

An appeal

- by -

Interior Pacific Flight Systems  
(“Interior Pacific”)

- 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:** April D. Katz

**FILE No.:** 2002/439

**DATE OF DECISION:** October 30, 2002

## DECISION

### OVERVIEW

The Director of Employment Standards (the "Director") issued a Determination against Interior Pacific Flight Systems Ltd. ("Interior Pacific") on July 18, 2002. The Determination found that Interior Pacific owed William Smith ("Smith") \$13,586.26 in commissions, length of service and vacation pay. Interior Pacific was under the management of a receiver. The receiver asked a director and employee of Interior Pacific to supply payroll information to the Director's Delegate. After the information was supplied all further communication was between the Director's Delegate and the receiver. The director of Interior Pacific has appealed on Interior Pacific's behalf on the basis that he was not given an opportunity to respond to the allegations and the findings of the Delegate. The Determination was the first document forwarded to the director of Interior Pacific. The Appeal was filed on August 14, 2002. The time for an appeal expired on August 12, 2002.

### ISSUE - TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from August 12, 2002 to August 14, 2002 and this decision deals only with that issue. This issue was decided on the basis of the written submissions.

### FACTS

William Smith was employed by Interior Pacific as a sales and marketing manager from June 15, 1999 until May 5, 2001. John Mitchell ("Mitchell") was a director of Interior Pacific, who was hired by the receiver after Interior Pacific was placed in the hands of a receiver. On April 12, 2002 John Mitchell provided records of William Smith's employment to the Director's Delegate. On July 18, 2002 the Director's Delegate sent a copy of the Determination to John Mitchell and the receiver. The Determination specified that the appeal period ended on August 12, 2002.

When the Determination was issued Mitchell contacted the receiver who advised him that the matter had been taken care of. Mitchell expected the receiver to appeal. Closer to the expiry of the appeal period Mitchell tried to contact the receiver. The receiver was on holidays. Mitchell learned that no appeal was filed because Interior Pacific was to be petitioned into bankruptcy. Mitchell then filed this appeal two days late.

### ARGUMENT

Mitchell argues on behalf of Interior Pacific that there are errors of fact in the Determination and different explanations for the facts as well as other information that does not appear to have been considered in the Determination. He argues that he has new and relevant information that he has not been given an opportunity to provide to the Director or to respond to the conclusions of the Director's Delegate.

William Smith argues that Mitchell could have chosen to participate earlier if he thought it was important to him. He submits that the amount found to be owing is only part of the claim and he would like to review other findings.

The Director's Delegate took no position with respect to extending the time for this appeal.

## LAW AND ANALYSIS

### Principles For Extending An Appeal Deadline

The Tribunal has been asked to extend the time to file an appeal on many occasions. In each case the Tribunal is mindful of the purpose of the *Employment Standards Act* (the "Act") under section 2 (d) is "to provide fair and efficient procedures for resolving disputes". The Act imposes an appeal deadline to ensure appeals are dealt with promptly. Under section 109(1)(b) of the Act, the Tribunal may extend the time for requesting an appeal, even though the appeal period has expired.

The Tribunal must assess an appeal and ensure that there are compelling reasons to extend a time limit. The Tribunal set out the six criteria for determining timeliness of appeals based on previous cases in *Bravo Cucina Restaurante Italiano Ltd.* BC EST #D343/00.

"Appellants who are seeking a time extension for an appeal, should satisfy the Tribunal on balance that:

1. there is a good reason they could not appeal before the deadline;
2. there is not an unreasonably long delay in appealing;
3. they always intended to appeal the determination;
4. the other parties (the respondent and the Director) are aware of the intent to appeal;
5. the respondent will not be harmed by an extension; and
6. they have a strong case that might succeed, if they get an extension."

In *Suter (Re)*, BC EST #D177/00, the Tribunal considered a request for extension of time for filing an appeal where the Determination was made and mailed on November 23, 1999. The appeal was to be filed by December 16, 1999 and was actually filed December 23, 1999. The mail had not been claimed by the Employer and had been returned to the Employment Standards Branch on December 14, 2000. The appeal was filed when the Employer received a demand notice from her bank. An extension of time was denied after citing the statutory requirements for timeliness of appeals.

I will consider the six factors described as they apply to the facts in this appeal.

1. "There is a good reason they could not appeal before the deadline"

Mitchell relied on the receiver's representation that this matter was being taken care of and did not take independent action until he learned that the receiver was not filing an appeal.

2. "There is not an unreasonably long delay in appealing"

The two day delay was not unreasonable.

3. "They always intended to appeal the determination"

There is no evidence that suggests Mitchell expressed an intention to appeal to the Delegate or William Smith but his conduct with the receiver suggests that he thought an appeal would follow the Determination.

4. "The other parties (the respondent and the Director) are aware of the intent to appeal"

Neither the Delegate nor William Smith have indicated they had prior knowledge of Interior Pacific's intention to appeal and in fact expressed the belief that Mitchell has taken this appeal because of his potential personal liability if the Determination stands.

5. "The respondent will not be harmed by an extension"

William Smith's submission suggests that the delay may affect his claim in the bankruptcy proceedings, however, his employment ended on May 5, 2001 and the Determination is dated July 18, 2002. The delay in August 2002 does not appear to have great significance.

6. "They have a strong case that might succeed, if they get an extension."

The final factor relates to the merits of the Appeal. There are a number of factual disputes between the parties based on the written submissions. The Delegate did not have the benefit of hearing orally from Mitchell on these issues. The primary issue of dispute is whether the commission on sales was earned when the aircraft was completed or when the sale was made.

When Mitchell sent the written submissions to the Delegate, he told the Delegate to deal with the receiver. The receiver had not been with Interior Pacific during William Smith's period of employment and could not have clarified any of the arrangements for commissions and sales.

It is difficult to assess if the facts alleged in the appeal would be successful, however a full review on the merits would ensure that all the facts presented were considered.

## **CONCLUSION**

There is some new evidence to consider on an appeal from both Mitchell and William Smith. The Determination was based on evidence available at the time, which did not include the employer's understanding of the contract arrangements for commissions.

The delay is not great and I find on balance that Mitchell's evidence should be considered before a final decision is made. In spite of the hardship to the William Smith, I allow the extension of time and allow this appeal to proceed.

**ORDER**

The Tribunal extends the appeal deadline and the appeal may proceed.

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**April D. Katz**  
**Adjudicator**  
**Employment Standards Tribunal**