

An appeal

- by -

0788164 B.C. Ltd. carrying on business as Yianni's Greek Taverna
(“Yianni’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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE Nos.: 2007A/159 & 2007A/160

DATE OF DECISION: February 14, 2008

3. The appeal was received by the Tribunal on December 20, 2007. It included a request to extend the appeal period and gave the following reasons for that request:
 - a. The director of the Appellant, Gerald Stephen Windsor, was unable to submit the necessary documentation until the present time as a result of his recent incarceration;
 - b. Some of the evidence on which this appeal is based did not come to the Appellant's attention until recently; and
 - c. The Director of Employment Standards has not suffered any prejudice as a result of the late filing of this appeal.
4. The Tribunal directed the parties to make any submissions on the timeliness issue by January 14, 2008. The Director filed a submission. No additional submission was received from Yianni's.

ARGUMENT AND ANALYSIS

8. There is no question the appeal was filed late. Section 112 sets out the requirements for filing an appeal; subsection 112(3) describes the appeal period as follows:
 - (3) *the period referred to in subsection (2) is*
 - (a) *30 days after the date of service of the determination, if the person was served by registered mail, and*
 - (b) *21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).*
9. The appeal should have been filed no later than December 3, 2007 and, as it was not delivered to the Tribunal until December 20, 2007, it is out of time. The Director argues there are no factors present that would justify the Tribunal exercising its discretion to extend the time limit for filing the appeal. In respect of the assertion that Mr. Windsor was unable to file an appeal because he was incarcerated, the Director notes that the request for an extension of time provides no particulars relating to that incarceration and specifically provides no details relating to the length of the incarceration and how the period of incarceration affected Mr. Windsor's ability to file a timely appeal on behalf of Yianni's.
10. The Director also submits that the only "new evidence" provided by Yianni's was a document which was not before the Director when the Determination was made and which had no bearing on the findings made in the Determination. The Director says there is no indication in the appeal that the employees on whose behalf the Determination was made are not owed wages and the efforts to collect from the employer, whose business is now closed, could be further delayed.
11. In *Metty M. Tang*, BC EST #D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

12. The Tribunal has identified several factors which should be considered in determining whether there are compelling reasons for extending the time for appeal:
- i) whether there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) whether there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) whether the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) whether the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) whether there is a strong *prima facie* case in favour of the appellant.
13. Other, perhaps unique, factors can also be considered. The burden of demonstrating the existence of any mitigating factors is on the party requesting the extension of time.
14. Even though the delay here is not great – approximately three weeks – I am not satisfied there was good reason for failing to file the appeal within the time limits set out in the *Act*. There is no indication Yianni’s ever expressed an intention to appeal the Determination. If there was such an intention, it was never expressed to any other party. The appeal appears to be related to collection efforts by the Director. While there is little in the way of evidence of prejudice to the employees if an extension is granted, I am mindful that the business has closed and its assets have been seized. In the circumstances, this factor points against an extension of time.
15. On its face, the appeal lacks merit. Yianni’s contends the Director relied on “inaccurate and unreliable information” in deciding the amount of wages owed to the employees. There are at least two impediments to grounding an appeal on such an argument. First, Yianni’s has provided no basis for this assertion and no relevant information with the appeal. Second, such an argument challenges findings of fact and discretionary judgements that the Director was entitled to make. Under the *Act*, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law (see *Britco Structures Ltd.*, BC EST #D260/03) and the Tribunal is reluctant to disturb discretionary judgements relating to the calculation of wages, particularly where the Appellant’s lack of response has contributed to the paucity of available information.
16. Yianni’s also submits they were not consulted about the calculations made in the Determination. The Determination, however, indicates several unsuccessful efforts were made by the Director to contact Mr. Windsor for his input. On its face, this aspect of the appeal would be impacted by application of the principle established by the Tribunal in *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97.
17. Yianni’s has not met the burden of showing the time period for filing an appeal should be extended and accordingly the appeal is denied as being out of time.
18. In light of my conclusion on the application to extend the time for filing an appeal, the suspension application is denied.

ORDER

19. Pursuant to Section 115 of the *Act*, I order the Determination dated October 25, 2007, be confirmed in the amount of \$11,632.70, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal