Employment Standards TRIBUNAL

An appeal

- by -

Malibu Rayz Tanning Ltd.
("Malibu")

- 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

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2004A/61

DATE OF DECISION: July 5, 2004

DECISION

SUBMISSIONS

John Boem	on behalf of Malibu Rayz Tanning Ltd.
Ken Elchuk	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Malibu Rayz Tanning Ltd. ("Malibu") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") on February 25, 2004 in favour of one Veronica Nilsen ("Nilsen"). The time limit for filing an appeal of the Determination expired on April 5, 2004. The Tribunal received an appeal from Malibu on April 14, 2004.

On April 28, 2004 the Delegate and Nilsen were invited to make submissions on the question whether the Tribunal should exercise its discretion under Section 109(1)(b) of the Act and extend the time period for requesting an appeal. The Delegate made a submission to the Tribunal dated May 6, 2004 asserting that no extension should be given (the "Delegate's Submission").

By letter dated May 20, 2004, the Tribunal forwarded a copy of the Delegate's Submission to Malibu and Nilsen and invited them to make any further replies by June 1, 2004. No replies were received.

I have considered the contents of the Appeal Form submitted on behalf of Malibu, the Determination and Reasons for the Determination dated February 25, 2004, the Delegate's Submission dated May 6, 2004, and the correspondence to which I have referred.

ISSUE TO BE DECIDED

Should the Tribunal extend the time period within which Malibu may request an appeal, notwithstanding it had expired when Malibu filed its Appeal Form on April 14, 2004?

FACTS

Nilsen filed a complaint against Malibu pursuant to Section 74 of the Act. The issues arising pursuant to that complaint were whether Malibu owed Nilsen wages, annual vacation pay, or other entitlements under the Act.

The Reasons for the Determination, and the Delegate's Submission reveal that:

- On November 13, 2003, a Notice of Mediation Session was sent to Malibu by registered mail advising Malibu of the mediation session scheduled for November 28, 2003. No one on behalf of Malibu attended that mediation;

- The delegate appointed to conduct the mediation contacted the employer later that day. A Mr. John Boem ("Boem"), a director of Malibu, advised that he had not received the Notice of Mediation Session. He also informed the delegate that the proper address for Malibu was 12098 – 96th Avenue in Surrey, British Columbia. The delegate then discovered that the Notice of Mediation Session had been mailed to an incorrect address, namely, 12090 – 96th Avenue in Surrey. The delegate sent an amended Notice of Mediation Session by fax to the employer advising of a mediation session scheduled for December 3, 2003. Malibu received the fax, but did not attend that mediation session either;

- On January 22, 2004 a Notice of Complaint Hearing was sent to Malibu by registered mail to the correct address at 12098 – 96th Avenue in Surrey, British Columbia. The Canada Post tracking record indicated that on January 23, 2004 the registered mail was received at the appropriate retail outlet but was returned "unclaimed". The unclaimed mail was then returned to the Employment Standards Branch and was received on February 9, 2004;

- On February 10, 2004 an Employment Standard Branch Assistant contacted Boem on his cellular telephone to determine if Malibu intended to attend the hearing. The Assistant verbally advised Boem of the date on which the hearing would occur, the time at which it would start, and the relevant venue. Boem advised that he should be able to attend the hearing. It was arranged that a copy of the Notice of Complaint Hearing would be sent to Malibu by fax. Later the same day, the Notice was sent to Malibu by fax, which fax was received;

- The Notice of Complaint Hearing set February 18, 2004 as the date for the hearing of the complaint, to commence at 9:00am. When the hearing date and time arrived, no one had as yet appeared on behalf of Malibu, notwithstanding that notice of the hearing had been provided to Malibu by registered mail, by fax and verbally by the Branch Assistant. At 9:00 a.m. and 9:15 a.m. the Branch Delegate attempted to contact Boem at both his business and cellular telephone numbers. A message was left for Boem reminding him that the hearing had been scheduled for 9:00 a.m. He was further advised that unless he contacted the Delegate by 9:15 a.m. the hearing would commence without his attendance. Boem did not contact the Delegate at that time, or later;

- The Determination issued on February 25, 2004 was served on Malibu by registered mail delivered to both 12090 and 12098 – 96th Avenue in Surrey, as well as to the Registered and Records offices shown for Malibu in a Corporate Registry search. The Determination was delivered to the appropriate Canada Post outlets for the 12090 and 12098 addresses but was returned to the Employment Standards Branch "unclaimed". Service on the Registered and Records office was accepted on March 1, 2004.

Boem delivered an Appeal Form to the Tribunal which was received on April 14, 2004. On that Appeal Form Boem noted his address to be 12098 – 96th Avenue. On the Appeal Form, Boem referred, in part, to the Branch's having a wrong address for Malibu, a lack of service, and his right to be heard as grounds for Malibu's appeal. In addition, he gave as reasons for Malibu's filing its appeal late that he had been traveling between Phoenix, Toronto, and Vancouver and that his mother had been suffering health problems.

ANALYSIS

Section 81(1) of the Act requires that on the making of a determination, the Director must serve any person named in the determination with a copy of the determination. One of the items that must be included in the determination served is a notification of the time limit and process for appealing the determination to the Tribunal. I note that the Reasons for the Determination dated February 25, 2004 include information advising that Malibu might appeal the Determination to the Tribunal by 4:30 p.m. on April 5, 2004.

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 it is served on the person, or sent by registered mail to the person's last known address. Section 122(2) of the Act provides that if service is by registered mail, the determination is deemed to be served 8 days after the determination is deposited in a Canada Post Office.

Section 112(3) of the Act sets out the time periods within which a person may appeal a determination. A person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 30 days after the date of service. The time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically by fax machine.

Boem suggests in the Appeal Form that Malibu was not properly served with relevant material, as the Director was relying on an incorrect address. While the material submitted suggests this may have been true when the first Notice of Mediation Session was forwarded on November 13, 2003, the record contains evidence sufficient to convince me that the documents which were forwarded thereafter, including the Determination, were directed to the correct address for Malibu at 12098 - 96th Avenue in Surrey.

In particular, the uncontradicted statements of the Delegate satisfy me that the Determination was deposited with Canada Post on February 27, 2004 for service on Malibu at its correct address at 12098 – 96th Avenue. Later, the Determination was returned to the Employment Standards Branch by Canada Post marked "unclaimed". The plain wording of Section 122(2) stipulates that if a determination is served by registered mail, it is deemed to be served 8 days after being deposited in a Canada Post Office, whether that is, whether it is claimed or not. The consequences of Section 122 of the Act cannot, therefore, be avoided by Malibu's neglecting or refusing to claim its registered mail. I am supported in this view by what was said in *#1 Low-Cost Moving & Hauling Ltd.* BCEST #D484/02.

In addition, the Delegate has further asserted that the Determination was also forwarded by registered mail to the Registered and Records offices shown for Malibu in a Corporate Registry search. While no material was submitted which established when this copy of the Determination was deposited at a Canada Post Office, the uncontradicted material submitted by the Delegate stated that the Determination was served on the Registered and Records office of Malibu on March 1, 2004, and that the service was accepted.

On these facts, I am satisfied that proper service of the Determination was effected on Malibu, and that its appeal was not properly filed until after the appeal period had expired.

The time limits within which one must file an appeal 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.

Section 109(1)(b) of the Act provides that the Tribunal may extend the time period for requesting an appeal even though the period has expired. That provision gives the Tribunal a discretion to extend the time limits for an appeal. However, the Tribunal will not grant an extension as a matter of course. Indeed, an extension is only granted where there are compelling reasons to do so. In every case the burden is on the appellant to show that the time period for an appeal should be extended. See in this regard *Niemisto* BCEST #D099/96 and *Tang* BCEST #D211/96.

The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered on applications of this sort:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing bone fide intention to appeal the determination;
- The respondent party and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent party will not be unduly prejudiced by the granting of an extension; and
- There is a strong prima facie case in favour of the appellant.

Having regard to these factors, it is my view that Malibu's request for an extension of time within which to file its appeal must be denied, for the following reasons.

First, no reasonable and credible explanation for the failure to request an appeal within the statutory limits has been provided. The Appeal Form suggests that Boem may have been traveling during the period in which the appeal should have been filed and that perhaps Boem's mother was suffering from health problems. However, no specific details were provided. Without more, I am not satisfied that Malibu was prevented from contacting the Tribunal about an appeal within time.

Second, no material has been provided on behalf of Malibu which demonstrates a genuine and ongoing bona fide intention to appeal the Determination, or that Nilsen and the Director were made aware of an intention to appeal within the time limited. Indeed, the preponderance of the material submitted demonstrates that Malibu had limited, if any, desire to participate in the process at all. No representative of Malibu attended either the Mediation Session or the Complaint Hearing, despite yeoman efforts on the part of the Employment Standards Branch to provide adequate notice.

The obligation is on an employer to exercise reasonable diligence in the pursuit of an appeal. In this case, Malibu has failed to persuade me that it has done so.

Finally, the material filed does not convince me that Malibu has established a strong prima facie case in its favour. The Appeal Form does include some entirely unsubstantiated allegations that Nilsen may have conducted herself inappropriately while she was a Malibu employee, but without further and better

particulars lending support to those allegations I must conclude that no prima facie case going to the merits has been made out with respect to them.

Malibu's principal contention on the appeal is that it was denied a reasonable opportunity to be heard during the complaint process. I disagree.

On January 20, 2004 a Notice of Complaint Hearing was sent to Malibu by registered mail. According to the Delegate's Submissions, the Notice was sent to Malibu's correct address at 12098 – 96th Avenue in Surrey. There is no suggestion in Malibu's Appeal Form that this Notice was sent to the wrong address.

When the Notice of Complaint Hearing was returned to the Branch, an Employment Standards Assistant contacted Boem on his cellular telephone and advised him verbally of the date and time for, and the place of, the hearing. The Determination states clearly that Boem advised the Assistant that he should be able to attend the hearing. This statement in the Determination is nowhere contradicted by Boem or any other representative of Malibu. I conclude, therefore, that Malibu has not established any prima facie case for a breach of natural justice or fairness.

For the above reasons, I have decided that it would be inappropriate for me to exercise my discretion to extend the time period for Malibu to request an appeal in this case.

ORDER

The request of Malibu to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to Section 114 of the Act. I order under Section 115 of the Act that the Determination dated February 25, 2004 be confirmed.

Robert Groves
Member
Employment Standards Tribunal