

An appeal

- by -

Om Paul and Umendra Singh operating as The Southeast Asia Post

- 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: John M. Orr

FILE No.: 2001/359

DATE OF DECISION: July 5, 2001

DECISION

APPLICATION

This is a consideration of an application by Umendra Singh (“Singh”) operating as The Southeast Asia Post pursuant to Section 109 of the Employment Standards Act (the “Act”) to extend the time period for requesting an appeal from a Determination dated February 27, 2001 by the Director of Employment Standards (the “Director”) even though the time period for requesting an appeal has expired.

The main issues addressed in the Determination were whether Singh was involved in the ownership of the newspaper to an extent that made him fall within the definition of “employer” as provided in the *Act* and whether Siegfredo Bercasio (“Bercasio”) had filed his complaint within the statutory time limit. On February 27, 2001 a delegate of the Director issued a Determination in which she found that Singh was an employer, that the claim was within time and that Bercasio was owed wages.

Notice of the appeal herein by Singh was received by the Tribunal May 03, 2001 at 1:53 p.m. The Determination advises on the last page that:

You can appeal this Determination.

The appeal deadline is 4:30 p.m. on March 22, 2001.

(instructions follow on how to appeal)

The time limits for appeals are setout in Section 112 of the *Act* as follows:

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).*

The *Act* also provides for how service of the Determination may be established:

Service of determinations and demands

- 122 (1) *A determination or demand that is required to be served on a person under this Act is deemed to have been 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.*
- (3) *At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.*

In this case, on February 27, 2001 the Director's delegate sent the Determination by depositing copies of it in a Canada Post Office to the last known address for Singh. There were problems with delivery in that the package was not picked-up until March 21, 2001. It is evident that Singh was at least aware of the issuing of the Determination no later than March 21, 2001.

By law service of the Determination was deemed to have occurred by March 7th - 8 days after the determination was deposited with Canada Post and sent to the last known address for Singh. As noted on the face of the Determination the last day, even counting generously, for filing an appeal would have been March 22nd. The appeal was not delivered until May 3rd.

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine and ongoing intention to appeal;
3. the respondent and the Director were aware of the intention to appeal;
4. the prejudice to the employee will be considered;
5. there is a *prima facie* case set out in the appeal.

In this case Singh states that the post office box address, which he had supplied to the delegate, was shared with other people, including some with the same last name. He states that he lives in

Surrey and rarely uses this box number. He claims that the package was collected by another user who did not return it to the box until April 9th and that he had then picked it up right away. He submits that the delegate had other means of contacting him.

Curiously, Singh's evidence does not correspond to the evidence provided by Canada Post. The postal service documents indicate that delivery was attempted and then a card – not the package – was left in the postal box. The postal service records indicate that Singh presented the card and picked-up the package on March 21, 2000.

So, Singh was deemed to have been served March 7th, was most likely in possession of the determination March 21, and the undisputed fact is that he knew of the Determination by April 9th and did not file the appeal until May 3rd. There is no satisfactory explanation for the delay between April 9th and May 3rd.

I note that in this case the appeal is a very simple matter. Singh states that he was not the owner or operator of the newspaper and therefore has no liability. The appeal itself is a one-page document and there seems to be no reason why this could not have been filed within the time limits.

I have reviewed the substance of the determination and the appeal. It is a most disturbing file and clearly gave the delegate great difficulty. It appears that Bercasio did not file his appeal within the 6 months time limit and then lied about his last day of work once he discovered the problem. He refuted his own evidence sworn in an affidavit initially presented to the delegate. His evidence lacked any remote degree of credibility. He recruited others to corroborate his lies.

Nevertheless, the delegate was left with a situation where the employer was also being untruthful and/or unresponsive and the onus is on the employer to keep records of the days and times worked by the employee. The delegate had to deal with a situation in which none of the parties were being truthful and it may have been a situation where the delegate could have refused to investigate or stopped an investigation in accordance with section 76(2){c} or {d} of the *Act*. However, the delegate proceeded to analyse the evidence presented, for what it was worth, made findings of credibility and made a determination.

The most relevant finding to Singh's appeal was the conclusion that Singh came within the very broad definition of "employer" as set out in the *Act*. Singh's appeal is simply an assertion that this finding is wrong. In my opinion Singh has not presented a *prima facie* case that would lead the Tribunal to overturn the conclusion of the delegate on this point.

On all of the material and submissions before me I am not satisfied that this is an appropriate case to exercise my discretion under section 109(1)(b) to extend the time for filing the appeal. Therefore the appeal is dismissed.

ORDER

Pursuant to section 109(1)(b), I decline to extend the time for requesting the appeal herein. The appeal is dismissed pursuant to section 114(1)(a) of the *Act*.

John M. Orr
Adjudicator
Employment Standards Tribunal