

An appeal

- by -

Canadian Motor Inn Ltd.
("the Appellant")

- 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: William Reeve

FILE No.: 2003A/209

DATE OF DECISION: July 22, 2003

DECISION

OVERVIEW

This is an appeal by Canadian Motor Inn Ltd (“the Appellant”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 20, 2003. The Determination found that the appellant had contravened the Act and that employee Ken Davis (“Davis”) was owed \$1,828.68 in wages, vacation pay and interest. The deadline for filing an appeal of the Determination was February 27, 2003.

This appeal has an unusual and somewhat convoluted procedural background. Initially the Director issued a Determination in the matter against the Appellant and in favour of Davis on December 4, 2002. The appellant filed an appeal of that Determination on January 13, 2003. After receipt of the appeal, Tribunal staff, on the same day, advised the Director that there appeared to be procedural problems with the Determination arising from the changes in the Act that came into effect at the end of November 2002. On January 15, 2003, two days after the Tribunal had received the appeal dated January 13, 2003; the Tribunal received a letter from the Director’s Delegate stating that the Determination issued on December 4, 2002 was cancelled. The Tribunal then wrote to Parm Aujla (“Aujla”), the representative of the Appellant, informing him that in light of the fact that the Determination was cancelled the Tribunal was closing its file on the appeal.

On February 4, 2003 the Appellant sent the Tribunal a further copy of the appeal form that had previously been sent on January 13, 2003 with one change in that the date of January 13, 2003 was crossed off and a new date of February 3, 2003 written in its place. There was no explanation as to why this altered form was sent to the Tribunal. The appellant failed to respond to a telephone message left for him on February 4, 2003 at the Appellant’s place of business asking what was the intention behind sending the altered form. The Appellant also ignored the subsequent letter dated February 10, 2003 sent to the Appellant’s mailing address in which he was asked about his intentions. He was informed in that letter that, in the absence of an explanation, no further action would be taken.

On July 14, 2003 the Tribunal received correspondence from the Appellant who was apparently desirous of a re-opening of the matter. The correspondence included a copy of the new Determination referred to above, dated January 20, 2003.

The Decision on this matter of timeliness is made on the basis of the written materials submitted by the Appellant. The Tribunal did not find that it was necessary to solicit submissions from the other parties concerning the extension of the time limit for filing an appeal.

ISSUE

The issue at this point is whether the February 27, 2003 deadline for filing an appeal of the new Determination should be extended by nearly five months to allow the appeal to be heard on its merits, now that the Appellant has submitted a complete appeal.

ARGUMENT

The Appellant, in the letter received by the Tribunal on July 14, 2003, provided the following explanation for why the appeal was not pursued in a timely manner,

“There was a determination and I filed the appeal papers and was waiting for the appeal date but the determination was cancelled for change of legislation or which I think for their own benefit they re-issued the determination which appeal board somehow did not get. I did not receive any letter and they could not contact me on phone. Now I called and find out that they need the determination letter which I am sending right away.”

THE FACTS AND ANALYSIS

The *Act* imposes an appeal deadline to ensure that appeals are dealt with promptly. This is consistent with one of the purposes of the *Act*, which is to provide fair and efficient procedures for resolving disputes. Under section 109(1)(b) of the *Act*, the Tribunal can extend the time for requesting an appeal, even though the appeal period has expired.

The Tribunal does not grant extensions automatically but it may extend a time limit if there are compelling reasons to do so. To help it decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria. They are the following:

1. is there a good reason why the appeal could not be filed before the deadline;
2. was there are unreasonable delay in appealing;
3. did the appellant always intend to appeal the determination;
4. were the other parties aware of the intent to appeal;
5. is an extension of the appeal deadline harmful to the interests of the respondent; and
6. does the Appellant have a strong case that might succeed if an extension were granted.

After an abortive initial attempt to issue a Determination on December 4, 2002 the Director issued a new Determination on January 20, 2003. The deadline for filing an appeal of that Determination was February 27, 2003. In its appeal the Appellant does not allege that it did not receive the new Determination nor does the Appellant give any reason why it failed to provide a copy of the Determination to the Tribunal as part of its appeal. The appellant says,

“...they re-issued the determination which appeal board some how did not get.”

The reason the Tribunal did not get the new Determination in a timely manner is that the Appellant failed to send it to the Tribunal, the Appellant did not respond to the telephone message left by Tribunal staff, and the Appellant ignored the Tribunal’s letter on the subject. The Appellant might claim that it did not know that it had to provide a copy of the Determination to the Tribunal however it had done so earlier with the first Determination and the appeal form signed by the Appellant’s representative states on it,

“Attach a copy of the Determination and the written reasons, if you have them, for the Determination.”

Essentially there is no good reason why the appeal was not filed in a timely manner.

The time elapsed between the deadline for filing an appeal, February 27, 2003, and the date when the Appellant finally perfected its appeal by filing a copy of the Determination on July 14, 2003, is close to five months. It is hard to imagine circumstances under which such a long delay would not be considered unreasonable.

The fact that an old appeal form with a new date inserted was faxed to the Tribunal on February 4, 2003 may indicate that there was some intention, at the time, to file an appeal of the Determination dated January 20, 2003. On the other hand the failure of the Appellant to respond to the Tribunal's telephone message might suggest that the Appellant had abandoned the idea of filing an appeal. The Appellant states, with respect to the letter,

“I did not receive any letter and they could not contact me on phone.”

The letter was sent to the Appellant's address, other correspondence sent to that address has been received, neither the letter in question or any other correspondence sent to that address has been returned to the Tribunal as undeliverable. It seems more likely that that letter was delivered to the Appellant and for some reason it was ignored. In any event the onus is on the Appellant to file its appeal properly, not on the Tribunal to ensure that the Appellant does so.

There is no evidence that any of the other parties was aware of any intention by the Appellant to file an appeal of the new Determination.

It would be reasonable to assume that to further delay final resolution of the matter by proceeding through the appeal process would not be favourable to the interests of the employee concerned.

Finally, there is the question of the apparent merits of the appeal. The Appellant believes that it should not have to pay compensation for length of service to the employee because the employee quit. It does not apparently dispute the fact that other wages and overtime are also owing to the employee. The Determination could hardly be clearer on why compensation for length of service is owing to the employee. Nothing in the Appellant's appeal submission seriously addresses or challenges the finding of constructive dismissal. The appellant in its appeal refers to a Record of Employment document showing that the employee quit. This is a document prepared by the employer and cannot be viewed as either objective evidence or determinative in this type of situation. In summary, the Appellant presents a weak case that would have little chance of success.

Nothing has been provided that constitutes a compelling reason to extend the deadline, I therefore decline to do so.

ORDER

The appellant's request for extension of the deadline and acceptance of the appeal is denied. The appeal is dismissed pursuant to section 114(1) of the *Act*. Pursuant to section 115(1) of the *Act* the Determination dated January 20, 2003 is confirmed, along with any additional interest calculated in accordance with section 88 of the *Act*.

William Reeve
Adjudicator
Employment Standards Tribunal