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-

Rons Backhoe Ltd.

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Fernanda Martins
FILE NO.:	99/13
DATE OF DECISION:	March 29, 1999

DECISION

OVERVIEW

This is an appeal by Rons Backhoe Ltd., 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 October 26, 1998. The Director found that the employer, Rons Backhoe Ltd. ("Rons Backhoe"), had contravened sections 17(1), 40(1) and (2), 44, 58(1) and (3) of the *Act* when it did not pay Anthony E. Swiston for the time he spent driving the employer's vehicle to various worksites, did not pay for overtime, did not pay for statutory holidays and did not pay annual vacation pay. The Director ordered Rons Backhoe to pay $9,255.42.

The Determination was issued on October 26, 1998 with a deadline for appeal of November 18, 1998. Rons Backhoe appealed the determination on January 11, 1999 with an explanation for delay.

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.

ISSUES 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, the employer states:

> The Determination was mailed to the previous address so we were not able to get it. The first time we found out about it was in December just before christmas [sic], we contacted Ms. Bellamore's office right away, unfortunately she was on holiday and wont [sic] be back till January the 4th, 1999, we tried to leave the message to the operator but she told us to leave a message to Ms. Bellamore's answering machine in which at that time did not allow us to leave a message but to call back on January the 4th. We called her when she came back to work, and she explained that what happened was, she sent every thing to our old address and it was not claimed. And she made her decision based on that. In our letter dated June 12th, (attached herein, labelled as Annex A), which we faxed to her and she received on June15th 1998 showed our new address, along with that, we mailed a

> little notice of our change of address (attached herein, labelled as Annex B) for everybody's attention.

In her written submissions to the Tribunal dated January 27, 1999 the Director's delegate agreed that she received a faxed copy of the employer's letter dated June 12, 1998. She enclosed a copy of the letter and pointed out that the address at the top of the page was not clear and the new address was not stated in the body of the letter. She indicated that she did not have a notice of a new address in her file nor did she recall ever receiving such a notice from the Appellant. She performed a company search on June 2,1998 which showed that the address for Rons Backhoe Ltd. was 7818 Prince Albert Street, Vancouver.

In her determination the Delegate states that she had contacted the employer in writing on June 1, 1998 addressing concerns which he had raised regarding the complainant's allegations. The employer was given the opportunity to produce additional evidence on or before June 10, 1998. The delegate ended the letter by stating:

> In the absence of further evidence from you, this matter will be resolved upon you sending to my attention a cheque made payable to Anthony Swiston in the amount of $9033.52. If I have not heard from you by the date noted above I will issue a Determination without further notice to you.

The employer asked for additional time to make the reply and was told by the Director to make the request in writing. On June 12, 1998, the employer's lawyer, Ian W. Burroughs, wrote and requested "at minimum... a couple of weeks to review the materials and your calculations". Someone from the employer's office also wrote to the Director requesting an extension of time until July 6, 1998.

On June 17, 1998, the delegate forwarded information which had been requested by the employer's lawyer. She agreed to wait until July 6, 1998 for a response to her letter of June 1, 1998.

On July 6, 1998 the employer called the Director's delegate to advise that he had had surgery two weeks prior and needed more time to respond to the letter. He advised that he would be speaking with his lawyer and would have him call the delegate.

Since July 6, 1998, the employer did not provide any further information nor make any payment. The Determination was issued on October 26, 1998, more than three months later. In his appeal and submissions, the employer does not explain why he never responded to the Director.

In her submissions, the Director set out that she had sent a Determination package to one of the directors/officers of Rons Backhoe, Sewa Dhanda . That package was received by Neelam Dhanda on November 9, 1998.

The Director submitted that on November 24, 1998, the Determination packages sent to both Rons Backhoe Ltd. and to Ranjit Dhanda, director/officer of Rons Backhoe Ltd. were returned by Canada Post as "unclaimed". She argued that if Canada Post had been instructed to forward the employer's mail then the two envelopes would have been delivered to him as there was nothing on the envelopes which indicated that the employer had moved.

On November 25, 1998, a Demand Notice was sent to the employer's bank requesting that the money owed as per the Determination be paid to the Director of Employment Standards. On December 10, 1998, the funds were received in the trust account of the Ministry of Labour Employment Standards Branch. On December 16, 1998, the funds were disbursed to Mr. Swiston via the Employment Standards Branch office in Burnaby where he picked up the cheque on December 29, 1998.

The Director set out that the employer contacted her on January 5, 1999 and asked if the matter could be resolved. He told her that his business address had changed. She requested another company search and saw that , as of January 5, 1999, the company address with the Registrar of Companies showed the Registered and Records office as well as the address for Ranjit Dhanda, director/officer of the company both as 7818 Prince Albert Street, Vancouver.

The Delegate states that she was on vacation from December 21, 1998 and returned to work on January 4, 1999. She points out that in the employer's reasons for appeal he claims that he found out about the Determination "in December just before Christmas" and that this does not seem logical given that his bank had withdrawn $9,302,99 from his account before December 10, 1988 when the money was deposited into the Employment Standards Trust Account. The employer does not address this in his reply to the Director's submissions.

The Director argues that either the employer did not notify the Post Office of the change of address or a mistake was made by Canada Post. In his submissions received by the Tribunal on February 25, 1999, the employer claims that he did not inform Canada Post of his change of address because he strongly believed that he had informed everyone that he had moved to a new location. The employer submits that :

> We only found out that the change of address in corporate registry which supposedly was sole responsibility of our accountant was left undone.

The employer argues that when the Determination was sent to his old address twice and was unclaimed, he should have been contacted on the phone since he had discussed the matter with the delegate on the phone before and the delegate had his cellular and office telephone numbers which had remained the same.

The Director argues that a copy of the Determination was received by one of the directors/officers of the company on November 9, 1998, therefore, the company had

knowledge of the Determination. The Appellant's response to this is that Sewa Dhanda was no longer a director of Rons Backhoe since February, 1998 and the employer's accountant failed to register or file any annual reports to this effect.

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.

These relatively short time limits are consistent with one of the purposes of the *Act* which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act.* It is in the interest of all parties to have complaints and appeals dealt with promptly. (*Tang (Re)* BC EST #D211/96 , August 9, 1996)

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 Rons Backhoe appealed the Determination by facsimile on January 11, 1999 after the deadline of November 18, 1998.

The onus for proving that the time period for appeal should be extended is on the appellant employer.

Section 77 of the *Act* provides that if an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

In this case the Director made more than reasonable efforts to provide Rons Backhoe with the opportunity to respond. In her letter of June 1, 1998, to the employer the Director carefully explained her findings after reviewing information she had received from both parties. She enclosed copies of all relevant sections of the *Act* and she enclosed all the calculations used to arrive at the total owed to the complainant. She then allowed the employer an extension to reply and then a further extension when she was told that the employer's lawyer would be contacting her . I have no doubt that the appellant was aware that it was his responsibility to provide further evidence to support his position and that he knew a Determination would be issued imminently. As stated earlier, the letter clearly set out that if the Director did not hear from the employer a determination would be issued without further notice to him.

Section 81(1) of the *Act* provides that on making a determination under the *Act*, the director must serve any person named in the determination with a copy of the determination .

Section 122(1) of the *Act* provides that a Determination that is required to be served on a person under the *Act* is deemed to have been served if either served on the person or sent by registered mail to the person's last known address.

Section 122(2) of the *Act* states that if service is by registered mail, the Determination is deemed to be served 8 days after it is deposited in a Canada Post Office.

The letter which the appellant sent to the director on June 12, 1998 to request an extension does have a different address from that used by the director but the tops of the letters and numbers in the return address are missing and difficult to read and in the body of the letter no attention is drawn to the fact that the address has changed although it is stated " we have just got hold of your letter last Tuesday night, when we happen to drop by to our previous house at Prince Albert."

I accept that the Director was in compliance with Sections 122(1) and (2) of the *Act.* The Director argues that when issuing Determinations, the address of most importance to Delegates is the Registered and Records office. The Corporate Registry searches show that, as of January 5, 1999, the employer still had not updated the Corporate Registry. The employer argues that it was his accountant's responsibility to make this change and he had neglected to make it. I find that the Director is entitled to rely on the address she had and which she then confirmed with the Corporate Registry. It was entirely the employer's responsibility to ensure that the registry has its accurate address. I accept that the Director never received the notice of change of address over the appellant's statement that he had informed all the people he dealt with of the change of address; especially when no efforts were made to advise the registry. I reject the employer's argument that the Director should have contacted him by telephone. It was his responsibility to maintain contact with the Director if he was indeed interested in defending the complainant's allegations.

The criteria which govern a request for an extension of the time within which an 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 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.

I find that the appellant's explanation for the delay is neither reasonable nor credible. The appellant was aware a determination would be issued without his reply. He was aware of what the findings in the determination would be. The employer had benefit of counsel and was given more than ample time to respond. The employer has not addressed his failure to respond. Also, he is vague with regard to the date he actually learned of the determination. He claims it was in December just before Christmas, although the funds were removed from his account on or before December 10, 1998, two weeks before Christmas. I do not accept that the employer acted immediately upon learning of the determination.

It is difficult for me to make a finding with regard to the employer's genuine and bona fide intention to appeal this determination. The findings in the determination were essentially the findings in the letter of June1, 1998, which he had received from the Director. He never provided the evidence he said he would when he had plenty of opportunity to do so. The Appellant has not provided any evidence regarding his intention to appeal the determination.

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

Mr. Swiston would be unduly prejudiced by an extension of the appeal in so far as he received the funds on December 29, 1998. Mr. Swiston's complaint was received by the Director on February 5, 1997. There should be no further delay.

With regard to whether there is a strong *prima facie* case, I can place no weight on this criterion in this particular appeal. The employer is submitting evidence at this stage which should have been submitted to the Director when he was given the opportunity to do so. The Tribunal does not favour the use of the appeal process to make the case that the employer had the opportunity to make during the investigation by the Director. In *Tri-West Tractor Ltd*. (BC EST #D268/96) the Tribunal set out:

> This Tribunal will not allow appellants to sit in the weeds, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies.

> The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.

ORDER

The Appellant's request to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to Section 114 of the *Act.*

_____

Fernanda M. R. Martins
Adjudicator
Employment Standards Tribunal