

An appeal

- by -

Dollenkamp's Bakery Ltd.

- 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:** John M. Orr

**FILE No.:** 2007A/91

**DATE OF DECISION:** November 13, 2007

## DECISION

### APPLICATION

1. This is a consideration of an application by Dollenkamp's Bakery Ltd. ("Dollenkamp") pursuant to Section 109(1)(b) of the Employment Standards Act (the "*Act*") to extend the time period for requesting an appeal from a Determination dated July 11, 2007 by the Director of Employment Standards (the "Director") even though the time period for requesting an appeal has expired.
2. The main issue addressed in the Determination was whether a person who worked at the bakery was owed severance after her employment was terminated. Dollenkamp alleged the employee was dismissed for cause, being theft of money from the workplace. The Determination found that Dollenkamp had not established cause and awarded severance to the employee and imposed two penalties totalling \$1,000.00 on Dollenkamp.
3. The Tribunal received notice of the appeal herein by Dollenkamp on August 23, 2007. The Determination advises in small print on the last page that:

#### **Appeal Information:**

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 pm on August 20, 2007. Information on the Tribunal and how to appeal a Determination can be found at the Tribunal's website: [www.bcest.bc.ca](http://www.bcest.bc.ca) or by contacting the Employment Standards Tribunal at (604) 775-3512. The Tribunal is separate and independent from the Employment Standards Branch.

4. The time limits for appeals are set out in Section 112 of the *Act* as follows:
  112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
    - (a) the director erred in law;
    - (b) the director failed to observe the principles of natural justice in making the determination;
    - (c) evidence has become available that was not available at the time the determination was being made.
  - (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),  
  
\* \* \* \*
  - (3) The appeal 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).

5. While the appeal in this case was filed three days beyond the time stipulated in the legislation the Tribunal has authority under Section 109(1)(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:
  1. there is a reasonable and credible explanation for the delay;
  2. the employer has had a genuine and ongoing intention to appeal;
  3. the respondent and the Director were aware of the intention to appeal;
  4. the prejudice to the employee will be considered;
  5. there is a prima facie case set out in the appeal.
6. However, the overriding principle is whether an injustice would result if an extension of time was not granted: *Re: Brett* [2004] BCEST No.D161/04. In this case it is evident on the face of the determination that there is a reasonable argument that the director's delegate misapplied fundamental principles of law and principles of natural justice.
7. The director is required to investigate complaints and as part of this process has instituted a form of "hearing". Having instituted this process the director is bound to apply the principles of natural justice and fairplay to such hearing process: *Re: Kyle Freney* [2004] BCEST No. D130/04. In this case the only evidence before the hearing delegate was the evidence provided by Dollenkamp as the complainant failed to attend the hearing. The delegate in this case gave a lengthy and detailed set of reasons for finding that Dollenkamp had not met the onus of proving that there was just cause for dismissing the employee. While the delegate is correct in placing the onus on the employer, it appears to me that there is at least a *prima facie* case that delegate placed too much emphasis on the possibilities of other explanations for the missing money and did not properly accept the only sworn evidence before her. The onus in a case such as this is the balance of probabilities and the appellant has a reasonable argument that the delegate relied on the mere possibility of other explanations for the missing money in rejecting the sworn evidence of the employer especially in the absence of any sworn explanation from the employee.
8. Of course, this is a preliminary assessment of these issues and this assessment does not decide the substance of the appeal herein but it appears to me that the appellant has raised an important issue that needs to be heard and an injustice could arise if an extension of time were not granted.
9. The delay in filing the appeal in this case was only a matter of 3 days and, in my opinion, the principle of strict compliance is outweighed by the principle of fundamental fairness and the need to ensure that an injustice does not result.
10. In conclusion, the application for an extension of time for requesting an appeal pursuant to S.109(1)(b) is granted. The substance of the appeal will addressed in due course.

**ORDER**

11. Accordingly, pursuant to section 109(1)(b), I extend the time for filing of the appeal herein.

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**John M. Orr**  
**Member**  
**Employment Standards Tribunal**