

An appeal

- by -

Al Craft
("Craft" or "Employee")

- 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: Paul E. Love

FILE No.: 2002/496

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an application by Al Craft (the “employee” or “appellant”) to extend time to permit the filing of a late appeal. The deadline for filing the appeal was September 19, 2002. The employee filed his appeal on September 25, 2002. The employee advanced no reasonable excuse for the late filing of the appeal. It appears that any delay in the forming of an intention to appeal, and file an appeal, is related to the late receipt by the Employee of the Determination. The Employee moved and did not receive the Determination until after the expiration of the appeal period. The appeal raised issues attacking the findings of fact made by the Delegate, which were based in part upon the Delegate’s assessment of credibility. The Delegate, however, does not have the benefit of hearing both parties under oath, with cross-examination, and therefore there may well be some merit to the appeal. I am satisfied that there is no prejudice to the Employer from a time extension. I therefore grant an extension and request the Tribunal to set this matter for an oral hearing.

ISSUE:

Should the Tribunal grant an extension of time to the employer to file this appeal?

FACTS

This is an application by the employee for extension of time to file an appeal. I decided this application on the basis of written submissions filed by the Employee and by the Delegate. The Employer did not file a submission in this matter. The Determination in this matter was issued on August 26, 2002, and was the exercise of the Delegate’s discretion pursuant to section 76(2)(d) of the *Act*, to cease investigating because there was not enough evidence to prove the complaint. The Delegate found that there was no credible record of hours worked, and therefore the Delegate was unable to make a finding that wages remained payable.

The appeal was filed on September 25, 2002, and is filed outside the 15 day time limit provided in s. 112(2) of the *Act*. The grounds advanced in the appeal consist primarily of disputes the employee has with the findings of fact made by the Delegate. In particular, the employee believes that the Delegate erred in failing to find that wages were owing pursuant to invoice 480033, and by crediting the sum of \$300.00 received as travel expenses, against the wage claim. The Delegate found that neither party kept records of the hours worked.

Employee’s Argument:

The Employee says that he did not receive the Determination until September 20, 2002. He apparently moved to Kamloops and contacted the Kelowna office. He filed an appeal shortly after receiving and reviewing the Determination. The Employee says that he contacted the Kelowna office because of the personal dealings with the Delegate, which left him dissatisfied in dealing with the Delegate in the investigating office.

Delegate's Argument:

The Delegate says that he had a telephone conversation with the Employee on or about August 30, 2002 and advised him that the Delegate did not find in his favour. The Delegate indicated that he would mail the Determination. The Delegate submits that the Employee was rude to him. The Delegate sent the Determination to Mr. Craft's address in Minitonas, Manitoba. The Employee did not inform the Delegate of any change in his address. The Delegate says that Mr. Craft withheld his correct address from the Delegate and did not advise the Delegate of any new address. When the Branch became aware of the new address it provided Mr. Craft quickly with a copy of the Determination. The Delegate says that Mr. Craft had all facts necessary to launch an appeal as a result of the telephone call on August 30, 2002, and in any event contributed to the delay by wilfully failing or neglecting to provide a new address.

ANALYSIS

The *Act* provides, in section 114(1) that the Tribunal may dismiss an appeal, without a hearing, if the Tribunal is satisfied that the appeal was not requested within the time limits provided, the appeal is not within the Tribunal's jurisdiction, or if the appeal is frivolous, vexatious, or not brought in good faith. I also have the power to extend the time for the filing of an appeal, to permit a late filing of the appeal, pursuant to s. 109(1)(b) of the *Act*.

In determining whether to grant an extension of time, I must consider whether the appellant formed the intention to appeal within the appeal period, that the appellant has a reasonable excuse for failing to file the appeal within the time limits set out in the Determination and that there is no prejudice to the respondent from the late filing of the appeal. I must also consider whether the appeal contains sufficient merit. The degree of merit required is that necessary to raise a serious issue. The burden rests on the appellant to persuade me that there are compelling reasons to grant an extension of time to file an appeal.

I note that the appellant did not receive the Determination during the appeal period. It is apparent from a reading of the submissions of both the Employee and the Delegate, that there was some type of heated exchange between these parties at the time of the telephone call. It is unnecessary for me to make findings as to "who" was "at fault". In my view, an appellant cannot form any intention to appeal, simply on the basis of telephone advice from the Delegate that he was unsuccessful and that the Determination would be coming in due course. An appellant must have an opportunity to receive and review the Determination. It appears that once the appellant received and reviewed the Determination, an appeal quickly followed. I am not satisfied that there was a wilful or deliberate withholding by the Employee of his new address from the Delegate. Such a finding seems unlikely given the speed at which the Employee addressed the appeal issue once he received the Determination.

In my view no compelling evidence has been introduced of any prejudice to the Employer arising from an appeal filed six days late. I appreciate that the Act contains a process for the speedy resolution of disputes, and there is good reasons to resolve employment disputes quickly, six days cannot be considered inordinate delay.

I am satisfied that there is some merit to the appeal. It appears that there are two copies of the salient invoice. One copy in the possession of the Employer has the words "paid" on it, but does not have any endorsement of the days worked. The copy in the possession of the Employee did not have the words "paid" marked on the invoice but had the endorsement of days worked. This is curious. In conducting the investigation, it is apparent that the Delegate did not use an evidentiary hearing. This is not a

“mistake” on the Delegate’s part because the usual investigation does not involve an evidentiary hearing, where the parties give evidence under oath or affirmation. A Delegate often has no method to resolve a credibility issue, however, because he cannot effectively challenge the evidence given by one side or the other during the investigation. It may be that with further oral evidence under oath, a Tribunal adjudicator can resolve the issue of the authenticity of the invoice, and resolve the issue of “cash payments”, and the purpose for which the sum of \$300.00 was advanced to the Employee. While a lack of a record of hours worked may be a problem, it may be a problem which can be resolved with oral evidence and cross-examination. I am not satisfied that this appeal is bound to fail, and I am satisfied that there is merit to the extent of a serious issue.

For all the above reasons I grant an extension of time, and that the Tribunal set this matter for an oral hearing.

ORDER

Pursuant to section 109(1)(b) and 114 of the *Act*, I allow the application to extend time for the filing of this appeal.

Paul E. Love
Adjudicator
Employment Standards Tribunal