



An appeal

- by -

Omobosola Owolabi operating as Just Beauty  
("Just Beauty")

- 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 No.:** 2004A/36

**DATE OF DECISION:** April 27, 2004



## DECISION

### SUBMISSIONS

Omobosola Owolabi:	On behalf of Just Beauty
Pat Douglas:	On behalf of the Director
Teresa Lancia:	On her own behalf

### OVERVIEW

This is an appeal by Omobosola Owolabi operating as Just Beauty (Just Beauty) pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director").

Teresa D. Lancia filed a complaint with the Employment Standards Branch alleging that Just Beauty had failed to pay her regular wages and vacation pay.

A delegate of Director of Employment Standards ("the Director") held a hearing into the complaint, following which the delegate determined that Ms. Lancia was an employee of Just Beauty and entitled to wages, annual vacation pay and interest in the total amount of \$753.64.

The Determination was issued January 12, 2004. Ms. Owolabi filed her notice of appeal on March 8, 2004.

### ISSUE TO BE DECIDED

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.

### ARGUMENT

In her letter of appeal, Ms. Owolabi stated that the appeal was filed late because she was out of the country from January 14, 2004 until February 29, 2004 and did not read her mail until March 2, 2004.

The Director's delegate contends that the Tribunal should not consider the late appeal. She submits that Ms. Owolabi provided no evidence she was out of Canada for the period of time she says she was. Furthermore, the delegate says that Canada Post confirms that the Determination was received on January 13, 2004, the time within which Ms. Owolabi was in the country.

The delegate also says that, although Ms. Owolabi did not appear at the hearing of the complaint, she sent a letter signed by "Sola Dare" on her behalf. The delegate submits that this person could also have filed an appeal on Ms. Owolabi's behalf within the time period.



The delegate further contended that Ms. Owolabi has failed to demonstrate that she has a strong case on appeal. She submits that Ms. Owolabi has advanced arguments that were considered during the hearing of the complaint.

Ms. Lanica also contended that the Tribunal should not consider the late appeal.

In reply, Ms. Owolabi submitted a copy of her Air Canada electronic ticket which shows that she left Canada January 14, 2004 at 18:35, and returned to Canada February 24, 2004. She contended that, if she had seen the determination before the appeal deadline, she would have filed the appeal.

Although Ms. Owolabi made other arguments on appeal, I have not addressed those as they do not relate to the issue of whether her appeal was filed in a timely manner, or whether her case is otherwise meritorious.

## ANALYSIS

Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

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.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*) BC EST #D298/96)

Having reviewed Ms. Owolabi's submissions, I am not persuaded that she has demonstrated reasons for extending the time in which she may file an appeal.

The evidence shows that Ms. Owolabi received the Determination on January 13, 2004. She stated she did not read her mail until March 2, 2004 because she left Canada for an extended period of time.



Ms. Owolabi operates a business which did not cease operations while she was away. She was aware Ms. Lancia had filed a complaint, and that there had been a hearing into that complaint. Having received registered mail from the Branch on January 13, 2004, one would have thought that Ms. Owolabi would have given the package priority attention. I find that Ms. Owolabi had time to file an appeal before she left Canada, engaged an agent to file the appeal on her behalf, or sought an extension to file such an appeal. I do not consider that Ms. Owolabi has demonstrated a genuine and *bona fide* intention to appeal the Determination.

Furthermore, I find no strong *prima facie* case in Ms. Owolabi's favor. Ms. Owolabi did not appear at the November 12, 2003 hearing of the complaint, and did not provide any records in support of her position at the hearing. Rather, she submitted a letter explaining her relationship to Ms. Lancia. Ms. Owolabi seeks to submit the same evidence on appeal. Given that Ms. Owolabi chose not to appear at the hearing, she cannot use an appeal as a basis for advancing positions she either advanced, or failed to advance, in the first instance. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* BC ESTD# 268/96 and *Kaiser Stables Ltd.* BC EST #D058/97). Any evidence offered by Ms. Owolabi that was available at the time of the investigation, therefore, will not be considered in any event.

I decline to grant Ms. Owolabi's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**