

An appeal

- by -

Maxine Mack also known as Clarice Mack, carrying on business as
Husky Restaurant
("Employer")

- 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: Yuki Matsuno

FILE No.: 2009A/165

DATE OF DECISION: March 23, 2010

DECISION

SUBMISSIONS

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| Clarice Mack | on behalf of Maxine Mack also known as Clarice Mack, carrying on business as Husky Restaurant |
| Ryan E. Smith | on his own behalf |
| Hans Suhr | on behalf of the Director of Employment Standards |

OVERVIEW

1. Maxine Mack also known as Clarice Mack, carrying on business as Husky Restaurant (the “Employer”), appeals a Determination of the Director of Employment Standards (the “Director”) issued October 23, 2009 (the “Determination”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. In the Determination, a delegate of the Director (the “Delegate”) found that the Employer owed Ryan E. Smith (the “Employee”) a total amount of \$3,116.66 in wages under section 18 of the *Act* and accrued interest under section 88 of the *Act*. The Delegate also imposed two administrative penalties in the amount of \$500.00 each for contravention of section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “Regulation”). The total owing by the Employer according to the Determination is \$4116.66.
3. The Employer now appeals on the grounds that the Director failed to observe the principles of natural justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made.
4. The Employer’s appeal was filed late. The task before me is to decide whether the Tribunal should exercise its discretion to extend the appeal period. I am able to make this decision based on the written materials before me: the Employer’s appeal submission and reply submission, the Employee’s submissions, the Delegate’s submission on behalf of the Director, the Determination, and the s. 112 record. I will be referring only to those aspects of the submissions and evidence that are relevant to the issue of extending the appeal period.

ISSUE

5. Should the Tribunal exercise its discretion under section 109(1)(b) to extend the appeal period in this case?

ARGUMENT AND ANALYSIS

6. In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied of the following (from *Niemesto*, BC EST # D099/96):
 - 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 as 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 appellant.
7. The Tribunal will not grant extensions as a matter of course and will do so only where there are compelling reasons. The burden is on the appellant to show that the time period for an appeal should be extended: *Moen & Sagh Contracting Ltd.*, BC EST # D298/96.
 8. The Determination indicates that should the Employer wish to appeal, the appeal must be delivered to the Tribunal by November 30, 2009. The Employer's appeal submission was received by the Tribunal on December 29, 2009, and indicates the reason for the late appeal was that the Employer "never received half of the information it was sent to the Husky. I live in a town of 250 people I have no services to help unless I leave town. Which is very hard since I had my own problems with the Husky having to phone a lawyer and also having to work every day just to pay my bills".
 9. The Director is of the view that the appeal period should not be extended for the following reasons:
 1. The Employer has not provided a good reason why she could not meet the deadline for filing the appeal. It is not clear what information the Employer did or did not receive. The Determination was sent by registered mail, regular mail and fax at contact information (addresses, fax numbers) provided by the Employer for communication and previously used successfully. The Employer refused the registered mail and the regular mail copy was not returned by Canada Post.
 2. In the Director's submission, the Employer decided to appeal only after she was advised on December 3, 2009 that collection would commence; on December 4, 2009 the Employer communicated with the Tribunal and received an Appeal Form with instructions. The appeal was filed on December 29, 2009. The Employer provides no reason for the delay between receiving the Appeal Form and the date she filed the appeal.
 3. The Director was unaware of any intent to appeal the Determination on the Employer's part. The only harm to the Respondent if the appeal period were extended is that any wages collected would be placed into trust pending the outcome of an appeal.
 4. The Employer does not have a strong case that might succeed if the Tribunal grants an extension. She appears in her appeal to be introducing evidence that should have been provided during the investigation; further, she has not provided any specifics as to the substantive grounds of her appeal.
 10. In his submissions, the Employee says that the address for the Employer to which the Determination was sent by regular mail, a post office box, is the post office box that belongs to the Employer. The Employee says that he has been waiting patiently for the matter to be resolved, and in his view, the Employer does not give any legitimate reason why she is filing the appeal late.
 11. The Employee last worked for the Employer on January 24, 2009, and his complaint was filed on April 6, 2009.
 12. Considering the submissions of the parties in light of the *Niemesto* factors, my view is that the Employer has not met the burden of showing that the time period for an appeal should be extended.

13. First, the Employer says she did not receive “half of the information it was sent to Husky”. There is no further explanation by the Employer regarding her reasons for filing a late appeal. This statement seems to indicate that she did receive at least some of the information at the time it was delivered. Further, the Employer’s explanation does not account for the fact that the Determination was sent to the contact information on file for the Employer in three different ways: (1) by regular mail; (2) by fax; and (3) by registered mail, which Canada Post tracked as being refused by the recipient (the Employer). Clearly at some point the Employer received the Determination as she includes it in her appeal submissions. However, the Employer offers no explanation as to the timing of her receipt of the Determination and no explanation as to why it took her until December 29, 2009 – one month after the appeal period expired – to file an appeal.
14. Second, there is no indication in the materials that the Employer had a genuine and ongoing *bona fide* intention to appeal the Determination or that either the Employee or the Director was aware of such an intention.
15. Lastly, my review of the materials does not disclose a strong *prima facie* case for the Employer. The Employer includes some evidence in her submissions that goes to the issue of how the Employee was paid and how employees generally paid monies owing to the Employer. However, as the Director points out, this is evidence that should have been presented during the investigation, and there is no explanation as to why it was not. The Employer also appeals on the grounds that the Director failed to observe the principles of natural justice in making the Determination; however, she provides no evidence or information that pertains to this ground of appeal. The Employer’s materials contain no indication of potential success on appeal, much less a strong *prima facie* case.
16. The Employer has provided no compelling reasons for extension of the appeal period. Further, there is no indication of a strong *prima facie* case. I decline to exercise my discretion to extend the appeal period.

ORDER

17. I deny the application to extend the appeal period and dismiss the appeal pursuant to section 114 of the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal