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 -

Bob Martin
(the " Appellant ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/297

DATE OF DECISION: July 20, 2000

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Bob Martin from a Determination dated March 30, 2000. That Determination found that the money owed to Mr. Martin for length of service, vacation pay, and sick days had been applied by the employer Lentia Enterprises Ltd. against advances paid to the complainant prior to his termination. Mr. Martin filed an appeal of the Determination which was outside time limits set in Section 112 of the *Act*.

ISSUE TO BE DECIDED

1. Should the Tribunal exercise its discretion to enlarge the time period for filing an appeal of a Determination?

FACTS

Mr. Martin worked for the employer for just over two years as a Technical Sales Representative. The employer is in the business of providing the food industry with ingredients, equipment and services. In June of 1997 Mr. Martin started working for the employer at a guaranteed wage of $3,000.00 per month. In January of 1998 the Delegate found that the wage rate was changed to a $2,500 monthly draw against commission. While Mr. Martin disputes that his wage was in fact a draw against commission it does not appear from the information on file that Mr. Martin disputes that he no longer was receiving a guarantee of $3,000.00 per month.

Mr. Martin worked from January 1998 to June 1999 under this new system. During this time it appears that Mr. Martin on some occasions would not earn the $2,500.00 draw in commissions. Upon termination of his employment the employer calculated that Mr. Martin had drawn more than he had earned. The employer therefore used the money owed Mr. Martin for compensation for length of service, vacation pay, and banked sick days to reduce this shortfall from $4,437.75 to $1,610.85.

ANALYSIS

Mr. Martin's appeal was filed on April 26, 2000. Section 112 of the *Act* governs the right of an appeal. Section 112(2) states:

> 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).

Section 122(3) states:

> If service is by registered mail, a determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post office.

The file material does not indicate how service was effected on Mr. Martin. It is clear from perusing the material that the parties proceeded on the basis that the expiry date of the appeal process was 23 days from March 30, 2000. Since that day was Saturday April 23, 2000, and Monday, April 24, 2000 was a government holiday, the parties assumed that the time to file the appeal expired on Tuesday April 25, 2000. For the purposes of this appeal decision I accept that the time for filing the appeal expired at the close of business on Tuesday April 25, 2000. Mr. Martin filed the appeal on April 26, 2000.

The Tribunal has a discretion under Section 109(1)(b) to extend the time period for filling an appeal. That Section reads:

> 109 (1) In addition to its powers under Section 108 and Part 13, the tribunal may:
>
> a) extend the time period for requesting an appeal even though the period has expired,

In order for an extension to be granted, the appellant should satisfy the following criteria: (1) there is a reasonable and credible explanation for failing to request an appeal within the statutory limit; (2) there has been a genuine and ongoing bona fide intention to appeal the determination; (3) the respondent party and the Director have 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.

Mr. Martin's appeal was one day late. This in itself is not a reason for extending the time limits. The Tribunal is justified in holding appellants to the limits set out in the *Act* unless the appellant can show why the limits should be extended. In a fax sent to the Employment Standards Tribunal on April 26, 2000, Mr. Martin states that due to the holiday weekend he had got the dates mixed up and thought that Tuesday was in fact April 25, 2000. What is reasonable and credible will depend on the circumstances. I am prepared to find that in this case this is a reasonable and credible explanation. The facts that the appeal was turned in only a day late, and that on its face it is not a "slap-dash" document, support Mr. Martin's explanation.

It is also clear from the appeal that Mr. Martin has spent time researching the law in regards to his case. In his letter he states that he has consulted with a lawyer and he has attached digests of 3 cases in support of his claim. As stated earlier this appeal is obviously not one done completely at the last minute. The intention to appeal can be inferred from the documents the appellant provides, and, while it may not be necessary to consult a lawyer, or to provide digests of cases in support of the position, it seems clear that in this case such action can be seen as showing a genuine and ongoing bona fide intention to appeal.

I have nothing before me to indicate that either the employer or the Director has been made aware of Mr. Martin's intention to appeal. I am not prepared to reject Mr. Martin's request for a

time extension solely on this basis however. The criteria are not there to be followed blindly. They are there to help ensure that like cases are decided alike.

The issues on appeal in this case are not such that a slight delay in the appeal would cause the respondent undue prejudice. The respondent must, under Section 28, maintain the employment records of Mr. Martin. The question of witnesses forgetting conversations does not appear to be an issue. The short nature of the delay in filing makes it unlikely that the employer has done anything in reliance that no appeal would be filed. In short, there is nothing to indicate that allowing an extension here would cause undue prejudice to the employer.

Mr. Martin, in his appeal, states that his contract of employment did not indicate that his wage was a guarantee or that he would have to pay back such wages in the event of a shortfall in his commissions earned. Mr. Martin does state that the removal of the guarantee was communicated to him by a notation at the bottom of the January 1998 commission statement. Mr. Martin does not dispute the finding that his base monthly wage payment went from $3,000.00 to $2,500.00. In effect, Mr. Martin is trying to rely upon a contract that was replaced in January 1998. Mr. Martin worked under the new contract for approximately 18 months. He cannot now say that the old contract applies. As such, Mr. Martin has not shown a strong prima facie case on this aspect of his appeal.

Mr. Martin's other issue of appeal raises the question of whether advances given to employees can be deducted from their final pay cheque.

Section 21 of the *Act* states:

> 21 (1) Except as permitted or required by the Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

Mr. Martin takes the position that if this money was advanced to him then such money was a loan and therefore a business expense. As such, under Section 21(2), the employer cannot deduct this sum from the money owing. The problem with this argument is that it is circular. An advance on wages is a loan, loans are a business expense, business expenses cannot be deducted from an employee's pay cheque, therefore wages paid in advance cannot be deducted from a future pay cheque. It is clear that under the *Act* cash advances can be deducted from an employee's pay cheque (see *Re Pacific Forest Maintenance Ltd.* BCEST #D202/96). As such, Mr. Martin has not shown a strong prima facie case on this aspect of his appeal either.

In summary, Mr. Martin has shown a reasonable and credible explanation for filing his appeal outside of the time limits. He has shown that he had the intent to file, and that the employer

would not face any undue prejudice if the extension were granted. Mr. Martin has not shown that he made either the Director or his employer aware of his desire to file an appeal, but in this case it is not fatal to his application for an extension. The weakness in his application is the inability to show that a strong prima facie case on the merits exists.

As Mr. Martin has not shown a strong prima facie case, I am not prepared to exercise my discretion under Section 109(1)(b) and allow this appeal. The appeal fails as being outside of the time period set out in Section 112.

ORDER

The Determination dated March 30, 2000 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal