Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Omobosola Owolabi operating as Just Beauty
("Owolabi")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/149

DATE OF DECISION: November 9, 2004

DECISION

SUBMISSIONS:

Omobosola Owolabi	on her own behalf
Teresa D. Lancia	on her own behalf
Greg Brown	for the Director of Employment Standards

INTRODUCTION

This is an application filed by Omobosola Owolabi ("Owolabi") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal Member Carol Roberts' decision issued on April 27th, 2004 (see B.C.E.S.T. Decision No. D062/04).

Member Roberts refused Ms. Owolabi's application to extend the appeal period [see section 109(1)(b)]. Accordingly, pursuant to section 114(2)(a) of the *Act*, Ms. Owolabi's appeal currently stands as having been summarily dismissed.

PREVIOUS PROCEEDINGS

The Determination

In her initial section 74 complaint, Ms. Teresa D. Lancia ("Lancia") alleged that Ms. Owolabi failed to pay regular wages and vacation pay. By way of response to the complaint, Ms. Owolabi asserted that there was no employment relationship between the parties and, accordingly, the Director had no jurisdiction to adjudicate Ms. Lancia's complaint.

Ms. Lancia's complaint was the subject of an evidentiary hearing held on November 12th, 2003 before the Director's delegate. Although Ms. Lancia attended the hearing along with a witness (the former owner of the salon), Ms. Owolabi did not attend the hearing. Ms. Owolabi forwarded a letter, signed by another person on her behalf, which stated that Ms. Owolabi did not intend to appear at the hearing; this letter also set out Ms. Owolabi's position with respect to Ms. Lancia's complaint.

Following the conclusion of the hearing, the delegate issued a Determination and accompanying "Reasons for the Determination"; these latter two documents were both issued on January 12th, 2004.

In her reasons, the delegate considered the evidence before her and the governing legal tests before determining that Ms. Lancia was employed by Ms. Owolabi as an aesthetician from May 17th to 31st, 2003. The delegate further accepted, in the absence of any contrary evidence from Ms. Owolabi, Ms. Lancia's record of hours worked and, accordingly, awarded Ms. Lancia 88 hours pay at the $8 per hour minimum wage plus 4% vacation pay ($28.16) and section 88 interest ($21.48). In total, Ms. Owolabi was ordered to pay Ms. Lancia the sum of $753.64.

In addition, the delegate levied two $500 administrative penalties against Ms. Owolabi based on the latter's contravention of sections 18 (payment of wages) and 58 (vacation pay) of the *Act.* Thus, the total amount payable under the Determination was $1,753.64.

The Appeal Proceedings

Ms. Owolabi appealed the Determination to the Tribunal on the grounds that the delegate erred in law [section 112 (1)(a)] and failed to observe the principles of natural justice in making the Determination [section 112(1)(b]. Ms. Owolabi's appeal was filed with the Tribunal on March 8th, 2004, however, the statutory appeal period expired on February 19th, 2004—a notice to this latter effect is set out at the bottom of page 2 of the Determination.

Since the appeal was not filed within the statutory appeal period [see section 112(3) of the *Act*] the Tribunal's Vice-Chair wrote the parties on March 9th, 2004 seeking their written submissions regarding whether the Tribunal should extend the appeal period pursuant to section 109(1)(b) of the *Act.*

Ms. Owolabi's application to extend the appeal period came before Tribunal Member Roberts who, in written reasons issued on April 27th, 2004 (B.C.E.S.T. Decision No. D062/04), declined to extend the appeal period. The relevant portions of Member Roberts' decision (at pages 2-4) are reproduced below:

> …Ms. Owolabi stated that the appeal was filed late because she was out of the country from January 14, 2004 until February 29, 2004 and did not read her mail until March 2, 2004.
>
> The Director's delegate contends that the Tribunal should not consider the late appeal. She submits that Ms. Owolabi provided no evidence she was out of Canada for the period of time she says she was. Furthermore, the delegate says that Canada Post confirms that the Determination was received on January 13, 2004, the time within which Ms. Owolabi was in the country.
>
> The delegate also says that, although Ms. Owolabi did not appear at the hearing of the complaint, she sent a letter signed by "Sola Dare" on her behalf. The delegate submits that this person could also have filed an appeal on Ms. Owolabi's behalf within the time period…
>
> Ms. Lancia also contended that the Tribunal should not consider the late appeal.
>
> In reply, Ms. Owolabi submitted a copy of her Air Canada electronic ticket which shows that she left Canada January 14, 2004 at 18:35, and returned to Canada February 24, 2004. She contended that, if she had seen the determination before the appeal deadline, she would have filed the appeal…
>
> Having reviewed Ms. Owolabi's submissions, I am not persuaded that she has demonstrated reasons for extending the time in which she may file an appeal.
>
> The evidence shows that Ms. Owolabi received the Determination on January 13, 2004. She stated she did not read her mail until March 2, 2004 because she left Canada for an extended period of time.
>
> Ms. Owolabi operates a business which did not cease operations while she was away. She was aware Ms. Lancia had filed a complaint, and that there had been a hearing into that complaint. Having reviewed registered mail from the Branch on January 13, 2004, one would have thought that Ms. Owolabi would have given the package priority attention. I find that Ms. Owolabi had time to file an appeal before she left Canada, engaged [sic] an agent to file the appeal on her

> behalf, or sought an extension to file such an appeal. I do not consider that Ms. Owolabi has demonstrated a genuine and *bona fide* intention to appeal the Determination.
>
> Furthermore, I find no strong prima facie case in Ms. Owolabi's favor. Ms. Owolabi did not appear at the November 12, 2003 hearing of the complaint, and did not provide any records in support of her position at the hearing. Rather, she submitted a letter explaining her relationship to Ms. Lancia. Ms. Owolabi seeks to submit the same evidence on appeal. Given that Ms. Owolabi chose not to appear at the hearing, she cannot use an appeal as a basis for advancing positions she either advanced, or failed to advance, in the first instance. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see Tri-west Tractor Ltd, BC ESTD# 268/96 and Kaiser Stables Ltd. BC EST #D058/97). Any evidence offered by Ms. Owolabi that was available at the time of the investigation, therefore, will not be considered in any event.
>
> I decline to grant Ms. Owolabi's application to extend the time for filing an appeal.

Ms. Owolabi now applies for reconsideration of Member Roberts' decision.

THE APPLICATION FOR RECONSIDERATION

Ms. Owolabi's application for reconsideration was filed on August 26th, 2004. In her application, Ms. Owolabi alleges, among other things, that the *delegate* failed to comply with the principles of natural justice and reached erroneous legal conclusions. Indeed, Ms. Owolabi's application exclusively addresses alleged errors and omissions by the delegate.

However, Ms. Owolabi's application does not address the various criteria that the Tribunal considers in adjudicating an application to extend the appeal period nor does the application, quite obviously, address whether Member Roberts erred in applying those criteria in the case at hand. It must be remembered that the application before me is one to reconsider Member Roberts' decision; the correctness of the Determination is not before me. In essence, Ms. Owolabi has utilized the reconsideration provision to file a second appeal of the Determination.

FINDINGS AND ANALYSIS

Although there is no statutory time limit governing the filing of reconsideration applications, the Tribunal has held in a number of decisions (see *e.g., Unisource Canada Inc.,* B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel,* B.C.E.S.T. Decision No. D279/00) that such applications must be filed in a timely manner.

Ms. Owolabi's application for reconsideration was filed some four months after Ms. Roberts issued her decision with respect to Ms. Owolabi's section 109(1)(b) application to extend the appeal period. There is nothing in Ms. Owolabi's material explaining why this application was not filed in a timely fashion.

The record before me suggests that Ms. Owolabi, throughout these entire proceedings, has displayed a rather cavalier attitude regarding the timely submission of documents, participation in proceedings, and filing timely applications. I note, for example, that Ms. Owolabi failed to respond to a lawful Demand for Employer Records originally issued by the delegate on October 14th, 2003, she did not attend the evidentiary hearing before the delegate held on November 12th, 2003, her appeal to the Tribunal was filed

outside the statutory time limit and she has now filed what can only be described as a tardy application for reconsideration.

In addition, even though the parties were advised by way of the Vice-Chair's letter dated October 12th, 2004, that their final submissions were to be filed by no later than October 26th, 2004, Ms. Owolabi attempted to file a further submission byway of a fax transmission on November 4th, 2004. This latter submission, I might add, simply reiterates assertions (and includes one document) that are already in the record before me and, accordingly, does not assist me in any fashion.

In her application, Ms. Owolabi raises several issues with respect to the correctness of the Determination. Indeed, and as previously noted, this application for reconsideration is not much more than a second attempt to appeal the Determination on its merits. However, Ms. Owolabi's application does not, in any meaningful manner, address the fundamental issue that is now before me, namely: "Did Member Roberts fall into serious error when she refused to extend the appeal period?".

I have previously set out Member Roberts' review of the relevant facts and her reasons for refusing to extend the appeal period. With respect to her findings of fact, I am satisfied that the material before me provides ample support for each and every one of her findings. As for her decision that this was not an appropriate case to extend the appeal period, I must observe that had this application been before me, I would have reached the very same conclusion as reached by Member Roberts.

The material before me suggests that Ms. Owolabi could have filed—or arrange to have filed—a timely appeal. Even though she was out of the country, she could nonetheless have filed her appeal by fax or by regular mail; she need not been in Canada in order to file her appeal. On this latter point, I note that this application was, in fact, filed by fax.

As for the merits of the appeal itself, I find myself in total agreement with my colleague Member Roberts—Ms. Owolabi's appeal, on the face of things, is of dubious merit.

I am not persuaded that Member Roberts decision should be reconsidered on its merits.

ORDER

The application to reconsider Member Roberts decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal