Employment Standards TRIBUNAL

An appeal

- by -

Penguin Contracting Inc.
("Penguin")

- 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.: 2001/661

DATE OF DECISION: November 14, 2001

DECISION

OVERVIEW

This is an application by Penguin Contracting Inc. (the "Employer" or "Penguin") to extend time to permit the filing of a late appeal of a Determination issued by a Delegate of the Director of Employment Standards ("Delegate") on July 9, 2001, pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113*. (the "*Act*"). The deadline for filing the appeal was August 1, 2001, and the appeal was filed on September 19,2001. I am satisfied that the Employer formed the intention to appeal within the appeal period, and has a reasonable excuse for the late filing. I am satisfied that there is some merit to the appeal on the issue of whether the amount of overtime worked by the employee was 44 or 52.5 hours. I am satisfied that there is no merit to the Employer's argument that the employee was on a flexible work schedule, and that no overtime was due to the Employee. I extended time for the filing of the appeal related to the arithmetic or calculation error alleged by the Employer.

FACTS

This is an application by the Employer, Penguin Contracting Inc. ("Penguin" or "Employer"), for an extension of time to file an appeal. The Determination was issued on July 9, 2001, and in the Determination the Delegate found that the Employer was obliged to pay to a former Employee, Ian Foster ("Employee"), the sum of $434.96 as overtime wages, vacation pay and interest. The deadline for the filing of the appeal was September 19, 2001. The Employer filed the appeal of the Determination on September 19, 2001 by fax transmission, after the Delegate commenced collection proceedings.

The Determination was mailed out to the parties on July 9, 2001. The Employer's copy was returned to the post office marked unclaimed.

The excuse offered by Penguin, for the late filing of the appeal is set out in the letter to the Tribunal dated September 17, 2001. In essence, the Employer claims that it became aware of the Determination, when a copy of the Determination was faxed to it on September 5, 2001 by the Delegate. The Employer says that it cannot recall receiving a copy of the Determination at its address, and a registered copy of the Determination was never picked up by him from the replacement post office, prior to receiving it by fax on September 5, 2001 There is a suggestion in the Employer's materials that the location of the post office changed due to a fire.

The grounds in the notice of appeal relate to an issue of whether there was a flexible work schedule, in place, and whether the overtime calculation of the Delegate contained in the Determination is correct. The Employer says that there is no overtime owing because of a flexible work schedule, but also appears to concede that if the Delegate has interpreted "flexible work schedule correctly", that the Employee worked 44 hours of overtime, but not the 52.5 hours

found by the Delegate. The Employer filed a letter from the Delegate dated May 9, 2001 where the Delegate stated that he reviewed the time sheets and calculated 44 hours of overtime was worked by the Employee. I note that the Determination contains no explanation why the Delegate found that the employee worked 52.5 hours of overtime rather than the 44 hours of overtime stated in the letter of May 9, 2001. In this case, the Employer appears to have paid overtime when the hours worked by the Employee in a two week period exceeded 80 hours, rather than using the method of overtime entitlement set out in *Act*.

The Determination found an entitlement of the Employee to the sum of $434.96, which represents 52.5 hours of overtime, calculated at one and a half times the hourly rate ($15.00), plus 4 % vacation pay ($15.75), plus interest ($25.46).

The Employee, Ian Foster, opposes the extension of time for the filing of the appeal. The Employee's argument, relates principally to the "merits" of the appeal. The Delegate does not oppose an extension of time for the filing of an appeal. The Delegate notes, in correspondence to the Tribunal dated October 10, 2001 that , " the employer has always indicated a desire to challenge the Employment Standards Act especially Section 4.

ISSUE:

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

ANALYSIS

In determining whether to grant an extension of time, I must consider whether the Appellant (in this case the Employer) 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 there is some merit to the appeal. I note that unless all the requirements for the test are satisfied by the person seeking the extension of time, the application for extension of time will fail.

Excuse for Filing the Late Filing:

I conclude from the evidence before me that Penguin formed an intention to appeal during the appeal period and has a reasonable excuse for the late filing of the appeal. I accept that the employer responded diligently when it became aware of the Determination.

Prejudice:

I see no evidence of any prejudice to the Employee arising from the late filing of the appeal. The only prejudice is that the Employee will be "kept out of his money", until an appeal is resolved if

the application for time is granted. A normal consequence of an appeal which fails, is that the Employee receives interest. While the Employee would be inconvenienced if time is extended, there is no prejudice to the Employee.

Merit:

In order for me to grant an extension of time, I must be in a position to determine that there is some merit or an arguable case presented by an Appellant who seeks an extension of time.

I note that the Employer raises a calculation error in the Determination and suggests that the time sheets convey that the Employee worked 44 hours of overtime, and not 52.5 as found by the Delegate on the Determination. There is some merit to this argument, which appears from a comparison of the 44 hours of overtime noted in the Delegate's letter of May 9, 2001 to the Employer, to the 52.5 hours of overtime noted in the Determination. There is no explanation by the Delegate of the differing amounts. I would grant leave to extend time for an appeal which relates to the alleged error in calculation of the overtime entitlement.

On the principal issue of the "flexible work schedule and the effect of a flexible work schedule", I do not grant an extension of time. This case involves a finding by the Delegate that there was no flexible work schedule approved by the affected employees or filed with the Director, and therefore the employee was entitled to overtime. The Appeal shows no error in the underlying facts found by the Delegate concerning a flexible work schedule. The procedure governing a flexible work schedule is set out in s. 37 of the *Act*.

The Employer's argument, which was considered by the Delegate prior to the issuance of the Determination, was that the employees agreed to flexibility in starting time, and they were therefore obligated to honour an agreement to work extra hours without payment at overtime rates. The Employer's view was denied by the employee. The Employer argues that the fact that the complainant came to work at different times, and therefore the Employee's hours were changing on a daily basis, there was a "flexible work schedule". The Employer says that there is an oral agreement which should be enforced, and which entitled him to have the employees work more than 8 hours per day on occasion, and to pay overtime if the Employee worked more than 80 hours in a two week period.

In my view, on the basis of the *Act*, there is no basis for a finding that "it is at least arguable" that the Delegate erred with regard to the finding about the flexible work schedule. The concept of a flexible work schedule is defined in the *Act*, and there is no room for the Appellant's interpretation of the *Act*. The Tribunal's jurisprudence surrounding s. 4 is very clear, and an agreement contrary to the *Act*, is not enforceable.

I note that a portion of the Employer's argument relates to the assertion that there ought to be some freedom and flexibility for small businesses and its employees. The Employer's argument has a policy basis, and articulates a policy which the Legislature may chose to implement, but

this would require an amendment to the *Act*. The *Act* in its present form, provides for minimum standards, and Employers and Employees are not at liberty to make an enforceable agreement which is contrary to the *Act*. The Employer's argument with regard to the existence and effect of the existence of a flexible work schedule, has no merit, and therefore I do not grant an extension of time for an appeal of this finding by the Delegate.

The Employer will have an extension of time to file an appeal related to the calculation error (whether it is 44 hours or 52.5 hours of overtime). I note that vacation pay, and interest are normal entitlements under the *Act*, and evidence and argument should be limited to the correctness of the calculation of whether the amount of overtime is 44 hours or 52.5 hours. It may be that if the Delegate concedes a calculation error that this matter can be dealt with accordingly without further need for the appeal process.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I extend the time for the employer to file the appeal until the close of business on September 22, 2000, with argument on the appeal limited to the correctness of the Delegate's calculation of overtime at 44 hours or 52.5 hours.

Paul E. Love
Adjudicator
Employment Standards Tribunal