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 -

Louis Daniel Ltd.
(" Daniel ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE No.: 1999/754

DATE OF DECISION: February 24, 2000

DECISION

OVERVIEW

Louis Daniel Ltd. ("Daniel"), pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), has appealed a Determination by a delegate of the Director of Employment Standards (the "Director") dated November 19, 1999. The Determination is that Daniel contravened section 46 of the *Employment Standards Regulation* (the "*Regulation*") when it failed to produce payroll records on being ordered to do so. It imposes a penalty of $500.

The appeal was received five days after the statutory period for an appeal of the Determination had passed. According to the employer, a letter of appeal was written on the 10th of December 1999, but his son forgot to post the letter and so it was late. Daniel has asked that the Tribunal waive the time limit for appealing the Determination.

ISSUE TO BE DECIDED

My task in this case is to decide whether the Tribunal should or should not exercise its discretionary power to waive the time limit for appealing the Determination.

FACTS

The Determination advised Daniel that it could be appealed. It goes on to say that the appeal "*must be delivered to the Tribunal no later than 4:30 p.m. on December 13, 1999*".

While the appeal is dated December 10, 1999 it was not until the 17th of December that the appeal was received by the Tribunal.

Gurnam Atwal, owner of Daniel, claims to have prepared the appeal on the 10th but that is not shown. According to Atwal, he gave the appeal to his son with instructions to mail it but the son forgot to mail the letter and so it was late in getting to the Tribunal.

Atwal of Daniel asks that the Tribunal review the penalty for the following reasons:

- Daniel is a small business which is just struggling to survive,
- there was miscommunication between him and the delegate,
- the employee's paycheque had been prepared and was in the store,
- he felt that the delegate was unsympathetic towards him and unwilling to listen.

Atwal in his submission indicates that it was not until Pura's mother asked for her daughters pay stubs and a record of the hours which she worked that he told his son to prepare the pay stubs and a record of Pura's work.

The investigating delegate contacted Atwal and she advised him of the Complaint. The delegate issued a Demand for Employer Records on October 27, 1999. It required Daniel to produce and to deliver, before 4:30 p.m., Wednesday, November 10, 1999, the following:

- all records relating to wages, hours of work, and conditions of employment; and
- all records an employer is required to keep pursuant to Part 3 of the *Act* and Part 8, section 46 and 47, of the *Regulation*.

Daniel received the Demand for Payroll Records but it did not deliver any of the documents which it had been ordered to produce. The penalty determination was then issued.

ANALYSIS

Section 112 of the *Act* is as follows:

> **112** (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.
>
> (2) The request must be delivered within
>
> (a) **15 days after the date of service**, if the person was served by registered mail, and
>
> (b) 8 days after the date of service, if the person was personally served or served under section 122 (3).
>
> (3) The filing of a determination under section 91 does not prevent the determination being appealed.
>
> (4) This section does not apply to a determination made under section 119.
>
> (my emphasis)

The amount of time given Daniel for an appeal is consistent with section 112 of the *Act*.

The Tribunal may waive the time limit for requesting an appeal. Section 109 (1)(b) of the *Act* provides the Tribunal with the power to do that.

> **109** (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
>
> (b) extend the time period for requesting an appeal even though the period has expired;
>
> ….

Is there a compelling reason to waive the time limit for appealing the penalty determination? I have in this case taken the approach of another panel of the Tribunal, and approach which is set out in the decision, *Liisa Tia Anneli Niemisto*, BCEST No. 099/96. The *Niemisto* decision recognises that the period for appeals which is set by statute should not be overridden lightly but only in certain circumstances:

> 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 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.

I am inclined to believe that it was always Daniel's intention to appeal the penalty determination. I very much doubt that the employer wants to pay the fine.

I am not convinced, however, that there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit. It is unlikely that Atwal, knowing that the appeal had to be in the hands of the Tribunal by the 13th of December, would have left it to his son to mail the appeal letter and not stressed that it was of vital importance that he post it immediately, and, had he done that, that his son would then just forget to drop the appeal in the mail.

Most importantly, I find that there is not a strong *prima facie* case in favour of the appellant.

The employer received a Demand for Employer Records which required that it produce and deliver various documents which concern Pura's employment. The employer did not act to comply with the order to produce and deliver documents. It is nonsense to suggest that was for reason of miscommunication. The Demand for Employer Records is perfectly clear in regard to what Daniel is asked to produce and deliver.

Once it became clear that Daniel was not going to provide payroll records and other records of the employment, the Director was in a position to issue a penalty determination. The amount of the penalty is set by the *Act* and *Regulation*. The Tribunal may only cancel a penalty determination or confirm it. I find that Daniel does nothing more than suggest that there should be no penalty for reason of financial hardship, and/or that a pay cheque had been prepared, and/or that the delegate was unsympathetic towards him and unwilling to listen. The appellant has not made a *prima facie* case for cancelling a penalty which has been imposed for a failure to produce and deliver records of any sort. The employer has not presented anything which remotely resembles a reasonable explanation for the failure comply with the Demand for Employer Records.

I find that there is not in this case a compelling reason to waive the time limit for the appeal.

ORDER

I order, pursuant to section 114 of the *Act*, that the request for an extension of the time for filing the appeal be denied. The appeal of the Determination dated November 19, 1999 is dismissed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal