EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Best Fresh Holdings Corp.
("Best")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 98/720

DATE OF DECISION: January 26, 1999

DECISION

OVERVIEW

This is an appeal by Best Fresh Holdings Corp. ("Best") pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") against a Determination issued by a delegate of the Director of Employment Standards on October 1, l998. The Director's delegate found that Best owed thirteen former employees wages in the amount of $6,606.74 (including interest). The Determination stated that an appeal of it had to be received by the Tribunal by October 26, l998. The Tribunal received an appeal on November 18, l998. Best effectively requested that the Tribunal extend the deadline to file an appeal. The other parties to the appeal were invited to make submissions on a possible extension of the deadline under Section 109(1)(b) of the *Act*. The Director's delegate opposed the granting of an extension. This appeal was decided based on the written submissions of the parties.

ISSUES TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

FACTS

The Determination which was issued on October 1, l998 found that Best owed regular wages and vacation pay to thirteen employees in the amount of $6,606.74 (including interest). The Director's delegate did not accept Best's position that vacation pay was included in the employees' hourly rates of pay.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than October 26, l998. The Determination was sent by registered mail to the employees and to the operating address and Registered and Records Office of Best. As well, a copy of the Determination was sent to J.Dan Hamilton ("Hamilton") and Craig Markovic ("Markovic"), Directors/Officers of Best. The Determinaton sent to the operating address was returned unclaimed. The Determination sent to the Registered and Records Office was received on October 5, l998 as evidenced by Canada Post Corporation's "Acknowledgement of Receipt" document.

The Tribunal received an appeal of the Determination issued against Best on November 18, l998. Markovic, on behalf of Best, effectively requested that the Tribunal extend the deadline to file an appeal. Markovic provided the following explanation why the appeal was late:

> On November 4, l998 I was contacted by Jennifer Ip from the Labour Relations Board regarding the fore mentioned "Determination". It was not

> until this phone call that I was aware that the "Determination" had been sent. According to Jennifer Ip the document had been sent registered mail to my home address but was later returned to her office. I have no explanation as to why the document was not properly served, nor was I aware of any notification of service. Later that day I was faxed a copy of the document (see attached cover sheet). I acknowledged receiving the document and requested 14 days to prepare my submittal to the "Tribunal".

The cover sheet indicates that the Director's delegate sent 13 pages (including the cover sheet) to Markovic on November 4, l998. It refers to Best and reads: "Please refer to the attached Determination". Markovic's acknowledgment consists of a November 9, l998 fax to the Director's delegate which refers to "Best Fresh Holdings - Determination" and reads as follows:

> I acknowledge receipt of your "Document of Determination" on November 4, l998. On Friday I contacted the Employment Standards Tribunal and received the Appeal form (see attached document). I am in the process of preparing our "Request for Appeal" and should have the necessary documentation filed by November 18, l998. Should you require any additional information please contact me at 818-7401.

In the appeal, Markovic said that the employer agrees $1,973.32 is owed in wages to the employees. It disputes, however, that $4633.42 is owed as vacation pay. Markovic stated that the President and Manager at the time, Hamilton, explained the rates of pay and policies regarding payment to each employee when hired by Best. In effect, the employees verbally agreed to have vacation pay included in their hourly rates of pay. Markovic further states that the Director's delegate is biased in favour of the employees and he is very concerned about the ability of the Labour Relations Board (the "LRB") to act fairly in this matter. He enclosed a copy of a Novermber 5, l998 Vancouver Sun article regarding a LRB case where bias was an issue. He said that since the Director's delegate failed to provide any evidence contrary to Best's position, the Determination should be dismissed.

In a subsequent submission dated December 10, l998, Markovic stated that the Determination was not served under Section 112 of the *Act*, but under Section 122 (3) of the *Act* when the Director's delegate sent him the Determinaton by fax on November 4, l998. He acknowledged receiving the Determination on November 9, l998 and the appeal was filed on November 18, l998. Therefore, the timelines have been met. Further, he disputes the wage claims which he previously agreed to in his reasons for the appeal, and he contends that Hamilton should resolve any dispute regarding vacation pay.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109(1)(b) of the *Act.*

The Tribunal received a submission dated November 27, l998 from the Director's delegate stating that she opposed the granting of an extension. She stated that the reason the Determination sent to the operating address of Best was unclaimed is because the company

ceased operation. She further stated that the copies of the Determination sent to Hamilton and Markovic had not been returned by Canada Post nor had she received an "Acknowledgement of Receipt" document. She said Canada Post advised her that if the documents had not been returned this meant they had been received by the individuals. Moreover, she received a fax from Hamilton regarding his capacity as a Director of Best. As well, she had sent letters to Markovic's address prior to the Determination which were received, and Markovic had confirmed that she had his current address.

The Director's delegate further stated that she issued Determinations on October 1, l998 against Markovic and Hamilton in their capacities as Directors/Officers of Best and sent them to the same addresses where she had sent a copy of the Determination issued against Best. The Determination issued against Markovic was returned by Canada Post on October 23, l998 as unclaimed. The Determination issued against Hamilton has not been returned to her office.

It is the position of the Director's delegate that the Determinations issued against Best and the Directors/Officers of Best have been properly served. Markovic chose not to claim the Determination issued against him in his capacity as a Director/Officer of Best.

The Tribunal also received a submission dated December 29, l998 from Hamilton in which he denied explaining a wage structure to any employee which was inclusive of vacation pay.

ANALYSIS

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BC EST #D211/96). In deciding whether "compelling" reasons" exist in a particular request for an extension, the Tribunal has identified several material considerations including:

> 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 ongoing *bona fide* intention to appeal the Determination;
> iii) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
> iv) the respondent party will not be unduly prejudiced by the granting of the extension; and
> v) there is a strong *prima facie* case in favour of the appellant.

In my view, Best has failed to satisfy any of the above-mentioned criteria.

Section 122 of the *Act* states as follows:

> **Service of determinations and demands**
>
> **122** (1) A determination or demand that is required to be served on a person under this *Act* is deemed to have been served if
>
> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.
>
> (3) At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.
>
> (4) A determination or demand transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgment of the transmission from the person served.

The Determination issued against Best was sent by registered mail to the company's last known address and to its Registered and Records Office. Copies of the Determination were also sent to the last known addresses of the Directors/Officers (Markovic and Hamilton). I am satisfied that the Determination was properly served by the Director's delegate and that service was made pursuant to Section 122(1)(b) of the *Act.* I do not accept that the Determination was served under Section 122(3) of the *Act*. If the Determination had been sent to Markovic only by fax, then Section 122(3) of the *Act* would be applicable. In this case, however, the Determination sent by fax was a further transmittal of a document which had already been properly served by registered mail. Faxing a copy of a Determination to a party does not negate previous service by registered mail.

The Determination issued against Best indicated that an appeal had to be delivered to the Tribunal by October 26, l998. Clear instructions were included on the Determination about how and when to file an appeal An information sheet was also attached to the Determination which provided detailed information about the Tribunal and appeals to the Tribunal. An appeal, however, was not filed with the Tribunal until 23 days after the deadline to file an appeal. I accept that the Determination under appeal is only the Determination issued against Best and not the Determination issued against Markovic in his capacity as a Director/Officer of Best. My reasons are twofold. First, nowhere in his submissions does Markovic raise an issue of his status as a Director/Officer and that is the

basis of the Determination issued against him personally. Second, the cover sheets on the November 4, l998 and November 9, l998 faxes refer to Best and not to Markovic as a Director/Officer of Best and the number of pages involved in the November 4, l998 fax indicate it concerned the Determination issued against Best. This latter Determination is 12 pages in length in contrast to the 10 page Determination issued against Markovic.

I have considered the circumstances of the late filing of this appeal and I am not satisfied that the Appellant has provided a reasonable and credible explanation for its failure to deliver an appeal to the Tribunal before October 26, l998. First, Best was properly served with the Determination and it was received at the Registered and Records Office well in advance of the deadline to file an appeal. Second, Markovoic does not dispute the suggestion made by the Director's delegate that he must have received the copy of the Determination issued against the company as it was not returned as unclaimed. Finally, Markovic has offered no explanation why the Determinations sent to the company's operating address and to him personally as a Director/Officer, were returned as unclaimed. Evading service and/or refusing to accept or to acknowledge delivery of registered mail, which may result in an Appellant failing to deliver a timely appeal to the Tribunal, is not an acceptable ground for allowing an extension to the time limit for filing an appeal.

Nor am I satisfied that there has been a bona fide intention to appeal the Determination in a timely fashion. Markovic claims he was not aware of the Determination until November 4, l998 but still, despite the clear directions contained in the Determination regarding how and when an appeal could be filed with the Tribunal, he did not file an appeal until 14 days later. Markovic notified the Director's delegate on November 9, l998 that he intended to appeal, but he never submitted an appeal to the Tribunal until November 18, l998 although the documents attached to the Determination make it clear that the Tribunal is the only body with the legal authority to conduct an appeal. Further, Markovic never notified any of the employees of his intention to make an appeal. The first they knew of the appeal was when they received notification from the Tribunal that an appeal had been received from Best.

One of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly. In this case, the claims of the employees concern wages which were owed at the end of March, l998. In my view, it would not be in the interest of the employees to have their claims further delayed during the appeal process. Moreover, the Appellant has not established that the employees would not be prejudiced by an extension of the appeal period.

Finally, the Appellant has not established that there is a strong *prima facie* case that the Tribunal would find, if the merits of the appeal were to be heard, that the Determination should be cancelled. I make no decision about the merits, but the following factors cause me to conclude there is not a strong *prima facie* case. First, Markovic's position on whether wages are owed to the employees has been inconsistent. Second, Markovic's claim that the Director's delegate is biased is entirely without foundation and his concern about the LRB is irrelevant as it is not involved in this matter. The LRB is a separate entity from the Tribunal and the Employment Standards Branch. Third, Hamilton has

denied that he had discussions with employees concerning vacation pay being included in their wages. Finally, Section 57 of the *Act* allows vacation pay to be included on each paycheque if agreed to by the employer and employees and, in this case, there is a complete absence of any evidence to support the view that the employees agreed to include vacation pay on each paycheque.

The obligation is on the Appellant to exercise reasonable diligence in the pursuit of an appeal. In this case, Best has failed to persuade me that it has done so. I find no compelling reasons to allow this appeal.

For the above reasons, I have decided not to extend the time limit for requesting an appeal in this case.

ORDER

Best's application under Section 109(1)(b) of the *Act* to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the *Act* the appeal is dismissed and accordingly the Determination is confirmed as issued in the amount of $6,606.74 together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Norma Edelman
Registrar
Employment Standards Tribunal

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