

An appeal

- by -

Kirk A. Pleasants
("Pleasants")

- 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 D. Katz

FILE No.: 2001/237

DATE OF DECISION: May 2, 2001

DECISION

SUBMISSIONS:

Kirk Pleasants	on his own behalf
Jim Dunne	on behalf of the Director

OVERVIEW

The Director of Employment Standards (the "Director") issued a Determination against Astro Guard Alarms Vancouver Ltd. ("Astro") on January 25, 2001. The Determination found that Kirk Pleasants ("Pleasants") was owed \$191.77 in wages and interest. The Determination calculations were hampered by a lack of payroll records. In March Pleasants appealed to the Tribunal on the basis of the T4 he received for the relevant period. The time for an appeal expired on February 19, 2001.

ISSUE - TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from February 19, 2001 to March 21, 2001 and this decision deals only with that issue.

FACTS

Pleasants worked for Astro as a sales representative from November 8, 1999 to March 14, 2000 with a guaranteed draw of \$650 per month plus commissions and a \$350 per month car allowance. Pleasants never exceeded the base sales that resulted in commissions. Pleasants had trip records for mileage but did not have an accurate record of hours worked. Astro had some estimates of hours worked in January but did not keep payroll hours records.

ARGUMENT

After the Determination was issued Pleasants received a T4 from Astro which indicated different salary payments. Pleasants did not have this information during the investigation and is seeking an appeal to have the calculations redone by the Director of Employment Standards, who has no objection.

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, even though the appeal period has expired.

The Tribunal must assess an appeal and ensure that there are compelling reasons to extend a time limit. The Tribunal set out the six criteria for determining timeliness of appeals based on previous cases in *Bravo Cucina Restaurante Italiano Ltd.* BC EST #D343/00.

"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 factors described as they apply to the facts in this appeal.

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

Pleasant was not aware of the new evidence of his earnings until he received his T4 from Astro. The figures used for the Determination and the T4 do not match.

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

Pleasant raised the issue of his T4 in a timely manner after he was aware of the implications.

3. "They always intended to appeal the determination"

There is no evidence that suggests Pleasant expressed an intention to appeal to the Delegate or Astro.

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

Neither the Delegate nor Astor have indicated they had prior knowledge of Pleasant's intention to appeal.

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

Astro may be harmed if the calculations show that more money is owed to Pleasant as a result of the information on the T4. The T4 was prepared by Astro. Astro should have provided the information on the T4 to the Delegate during the information.

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

The final factor relates to the merits of the Appeal. There appears to be a discrepancy in Astro's report of the earnings reported to the Delegate and on the T4. There is merit to clarifying this discrepancy.

CONCLUSION

There is new evidence to consider on an appeal. The Determination was based on evidence available at the time. A recalculation appears to be warranted based on the new evidence.

The delay is not great and I find on balance that the new evidence should be considered before a final decision is made. In spite of the hardship to the Respondent, I allow the extension of time and allow this appeal to proceed.

ORDER

The Tribunal extends the appeal deadline and the appeal may proceed.

APRIL D. KATZ

**April D. Katz
Adjudicator
Employment Standards Tribunal**