

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 -

Polygon GPS Surveys Ltd.
("Polygon")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/460

DATE OF DECISION: August 17, 2000

DECISION

This is a decision based on written submissions by Ned Habedus, on behalf of Polygon GPS Surveys Ltd. (“Polygon”), John Hartmann and Michael Taylor for the Director of Employment Standards (the “Director”), and Lorna Ann Graham (“Graham”).

This decision is on the question of whether the Tribunal should extend the time for Polygon to file its appeal.

OVERVIEW

Graham filed a complaint with the Director alleging that Polygon owed her compensation for hours worked. A delegate of the Director (Hartmann) investigated Graham’s complaint, and on November 23, 1999, issued a determination finding that Polygon had contravened the Employment Standards Act (“the Act”). Polygon was ordered to pay Graham \$5,735.06 in wages and interest.

Habedus’s letter of appeal was dated June 6, 2000, and received by the Tribunal on July 4, 2000.

Polygon seeks an extension of time to file the appeal on the basis that Graham misled Polygon in believing that she was not pursuing her claim.

The Director opposes the application.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the Act and allow the appeal even though the time period for seeking an appeal has expired.

FACTS

As noted, the Determination was issued November 23,1999. The Determination indicated that the appeal deadline was 4:30 p.m. December 16, 1999.

The Director’s evidence discloses that the Determination was served on Polygon’s Registered office by registered mail by November 30, 1999. Copies of the Determination were also sent to the last known address of Polygon and Habedus, its sole Director. Those copies were returned to the Employment Standards Branch by Canada Post.

Habedus acknowledged that the appeal was filed late. He contends that he relocated on June 14, 1999, and that he was unaware that a determination had been issued until Taylor, another delegate of the Director, contacted him in February, 2000 in an attempt to collect the amount of the determination. Habedus claims that he was surprised because Graham had told him that she would “drop all claims”. By the time Taylor contacted Habedus, the deadline for filing an appeal had passed. Habedus then states “Mr. Taylor and I felt that it would be futile to try and appeal the

decision at this point.” He then alleges that he contacted Graham and that “yet again said she would drop the charges and call Mr. Taylor and inform him so. This behaviour continues to this date.”

The Director’s delegates contend that Polygon was properly served under the Act, and the fact that neither Polygon nor its counsel chose to respond to service is not a sufficient reason for the Tribunal to exercise its discretion under section 109(1)(b).

The delegates also argue that, even though Habedus and Graham may have attempted to resolve the matter between themselves, the Director was not a party to those discussions, and never led Habedus to believe the matter was withdrawn or resolved. They say that Habedus initiated the discussions about resolving the matter. The delegates also say that the Director takes no interest in pursuing matters when the complainant wishes to withdraw, but that Graham never expressed her intention to either withdraw or suspend her complaint.

Graham denies that she has had ongoing contact with Habedus regarding a settlement, or any other matter. She claims that, in her discussions with Habedus, Habedus has denied owing her money and claimed that the delegate had made a calculation error. She also claims that she has always told both of the delegates that Polygon made no settlement offers, and that it continued to claim that it has no money. She denies that she has been offered, or accepted, any settlement offer from Polygon.

ANALYSIS AND DECISION

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. The party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong *prima facie* case in favour of the appellant.

(see: *Niemisto v. British Columbia (Director of Employment Standards)* (BC EST #D099/96) and *Pacholak v. British Columbia (Director of Employment Standards)*(BC EST #D526/97)

Furthermore, extensions will only be granted where there are compelling reasons present. (*Moen and Sagh Contracting Ltd.*, BC EST # D298/96)

Reasonable explanation for the failure to request an appeal within the time limits

The deadline for filing the appeal was December 16. The appeal is dated July 5, 2000, almost seven months after the deadline. I find that Polygon was properly served with the Determination, and that the fact that Habedus relocated without notifying the Director is not a reasonable explanation for failing to file an appeal in a timely fashion.

Habedus claims that the Determination came to his notice in February. Even if I were to accept that Polygon was not served until February, no appeal was filed for a further five months. I am also unable to conclude that there is a reasonable explanation for this delay. Polygon claims that he did not file his appeal until June because of ongoing settlement discussions with Graham. Graham denies that any settlement offer was ever made to her. I am unable to find that, even if Polygon was active in pursuing a resolution to the claim, and the Determination, those discussions did not prevent him from filing an appeal.

The evidence is that the Director was attempting to enforce the Determination throughout that time period, and Habedus ought to have been aware that unless the issue was resolved or he was successful in appealing the Determination, collection proceedings would have been commenced.

I am unable to find that ongoing settlement discussions, if those indeed occurred, constitute extenuating circumstances over which Habedus has no control.

***Bona fide* intention to appeal the determination and notice to the parties of this intention**

Further, I am not persuaded that Polygon had a *bona fide* intention to appeal the Determination. I accept there were some discussions between Habedus and delegate Taylor some time after the appeal deadline had passed, but I do not find that those conversations establish a *bona fide* intention to appeal.

Strong prima facie case

I also find that Habedus has failed to show that there is a serious issue that ought to be dealt with on appeal. The claim was for wages. Habedus claims that Graham has been fully paid. The Determination notes as follows:

Habedus, for Polygon, was contacted by telephone and several conversations ensued. There were no written records provided by Polygon. Polygon's evidence consisted of an admittance that Graham was an employee of Polygon; that there may well have been wages still owing to her; a query respecting quantum; a query why Graham was pursuing this at this time; a maintenance that Polygon was cash poor and so could not pay any great sums; a stated interest in finding a resolution to the matter; a statement that Polygon had gone out of its way to provide shelter for Graham when she appeared to be indigent; and, a suggestion that there should be some **mitigation. There was no evidence offered to suggest that Graham**

was anything other than an employee, or that wages were not owed her...’
(my emphasis)

Having provided no evidence to the delegate during the investigation, it is not now open to Habedus to submit evidence that the Determination is incorrect. The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director’s delegate at first instance. (see *Kaiser Stables* BC EST #D058/98, and *Tri West Tractor Ltd.* BC EST #D268/96). Consequently, any new evidence will not be admissible on appeal.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I conclude that the extension should not be granted. Polygon has failed on balance to satisfy the criteria established for an exercise of discretion extending the time for filing an appeal.

C. L. Roberts
Adjudicator
Employment Standards Tribunal