

An appeal

- by -

Bryan Altenburg operating as
Bryan Altenburg Painting & Decorating
("Altenburg")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/392

DATE OF DECISION: September 12, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "*Act*") brought by Bryan Altenburg ("Altenburg") of a Determination issued on April 4, 2001 by the Director of Employment Standards (the "Director"). The Director found that Altenburg owed Richard Conway, a former employee, \$1,059.06 for unpaid overtime, minimum daily pay, statutory holidays, vacation pay and interest.

The Director sent the Determination by registered mail. Altenburg had until April 27, 2001 to file an appeal. He filed this appeal on May 18, 2001 with a request for the Tribunal to extend the time under section 109(1)(b) of the *Act*. The extension application is based on not having received the Determination until the Director faxed a copy on May 1, 2001. Altenburg also applied for a suspension of the effect of the Determination pending the appeal.

In the appeal, Altenburg takes issues with the Director's reliance on Conway's evidence; his calculation of the amount owing to Conway is \$843.87, before interest. Once interest is calculated, the difference between Altenburg's calculations and the Director's calculation is \$170.00.

ISSUE

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.

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

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 can extend the time for requesting an appeal if there are compelling reasons. To decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria which Appellants must satisfy:

- (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.

THE FACTS AND ANALYSIS

Conway was employed by Altenburg as a painter from May 11, 2000 to October 6, 2000. He claimed he was owed for overtime, statutory holiday pay and vacation pay. The primary issue before the Director was the discrepancy in the evidence between the Altenburg and Conway concerning time sheets and records. The Director was swayed by Conway's evidence.

The Director sent the Determination by Registered Mail on April 4, 2001, which Altenburg says he did not receive. Canada Post records show that delivery was attempted on April 5, 2001, a card was left indicating delivery was attempted, and on April 21, 2001 the unclaimed mail was returned to the sender. The Director's delegate faxed a letter to Altenburg on May 1, 2001 concerning payment of the amount ordered to be paid and, having determined through Canada Post that the mail had not been claimed, also faxed a copy of the Determination. Altenburg telephoned the delegate within a couple of days. A few days later he spoke with a manager at the Employment Standards Branch.

In the letter of May 1, 2001, the delegate advised that if payment had not been received by May 18, 2001, he would commence collection proceedings.

Altenburg filed the appeal and request for extension on May 18, 2001.

By letter dated August 2, 2001, the Tribunal advised that the Director would not engage in any collection action prior to the Tribunal's rendering a decision.

SUBMISSIONS

On May 30, 2001, the Director's delegate filed a lengthy response opposing the application for extension. The delegate noted that Altenburg knew the Determination would be coming, chose not to pick up the registered mail, did not file an appeal immediately upon receipt of the Determination, and filed the appeal on the day indicated for collection proceedings. Altenburg had not complied with the legislative requirements for record keeping. The amount in dispute, after interest is calculated, is only \$170. It has been in excess of 7 months since Conway's employment terminated and he is still waiting for final payment. The delegate submitted that the appeal is a frivolous delay tactic.

On July 23, 2001, Altenburg filed a response to the Director's submissions. He took exception to the claim that he had not complied with the legislative requirements for keeping records and with the suggestion that the appeal was frivolous.

ANALYSIS AND DECISION

1. Altenburg has not given any reason for not retrieving the registered mail. He has not denied that the card was left at his address or suggested that the process was other than that indicated by Canada Post. Retrieving the registered mail was within his control. I find that he has not provided a good reason for not being able to appeal before the deadline.
2. Once he received the Determination on May 1, 2001, Altenburg did not indicate to the Director or to Conway his intention to appeal. He has given no reason for delaying from May 1 until May 18, 2001. Although this is not an unduly long delay, it was longer than necessary and I find it was not reasonable.
3. As noted in 2), Altenburg did not indicate his intention to appeal.
4. There is nothing in the evidence before me to suggest that the Director or Conway knew that Altenburg would appeal.
5. Conway will be prejudiced by an appeal because of the additional delay in receiving payment, most of which is not disputed. The Director has suspended collection proceedings pending the outcome of the appeal. Also, if the extension is granted, Conway will have to prepare for a hearing.
6. The Director's determination was largely based on assessing credibility. I find that Altenburg has not presented a strong case for the Tribunal to overturn the Director's findings.

I find nothing in Altenburg's submissions to support granting an extension for time to appeal.

ORDER

The Tribunal declines to extend the time to file an appeal.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal