

An appeal

- by -

Judith Schneider
("Schneider")

- 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: Lorne D. Collingwood

FILE No.: 2001/450

DATE OF DECISION: August 8, 2001

DECISION

OVERVIEW

The appeal is by Judith Schneider (who I will refer to as both “Schneider” and “the Appellant”) and it is pursuant to section 112 of the *Employment Standards Act* (“the *Act*”). Schneider appeals a Determination issued on May 3, 2001 by a delegate of the Director of Employment Standards (“the Director”).

The appeal was received by the Tribunal after the statutory period for appealing the Determination had expired. This is a decision to extend the time limit for requesting the appeal.

ISSUE TO BE DECIDED

The sole issue before me is whether the Tribunal should or should not exercise its discretion to extend the time period for appealing the Determination. According to Schneider, it is not her fault that the appeal is late. According to Schneider, she moved and the Determination was sent to her old address even though she repeatedly sought to advise the Director’s delegate of her new address.

FACTS

Schneider worked for Leisure Aquatics as an instructor who performed other jobs as well. On September 15, 1999, Schneider notified the employer that she would be resigning her employment on September 30, 1999.

Schneider filed a complaint in which she claimed compensation for length of service (what she calls severance pay). The Director’s delegate investigated her complaint and then issued the Determination.

The Determination was sent to Schneider’s former address in Chilliwack.

Schneider claims that she went to great lengths to contact the delegate so as to advise him of the fact that she had moved. I am given no reason to disbelieve her. I accept that she telephoned the delegate several times and left messages for him to call her. I accept that, after 2 or 3 weeks of doing that, she called again, this time leaving voice mail which gave her new address and telephone number. And I find that it was not until Schneider called again, this time leaving a message in which she expressed concern that nothing had been heard from the delegate and about the possibility that a decision had been reached in her case, that the delegate finally called Schneider. That led him to send a copy of the Determination to her new Vancouver address.

I am not told when it was that the Determination was sent to Schneider's Vancouver address but, as I understand the Appellant, she is saying that it was not until the deadline for an appeal had passed that she finally received her copy of the Determination .

The appeal, on its surface, and in part, is that it is that the delegate errs in respect to facts which are of vital importance to the Determination. It is also that Schneider had her hours of work cut such that she was forced to resign and that she was, in effect, terminated when she gave the employer notice that it was her intention to resign. The Determination deals with only the first part of that latter complaint, not the second part.

Leisure Aquatics does not object to an extension of the time limit for requesting an appeal. The Director's delegate is not asking that the requested extension be denied but in fact asks that the period for the appeal be extended. He is unable to establish whether information in respect to the new address was submitted or whether the Determination was mailed in error.

ANALYSIS

Section 112 of the *Act* establishes a 15 day period for appealing Determinations.

- 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 Tribunal may dismiss an appeal without holding a hearing if it is satisfied that the appeal is not in time, the appeal is not within the Tribunal's jurisdiction, or the appeal is frivolous, vexatious, trivial or not in good faith. The Tribunal may also extend the time limit for filing an appeal.

- 114** (1) The tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that
- (a) the appeal has not been requested within the time limit in section 112 (2),
 - (b) the appeal is not within the tribunal's jurisdiction, or
 - (c) the appeal is frivolous, vexatious or trivial or is not brought in good faith.

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;
...

The statutory period for appeals will not be overridden lightly but only where there is a compelling reason to do so. Where there is a reasonable explanation for the failure to file the appeal in time, no actual prejudice to other parties, and it appears that there is a serious issue to address, I am satisfied that the Tribunal should not deny the appellant access to the Tribunal but accept the appeal even though late. And, in my view, the Tribunal should be more inclined to extending the time limit for an appeal where the appeal is only late by a few days and much less inclined to doing so if deadline is missed by a wide margin.

I have decided to extend the time limit for this particular appeal. In this case, I have accepted that the Appellant made a concerted effort to contact the delegate and advise him of her new address. I therefore accept that it is not the fault of the Appellant that the appeal is late and that she has a reasonable excuse for her failure to file the appeal in time. I am given no reason to believe that an extension of the time limit for the appeal is prejudicial to the employer. I am, moreover, led to believe that there may well be serious issues to address in this case, factual issues and the matter of whether the employee was or was not terminated by the employer on or about the point where she served notice that it was her intention to resign.

ORDER

I order, pursuant to section 109 (1)(b) of the *Act*, that the time limit for an appeal of the Determination dated May 3, 2001 be extended and that further submissions be invited in respect to that appeal.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal