

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Blackfish Pub Ltd.  
("Blackfish")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Fernanda Martins

**FILE NO.:** 99/08

**DATE OF DECISION:** February 24, 1999

**DECISION**

**OVERVIEW**

This is an appeal by Blackfish Pub Ltd. (“Blackfish”), pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The appeal is from the Determination issued by a delegate of the Director of Employment Standards on December 10, 1998. The Director found that Blackfish had contravened Section 63 of the *Act* when it terminated Maureen Kennedy without notice or compensation and ordered Blackfish to pay \$2532.77.

The Determination was issued on December 19, 1998 with a deadline for appeal of December 31, 1998. Blackfish appealed the determination on January 6, 1999 with an explanation for lateness.

The Tribunal will decide whether it should exercise its discretion to extend time to appeal without an oral hearing, on the basis of written submissions and the record before the Tribunal.

**ISSUE TO BE DECIDED**

The issue to be decided is whether the time limit for requesting an appeal set out in Section 112 of the *Act* should be extended.

**FACTS**

In its reasons for appeal, Blackfish states:

The reason this appeal is late is because:

1. My bookkeeper, Mrs. Coral O’Reilly, was out of the country until late December and was more knowledgeable about reasons 1 & 2.
2. Mrs. O’Reilly attempted to call the Tribunal on December 31, 1998 early in the day, but received no reply until January 4, 1999.

In her written submission to the Tribunal dated January 7, 1999 the Director’s delegate stated:

This appeal should be denied since it is clearly untimely. The employer was served with the Determination properly and received it on December 14, 1998. Please see the attached Certified Mail Receipt. I can see no compelling reason why any extension to the appeal period should be granted, since the employer had from December 14, 1998, to initiate the appeal. The fact that his bookkeeper was away is irrelevant. The

information that the employer claims was only known to his bookkeeper was known to the employer when the investigation of this matter was conducted, since the employer's obligations pursuant to Section 97 of the *Act* were explored with him at length and are considered in the Determination. The employer's bookkeeper was not the only source of the information cited by the employer in his appeal. It also appears that the employer [sic] no effort to contact the Tribunal to request an extension due to the absence of his bookkeeper (if his bookkeeper's input was crucial to his appeal) prior to the expiry [sic] of the appeal period. An attempt to call the Tribunal on the expiry date of the appeal is insufficient.

In her written submissions to the Tribunal dated January 12, 1999, the employee stated:

The reasons Mr. McDonnell stated for his late appeal (his bookkeeper being out of the country until late in December and your unavailability when she did return) do not seem that compelling. There was ample time and opportunity to respond. I informed the bookkeeper that I was going for severance pay the day I picked up my last paycheck. Mr. McDonnell was informed that these proceedings were going to forward in Early November when your office contacted him. Finally, a copy of your determination was delivered in early December. The bookkeeper, Coral O'Reilly, may have been out of the country for a period of that time but her office was open. Someone there could have assisted him. Of more consequence are his reasons for appeal.

The Tribunal wrote to the employer on January 22, 1999 and enclosed the written submissions from the Director and the employee. The employer was advised that if he wished to make a reply, he had until January 29, 1999. No reply was received by the Tribunal.

## **ANALYSIS**

Section 112(2) of the *Act* sets out the time periods for appealing a Determination. A person served with a Determination by registered mail has 15 days after the date of service to file their appeal. The Determination was received by the Appellant on December 14, 1998. The Appellant was advised in the written Determination that:

Any person served with a Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by December 31, 1998. Complete information on the appeal procedure is attached.

The attachment which was included with the Determination set out that:

A complete appeal form must be delivered to the Tribunal on or before the appeal deadline shown on the Determination.

The appeal deadline of December 31, 1998 already gave the Appellant more than fifteen days to file the appeal.

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time for requesting an appeal even though the period has expired. In this case, Blackfish appealed the Determination by facsimile on January 6, 1999 after the deadline of December 31, 1998.

The onus for providing that the time period for appeal should be extended is on the Appellant.

The criteria which govern a request for an extension of the time within which to appeal must be filed were set out in *Niemisto* (BC EST #D099/96):

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- 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 made 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 facie* case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique, factors ought to be considered.

The Appellant claims that the Determination is in error because Maureen Kennedy was employed on May 29, 1998, and therefore not due five weeks compensation. The assets of Sunshine S. Holdings (Cedars Pub) were purchased on May 29, 1998. Sunshine S. Holdings was the former employer of Maureen Kennedy, who was hired by Jean Hyams, owner of Sunshine S. Holdings, April 29, 1993. Notice was given to all her employees on April 22, 1998 of the impending sale. A further notice (undated) was given to all employees informing them that their employment with the pub would be terminated May 29,

1998. Only one employee, who was hired in 1992, was entitled to severance pay of about 3 days on the final pay cheques.

The Director submits that the Appellant had the aforementioned information during the time of the investigation. The Appellant did not dispute this submission. The Appellant does not give specific dates that the bookkeeper was absent nor describe any efforts that might have been made to obtain the required information before the deadline even though it was known that the bookkeeper was away. The bookkeeper did not return in time to provide the information if she managed to contact the Tribunal early on December 31, 1999. It was the Appellant's responsibility to assure the deadline was met. There is no explanation why the appeal was not filed before the Tribunal returned the phone call. I do not find the Appellant's explanation for failure to meet the deadline reasonable or credible.

The Director and the employee were not made aware of the Appellant's intention to have the appeal time limit extended until after the deadline had passed.

Review of the reasons for appeal does not indicate a strong prima facie case in favor of the Appellant vis-à-vis Section 97 of the *Act*.

For the above reasons, I find on balance that an extension should not be granted to the Appellant.

**ORDER**

The request to extend the time period for requesting an appeal is denied.

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**Fernanda M. R. Martins**  
**Adjudicator**  
**Employment Standards Tribunal**