

An appeal

- by -

Wally's Auto Body Ltd.
("Wally's")

- 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: David B. Stevenson

FILE No.: 2001/545

DATE OF DECISION: September 27, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Wally’s Auto Body Ltd. (“Wally’s”) of a Determination that was issued on June 22, 2001 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Wally’s had contravened Part 2, Section 18(1), Part 7, Sections 58(1) and (3) and Part 8, Section 63(2) of the *Act* in respect of the employment of Bryan Jones (“Jones”) and ordered Wally’s to cease contravening and to comply with the *Act* and to pay an amount of \$6,768.42.

In the appeal, Wally’s contends that Jones gave wrong information to the Director, that he was terminated for willful misconduct and that he was paid all vacation pay owed.

The appeal was filed late and a preliminary matter has arisen concerning whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for requesting an appeal. This decision deals with the preliminary objection. The Tribunal has decided this matter can be decided on the written submissions of the parties.

ISSUE

The issue being considered in this decision is whether the Tribunal should extend the time limited for requesting an appeal under the *Act*. If the appeal is accepted, there are additional issues arising from the appeal concerning whether, having failed or refused to cooperate with the Director during the investigation, Wally’s should be allowed to challenge the findings made in the Determination and, if allowed to challenge the Determination, whether Wally’s has met the burden of showing there is an error in the Determination sufficient to require the Tribunal to cancel or vary it. The additional issues have been deferred pending a determination on the preliminary matter.

FACTS

The Determination was issued on June 22, 2001 and was delivered to the employer on June 26, 2001. It clearly indicated the deadline for filing an appeal of the Determination to the Tribunal was July 16, 2001.

The appeal form is dated July 19, 2001 and the appeal was not delivered to the Tribunal until July 24, 2001.

On July 26, 2001, the Tribunal indicated the appeal had been filed outside of the time limited for an appeal of a Determination under the *Act* and that the Tribunal had the authority, under Section 109(1)(b) of the *Act* to extend the appeal deadline if there were compelling reasons to do so. The

Tribunal asked Wally's to provide the reasons why the appeal was late and why the Tribunal should extend the appeal deadline. On August 14, 2001, Wally's provided the following response:

We had good reasons to file a few days late because the appeal involved discussions with the officer and the accumulation of past information. This required time to complete. The officer who wrote the determination was well aware of the pending appeal. We believe the respondent's case would not be harmed by the appeal extension. Furthermore, we firmly believe that we have a strong case on appeal.

In reply to the above submission, the Director says the investigating officer was never made aware of any intention by Wally's to file an appeal of the Determination. The investigating officer recalls there was a conversation about the officer forwarding information, but the conversation was not in the context of an appeal or additional time to file an appeal.

ARGUMENT AND ANALYSIS

The Tribunal has consistently held that it will not grant extensions under Section 109(1)(b) of the *Act* as a matter of course and will exercise its discretionary powers only where there were compelling reasons to do so (see, for example, *Re Metty M. Tang*, BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal's decision in *Re Niemisto*, BC EST #D99/96, stated the following:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. there has been a genuine and on-going bona fide intention to appeal the Determination;
- iii. the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
- v. there is a strong prima facie case in favour of the appellant¹.

¹ See also the comments in *Re Berg*, BC EST #D212/97 in respect of this factor.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

I am not convinced this is an appropriate case to exercise my discretion in favour of extending the time for requesting an appeal.

The explanation given by Wally's to explain the delay in filing the appeal is not reasonable. Wally's states they needed time to accumulate past information. The appeal itself challenges the veracity of information given by Jones, says Jones was terminated for willful misconduct and that Jones' vacation pay was paid in full. Accompanying the appeal are two letters, one over the signature of Jim Shindle, the owner of Wally's, and one over the signature of Michael Rupar, the Manager of Wally's, and photocopies of what appear to be a paycheque statement and payroll summaries. The letters are both dated July 19, 2001. The letters speak to the reasons for dismissal and to alleged warnings that were given to Jones about his conduct prior to his dismissal and going back to December, 1996. This information was known to Wally's during the investigation but was not made available to the investigating officer. All of the payroll information attached to the appeal existed well before the Determination was issued.

Jones was terminated on October 26, 2000. Wally's provided no records or other information during the investigation. All of the information attached to the appeal is information that should have been disclosed and provided during the investigation. It was not. To suggest that relief should be granted from the time limits for filing the appeal because time was needed to gather past information is, in effect, asking the Tribunal to grant relief from a failure or refusal to cooperate in the investigation of the complaint. That is unreasonable. To allow an extension of the time for filing an appeal in such circumstances would undermine the integrity of the investigative and the appeal process. It would be inconsistent with the stated objective of the *Act* to provide efficient procedures for resolving disputes arising under the *Act*. It would also be inconsistent with the approach taken by the Tribunal to cases where a party who has failed to participate in the investigation of a complaint seeks to appeal the outcome of the investigation.

I am also dissuaded from extending the time limited for appeal by the fact the letters accompanying the appeal were not even prepared until July 19, 2001, three days after the deadline had expired, notwithstanding Wally's received the Determination on June 26, 2001. No explanation at all is provided for that delay. The letters appear to contain information that was known to Mr. Shindle and to Mr. Rupar at the time Jones was terminated, October 26, 2000.

The above also suggest there was no genuine and ongoing intention to appeal the Determination. I do not accept that the investigating officer was ever made aware of Wally's intention to file an appeal or of a pending appeal.

I conclude that the appeal has not been requested within the time limits in the *Act*, that no good reason to extend the time limited for appeal has been provided and, pursuant to Section 114(1)(a) of the *Act*, the appeal is dismissed.

I would add the following. The Director has the authority, under Section 86 of the *Act*, to vary a Determination. While I do not speak for the Director, the opportunity may still exist for further discussion concerning the merits of the complaint. If it is obvious that the investigating officer has been misled by the complainant, it is likely he would wish to know that.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated June 22, 2001 be confirmed in the amount of \$6,768.42, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal