

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Astrolabe Marine Inc.
("Astrolabe" or "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE NO.: 97/377

DATE OF DECISION: July 8th, 1997

DECISION

OVERVIEW

This is a request for reconsideration made by Astrolabe Marine Inc. (“Astrolabe” or the “Employer”) pursuant to Section 116 of the *Employment Standards Act* (the “Act”). The reconsideration request relates to an appeal filed by Astrolabe from a Determination issued by the Director of Employment Standards (the “Director”) on April 17th, 1997 under number CDET 005944 (the “Determination”). The Director determined that Astrolabe owed its former employee, Hendrik Meinster (“Meinster”), the sum of \$57,893.69 on account of unpaid regular and overtime wages, vacation pay, compensation for length of service, reimbursement for certain employer business costs paid by Meinster, and interest.

Astrolabe’s appeal is based on the following grounds:

- Meinster was an independent contractor, not an employee, and therefore is not entitled to file claim under the *Act*.
- In any event, the agreement between the parties was that Meinster would be paid a commission based on sales and, inasmuch as he failed to generate any sales, no monies are owed by Astrolabe to Meinster.

ISSUE TO BE DECIDED

The issue now before me concerns the timeliness of Astrolabe’s appeal and, specifically, whether or not the Tribunal ought to exercise its statutory discretion to extend the time for filing an appeal [see Section 109(1)(b) of the *Act*].

FACTS

As noted above, the Determination was issued on April 17th, 1997. A timely appeal would have been filed on or before May 10th, 1997--in fact, the appeal was filed three days later, on May 13th, 1997.

In a letter dated May 14th, 1997, the Tribunal advised Astrolabe that its “appeal will not be considered since it does not comply with the requirements of Section 112(2) of the *Employment Standards Act*” (*i.e.*, the appeal was time-barred). It should perhaps be noted that this decision was based on the simple fact that the appeal was filed outside the statutory time limit; no formal submissions on the issue of whether or not a time extension was appropriate were in hand at that point.

By way of a letter dated May 22nd, 1997, Astrolabe's solicitor requested that the Tribunal reconsider its refusal to consider Astrolabe's appeal. An affidavit sworn by Astrolabe's solicitor was filed in support of the reconsideration request. In this affidavit, the solicitor deposes, *inter alia*, that:

- He received a faxed copy of the Determination on April 28th, 1997 and subsequently met with his client's representatives who instructed him to appeal the Determination.
- He opened a file with respect to the matter on May 2nd, 1997.
- Due to an error on the solicitor's part, he diarized the final day for filing the appeal as being May 19th, 1997.
- A form of Notice of Appeal was obtained from the Tribunal on May 9th, 1997 and the actual appeal documentation was prepared over the course of the weekend of May 10th and 11th, 1997.
- As noted above, the appeal was filed with the Tribunal on May 13th, 1997.

ANALYSIS

In my opinion it can be argued that the within appeal was only filed only *one day* outside the governing time limit. Section 25(3) of the *Interpretation Act*, R.S.B.C. 1996, c. 238 states as follows:

Calculation of time or age

25. (3) Where the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours the time is extended to the next day that the office is open.

Given that the time limitation expired on May 10th, 1997, a Saturday, and that the Tribunal was closed for business over the May 10th/11th, 1997 weekend, the appeal period would not have expired until the close of business on Monday, May 12th, 1997--one day before the appeal was actually filed.

However, regardless of whether the within appeal was filed one or three days late, I would nonetheless grant a time extension in the rather unique circumstances of this case.

In *Niemisto*, [1996] B.C.E.S.T.D. 320.03.20-02, May 17th, 1996, I stated the following with respect to the granting of appeal period extensions:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the Act should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique, factors ought to be considered.

In my view, the appellant has satisfied all of the above-noted criteria. The material before me discloses an on-going and *bona fide* intention to file a timely appeal and this intention was made known in advance of the expiration of the appeal period--*e.g.* obtaining a form of Notice of Appeal on May 9th. The appeal, although filed late, was only late by a matter of one, or at most three, days.

In response to the reconsideration request, Meinster filed a short one-page handwritten letter with the Tribunal in which he simply stated that he “opposed” Astrolabe’s appeal and would be away on vacation until July 3rd, 1997. I cannot see, nor is there any assertion, of undue prejudice to Meinster if the appeal period is extended to May 13th, 1997.

Finally, the appellant has raised some compelling arguments on the substantive question; this is not to say that the appellant will ultimately prevail. In any event, that is not the test under Section 109(1)(b) of the *Act*, otherwise the procedural issue (*i.e.* the timeliness of the appeal) and the substantive issue (*i.e.* the merit of the appeal itself) would be “blended” into the same inquiry. Rather, the appeal, on its face, appears to have some merit; to put the matter another way, the appeal is not obviously frivolous.

ORDER

Pursuant to Sections 116 and 109(1)(b) of the *Act*, I order that the time for filing an appeal with respect to Determination No. CDET 005944 be extended until 4:30 P.M. on May 13th, 1997. Accordingly, the appeal was filed within the extended time period and thus will be considered in due course as directed by the Tribunal's Registrar.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal