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-

Christopher Rasmussen
(the Appellant)

- of a Determination issued by-

The Director of Employment Standards
(the Director)

ADJUDICATOR: Hugh R. Jamieson

FILE NO: 1999/343

DATE OF DECISION: August 26, 1999

DECISION

OVERVIEW

This decision deals with an application under Section 109 (1) (b) of the *Employment Standards Act* (the "*Act* "), dated June 1, 1999, wherein the Appellant seeks an extension of the time limits for filing an appeal. Villa Agencies Inc. and Go Transport Ltd. (Associated Corporations hereinafter referred to as the "Employer"), opposes the granting of the extension.

ISSUES TO BE DECIDED

The only issue here is whether the Tribunal should exercise its authority to extend the time limits provided for in Section 112 (2) of the *Act*, thereby allowing the appeal to proceed.

FACTS

The Appellant requires an extension to proceed with an appeal against a Determination issued by the Director on April 16, 1999. In this Determination the Director found that the Appellant is due some overtime wages, vacation pay and statutory holiday pay amounting to $2,105.12. However, in the same Determination, a complaint by the Appellant seeking compensation for length of service was dismissed as the Director found that the Employer had just cause to terminate his employment. This just cause involved allegations of sexual harassment. According to the Director's findings, the Appellant had received oral warnings regarding the sexual harassment and verbal abuse of a female co-worker. It is the position of the Appellant that the Director erred in finding just cause. Also, the amount found due for overtime wages falls well short of the $11,000.00 or so that the Appellant had originally claimed.

As background, it should also be pointed out that the Determination in question here is one of four that the Director issued on April 16, 1999, against the Employer. It is my understanding that the Employer has brought appeals against all four Determinations and that the Appellant is already a party to the proceedings involving the Employer's appeal against this Determination. While I do not have the documents before me, I have to assume that the target of all four appeals by the Employer is the amounts of money found due to the four employees.

In any event, the deadline for filing an appeal by any party served with this Determination is set out at the bottom of page four (4) of the Determination as being May 10, 1999. As indicated, this application to extend that time limit is dated June 1, 1999, some twenty-two (22) days later.

This was followed by a further letter dated June 3, 1999, expanding the grounds relied upon by the Appellant as to why the extension of the time limits should be granted.

Keeping to the specific issue of timeliness rather than the content of the appeal, these grounds can be summarized briefly as follows. To begin with, the Appellant suggests that the Director did not follow the service provisions set out in the *Act* regarding personal service or service by registered mail. Apparently, the Appellant received his copy by ordinary mail sometime around the end of April.

The Appellant says that this was the first time he had been made aware of the allegations relied upon by the Employer as just cause for the termination. He also claims that he was so shocked when he read about the findings of sexual harassment that he did not read on to the part of the determination that refers to the appeal process. The Appellant also submits that the Director did not give him an opportunity to respond to these allegations prior to the Determination being issued. He adds that all of this confused him and that is why he chose to consult a lawyer. Lastly, the Appellant submits that there will be no prejudice to the Employer by an extension of the time limits and that in the circumstances, both appeals should be dealt with at the same time.

As indicated, the Employer opposes the application and basically submits that the Appellant has not met the criteria which Tribunal normally applies in these situations. The Employer does concede though, that it will not be unduly prejudiced if an extension is granted as all witnesses required to refute the Appellant's claims are available and, all of the documentation that was before the Director is still accessible. The Employer suggests however, that there may be prejudice to the person who is the victim of the alleged sexual harassment as she might be called upon to testify about her ordeal.

ANALYSIS

Section 112 of the *Act* provides:

> "**Right to appeal director's determination**
>
> 112 (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
>
> (2) The request must be delivered within
>
> (a) 15 days after the date of service, if the person was served by registered mail, and
>
> (b) 8 days after the date of service, if the person was personally served or served under section 122 (3) ....."

Section 122 of the *Act* says:

"**Service of determinations and demands**

122 (1) A determination or demand is that is required to be served on a person under this *Act* is deemed to be served if

(a) served on the person, or

(b) sent by registered mail to the person's last known address.

(2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office. ....."

Section 109 of the *Act* provides:

" **Other powers of tribunal**

109 (1) In addition to its powers under section 108 and Part 13, the Tribunal may do one or more of the following:

.....

(b) Extend the time period for requesting an appeal even though the period has expired; ....."

In past situations where the Tribunal has been asked to extend time limits pursuant to Section 109 (1)(b) of the *Act*, it has indicated that in the interests of achieving one of the objectives of the *Act*, i.e., to provide fair and efficient procedures for resolving disputes, extensions will not be granted as a matter of course. To this end, the Tribunal has adopted certain criteria which it says must be present before it will grant such extensions.

These criterion are set out in numerous cases such as, for example, *Swift River Ranch Ltd.*, BC EST #D316/98 and *Pacholok*, BC EST #D526/97. Consequently, to obtain an extension of these time limits, an appellant is required to prove that; (1) there is a reasonable and credible explanation for the failure to file within the time period; (2) there has been a genuine and ongoing bona fide intention to appeal the determination; (3) the respondent party and the director have been made aware of that intention; (4) the respondent party will not be prejudiced by the granting of an extension; (5) there is a strong prima facie case in favour of the appellant.

More recently, the Tribunal has reconfirmed that extensions of time limits will be granted only on rare occasions, where reasonable diligence in pursuing the request for appeal is demonstrated and, where there

are compelling reasons for requesting an extension - see *Trainor*, BC EST #D547/98 and *Koutsantonis Enterprises Ltd.*, BC EST #D555/98.

While I naturally accept that approach, it appears that the circumstances and issues here are quite unique and involve some compelling natural justice considerations that call for special consideration. This may result in a deviation from the Tribunal's standard approach.

To begin with, the obvious starting point in these situations is to determine when the appeal was initially due. This is not normally a difficult task, in fact, on reviewing many of the previous cases involving appeal time limits, I see no instances where there has been doubt about the date when the appeal should have been filed. It seems that the usual pattern of events is that for some reason or another, the person to whom the determination is directed fails to meet the deadline for filing an appeal. These deadlines have been regularly applied as being those provided for in Section 112 of the *Act*, i.e., either fifteen (15) days from the date of service where service was made by registered mail or, eight (8) days after service where there was personal service. Of course, if there had been any doubt about the date an appeal was due where service was made by registered mail, the deeming provisions under Section 122 would come into play and the count down for the fifteen (15) day deadline from the date of service would start ticking eight (8) days after the determination was deposited with Canada Post.

Here, we have no clear compulsory date when the appeal should have been filed. We have a copy of the Determination that was primarily directed at the Employer, being sent by regular mail to the Appellant as being a party affected. We therefore have no date of mailing, no date of service and, the deeming provisions of Section 122 clearly do not apply because there was no registered mail involved. What we are left with is a date of May 10, 1999, that was set by the Director, which I assume is in keeping with the Section 112 time limits applicable to the Employer to whom the Determination was directed. However, I doubt that this date can be construed as being mandatory in the context of time limits for filing this appeal.

In addition to this difficulty in establishing the date of service and a compulsory date for filing this appeal, we also have serious natural justice considerations here. The Appellant's contends that he only became aware that the Employer was relying on sexual harassment as just cause for dismissal when he received the Determination. He says that he had not been given an opportunity to respond to these allegations before the Director's finding was made and the Determination issued.

In this regard, in the Employer's submissions of June 16, 1999, particular emphasis was placed on the improbability of the Director accepting at face value the Employer's allegations of sexual harassment as a defence to a termination complaint, without raising it with the Appellant. However, in the Director's submission of June 15, 1999, this is not specifically denied. There, starting at the bottom of page one, the Director says:

> " ..... Letter to Rasmussen, item 8 indicated he had been paid all wages owed. Requested contact by January 29, 1999 if he disagreed with assessment. Rasmussen called February 9, 1999. *He brought up the issue of compensation for length of service which had not been addressed*. When file reviewed I realized the payroll records contained errors in

> overtime calculation. *The employer took the position that Rusmussen had been fired for cause and that was sexual harrassment of a co-worker. Rasmussen was called and messages left, no return calls were made. Rasmussen did not contact the branch again. The determination was issued April 16, 1999 a copy was sent to Rasmussen. .....*"
>
> (Emphasis added)

At the time of this submission, the Director obviously knew, or ought to have known of the Appellant's position, having been provided with a copy of the appeal along with the Appellant's submission of June 3, 1999, where this issue was raised. Yet, this serious allegation is not specifically addressed. In the circumstances, I must take the foregoing submission of the Director on its face value and treat it as an indication that there was indeed no verbal contact between *the branch* and the Appellant after the issue of sexual harassment was raised by the Employer and the issuance of the Determination. I also have to assume that the details surrounding the allegations of sexual harassment were never committed to writing by the Director and sent to the Appellant prior to the Determination being issued, otherwise, I would have been supplied with a copy. This being the case, it appears that the natural justice issues raised by the Appellant may well have some foundation. This in itself surely calls for corrective measures from the Tribunal, even if it means straying from the policy of strictly enforcing time limits for requesting an appeal.

Let me be very clear here, I am not suggesting for one minute that someone can come back months after the expiry of an appeal deadline, raise some natural justice issues and get an extension of the time limits as a matter of course. To the contrary, the Tribunal's policies regarding time limits are still intact. All I am saying is that there are naturally going to be times where circumstances arise that require special consideration. In my view, in these situations, extensions of the time limits for filing appeals should be available provided there are reasonable grounds for the extension and, there is no prejudice to the respondent parties. This is of course in keeping with the longstanding general principle that any tribunal's policies cannot be applied so slavishly that a statutory provision is rendered meaningless or, that the circumstances surrounding each application are not given due consideration. (Mission Transport Ltd. v. British Transport Commission, [1962] 2 Q.B. 173, 193 (Lord Devlin)).

It is also in keeping with the well established arbitral principle that where a discretion to extend time limits exists, the test is one of reasonableness - see Re Canadian General Electric Co. (Davenport Works) and U.E.W., (1952), 3 L.A.C. 980 (Laskin); Re Becker Milk Co. and Teamsters Union, Local 647, (1978), 19 L.A.C. (2d) 217 (Burkett); Re Air Canada and International Association of Machinists, (1979), 22 L.A.C. (2d) 298 (Shime); and, Re British Columbia Institute of Technology and B.C.G.E.U., (1986), 27 L.A.C. (3d) 56 (Kelleher).

In light of all of the foregoing and, taking into account the Employer's concession that it will suffer no prejudice if an extension is granted, I am satisfied that there are indeed reasonable grounds here to warrant the exercise of the Tribunal's discretion under Section 109 (1)(b) of the *Act* to enlarge the time limits for requesting an appeal.

In arriving at this conclusion, I have taken into account the confusion over the date of service of the Determination and the difficulty in nailing down a compulsory date for bringing the appeal. As indicated, I have also found that the natural justice concerns of the Appellant require airing, notwithstanding the apparent expiry of the time limits for requesting an appeal.

As for the delay in bringing the request for an extension, by the Appellant's own admission, he received the Determination by regular mail around the end of April, 1999. Giving him the same fifteen (15) days from the date of service that applies to service by registered mail, this brings us to the middle of May 1999. The Appellant sought legal advice, presumably around the time he was served with a copy of the Employer's appeal. Counsel for the Appellant then filed the request for an extension of the time limits on June 1, 1999, a delay of some two weeks or so. In interests of fairness and particularly where the Appellant was only notified by the Director of the reasons relied upon by the Employer for his discharge so late in a process that had been dragging on since June 1998, a two week delay does not seem unreasonable to me.

What would be unreasonable in these unique circumstances, would be to deny the Appellant a meaningful opportunity to respond to the serious allegations against him, especially when he is already a party to the Employer's appeal to this very Determination.

ORDER

Pursuant to Section 109 (1)(b) of the *Act*, the Appellant's application for an extension of the time limits for requesting an appeal is hereby granted. Consequently, the time limits are enlarged and the appeal in question is properly before the Tribunal.

Hugh R. Jamieson
Adjudicator
Employment Standards Tribunal