

An appeal

- by -

Round Table Enterprises Ltd. operating as The Troller Pub

("Round Table")

- 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: Carol L. Roberts

FILE Nos.: 2005A/29

DATE OF DECISION: April 13, 2005



DECISION

SUBMISSIONS

John Kavanagh	on behalf of Round Table Enterprises Ltd.
Theresa Robertson	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Round Table Enterprises Ltd. ("Round Table") pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director").

Jimmy Foo filed a complaint with the Employment Standards Branch alleging that Round Table operating as The Troller Pub ("Round Table") had contravened the Act by failing to pay compensation for length of service.

Following a hearing into Mr. Foo's complaint on October 13, 2004, a delegate of Director of Employment Standards ("the Director") determined that Round Table had contravened section 63 of the Act, and ordered it to pay compensation in the amount of \$1,071.82, including interest.

The Determination was issued December 24, 2004. Pursuant to section 112(c), the deadline for filing an appeal of the Determination with the Tribunal was 30 days after the date of service of the Determination, if served by registered mail, or 21 days after the date of service, if the personal was personally served.

Mr. Kavanagh personally delivered Round Table's appeal documents to the Tribunal on February 23, 2005. Round Table alleges that the delegate failed to observe the principles of natural justice in making the Determination.

ISSUE

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

THE FACTS

Round Table mailed its appeal documents to the Employment Standards Branch Head Office on January 21, 2005. On January 24, 2005, the Branch sent the appeal documents to the delegate. On February 18, 2005, the delegate telephoned the Tribunal to determine the status of the appeal. The Tribunal had no record of the appeal and the delegate faxed the appeal documents to the Tribunal. The Tribunal then contacted Mr. Kavanagh, who personally delivered the appeal documents.

In his application for an extension of time to file the appeal, Mr. Kavanagh says that he mailed the appeal documents to the Tribunal on January 17, 2005, the same day he mailed them to the Branch. He does not address any of the other factors the Tribunal considers when deciding to extend the deadline.

The delegate took no position on Round Table's application.

ANALYSIS AND DECISION

Section 112(1) of the Act provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

Section 109(1) (b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this 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.

These criteria are not exhaustive.

I find it appropriate to extend the time in which to file an appeal.

The appeal documents are dated January 17, 2005, and received by the Branch on January 21, 2005, well before the appeal deadline.

I am satisfied Round Table had a genuine, ongoing and *bona fide* intent to appeal the Determination. It is clear that the director was aware of this intent, and in any event, does not appear to dispute the application.

Furthermore, there is no evidence that Mr. Foo or the director will be unduly prejudiced by the granting of an extension.

Mr. Kavanagh says that he mailed the appeal documents to the Tribunal at the same time as he sent them to the Branch, which was January 17, 2005. Although he provides no evidence, either postage receipts or

other documentation, to support this assertion, I find the assertion to be a reasonable and plausible one. Had the appeal documents been delivered, they would have been filed within the appeal deadline.

In light of all of these conclusions, I need not conduct a lengthy analysis of the merits of the appeal at this time. Although the appeal documents appear to suggest that the basis of the appeal is something other than a failure to observe natural justice, it cannot be characterized as a frivolous appeal. The merits of the appeal can be determined by a Member upon hearing the appeal itself.

ORDER

Pursuant to section 109(1) (b) of the Act, I Order that the deadline for filing the appeal be extended to February 23, 2005.

Carol L. Roberts Member Employment Standards Tribunal