

**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 -

Consolidated Van-City Marble Ltd.  
("Consolidated" or the "employer")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Paul E. Love

**FILE No.:** 2000/217

**DATE OF DECISION:** August 2, 2000

## DECISION

### OVERVIEW

This is an application to extend time to file an appeal of a Determination, dated March 3, 2000.

This is also a case where the employer did not respond to a demand for records issued by the Delegate, and the Delegate determined this matter based on the evidence of the employee, Mr. Dhillon. In reviewing the factors relating to granting of extensions of time I determined that while the appellant had formed an intention to appeal within the appeal period, and had a credible excuse for the delay, and that there was not undue prejudice to the respondent from an extension of time, the appeal was devoid of merit. I refused the application to extend time to file the appeal, and dismissed the appeal pursuant to s. 114 of the *Act*.

### ISSUE TO BE DECIDED

Should an extension of time be granted to the appellant to extend the time for the filing of the appeal?

### FACTS

The Determination was made in this matter on March 3, 2000. The Determination contained a statement advising that an appeal must be filed no later than 4:30 p.m. on March 27, 2000 if the party wished to appeal. This appeal was filed March 28, 2000.

The Delegate determined that the sum of \$10,175.47 was due and owing by the employer to Mr. Dhillon. The Delegate found that Mr. Dhillon was entitled to overtime wages in the amount of \$1,354.50, vacation pay of \$81.27 on the overtime wages, compensation for length of service of \$5,250.91 and vacation pay of \$3,488.79.

In the employer's submission it was clear that this was a business that had suffered a business failure. This is also a case where the employer did not respond to a demand for records issued by the Delegate, and the Delegate determined this matter based on the evidence of Mr. Dhillon.

### ANALYSIS

I have the power to extend the time for the filing of an appeal. Extensions of time are granted only for compelling reasons, and the burden is on the appellant to show that an extension should be granted. Given the short duration of the delay in filing of this matter, my initial inclination was to grant the time extension. I am, however, persuaded by a review of the grounds of appeal, that such an appeal will have no prospect of success before an adjudicator.

In analyzing whether the employer should be permitted an extension of time I have considered the following factors:

- (a) Did the employer form an intention to appeal within the appeal period?
- (b) Is there a reasonable and credible excuse for the late filing?
- (c) Is there a meritorious claim or a strong *prima facie* case?
- (d) Is there undue prejudice to the respondent that would arise from the granting of an appeal?

I consider each of the grounds of appeal below.

**Did the employer form an intention to appeal within the appeal period?**

From a review of the documents, it is apparent that the employer intended to file the appeal within the appeal period.

**Is there a reasonable and credible excuse for the late filing?**

The employer was one day late in the filing of the appeal. It has given different reasons for the excuse. The bookkeeper says that the late filing was because the owner needed to review the appeal submission. The owner of the company suggests it was because there were difficulties with the fax machine. There appears to be a reasonable excuse for the late filing of the appeal.

**Is there a meritorious claim or a strong *prima facie* case?**

I have reviewed this question of merit, with regard to each substantial claim allowed in the Determination and the reasons the employer alleges the Delegate erred. I recognize that if there is merit on any one of the claims, time should be extended.

**Compensation for Length of Service:**

I note that in reading the appeal submission, the employer states that it is opposed to the compensation for length of service claim because the employee was laid off due to shortage of work and his position was eliminated. The Delegate calculated the compensation for length of service at \$5,250.91. From the grounds of appeal advanced with respect to compensation for length of service, it appears that the employer has little or no chance of success with regard to this claim.

**Overtime Claim:**

The Delegate appears to have established the overtime claim by a review of the relevant time documents supplied by the employee. The employer did not submit documents after a demand was made by the Delegate. The owner now claims that the company policy was that overtime was not paid if not authorized by the company. This does not appear to be a submission that was before the Delegate. There do not appear to have been any documents filed by employer with the Delegate with regard to this policy.

I note that the Tribunal is not a forum for an appellant to adduce new information or arguments. (*Tri-west Tractor Ltd.*, #D268/96 (Stevenson)). It is my view that there is no prospect of success with regard to the overtime claim.

**Vacation Pay:**

The employer's excuse for not paying vacation pay in 1998, is that the employee is alleged to have damaged a machine. The employer's view is that it is justified in withholding vacation pay in these circumstances. I note that this defence has little hope of success. By virtue of s. 21 and s. 22 of the *Act*, an employer must pay all the wages to which an employee is entitled, and may withhold pay only in specified circumstances where an authorization or assignment has been given by the employee. There is therefore no prospect of success with regard to vacation pay in 1998.

The employer claims that a portion of the 1997 vacation pay was paid by transfer of a payment from a customer and from his own personal bank account. For this claim to succeed, the employer must supply documents, which the employer apparently failed to do. Given the policy of the Tribunal with regard to making the case to the Delegate, not advancing a new case before the Tribunal, it is apparent that with regard to the 1997 vacation pay, this ground has no merit.

**Prejudice:**

It appears from the submissions of the employer that it is in precarious financial circumstances. There may be prejudice to the employee if the employer is permitted to continue an appeal, without any obvious merit. I am satisfied that there would not be undue prejudice to the employee if an extension of time were granted.

**Summary:**

Although the employer appears to have formed the intention to appeal within the period, and there is an excuse for the late filing, the appeal is devoid of merit. In weighing the various factors, in the circumstances of this case, I am persuaded that the lack of merit to any of the grounds of appeal is fatal to the application to extend time.

**ORDER**

Pursuant to section 112 of the *Act*, I decline to grant the Appellant an extension of time to file the appeal. This appeal of the Determination made March 3, 2000 is dismissed pursuant to section 114(1) of the *Act*.

---

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