

An appeal

- by -

Alibi Entertainment Ltd.  
(the "Employer")

- 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*

**ADJUDICATOR:** Mark Thompson

**FILE No.:** 2000/822

**DATE OF DECISION:** February 12, 2001

## DECISION

### OVERVIEW

This is an appeal by Alibi Entertainment Ltd. (the “Employer”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on November 3, 2000. The Determination found that the Employer had failed to pay a former employee, Ken Galley (“Galley”) overtime, statutory holiday and vacation pay and compensation for length of service. It ordered that Galley be paid a total of \$2,849.25, including interest. A zero dollar penalty also was imposed. The deadline for filing an appeal with the Tribunal was November 27, 2000. The Employer filed an appeal on December 1, 2000, requesting that the deadline for appeals be extended until that date. The substance of the appeal challenged a number of points in the Determination. This case concerns the timeliness of the Employer’s appeal. It was decided based on written submissions from the Employer, Galley and the Directors’ Delegate.

### ISSUE TO BE DECIDED

The issue to be decided in this case is: should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* and extend the statutory deadline for filing appeals contained in Section 112 of the *Act*. If the decision in this case is to deny the Employer’s request for an extension of the time limit in the Determination, the Employer’s appeal is thereby denied.

### FACTS

Galley was employed by the Employer from July 1998 until December 31, 1999. Both parties agree that Galley was terminated on December 31, 1999, although they differ sharply about the circumstances of the termination. The Employer alleged that Galley was terminated for cause after an altercation with three fellow staff members on that date. Galley denied taking part in a fight and alleged that he had not been paid overtime for hours worked in excess of normal shifts.

After her investigation of Galley’s complaint of unpaid overtime, the Director’s delegate provided the Employer with calculations of overtime worked based on the Employer’s own records except for two periods for which no records were available. In those cases, the Delegate calculated overtime based on payroll records. The Employer did not rebut these calculations. Nor did it offer the names of any witnesses to the altercation that formed the basis for Galley’s termination, despite a written request from the Delegate to provide that information.

Based on the information in her possession, the Delegate found that the Employer was obligated to pay Galley for overtime worked, statutory holidays and vacations. In addition,

the Employer was ordered to pay Galley two weeks compensation for length of service on the grounds that the Employer had not demonstrated that he was terminated for cause.

Initially a determination was issued on October 31, 2000 and sent by registered mail to the Employer, the Registered & Records Office and the directors' home addresses. All copies were delivered except for one sent to a director, Tim Hunt ("Hunt") that was returned by Canada Post marked "Unclaimed." The Delegate cancelled the initial determination on November 2, 2000 due to a typographical error and sent a notice of cancellation to the Employer, the Registered & Records Office and the directors' home addresses. The copy addressed to Hunt was returned as unclaimed and the copy addressed to Rick Stevenson ("Stevenson") was returned marked "refused by addressee."

The delegate issued a second Determination on November 3, 2000 and sent copies by registered mail to the Employer, the Registered & Records Office, and the directors' home addresses. The Determination contained the deadline for an appeal was November 27, 2000. The copy sent to Hunt was returned as unclaimed, and delivery to another director was unsuccessful.

The delegate faxed copies of the October 31, 2000 determination, the notice of cancellation and the Determination issued on November 3, 2000 to John Kinninmont ("Kinninmont"). The Delegate submitted copies of confirmations of the faxes to Kinninmont to the Tribunal.

JK Management, acting on behalf of the Employer, filed an appeal of the Determination on December 1, 2000, requesting that the deadline for filing the appeal "be extended" to the date of the filing. There was no signature on the appeal, only a printed block of JK Management. The grounds for the appeal were that the delivery of the Determination had caused a misunderstanding between JK Management and the Employer. According to JK Management, it did not receive the October 31 determination, but did receive the cancellation on November 2 and the second Determination on November 3. JK Management stated that there were fax problems, although it did not state what those problems were. JK Management stated "for whatever reason, we were led to believe that the submission date for an appeal had been altered to December 4<sup>th</sup> . . . ."

The second reason for the request to extend the deadline for filing an appeal was "very serious concerns about the conduct" of the delegate that it believed the Tribunal should hear.

On December 18, 2000, Corinne Lea ("Lea"), who identified herself as a representative of the Employer, wrote to the Tribunal to support the appeal. Lea stated that the appeal was not filed before the deadline because three determinations had been received within a week. She further stated that she had "possibly" given an incorrect deadline date to Kinninmont who was "trying to assist us with this problem." Lea further explained that the Determination referred to one former employee, while previous correspondence had concerned two ex-employees.

Kinninmont wrote to the Tribunal on the letterhead of JK Management Inc. on January 17, 2001. He stated that errors existed in a submission to the Tribunal by a delegate of the Director dated December 22, 2000, which was a reply to the original appeal. According to Kinninmont, the letter did not include a copy of a fax confirmation for the October 31, 2000 determination and the number of pages listed in the fax confirmation of the Determination of November 3, 2000 was incorrect.

Galley filed statements with respect to the Determination and the request for an extension of the deadline for filing an appeal. He pointed out that the Employer received the Determination in time to file an appeal. Even if there were problems with the fax system, officers of the Employer received copies of the Determination by registered mail.

The Employer raised a number of issues on the merits of the Determination, including alleged mistakes in the calculation of wages owed to Galley, bias on the part of the Director's Delegate and a denial that it had raised issues of fraud, as stated in the Determination. In addition, Kinninmont, on behalf of the Employer, offered additional information with respect to Galley's termination.

## ANALYSIS

Section 122(1) of the *Act* states that a determination is deemed to have been served if either served on the person or sent by registered mail to the person's last known address. Section 122(2) of the *Act* provides that if service is by registered mail, the determination is deemed to be served 8 days after it is deposited with Canada Post. Time periods for appealing a determination are contained in Section 112(2) of the *Act*. A person served with a determination must file an appeal within 8 days if served in person or 15 days if served by registered mail.

These relatively short time periods for filing an appeal are consistent with one of the purposes of the *Act* as stated in Section 2(d), "to provide for fair and efficient procedures for resolving disputes over the application and interpretation of this Act.

The Tribunal has the discretion to extend the time limits under Section 109(1) of the *Act*. Mindful of the overriding purpose of the *Act*, the Tribunal has ruled consistently that extensions should be granted only when compelling reasons for an extension are advanced. The guiding principles for consideration of an application to extend the statutory time limits have been summarized in *Re Niemisto* (BC EST 99/96):

- 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 as the Director, must have been 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 facia case in favour of the appellant.

Although these principles are not exhaustive, they provide an adequate framework for analyzing this case.

The only explanations for the failure of the Employer to request an appeal within the time limit were confusion about the cancellation of the first determination and an alleged malfunction of the fax system. Apart from the lack of any corroborating evidence of problems with transmission of the fax message, several officers of the Employer received the Determination by registered mail. Moreover, the deadline in question exceeded the time limits in the *Act*.

The Employer stated that it had an on-going intention to appeal the Determination. However, neither the respondent, Galley, nor the Director was aware of this intention before the request to extend the deadline for filing an appeal was received on December 1, 2000.

Galley argued that his interests were prejudiced by the delay in completing this proceeding. While no evidence on this point was produced, the record is clear that the Employer terminated Galley on December 31, 1999. At a minimum, therefore, Galley did not have access to any funds that may be due to him for over one year after his employment ended. The *Act* was designed to produce prompt closure to complaints such as Galley's.

Finally, the Employer has not presented a prima facia case in favour of its appeal. It disagreed with some of the calculations in the Determination. It asserted that it had "additional evidence," with respect to Galley's termination. Normally, the Tribunal will not receive evidence that should have been provided to the Director's delegate during the investigation of the original complaint. In particular, the Employer did not provide the Delegate with evidence to support its assertion that Galley was terminated for engaging in a physical altercation with fellow employees.

For these reasons, I do not find that the circumstances of this case are appropriate to grant an extension of the time to appeal the Determination.

**ORDER**

The Employer's request to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to Section 114 of the *Act*. The effect of this decision is to confirm the Determination of November 3, 2000.

**MARK THOMPSON**

**Mark Thompson  
Adjudicator  
Employment Standards Tribunal**