

An appeal

- by -

Enterprise Valley Ranch Ltd.
("EVRL")

- 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 No.: 2007A/10

DATE OF DECISION: May 14, 2007

DECISION

SUBMISSIONS

Christopher Lake	on behalf of Enterprise Valley Ranch Ltd.
Barbara Watson	on behalf of the Director
Marion Anderson	on her own behalf
Robin Engel	on his own behalf

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Walden Retreat Corporation (formerly Enterprise Valley Ranch Ltd.) (“EVR”) of a Determination that was issued against EVRL on October 02, 2006 by a delegate of the Director of Employment Standards (the “Director”). The Determination was amended on November 27, 2006 to correct a technical error in calculating the amount of wages owed.
2. The Determination found that EVRL had contravened Part 3, Sections 16, 17, 18, 21 and 27, Part 5, Section 46, Part 7, Section 58 and Part 8, Section 63 of the *Act* and Section 46 of the *Employment Standards Regulation* in respect of the employment of Marion Anderson (“Anderson”) and Robin Engel (“Engel”) and ordered EVRL to pay wages to Anderson and Engel in the amount of \$8,020.94 and to pay administrative penalties in the amount of \$4500.00.
3. EVRL has filed an appeal of the Determination, alleging the Director erred in law, failed to observe principles of natural justice and that new evidence has come available which was not available at the time the Determination was being made.

ISSUE

4. A preliminary issue relating to the timeliness of the appeal has arisen. On February 19, 2007, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal.

THE FACTS

5. The facts relating to the issue of timeliness are as follows:
 1. The Determination was issued on October 2, 2006.
 2. The Record indicates the Determination was sent by registered mail to EVRL c/o AWIAI Corp. at an office address in Washington, DC and was received at that address on October 10, 2006.
 3. A copy of the Determination was also sent to Awiai International in Makati City, Philippines.

4. The appeal was received by the Tribunal on February 16, 2007. The appeal was filed by Walden Retreat Corporation. The Record indicates EVRL changed its name to Walden Retreat Corporation in December 2006.
5. The Record indicates that as of May 9, 2005, EVRL was listed in the Corporate Registry of the provincial Ministry of Finance, with a Registered and Records Office at 34550-1268 Marine Drive in North Vancouver, BC. Its sole Director is identified as Maria L. Illamas. The mailing and delivery address for this individual is shown as the Registered and Records Office address. David Atkinson is listed as the President and Secretary of EVRL and his mailing and delivery address is shown as 329 1489 Marine Drive in North Vancouver, BC.
6. A document in the Record identifies Mr. Atkinson as the President and Chief Executive Officer of Awiai Corp. and on another document, Mr. Atkinson has signed on behalf of Awiai Corp.
7. During the investigation of the complaints filed by Anderson and Engel, the Director communicated with Awiai Corp and EVRL jointly to the office address in Washington, DC. A Demand for Employer Records had been served on “Awiai LLC/EVR Ltd. operating as Enterprise Valley Ranch Ltd.” at that address and, while no records which are required to be kept under Section 28 of the *Act* were produced, the Determination notes the, “employer did provide a spread sheet entitled “*Reconciliation of Advances, Salaries & Expenses Liquidated*” which set forth amounts of wages, advances and petty cash they allegedly”.

ARGUMENT AND ANALYSIS

6. The Director argues the appeal should have been filed no later than November 9, 2006 and, as it was not delivered to the Tribunal until February 16, 2007, is out of time.
7. Counsel for EVRL makes several arguments on the timeliness issue.
8. First, he says the Record does not show the Determination was “actually sent” to EVRL at its registered and records office address and, as a result, there was a complete failure to serve EVRL.
9. Second, he says, in any event, at the time the Determination was issued EVRL was a dissolved company and for that reason could not have received the Determination or, if received, prepared the appeal on time.
10. Third, he submits delivery on Awiai Corp. (or Awiai International) cannot be viewed as service on EVRL as the Director has not shown either of those entities had authority to act as agents of EVRL and there is no evidence that EVRL was a holding of Awiai Corp.
11. Section 81 of the *Act* requires, among other things, that the Director serve any person named in a Determination with a copy of it. Section 122 of the *Act* speaks to service. Subsections (1) and (2) of that provision are relevant to the issue being considered in this decision and state:
 - 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 a 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.*

12. The above provisions answer all of the arguments made by counsel for EVRL on this issue.
13. The *Act* does not require service on a company to be made only at the registered or records office of the company. It is not relevant that a company has dissolved or ceased to do business. Provided that company's "last known address" can be determined, a Determination can be sent by registered mail to that address and the *Act* deems service to have been made. I accept the address in Washington, DC qualifies as EVRL's "last known address". The Director had delivered of the Demand for Employer Documents on Awiai and EVRL to that address. That delivery was acknowledged by the conduct of persons at that address. The subsequent communications to the Director, in response to the Demand and as well to respond to the complaints, contains no indication that such correspondence should not have been sent to EVRL at that address. Mr. Atkinson, the President and CEO of Awiai Corp, the President and Secretary of EVRL and a person the complainants directly identify with their employment, is associated with that address.
14. While the term "last known address" is not defined in the *Act*, common sense would dictate it would include the address to which the last successful delivery or service of a communication from the Director was made. EVRL has not provided any reason why the address in Washington, DC should not in the circumstances be considered the "last known address" for EVRL. It is worth noting that when the Tribunal has been called upon to interpret and apply Section 122 of the *Act*, it has adopted an approach that ensures the deeming provisions prevail and that the purposes of the *Act* are achieved. For example, see *A-Mil Financial Corp.*, BC EST # D193/98; *ScottLynn Contracting Ltd.*, BC EST # D012/97; and *Zedi*, BC EST # D308/96.
15. I therefore reject the arguments of EVRL and find the Determination was served in accordance with the requirements of the *Act*. It remains to be decided whether the Tribunal should extend the time for filing this appeal.
16. 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.
17. 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.

18. 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.
19. The delay here is substantial – more than three months. No explanation for the delay is given. Counsel for EVRL says the Determination was provided to the EVRL’s lawyers on November 15, 2006. The appeal was still three months getting to the Tribunal from that date. There was no apparent effort to indicate to any other party, or to the Tribunal, an intention to appeal the Determination.
20. On its face, the appeal lacks merit. The arguments made by EVRL are technical and quite inconsistent with applicable provisions of the *Act*, its purposes and objectives and previous decisions of this Tribunal.
21. The appeal is denied as being out of time.

ORDER

22. Pursuant to Section 115 of the *Act*, I Order the Determination dated October 6, 2006, as amended on November 27, 2006, be confirmed in the amount of \$12,520.94 together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal