

An appeal

- by -

Styro-Mold Manufacturing Ltd.
("Styro-Mold")

- 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.: 2007A/70

DATE OF DECISION: September 4, 2007

DECISION

SUBMISSIONS

Abram Neudorf	on behalf of Styro-Mold Manufacturing Ltd.
Roger Hall	on his own behalf
Amanda Clark Welder	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) brought by Styro-Mold Manufacturing Ltd. (“Styro-Mold”) (“Rubin”) of a Determination that was issued on April 13, 2007 by a delegate of the Director of Employment Standards (the “Director”). The Determination found that Styro-Mold had contravened Part 3, Sections 17, 18 and 21, Part 7, Section 58 and Part 8, Section 63 of the *Act* in respect of the employment of Roger Hall (“Hall”) and ordered Styro-Mold to pay Hall an amount of \$7,509.38, an amount which included wages and interest.
2. The Director also imposed an administrative penalty on Rubin under Section 29(1) of the *Employment Standards Regulation* (the “Regulation”) in the amount of \$1500.00.
3. The Determination was issued following a complaint hearing which was held on April 4, 2007. No representative of Styro-Mold attended the complaint hearing, although according to the Director Mr. Neudorf, a director/officer of Styro-Mold was verbally, electronically and by written notice notified of the date, time and place of the complaint.
4. The total amount of the Determination is \$9,009.38.
5. Styro-Mold has filed an appeal of the Determination, alleging the Director erred in law, failed to observe principles of natural justice and that new evidence has come available which was not available at the time the Determination was being made.

ISSUE

6. A preliminary issue relating to the timeliness of the appeal has arisen. On July 5, 2007, 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.

THE FACTS

7. The facts relating to the issue of timeliness are as follows:
 - The Determination was issued April 13, 2007.

- The Record indicates the Determination was sent by registered mail to the business address and the registered and records office of Styro-Mold and to the home address of the directors/officers of Styro-Mold. The Determination was delivered to the business address and the registered and records office on April 16, 2007. The Determination sent to the directors/officers was unclaimed and by virtue of Section 122(2) was deemed to have been served 8 days after it was deposited with Canada Post.
- The appeal was received by the Tribunal on June 29, 2007.
- The Tribunal directed the parties to make any submissions on the timeliness issue by July 26, 2007. The Director and Hall met that deadline. No submission was received from Styro-Mold by that date.

ARGUMENT AND ANALYSIS

8. There is no question the appeal was filed late. Section 112 sets out the requirements for filing an appeal; subsection 112(3) describes the appeal period as follows:

(3) *the period referred to in subsection (2) is*

(a) *30 days after the date of service of the determination, if the person was served by registered mail, and*

(b) *21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).*

9. The Director argues the appeal should have been filed no later than May 22, 2007 and, as it was not delivered to the Tribunal until June 28, 2007, is out of time. The Director argues there are no factors present that would justify the Tribunal exercising its discretion to extend the time limit for filing the appeal.

10. The appeal contains one comment that may have been intended by Mr. Neudorf, who filed the appeal on behalf of Styro-Mold, as an explanation for the late filing, although I am inclined to agree with the perspective of the Director that the statement is more likely meant as an explanation for not attending the complaint hearing:

I was employed out of town was not able to leave in fear I would lose my job. Did not receive notice on time to defend the claim.

11. If it is intended to address the delay, the comment does not adequately address it.

12. 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.

13. The Tribunal has identified several factors which should be considered in determining whether there are compelling reasons for extending the time for appeal:
- i) whether there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) whether there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) whether the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) whether the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) whether there is a strong *prima facie* case in favour of the appellant.
14. Other, perhaps unique, factors can also be considered. The burden of demonstrating the existence of any mitigating factors is on the party requesting the extension of time.
15. The delay here is not insubstantial – almost six weeks. No good reason has been provided for the delay. There is no indication Styro-Mold ever expressed an intention to appeal the Determination. If there was such an intention, it was never expressed to any other party. The appeal appears to be closely related to collection efforts by the Director. There is little prejudice to Hall if an extension is granted. In the circumstances, this factor does not point one way or the other. On its face, the appeal lacks merit. Styro-Mold failed to attend mediation sessions and the complaint hearing scheduled to deal with Hall's complaint. In sum, the factors weigh heavily in favour of refusing an extension of time.
16. Accordingly, the appeal is denied as being out of time.

ORDER

17. Pursuant to Section 115 of the *Act*, I order the Determination dated April 13, 2007, be confirmed in the amount of \$9,009.38, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal