

An appeal

- by -

Vicki Forrest carrying on business as White Lotus Hair & Dayspa
(“Ms. Forrest”)

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2012A/16

DATE OF DECISION: April 5, 2012

DECISION

SUBMISSIONS

Vicki Forrest	on her own behalf carrying on business as White Lotus Hair & Dayspa
Dyonne Nicol Dalton	on her own behalf
Analisa Lundstrom	on her own behalf
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Vicki Forrest carrying on business as White Lotus Hair & Dayspa (“Ms. Forrest”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 4, 2011.
2. The Determination was made by the Director on complaints filed by Dyonne Nicol Dalton and Analisa Lundstrom (collectively, “the complainants”), who alleged Ms. Forrest had contravened the *Act* by issuing pay cheques that could not be negotiated, by failing to pay regular wages, statutory holiday pay, and annual vacation pay. The Determination found that Ms. Forrest had contravened Part 3, section 18, Part 5, section 45 and Part 7, section 58 of the *Act* of the and ordered Ms. Forrest to pay the complainants \$2,170.46, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Ms. Forrest under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
4. The total amount of the Determination is \$3,670.46.
5. Ms. Forrest has appealed the Determination on the grounds the Director failed to observe the principles of natural justice in making the Determination and evidence has come available that was not available at the time the Determination was being made. Ms. Forrest is seeking to have the Determination cancelled. The appeal was filed late and Ms. Forrest is seeking to have the time period for filing an appeal extended.
6. The Tribunal has discretion to choose the type of hearing for deciding an appeal and has decided the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties and any additional evidence allowed by the Tribunal to be added to the “record”.

ISSUE

7. There is an initial issue about whether the Tribunal should extend the appeal period. In correspondence dated February 16, 2012, the Tribunal requested submissions on whether the appeal period should be extended. Submissions have been made on that matter. If the Tribunal decides to accept the appeal, the issues raised in the appeal are whether the Director failed to observe principles of natural justice in making the Determination. There is also a question about whether there is additional evidence that will be accepted

by the Tribunal. As indicated by the Tribunal in its letter of February 16, 2012, if the appeal is accepted, the parties will be asked for further submissions on the merits of the appeal.

THE FACTS

8. The facts relating to the matter of timeliness are as follows:
 1. The Determination was issued on November 4, 2011;
 2. The “record” indicates copies of the Determination were sent from the Prince George office of the Employment Standards Branch by registered mail to Ms. Forrest and the business to an address on Douglas Street in Prince George, which appears to have been the address of the business.
 3. The Determination addressed to the business was returned to the Branch office on November 8, 2011, and the Determination addressed to Ms. Forrest appears to have been returned on December 20, 2011. Both returned pieces of mail bear the notation “VACANT” on the envelope and the return to sender box “moved, address unknown” checked.
 4. The Determination noted that any appeal of the Determination was required to be delivered to the offices of the Tribunal by 4:30 pm on December 12, 2011.
 5. No appeal was delivered to the Tribunal by that date.
 6. This appeal was delivered to the Tribunal on February 14, 2012.
 7. The appeal relies on the assertion that a settlement was reached with the Director on the complaints in December 2010, and that Ms. Forrest had been informed by the Director that no further monies were owed.
 8. The appeal also alleges the Director is harassing Ms. Forrest, has not performed “due diligence” in respect of the complaints, has made untrue statements and misquoted Ms. Forrest in the Determination and has violated her personal privacy by discussing matters relating to her circumstances of her former business with her current employer.

ARGUMENT

9. In this appeal, Ms. Forrest has provided the following reasons for the late filing, which I set out in their entirety:
 - I was never made aware that a determination was made against [sic] until my bank accounts were frozen and my employer made me aware.
 - Karin Doucette had all my contact info and my book keeper info as well she could have gotten a hole [sic] of me she chose no not [sic].
10. The Director has made no submission on the extension request. The complainants have both filed responses. They primarily go to the merits of the appeal. The response from Ms. Dalton briefly addresses the requested extension, asserting it would be unfair to allow Ms. Forrest to file a late appeal when she has “refused to deal with this situation in a timely manner”. She contends the matter has gone on long enough and needs to be resolved.

ANALYSIS

11. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. 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 developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:
 1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
 2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The respondent party and the Director have been made aware of the intention;
 4. The respondent party will not be unduly prejudiced by the granting of an extension;
 5. There is a strong *prima facie* case in favour of the appellant.
13. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.
14. The first point I would make is that section 122(1) of the *Act* deems the Determination to have been served on Ms. Forrest and the business. The assertion by Ms. Forrest that she was not aware of the Determination is not a factor that either adds to or derogates from the request to extend the appeal period. Applying the above criteria, I find that the delay has been relatively lengthy – more than two months; there is no indication of an ongoing intention to appeal the Determination; the attempt to generate some review of the Determination appears to have been coincidental with the Director enforcing the Determination; and the *prima facie* case set out in the appeal is very weak. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds of appeal chosen against long standing principles that apply in the context of those grounds. In this case, those principles would include the burden of persuasion applied to appeals generally and, more specifically, the evidentiary burden applied when natural justice issues are raised in an appeal. As noted by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11:

. . . inquiry flows from the section 2 purposes of the Act and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.
15. The appeal does not include evidence supporting the alleged denial of natural justice or showing there was any error in finding wages were owed in the amount calculated. The administrative penalties are grounded in requirements of the *Act* that were found in the Determination to have been contravened. While one might

question the fairness of the Director failing to make any effort to contact Ms. Forrest, when it appears the Director had additional contact information – a telephone number and an e-mail address – for her and was aware within days of issuing the Determination that the location of the business was vacant, the obvious weakness of Ms. Forrest’s appeal militates strongly against allowing that fact to form the basis for an extension of time; it could have been otherwise if the appeal demonstrated some merit.

16. For these reasons, the application to extend the appeal period is denied. The appeal is dismissed.

ORDER

17. Pursuant to section 115 of the *Act*, I order the Determination dated November 4, 2011, be confirmed in the amount of \$3,670.46, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal