



An appeal

- by -

Jane Hanni
("Hanni")

- 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: Mark Thompson

FILE No.: 2001/462

DATE OF DECISION: September 19, 2001

DECISION

OVERVIEW

This is a request by Jane Hanni (“Hanni”) pursuant to Section 109(1)(b) of the *Employment Standards Act* (the “*Act*”) that the Tribunal exercise its discretion and accept an appeal against a Determination issued by a delegate of the Director of Employment Standards on May 16, 2001 under Section 112 of the *Act*. The Determination found that Hanni’s former employer, Western Road Rail Systems (“Western”) owed her \$1,676.90 in vacation pay. The employer paid the delegate the sum in question, and he closed the case. Hanni filed an appeal, arguing that she was entitled to a larger sum. Hanni’s counsel acknowledged that the deadline for filing an appeal was 4:30 p.m. on June 14, 2001. The appeal was submitted to the Tribunal by fax at 6:15 p.m. on that date. Counsel then requested that the Tribunal accept the appeal.

Western argued that the Tribunal should not accept Hanni’s appeal.

This case was decided based on written submissions.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Tribunal should exercise its jurisdiction to accept Hanni's appeal.

FACTS

For purposes of this decision, it is not necessary to set out the facts that led to the Determination of May 16, 2001.

Hanni filed a complaint against Western early in 2001. The Director’s delegate investigated her complaint and sent a letter to Western (with a copy to Hanni) on April 24, 2001 setting out the results of that investigation, which were that Western owed Hanni \$1,619.43 in vacation pay. The letter stated that Western’s response would determine whether or not a determination would be issued. Hanni’s counsel replied on May 4, stating that she calculated her client was entitled to vacation pay in the amount of at least \$5,677.01. According to Hanni’s counsel, her client spoke to the Director’s delegate after the May 4 letter, and the delegate informed Hanni that he would issue a Determination, that she could appeal. The May 16 Determination then followed, confirming the calculation of vacation pay owed to Hanni contained in the April 24 letter, plus interest that had accrued. A page attached to the Determination stated clearly that the deadline for filing an appeal was 4:30 p.m. on June 14, 2001. Hanni instructed her counsel to prepare an appeal on or about June 7, 2001.

Hanni's counsel stated that she believed that the deadline for filing Hanni's appeal was June 16, 2001. The Director's delegate was aware that Hanni intended to appeal the Determination and spoke with her on June 14 to ask if she had any questions about the appeal process. After that conversation, Hanni called her counsel, who then faxed a submission to the Tribunal at 6:15 p.m.

ANALYSIS

Hanni's argument in support of her request that the Tribunal accept her appeal had four elements. First, Hanni argued that there was a reasonable and credible explanation for the delay in filing the appeal. Secondly, Hanni had intended to appeal the Determination when it was issued and even when she received the April 24, 2001 letter. Thirdly, the delegate knew of her intention and raised the matter in a conversation on June 14. Finally, Hanni's appeal contains a strong argument on the merits of her case.

Western submitted arguments against acceptance of Hanni's appeal. It argued that there was no good reason for the delay. Hanni was represented by counsel who admitted that she was the cause of the delay. This should not be grounds for exercising the Tribunal's jurisdiction. In the past, the Tribunal has refused to accept appeals that were as little as one day overdue. Furthermore, there was no direct evidence that Hanni intended to appeal, merely her assertions about the contents of conversations between herself and the delegate. Counsel for Western stated that his client had no knowledge of Hanni's alleged intention to appeal. Finally, Hanni's arguments on the merits of the case were essentially a repetition of the submissions she made to the delegate originally.

The delegate took no position on this issue.

Section 112 (2) (a) of the *Act* requires that a request for an appeal must be delivered within "15 days after the date of service if the person was served by registered mail . . . "

Section 109 (1) (b) of the *Act* gives the Tribunal the power to "extend the time period for requesting an appeal even though the period has expired."

Given these two provisions, the Tribunal has been asked to grant an extension of the statutory time limit on many occasions. The party seeking an extension bears the onus of persuading the Tribunal to exercise its power under Section 109.

As the Vice Chair of the Tribunal stated in her letter to the parties of June 18, 2001, the Tribunal examines the following principles to decide whether to exercise its jurisdiction:

1. The existence of a good reason for the failure of the appellant to meet the deadline.
2. Whether the delay was unreasonably long.
3. Did the person appealing always intend to appeal the Determination?

4. Were other parties, including the respondent and the delegate aware of the intention to appeal?
5. Would the extension prejudice the respondent's case?
6. If the extension were granted, does the appellant have a strong case that might succeed.

The appropriate analysis to decide this case is to test the facts before the Tribunal against the six principles listed above.

Clearly, there was a “good” reason for the delay in this case, in that Hanni’s counsel admitted that she misunderstood the deadline for filing an appeal. While there is an argument that professional counsel should be responsible for meeting the time limits in the *Act*, this was not a case of neglect or lack of attention to the need to file the appeal within a reasonable period of time. See *Ton (operating as Education Fund Network Society Services)* [2000] BC EST #D523/00. In *Uniglobe Pacific Travel Ltd.* [2001] BC EST #D361/01, the adjudicator granted an extension after a five-day delay due to “miscommunication” between two officers of the appellant, which he found to be a “credible explanation” for the delay. I am unwilling to penalize Hanni because of an error by counsel.

The length of the delay in this case was minimal, approximately 2 hours.

The evidence before the Tribunal showed that Hanni did intend to appeal the Determination. She had so informed the delegate, although not Western. In fact, the delegate telephoned Hanni to ask why she had not appealed, the action that triggered action by her counsel. Western correctly argued that it was not aware of the appeal until the Tribunal provided documentation of the appeal. However, the principle here first is the intention of the appellant. To prevent self-serving statements unsupported by any corroborating evidence, the Tribunal normally requires that another interested party, usually the delegate or the respondent, be aware of the intention. The delegate did not contradict Hanni’s position that he was aware of her intention to appeal.

No evidence that Western’s position would be damaged by extension of the deadline was presented to the Tribunal. Western argued that it would be prejudiced by the lack of certainty about the conclusion of the case. Clearly, the statute supports the position that disputes be resolved expeditiously. However, Western’s interests as a party to the dispute were not prejudiced by the brief delay in filing the request or the subsequent time required to render a decision on the timeliness issue.

Hanni’s appeal raised a number of issues regarding the facts on which the Determination was based and the proper interpretation of Section 58 of the *Act*. While I take no position on the merits of the appeal, the issues raised are substantial and worthy of a full examination by the Tribunal.

ORDER

For these reasons, Hanni's request should be granted, and the period governing the filing of an appeal of the Determination is extended to June 15, 2001, pursuant to Section 109(1)(b) of the *Act*.

Mark Thompson
Adjudicator
Employment Standards Tribunal