

An appeal

- by -

578047 B.C. Ltd. operating as Pro Gas & Heating
("Pro Gas")

- 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.: 2003A/248

DATE OF DECISION: November 3, 2003

DECISION

SUBMISSIONS

Eddie Lowe on behalf of 578047 B.C. Ltd. operating as Pro Gas & Heating
Rod Bianchini on behalf of the Director of Employment Standards

OVERVIEW

The Tribunal received this appeal from 578047 B.C. Ltd. carrying on business as Pro Gas & Heating (“Pro Gas”) on September 19, 2003. The deadline for this appeal was 4:30 PM on September 18, 2003. Pro Gas applied to extend the time to file the appeal. This Decision addresses the issue of extending the time to file the appeal under section 109(1)(b) of the *Employment Standards Act* (“Act”). Pro Gas provided evidence that they tried to facsimile machine (“fax”) the appeal documents on September 18, 2003 and believed they were filed in time for the appeal deadline. Pro Gas’s appeal is based on the position that when they realized that the fax was not successfully delivered, they sent the documents on September 19, 2003 successfully.

The appeal proceeded by way of written submissions from the Appellant and the Director.

ISSUE - TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from September 18, 2003 at 4:30 PM to September 19, 2003 at 11:25 AM and this decision deals only with that issue.

ARGUMENTS

In support of Pro Gas’s application to extend the time to file the Appeal, Pro Gas argues that they complied with the time requirements and submitted their documents by fax within the time frame, but the documents were not received by the Tribunal due to a technical error related to the operation of the fax. When Pro Gas realized that the fax had not successfully reached the Tribunal a second fax was sent and the documents successfully reached the Tribunal without unreasonable delay.

In support of the merits of the appeal, Pro Gas argues that the Director failed to provide Pro Gas with an opportunity to respond to the complaint filed by Paul Bjarnason (“Bjarnason”) as required by section 77 of the *Act*. Pro Gas argues that the Director’s office was notified that Pro Gas could not participate in a hearing in May due to commitments outside the country. Pro Gas argues that the Director breached section 77 of the *Act* when the Director proceeded with the mediation and hearing when the Director knew Pro Gas could not participate.

Pro Gas argues that without giving the employer an opportunity to present their evidence that the Director erred in making the Determination solely on Bjarnason’s evidence.

The Director’s Delegate’s argues that the Tribunal should not grant an extension of time for the appeal because Pro Gas knew when the deadline was and did not provide evidence to support the claim that Pro

Gas had tried to fax the appeal on time. The Delegate argues that Pro Gas did not meet the six criteria the Tribunal applies to considerations of an extension of time. The Director's Delegate argues that Pro Gas refused to pay Bjarnason on time and consistently and an extension of time would further condone this method of doing business. The Delegate further argues that Pro Gas would not have a strong appeal and argue that any new evidence should not be admitted.

FACTS

The facts in this appeal are in dispute. Bjarnason's evidence to the Director was that he started his employment with Pro Gas on September 23, 2002 and worked until October 11, 2002. Bjarnason's evidence was that he received two advances of \$60 for which he signed receipts. In addition Bjarnason says Pro Gas asked him to sign a receipt that stated he received \$420 but he only received \$120. His evidence at the hearing was that the receipt had been altered after he signed it. Pro Gas provided the Delegate with a copy of the three receipts.

Pro Gas's position is that Bjarnason was interviewed for a position on October 2, 2002 and started on October 3, 2002. Pro Gas's position is that Bjarnason did not work the hours he claims he worked and was prepared to bring witnesses to a hearing to demonstrate the errors in Bjarnason's claim.

Pro Gas was told of a proposed mediation meeting scheduled for date of April 1, 2003. Pro Gas contacted the Director's office in March to indicate that Pro Gas's witness was unavailable and asked for another day in April. The Director's office indicated that the next available date was in May 2003. Pro Gas told the Director's office that their witness was out of the country for May 2003 and would not return before June 10, 2003. The Director proceeded with a mediation on May 21, 2003 when Pro Gas could not participate and proceeded to a hearing on June 10, 2003 when Pro Gas was not available. Pro Gas was not represented at the mediation or the hearing.

LAW AND ANALYSIS

The Tribunal has been asked to extend the time to file an appeal on previous occasions. In each appeal the Tribunal is mindful of the purpose of the *Act* under section 2 (d) is "to provide fair and efficient procedures for resolving disputes". An appeal deadline is imposed 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 where there are compelling reasons.

The Tribunal set out the six criteria for determining timeliness of appeals based on previous cases in *Bravo Cucina Ristorante 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"

Pro Gas provided evidence that the documents were sent by fax but not received within the specified time limit. Pro Gas did send the documents as soon as it was aware that the documents were not successfully sent.

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

The appeal was 3 business hours later than the deadline. The delay was not long.

3. "They always intended to appeal the determination"

Pro Gas had expressed its unhappiness to the Director with the fact that matters proceeded in the company's absence and without their witnesses and evidence.

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

There is no specific evidence of an intention to appeal mentioned in the material filed.

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

Bjarnason has not made any submissions showing any prejudice as a result of the delay.

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 are a number of factual disputes between the parties based on the written submissions. The Delegate did not have the benefit of hearing orally from Pro Gas on these issues. One of the areas of dispute is what was actually paid by Pro Gas to Bjarnason as advances. These issues may well rely on credibility which is difficult to assess without oral evidence from both parties and the opportunity for cross examination.

Section 112(1) of the Act provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made.

The principles of natural justice are reiterated in section 77 which states as follows.

Opportunity to respond

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The fact that the Director was told that the respondent, Pro Gas was unavailable and out of the country when the mediation was scheduled suggests that Pro Gas wanted to participate in the mediation and hearing. If the Tribunal found that the Director failed to observe the principles of natural justice the appeal might be successful on its merits. The essence of natural justice means that the Director's procedure should ensure parties a right to present their evidence and be heard by an independent decision maker. Pro Gas may not have been given this opportunity.

On the other hand after Bjarnason's complaint, Pro Gas was asked for the normal business records the *Act* requires an employer to keep under sections 28.

“Payroll records

- 28** (1) For each employee, an employer must keep records of the following information:
- (a) the employee's name, date of birth, occupation, telephone number and residential address;
 - (b) the date employment began;
 - (c) the employee's wage rate, whether paid hourly, on a salary basis or on a flat rate, piece rate, commission or other incentive basis;
 - (d) the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis;
 - (e) the benefits paid to the employee by the employer;
 - (f) the employee's gross and net wages for each pay period;
 - (g) each deduction made from the employee's wages and the reason for it;
 - (h) the dates of the statutory holidays taken by the employee and the amounts paid by the employer;
 - (i) the dates of the annual vacation taken by the employee, the amounts paid by the employer and the days and amounts owing;
 - (j) how much money the employee has taken from the employee's time bank, how much remains, the amounts paid and dates taken.
- (2) Payroll records must
- (a) be in English,
 - (b) be kept at the employer's principal place of business in British Columbia, and
 - (c) be retained by the employer for 2 years after the employment terminates.”

Pro Gas did not submit the detail of information sought and the Delegate was left to deal with the limited evidence available at the hearing in the absence of Pro Gas.

I am persuaded that the way to assess the merits of the appeal and to ensure that the application of the principles of natural justice are met is to have a hearing.

The delay is not great and I find on balance that Pro Gas's evidence should be considered before a final decision is made. The time is extended to allow the appeal to proceed on its merits.

CONCLUSION

Based on the evidence submitted, I allow the extension of time and allow this appeal to proceed.

ORDER

Pursuant to section 109 (1)(b) of the Act, I extend the appeal deadline and the appeal may proceed on its merits.

April D. Katz
Adjudicator
Employment Standards Tribunal