

An appeal

- by -

James Middelkamp aka Middlecamp aka Middelkamp  
("Middlekamp" or "Employer")

- 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:** Paul E. Love

**FILE No.:** 2002/104

**DATE OF DECISION:** June 17, 2002

## DECISION

### OVERVIEW

This is an appeal by an employer, James Middlekamp (“Employer”), from a Determination dated January 18, 2002 (the “Determination”) issued by a Delegate of the Director of Employment Standards (“Delegate”) pursuant to the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the “Act”). This is an application by the Employer to extend time for filing an appeal. From the facts alleged on this appeal, it is apparent that Mr. Middlekamp was the employer of Kevin Hall. The Employer filed an appeal following steps taken to successfully garnishee his bank account. From the information filed on this appeal, it appears that the Delegate did not fail to extend a reasonable opportunity to the Employer to participate in the investigation. The Employer failed to establish that the appeal had some merit, and therefore I dismissed the application to extend time to file the appeal.

### ISSUE

Should the time period for filing the appeal be extended?

### FACTS

I decided this case after considering the written submission of James Middlekamp, Kevin Hall (“Employee”), and the Delegate.

Kevin Hall was hired by James Middlekamp in July of 2001, to work around the home of Mr. Middlekamp, and at the home of the Employer’s friend, Chrstal Ashworth. Mr. Hall worked between May 11, 2001 to August 9, 2001, as a labourer, at the hourly rate of \$8 per hour. The Delegate found, based on the information of Mr. Hall, and by reviewing the records kept by Mr. Hall, that Mr. Hall worked and was entitled to be paid wages for the following dates:

July 30, 2001	8 hours
July 31, 2001	8 hours
August 1, 2001	6.5 hours
August 8, 2001	8 hours
August 9, 2001	sent home upon arrival at work, 4 hours

The Delegate issued a determination on January 18, 2002 in the amount of \$409.28 for the hours indicated above, which included \$244.00 for 30.5 hours worked, \$32.00 for minimum pay on August 9, 2002, and vacation pay of \$133.28. The Delegate issued the information solely on the basis of information provided by the Employee as the Employer did not participate in the investigation. The Delegate made a number of attempts to contact the Employer which were set out in the Determination as follows:

- three messages left on the employer’s answering machine,
- a registered letter was sent setting out the allegations and accompanied by a record demand,  
and

- visit paid to the employer's residence
- message left with Chrstal Ashworth, a business associate

The Delegate attempted to leave messages on the Employer's telephone answering machine as follows:

November 14, 2001 1:25 pm

November 16, 2001 11:43 am

December 5, 2001

The Delegate made further phone calls after this time, but the Employer's machine answering the calls did not accept the leaving of messages. On February 12, 2002 the Delegate phoned the employer using a cell phone. There was no answer, however, within 60 seconds the Employer called the cellular phone number, but hung up upon hearing the Delegate answer. The Delegate sent correspondence to the Employer which was returned marked "unclaimed" as opposed to "no such address" or "address unknown". The Delegate also left telephone messages for Chrstale Ashworth, an associate of the Employer, for whom Mr. Hall also worked.

The Delegate was able to enforce the Determination by collecting funds from the Employer by garnishment, on February 8, 2002. The Employer claims that he found out about the existence of the dispute on February 8, 2002, when he was notified by his bank that the Ministry of Labour had removed funds from his account.

The time for filing the appeal expired on February 11, 2002. The Employer filed an appeal on February 26, 2002. The reasons advanced for the late filing was that the Employer learned of the Determination as a result of garnishment, and did not receive the Determination until after the appeal period expired.

I note that the Employer on the appeal form does not indicate that there is any error of law or facts. The defence appears to be as set out in the notice of appeal, that there has been a breach of the rules of natural justice, and that the appellant has a "reasonable apprehension of bias". In the notice of appeal or attachment, the Employer has not alleged that he does not owe the money to Kevin Hall, or that Kevin Hall was never an employee. The Employer seeks to cancel the Determination, and seeks "return of the Appellant's funds wrongfully taken".

In a written submission dated April 8, 2002 the Employer submitted that the Respondent's case was built of falsehoods, misrepresentations and false work records, however, the Employer did not deny that Mr. Hall was his employee, and did not particularize how Mr. Hall falsified his complaint. The balance of the submission on the merits relates to allegations by the Employer of the Delegate's misconduct after garnishment of funds. The interesting point is that the Employer does not address, in any helpful detail the merits of the appeal in his application to extend time.

***Employer's Argument:***

The Employer relies on the notice of appeal filed, and written submissions of April 8, 2002 and April 30th, 2002. Much of the argument is an attack on the conduct of the Delegate, without focussing on the findings of fact made by the Delegate in the Determination, or addressing the Employer's own failure to participate in the investigation. In essence, the appellant says that "once the Appellant had notice of the

dispute action was taken forthwith, and has been diligently pursued since that notice was received.” The Employer vigorously argues that he did not receive the phone calls or communications sent by the Delegate. The Employer indicates that from time to time his telephone answering machine did not work properly. The Employer indicates that he picked up his mail infrequently. The Employer characterizes the claim of the Employee as “a fraudulent scheme to extort money from the respondent”.

***Employee’s Argument:***

The Employee argues that there is no merit in the appeal, and the Employer must have been aware of attempts of the Delegate to contact him. The Employee indicated that “ Through working for the appellant for a time in the summer of 2001, I noticed that he never answered his phone, screening calls by letting his answering machine pick it up or checking the number on call display”. The Employee says that he is unaware of the appellant’s intention to appeal the Determination.

***Delegate’s Argument***

The Delegate argues that the application of the Employer does not meet the test for extending time for the filing of the appeal. The Delegate says given the Employer’s lack of interest in cooperating in the investigation, the delay in filing the appeal is unreasonably long. The Delegate further says that the appeal has little chance of success given the policy of the Tribunal in not hearing new evidence, where that evidence could have been presented to the Delegate.

**ANALYSIS**

In order to extend time to file an appeal the burden is on the appellant to show that time for the filing of the appeal should be extended. The points that are usually looked at by the Tribunal in considering an extension are:

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 officer who wrote the determination) 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.

I note that the criteria, are not set out in any particular order, and it is for the Tribunal to consider and weigh the criteria. Provided that there is some merit to the appeal, and a reasonable explanation for the delay in filing the appeal, and minimal prejudice to the respondent, the Tribunal often does grant extensions to file the appeal. Time extensions, should, however, be granted only for compelling reasons.

### ***Merit to the Appeal***

I am concerned in this case, that the Notice of Appeal does not disclose any suggestion that the Employee had fabricated a claim for monies. The Notice of Appeal is primarily an attack upon the Delegate. In the Appellant's submission of April 8, 2002, the Appellant's only comment relating to the merits is the bare assertion that "The Respondent's case is built upon falsehoods and misrepresentations and will fail". By the Appellant's submission of April 30, 2002 he appears to be well aware that "an assessment of the merits" is a factor to consider in extending time, yet the only information with regard to the merits of his appeal are the following comments:

- ¶1 In this dispute the Respondent has put forth a fabricated and fraudulent claim and it is submitted that the conduct of the Delegate has as been that of facilitator or co-conspirator rather than that of a neutral delegate.
- ¶P9 The document that is produced as a "work record" is not an accurate or true document, but a fabrication to further a fraudulent scheme. The Appellant has evidence to prove its inaccuracy, and has the right to test the Respondent on his documentation and allegations.
- ¶P 9 This is not the time to argue the merits of the Appellant's case nor does the law require it to be done. The test is that the Appellant has a case that is worthy of investigation, and that test has been amply met.

Mr. Middlekamp has made three lengthy submissions to the Tribunal in writing. At no time has he denied that Kevin Hall performed work for him. He wishes now to have an opportunity to test the records Mr. Hall provided to the Delegate. In order to do this I would have to extend time for the late filing of an appeal, which does not address in any helpful way the merits of Mr. Hall's claim, or his own defence to Mr. Hall's claim. In reviewing the appellant's materials, I am struck by the fact that the appellant has not alleged any facts from which I can conclude that there was any merit to his appeal. I am not satisfied that there is an arguable case that the appeal may succeed, let alone a strong case that the appeal might succeed, or a defence worthy of investigation. Further, while there is a hint that the appellant believes that the employee's claim is fraudulent, there is not any sufficient disclosure of the appellant's case to permit an assessment of whether there is some merit to the allegation.

### ***Intention to Appeal and Delay***

The appellant has alleged a breach of natural justice; in essence that he did not know that the complaint was being investigated, and only found out about the complaint at the time of garnishment. In order to extend time for the appellant, in this case, and in order to make an assessment of the appellant's reasons for delay in filing the appeal, I must be satisfied that the appellant has shown that there is an arguable case that the Delegate breached s. 77 of the Act, particularly that the Delegate did not afford a reasonable opportunity to Mr. Middlekamp to participate in the investigation. I must make some preliminary assessment as to whether this was a case where the Delegate proceeded in the absence of any notice to the Appellant, or whether it is a case where the Employer ignored the investigation.

In my view, it is not sufficient for the Appellant to allege that he just learned of the Determination after garnishment, particularly when there is some material suggesting that he neglected or refused to participate in the investigation, and some evidence, from his own submissions that he has arranged his affairs so that he is he collects his mail infrequently, and does not answer the telephone. Further, there is information from the Employee that confirms that Mr. Middlekamp has arranged his affairs so as not to

answer the phone, but also with the ability to screen calls by listening to his answering machine and by viewing call display.

The appeal has been couched in terms which are a procedural attack, based on natural justice. I note the duties on the Delegate set out in s. 77 are to afford a reasonable opportunity to a person to participate in the investigation. I am not satisfied that the appellant has disclosed any factual basis or arguable basis for suggesting that the Delegate did not extend a reasonable opportunity to him to participate in the investigation. In fact, this appears to be a case where the Employer chose to ignore the investigation, and only became interested in responding when there was garnishment from the Employer's bank account.

While there has not been any extraordinary delay in the filing of the appeal, as Mr. Middlekamp took action once the Delegate garnished in support of the Determination, there will be some prejudice to the respondent to delay the "payment of the money in hand", when there is no apparent merit to the appeal disclosed by the appeal documents. I do not accept that there is any other prejudice to the respondent arising from the delay in filing the appeal.

I am dismissing the application to extend time for the filing of the appeal on the basis that the appellant has not shown any merit to this appeal, albeit Mr. Middlekamp speedily took steps to deal with the appeal after the Director garnished his bank account successfully. This Tribunal has in the past refused to grant an extension of time where the appellant's motivation for filing an appeal becomes apparent after the Director takes collection steps: *Re Mega Tire Inc. (c.o.b. Discovery Tire Service)* BCEST #D406/75. Further, I am not satisfied that the appellant has demonstrated a failure of the Delegate to provide a reasonable opportunity to the Employer to participate in the investigation, pursuant to s. 77, where the Employer has apparently constructed his affairs to minimize the chance of receiving written communication and telephone calls. Further, in this case in weighing the factors that I must consider in an application to extend time, I place the most weight on the non-disclosure by the appellant of sufficient information to permit me to assess the "merits of the appeal". On the information disclosed by the appellant, it is my view that there is no defence worthy of investigation, serious issue to be tried, or a case involving some merit.

## **ORDER**

Pursuant to s.109(b) of the *Act* I dismiss the application of James Middlekamp to extend time for the filing of an appeal of the Determination dated January 18, 2002.

---

**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**