

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Douglas K. Berg
("Berg")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	96/744
DATE OF DECISION:	May 27th, 1997

DECISION

OVERVIEW

This is an appeal brought by Douglas K. Berg (“Berg”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from Determination No. CDET 003128 issued by the Director of Employment Standards (the “Director”) on July 2nd, 1996. The Director determined that Berg was not entitled to claim any unpaid wages as against Motion Works Group Limited (“Motion Works”) by reason of his status as an officer of that firm.

FACTS

Berg’s initial complaint was that he was owed \$41,035.57 in unpaid wages. The Director did not make any finding as to the accuracy or validity of the wage claim. Rather, Berg’s complaint was dismissed on the sole ground that, as an officer of Motion Works (Vice-President) and as a director of a related firm (Motion Works Interactive Ltd.), Berg was not entitled to advance a wage claim under the *Act*.

In the Reason Schedule appended to the Determination, the Director’s delegate, after having first referred to section 96(1) of the *Act* (the corporate officer’s personal wage liability provision), stated: “Accordingly Mr. Berg, in effect, owes to himself whatever wages he may be owed. He cannot employ the mechanisms of the *Employment Standards Act* to collect.”

However, the primary issue that needs to be addressed in this appeal is the timeliness of the appeal itself. As noted above, the Determination was issued on July 2nd, 1996; however, Berg’s appeal to the Tribunal was not filed until December 11th, 1996 -- well beyond the 15-day time limit set out in section 112(2)(a) of the *Act*.

ISSUES TO BE DECIDED

Two issues are raised in this appeal: the timeliness of the appeal and the substantive legal question as to whether or not a corporate officer may file a claim under the *Act* for unpaid wages.

I propose to deal with each issue in turn.

ANALYSIS

The Timeliness of the Appeal

By way of a letter dated December 12th, 1996 Tribunal Registrar Edelman advised Berg that his appeal would not be considered because it was filed well beyond the 15-day statutory time limit.

In response, Berg's solicitors filed two submissions with the Tribunal, both dated February 27th, 1997. Berg's solicitors sought an order extending the time for filing an appeal [see section 109(1)(b) of the *Act*] and a reconsideration of the Tribunal's decision not to consider Berg's appeal (see section 116 of the *Act*).

Berg's position, as set out in his solicitors' written submissions to the Tribunal, is that following his dismissal as a Vice-President of Motion Works (on April 3rd, 1996), Berg entered into settlement negotiations with Motion Works with respect to his claims arising from the termination of his employment. Apparently, these negotiations reached an impasse on December 9th, 1996 and the next day Berg completed an appeal form which, as noted earlier, was filed with the Tribunal on December 11th, 1996.

Berg's request for reconsideration of the decision to dismiss his appeal is predicated on the following factors:

- Berg did not file a timely appeal as he believed it might jeopardize the ongoing settlement negotiations; an appeal was filed as soon as those negotiations reached an impasse.
- The employer will not be prejudiced if a time extension is granted.
- Berg has a strong *prima facie* case on the substantive question raised by the appeal; namely, whether or not corporate officers can file wage claims under the *Act*.

Legal counsel for Motion Works, in separate submissions to the Tribunal dated December 13th, 1996, March 5th and April 16th, 1997, maintains that:

- Berg has not made out a proper case for reconsideration in that Berg has failed to show that the refusal to grant Berg a time extension was manifestly wrong.
- In any event, the Determination is correct on the substantive issue and thus, there is no strong *prima facie* case.

Whether or not Berg has a strong *prima facie* case on the substantive legal question is but one factor that ought to be examined when considering a time extension request. I am satisfied, based on the information that has been placed before me, that Registrar Edelman's decision to dismiss Berg's appeal because it was time-barred was not an unreasonable one.

I must confess that I have great difficulty with Berg's submission that if he had filed a timely appeal to the Tribunal, his ongoing settlement negotiations would have been compromised. Both parties were, and are, represented by experienced and competent legal counsel. Settlement

negotiations are routinely conducted between counsel in circumstances where one side or the other has filed an appeal from an earlier judgment or other award. In my view, the alleged jeopardy to ongoing settlement discussions constitutes neither a reasonable nor a credible explanation for Berg's failure to file a timely appeal.

As a final point, I might add that I cannot appreciate the logic inherent in a situation where the filing of a wage complaint would not, apparently, jeopardize the settlement negotiations but that the filing of an appeal from the Determination rendered with respect to that complaint, would.

I also wish to take this opportunity to clarify my remarks in *Niemisto* (BC EST #D099/96, May 17th, 1996) with respect to the "strong *prima facie* case" criterion. This particular factor is not predominant; it is to be considered along with the other criteria set out in *Niemisto*. I included this factor in my, admittedly non-exhaustive, list of factors to be considered on an application for a time extension so as to screen out apparently frivolous or trivial appeals. I did not intend for this particular factor to be used, **on an application for a time extension**, as a springboard into a deep inquiry regarding the merits of the proposed appeal. Rather, it should be apparent from a reading of the appeal document itself, that the appeal has merit.

The Substantive Issue

In light of my decision on the procedural issue, anything I might now say as to the right of a corporate officer to file a wage complaint under the *Act* would be, in effect, *obiter dicta*. For that reason, I think it best to leave this issue for another day when it has been properly placed before the Tribunal.

ORDER

Pursuant to section 114(1)(a) of the *Act*, I order that the within appeal be dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal