. The Determination was returned undeliverable from your former address." Therefore I am appealing the established Appeal Deadline of 4:30 P.M. on March 14, 2002 to sometime after I received the Determination (11:27 A.M. March 27, 2002).

I will be compiling a list of facts, believed to have been not considered by The Ministry of Skills, Development and Labour, and forwarding this to the Tribunal no later than March 30, 2002. Thank you for your patience during the events that have prevented me from replying to this matter before now.

Lawlor's reasons for the appeal are that the delegate overlooked the fact that Young was hired to manage; Young was paid statutory holiday pay and vacation pay; and Young was on a flexible work schedule.

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. The delegate replied that Lawlor has raised issues on the appeal that were not raised during the investigation. She said there is no indication anywhere

in the file that Lawlor considered Young to be a manager. Further, he was sent a letter dated October 24, 2001 which included the calculations for outstanding wages and was asked to send back either a cheque or his reasons for disagreeing with the calculations by October 31, 2001. He was also advised if he failed to do so, a Determination would be issued. However, no response was ever received from Lawlor.

The delegate further said that Lawlor filed the appeal in response to a letter from the Employment Standards Branch requesting payment. She said Lawlor was aware of the complaint and the investigation. He moved his business something in the fall of 2001 or the early part of 2002.

Letters mailed in October appear to have been received by him while the Determination mailed in February was returned as address unknown. Lawlor did not make any apparent attempt to contact the Branch with a new address. Young reported his new location to the Branch. She said Lawlor was given ample opportunity to respond to the allegations, his input was solicited, and he responded in a minimal fashion or he failed to respond at all. She says he should not now be afforded that opportunity. She says he neglected to either provide the post office with a forwarding address or notify the Branch of a new address. Section 122 of the Act considers the registered mail (the Determination) delivered 8 days after the mail is deposited in a Canada Post Office. The delegate included various documents with her submission including a letter dated March 22, 2002 from her to Lawlor at his current address. This letter appears to be the document that Lawlor refers to in his reasons why the appeal is late. The letter reads "Enclosed is a copy of the Determination dated February 18, 2002. This Determination was returned undeliverable from your former address". The delegate then goes on to cite Section 122 of the Act and advises him if he does not pay \$676.99 by April 10, 2002 she will proceed with collection action.

The parties were provided with the delegate's submission and invited to make a final reply. Lawlor did not reply. Young replied that she was not a manager at the shop and that Lawlor continues to contact her telling her it would be in her best interest to drop the case.

ANALYSIS

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

The Tribunal has held consistently 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* BCEST #D 211/96). 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.

The Determination was lawfully served on Lawlor at his last known address. However, he did not receive it prior to the expiry of the appeal deadline because he had moved to a new location. Once he received the Determination at his current address he filed the appeal. While this appears to be a reasonable excuse

for failing to file the appeal within the time limits set out in the Determination, I am of the view that Lawlor had some responsibility to advise the delegate of his change of address. Lawlor knew, by way of the October 24 letter, that the delegate would issue a Determination if he failed to send her a cheque or his reasons for disagreeing with her calculations. He did neither. He effectively ignored the delegate. Although he could have, he chose not to advise the delegate of his new address. As a result, the delay in this case has been caused by Lawlor's conduct.

Further, although Lawlor showed an intention to appeal as soon as he had the Determination and the delegate and Young were notified shortly thereafter of the appeal, the fact remains that the cause of the delay in filing the appeal was due to Lawlor's failure to advise the delegate of his change of address. In my view, if Lawlor had genuinely intended to dispute Young's claim, he would have responded to the delegate's October 24 letter or he would have advised her of where to send the Determination.

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. I accept that it is not in Young's interest to have this matter further delayed by granting an extension to the appeal deadline.

Finally, Lawlor has not established a strong case in his favour. The Tribunal has consistently held that it will not accept evidence on an appeal that could have and should have been provided to the delegate, but was not provided to the delegate during the investigation (see *Tri-West Tractor Ltd.* BCEST #D268/96). In this case, Lawlor does not challenge the delegate's statement that he was unresponsive during the investigation and never raised the issue that Young was a manager. I am satisfied that if the appeal were accepted, Lawlor would likely not be allowed to present evidence regarding Young's managerial status with the result the appeal would be dismissed on this point. As for the other points raised by Lawlor, he has provided absolutely no evidence to show that Young was paid statutory and holiday pay or that she was on a flexible work schedule, with the result that his appeal concerning these issues has little, if any, chance of succeeding.

On balance, I find no compelling reasons to extend the appeal period.

ORDER

Lawlor'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, Vice-Chair
Employment Standards Tribunal**