

An appeal

- by -

Christi Irlam  
("Ms. Irlam")

- 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.:** 2010A/31

**DATE OF DECISION:** April 27, 2010

## DECISION

### SUBMISSIONS

Christi Irlam	on her own behalf
Ravi Sandhu	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision relates to an appeal brought under to Section 112 of the *Employment Standards Act* (the “*Act*”) by Christi Irlam (“Ms. Irlam”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on July 28, 2009.
2. The Determination found that Ms. Irlam’s former employer, Adventure West Resorts Ltd. carrying on business as Elkin Creek Guest Ranch (“AWR”), had contravened provisions of the *Act* in respect of her employment and ordered AWR to pay wages to Ms. Irlam in the amount of \$3,140.80 and to pay administrative penalties in the amount of \$1000.00.
3. Ms. Irlam has filed an appeal of the Determination, indicating new evidence has come available that was not available at the time the Determination was made.
4. The appeal was filed late, and Ms. Irlam has made an application to extend the time period for filing an appeal. On April 19, 2010, 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. This decision addresses this application to extend the time period for filing an appeal under the *Act*.

### ISSUE

5. The issue here is whether the Tribunal should extend the appeal period.

### THE FACTS

6. The facts relating to the issue of timeliness are as follows:
  1. The Determination was issued on July 28, 2009;
  2. The time limited for filing an appeal under the *Act* expired on September 4, 2009;
  3. This appeal was delivered to the Tribunal on March 10, 2010;
  4. The basis for the appeal is Ms. Irlam’s assertion that evidence has come available that was not available when the Determination was being made; and
  5. The evidence that has come available is identified as evidence provided by the principal of AWR, David Milne (“Mr. Milne”), in a small claims court action on January 27, 2010, which Ms. Irlam says contradicted evidence provided by Mr. Milne (and others) during the complaint hearing held by the Director on February 26 and April 29, 2009 and which led to a reduction of the amount of wages the Director found to be owing to her under the *Act*.

## ARGUMENT

7. Ms. Irlam says an extension of the appeal period should be allowed in order to address an error in the Determination that was generated by an untruthful statement made under oath by Mr. Milne, and possibly other witnesses, to the Director during the complaint hearing.
8. The Director takes no position on whether the statutory appeal period should be extended.
9. AWR has not filed any response to the application.

## ANALYSIS

10. 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.

11. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] 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; and
  5. There is a strong *prima facie* case in favour of the appellant.
12. 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. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
13. There is no specific explanation for Ms. Irlam failing to file an appeal of the Determination within the statutory appeal period. The submission made by Ms. Irlam suggests there was no appeal because she accepted the weight of the evidence provided to the Director by AWR during the complaint hearing and the conclusion made by the Director on how that evidence should be characterized would not result in a successful appeal. Ms. Irlam does say the evidence suggesting Mr. Milne had misled the Director in giving that evidence did not become available until January 27, 2010.
14. Ms. Irlam had no intention to appeal the Determination until Mr. Milne testified in the small claims action that the amount AWR had asserted in their evidence to the Director was payment of wages for extra time worked was described in the small claims action as an amount paid to her “in lieu of notice”. That testimony

occurred nearly five months after the Determination was issued. The delay in delivering the appeal is considerable.

15. The matter of prejudice is neutral in this case. There is no indication from AWR that they would be unduly prejudiced by an extension of the appeal period, but an appeal will undoubtedly entail further time and expense on a complaint that was concluded as a matter under the *Act* approximately six and one-half months before this appeal was filed.
16. As for there being a strong *prima facie* case shown, it must be considered that it is a finding of fact made by the Director in the Determination that is at the root of the appeal and the Tribunal's appeal authority over such a finding is limited. While there would seem to be some basis for Ms. Irlam's position that Mr. Milne misled either the Director or the small claims judge, and no decision is being made here on that position, it is not entirely clear in which forum that deception occurred. It would be wrong for the Tribunal simply to presume the Director was misled. In the circumstances, it is not entirely free of doubt whether the Tribunal may address that finding on appeal. It would depend on other findings of fact that have not yet been made, and in this case are best left to the Director. It is, after all, the integrity of the Director's complaint hearing process that is called into question by the allegations made by Ms. Irlam.
17. If the usual factors identified in decisions of the Tribunal are applied, there is no question that the appeal period would not be extended and the appeal would be dismissed. The circumstance in this application, however, is one of those unique criterion the Tribunal will consider. Notwithstanding, I find that the length of the delay, the absence of clear authority in the Tribunal to address the basis of the appeal and the need for further investigation on the allegation militate against granting an extension of the statutory appeal period.
18. That does not necessarily end the matter. The Tribunal faced a similar concern in *Wally's Auto Body Ltd.*, BC EST # D519/01, where the Tribunal was also asked to extend the statutory appeal period based on allegations the complainant had misled the investigating delegate. The Tribunal denied the application, but added the following comments:

The Director has the authority, under Section 86 of the Act, to vary a Determination. While I do not speak for the Director, the opportunity may still exist for further discussion concerning the merits of the complaint. If it is obvious that the investigating officer has been misled by the complainant, it is likely he would wish to know that.

19. Those comments, and particularly the sentiment expressed in the final sentence above, appear to apply here.
20. The application is denied and the appeal is dismissed.

## **ORDER**

21. Pursuant to section 115 of the *Act*, I order the Determination dated July 28, 2009 be confirmed.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**