



An appeal

- by -

Chanel Foods Ltd. carrying on business as Subway  
("Chanel Foods")

– 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)

and

An application for suspension

- by -

Chanel Foods Ltd. carrying on business as Subway  
("Chanel Foods")

– of a Determination issued by –

The Director of Employment Standards  
(the "Director")

Pursuant to section 113 of the  
*Employment Standards Act* R.S.B.C. 1996, C. 113 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2010A/128 & 2010A/129

**DATE OF DECISION:** December 20, 2010

## DECISION

### SUBMISSIONS

Harry Toor	on behalf of Chanel Foods Ltd. carrying on business as Subway
Mandeep Kaur Jaswal	on her own behalf
J. Paul Harvey	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Chanel Foods Ltd. carrying on business as Subway (“Chanel Foods”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 13, 2009.
2. The Determination was made by the Director on a complaint filed by Mandeep Kaur Jaswal (“Jaswal”), who alleged Chanel Foods had contravened the *Act* by failing to pay regular wages, overtime wages, annual vacation pay and statutory holiday pay. The Determination found that Chanel Foods had contravened Part 3, section 18, Part 4, section 40, Part 5, section 45 and Part 7, section 58 of the *Act* and ordered Chanel Foods to pay Jaswal \$3,658.55, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Chanel Foods under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$4,658.55.
5. Chanel Foods has appealed the Determination on the grounds the Director erred in law, failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available when the Determination was issued. Chanel Foods seeks to have the Determination referred back to the Director. The appeal was filed late, and Chanel Foods has requested the time period for filing the appeal be extended.
6. Chanel Foods has also requested a suspension of the effect of the Determination under section 113 of the *Act*.
7. The Tribunal has discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

8. There is an initial issue about whether the Tribunal should extend the appeal period. In correspondence dated October 4, 2010, the Tribunal requested submissions on whether the appeal period should be extended. The parties have made submissions on that matter. If the Tribunal decides to accept the appeal, the issues raised in the appeal are whether the Director has erred in law or failed to observe principles of natural justice in making the Determination. There is also a question about whether there is additional evidence that will be

accepted by the Tribunal. As indicated by the Tribunal in its letter of October 4, 2010, if the appeal is accepted, the parties will be asked for further submissions on the merits of the appeal. The suspension request will have to be addressed if the appeal period is extended.

## THE FACTS

9. The facts relating to the matter of timeliness are as follows:
  1. The Determination was issued on October 13, 2009.
  2. The Determination, which included a notice to the directors and officers of Chanel Foods explaining their personal liability under the *Act*, was sent by registered mail to the registered and records office of the company and to the directors and officer listed in the provincial Corporate Registry. The registered mail was accepted and signed for by “H. Toor”.
  3. The Determination clearly noted that any appeal of the Determination was required to be delivered to the offices of the Tribunal by 4:30 pm on November 20, 2009.
  4. No appeal was delivered to the Tribunal on that date.
  5. In April 2010, Harry Toor (“Mr. Toor”), on behalf of Chanel Foods, prepared a letter addressed to the Tribunal, asking the Determination be set aside and reviewed, citing ten reasons why the Tribunal should do that. The letter to the Tribunal may have been prompted by the Director having commenced collection proceedings on the Determination. There is no record the Tribunal received such a letter.
  6. The letter was apparently also sent to the Director, as it spurred a response from the Director which was received by the Tribunal on June 18, 2010.
  7. On June 24, 2010, the Tribunal corresponded with Mr. Toor, advising him no appeal had been received by the Tribunal, providing him with a copy of the Appeal Form and appeal guide and specifically referring him to the essential requirements of an appeal, with reference to the requirement in the circumstances of the immediate case to provide reasons when filing a late appeal.
  8. This appeal was delivered to the Tribunal on September 20, 2010 – 10 months after the time limited for appeal in section 112 of the *Act*.

## ARGUMENT

10. In this appeal, Chanel Foods has provided the following reasons for the late filing, which I set out in their entirety:
  1. Trying to deal with the Director has been impossible.
  2. The director was more interested in holding up the previous officers decision, than to re look at the file.
  3. I did send in an appeal, still waiting to hear further on that.
11. The Director says the Tribunal should not accept the late appeal: the Determination was properly served on Chanel Foods and was received by Mr. Toor; it clearly indicates the time limited for delivering an appeal; the length of the delay is substantial; and Chanel Foods failed or refused to participate in the investigation, including failing to comply with a Demand for Employer Documents. The Director expresses some doubt

about the effect of the documents provided by Chanel Foods with the appeal on the conclusions reached in the Determination.

12. Jaswal has also replied to the appeal. She says Mr. Toor is simply trying to delay the process and has submitted no good reason why the Determination should be reviewed.

## ANALYSIS

13. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

14. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST # D 099/96. The following criteria should be satisfied to grant an extension:

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 the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension;
5. There is a strong *prima facie* case in favour of the appellant.

15. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.

16. In this case, I find no reason to extend the time limited for appeal. The delay has been lengthy; there is no indication of an ongoing intention to appeal the Determination; the attempt to generate some review of the Determination appears to have been coincidental with proceedings by the Director to enforce the Determination; any further delay unduly prejudices Jaswal, who has had the benefit of a Determination for well over a year; no *prima facie* case is shown in the appeal. On this latter point, I take into account the failure or refusal of Chanel Foods to participate in the investigation or comply with efforts made by the Director to obtain production of the employer's records for Jaswal's employment.

17. For these reasons, the application to extend the appeal period is denied. The appeal is dismissed.

18. In light of the result of this appeal, there is no need to address the request for a suspension of the effect of the Determination.

**ORDER**

- <sup>19</sup>. Pursuant to section 115 of the *Act*, I order the Determination dated October 13, 2009, be confirmed in the amount of \$4,658.55, together with any interest that has accrued under Section 88.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**