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 -

4230 Investments Ltd.
(" Investments ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No: 1999/672

DATE OF DECISION: March 17, 2000

DECISION

OVERVIEW

4230 Investments Ltd. ("Investments", or, "the Appellant") appeals a Determination which is dated June 16, 1999 and issued under the Director of Employment Standards (the "Director") . The appeal is pursuant to section 112 of the *Employment Standards Act* (the "*Act*").

The appeal was received well after the time limit for filing an appeal of the Determination had passed. On receiving the appeal, the Tribunal indicated that it would consider exercising its discretion to allow the out of time appeal. The parties were invited to make written submissions in that regard.

The submission of Investments is that its former employee, Michael Torontow (the "employee") compromised his claim. According to Investments, Torontow asserted in proceedings pursuant to the *Companies Creditors Arrangement Act* (the "*CCAA*") that Investments was not his employer but another company. Investments claims that there is, therefore, no factual basis for the Determination.

The submission of the Director is that Investments has not shown any interest in an appeal of the Determination until now, the Director having acted to collect on the Determination through a second determination, one which is against a director/officer of Investments. The Director claims that Investments is not bankrupt and is not affected by the *CCAA* settlement. In the latter regard, the Director notes that Investments is not one of the six "Family Companies" listed in the settlement. The Director argues, moreover, that the appeal does not go to the matter of what Investments is obligated to pay as the employer of Michael Torontow.

ISSUE TO BE DECIDED

My task in this case is to decide whether the Tribunal should or should not exercise its discretionary power to waive the time limit for appealing the Determination.

FACTS

The Determination advised Investments that Determinations could be appealed. It goes on to advise Investments that appeals were to be delivered to the Tribunal by July 12, 1999. Investments' appeal was received on November 9, 1999.

The Tribunal invited submissions on the matter of whether or not this is a case in which to waive the time limit. The parties were asked to have their submissions in by 4:00 p.m. on December 1, 1999.

It was not until the 21st of December, 1999, that Investments filed a submission.

Torontow worked for the Family Insurance Corporation, Family Underwriting Management Ltd. and Investments. His employment by Investments ended May 3, 1999. He was issued a Record

of Employment ("ROE") by Investments and that gives May 3, 1999 as his last day of work for that company. In a letter dated May 3, 1999, Gerald Toms advised him that his termination was for reason *CCAA* protection and a "restructuring of the company". That letter is on Family Insurance Group letterhead and the name Family Underwriting Management Limited is at the bottom of the letterhead.

According to the Determination, Investments was contracted during the course of the investigation and it agreed that the employee was owed $400.82 in vacation pay plus termination pay of $8,016.32. The Determination was issued when Deryck Helkaa, who was handling the matter of the six "Family Companies" that were in receivership, indicated that 4230 Investments Ltd. was not one of those companies and that Investments had not sought Court Order protection.

Torontow has attempted to enforce the Determination through a Proof of Claim against the six "Family Companies". The Order of the Supreme Court of British Columbia lists the six companies covered by the settlement reached pursuant to the *CCAA*. Investments is not listed as one of those companies.

ANALYSIS

Section 112 of the *Act* is as follows:

> **112** (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
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> (2) The request must be delivered within
>
> (a) **15 days after the date of service**, if the person was served by registered mail, and
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> (b) 8 days after the date of service, if the person was personally served or served under section 122 (3).
>
> (3) The filing of a determination under section 91 does not prevent the determination being appealed.
>
> (4) This section does not apply to a determination made under section 119.

(my emphasis)

The amount of time given Investments for an appeal is consistent with section 112 of the *Act*.

The Tribunal may waive the time limit for requesting an appeal. Section 109 (1)(b) of the *Act* provides the Tribunal with the power to do that.

> **109** (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
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> (b) extend the time period for requesting an appeal even though the period has expired;
>
> … .

In considering whether to exercise or not exercise the discretion to extend the time period for filing this particular appeal, I adopt the approach taken in a leading decision of the Tribunal, namely, *Liisa Tia Anneli Niemisto*, (1996) BCEST No. 099/96. The *Niemisto* decision recognises that:

> Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:
>
> 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 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.

Investments has not shown a genuine and on-going interest in appealing the Determination and there is not a strong *prima facie* in favour of the appellant. Investments issued the ROE which lists Investments as Torontow's employer. And, Investments has never denied that that it is Torontow's employer but agreed that it owed Torontow $400.82 in vacation pay plus termination pay of $8,016.32. Nothing that Torontow might have said can alter that.

Torontow has for some reason sought to enforce the Determination against the six "Family Companies". But the Determination is not affected by that or the settlement and court order which is pursuant to the *CCAA*. Investments is not one of the six "Family Companies" which are covered by the later.

There is not a compelling reason to grant an extension in this case. I will not waive the time limit for the appeal for that reason.

ORDER

I order, pursuant to section 114 of the *Act*, that the request for an extension of the time for filing the appeal be denied. The appeal of the Determination dated June 16, 1999 is dismissed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal