

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

Suraj Sewak, Director/Officer of Majestic Gateway Travel Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/112

DATE OF DECISION: April 2, 1998

DECISION

APPEARANCES/SUBMISSIONS

Ms. Suraj Sewak on behalf of herself

Ms. Diane H. MacLean on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by the Ms. Sewak, pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued on December 9, 1997 which determined that a former employee, Mr. Deo Sharma, was owed regular wages, vacation pay and compensation for length of service, a total of \$2,017.56.

Ms. Sewak is a director of Majestic Gateway Travel Ltd. (“Majestic” or the “Employer”). Mr. Sharma worked for the Employer between January and April 30, 1996. He was off work due to illness after that date. After the termination of his employment on May 4, 1996, he filed a complaint with the Employment Standards Branch. The Director’s delegate contacted the Employer in response to the complaint and the Employer sent copies of records which enabled the delegate to calculate certain amounts owing to the complainant. Subsequently, on March 13, 1997, the delegate wrote to the Employer for further information with respect to when Mr. Sharma was absent from work, money owing to the employer and whether the Employer condoned Mr. Sharma’s behaviour in borrowing money from the Employer. When there was no response to the letter requesting further information, the Director’s delegate left messages on the Employer’s answering machine on two occasions in May 1997. After that time, the telephone number was out of service. In August 1997, the delegate contacted Ms. Sewak at her place of employment. Ms. Sewak explained that she had neither received the letter nor the telephone messages. The March 13 letter was re-sent to her home address via registered mail on August 7, 1997. It was returned “unclaimed”. The Director’s delegate sent the Determination to Ms. Sewak’s home address by registered mail on December 9, 1997 and, subsequently, sent several final notices, also by registered mail. These were returned “unclaimed”.

The delegate accepted the Employer’s information that Mr. Sharma’s monthly salary was \$2,200 and found the employee entitled to regular wages owing, statutory vacation pay and one week’s wages for compensation for length of service. The delegate did not accept that amounts should be deducted for undocumented absences from work, lateness and money owing to the Employer on account of unauthorized long distance telephone calls and money which the Employer alleged that the employee had failed to remit from customers. The delegate noted that the employee’s conduct, in not remitting money from customers to the Employer, in the absence of condonation, could constitute just cause for termination. Since the Employer failed to participate in the investigation, the delegate was not able to determine if the Employer had just cause and, in the result, the employee was entitled to compensation for length of service. The delegate found that Section 96 of the *Act*, which provides for liability of officers and directors, applied to Ms. Sewak.

Ms. Sewak argues that the Determination is wrong. In her appeal dated February 20, 1998, Ms. Sewak claims that she did not know of the Determination until her bank account was frozen at the request of Director. She contacted the Director's delegate and received copies of the correspondence. As the date of the Determination is December 9 1997, Ms. Sewak's appeal is filed outside the time limit set out in Section 112(2) of the *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the Tribunal should entertain the appeal in these circumstances, *i.e.*, whether the Tribunal should exercise its discretion to extend the time limit for filing an appeal where the appellant was served by registered mail but claims she did not receive the Determination.

ANALYSIS

Section 112(2) of the *Act* provides that a person served by registered mail with a determination may file an appeal within 15 days after the date of service. Where, the circumstances are such that the Employer may not have received the Demand because it was not served as required by Section 122(1) of the *Act*, that is, either "served on the person" or "sent by registered mail to the person's last known address", the determination cannot stand. In this case, however, the Determination was served by registered mail to the last known address of Ms. Sewak.

Section 109(1)(b) of the *Act* gives the Tribunal the discretion to extend the time period for requesting an appeal even though the period has expired. In the case at hand, there is no dispute that the Determination was sent by registered mail to Ms. Sewak. She claims that she never received it. While I am sympathetic to Ms. Sewak's position on the merits of the appeal, I am not persuaded that the Tribunal should consider the appeal. As set out in the Determination and the Director's submission, the Director's delegate went to considerable effort to contact Ms. Sewak and the Employer with respect to the matters in the Determination. The March 13, 1997 requesting further information was sent to the Employer's premises. The Director's delegate left telephone messages with the Employer. The Employer did not respond to either the letter or the messages. Ms. Sewak's explanation was that the company had moved. The March 13 letter was re-sent in August by registered mail to the address provided in a corporate search. Ms. Sewak confirmed that as the correct address. Nevertheless, she did not respond. Similarly, she did not respond to the Determination in a timely fashion. In addition, several notices and final notices were sent to Ms. Sewak. This is not in dispute. In these circumstances, I am not prepared to extend the time for filing the appeal.

Moreover, I agree with my colleagues in *Kaiser Stables*, BC EST #D058/97, and numerous other cases, that the Tribunal will not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. Ms. Sewak now attempts to substantiate the Employer's defence to the Determination. These issues could have been

addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage.

For the above reasons, the appeal must fail.

ORDER

Pursuant to Section 115 of the Act, I order that the Determination in this matter, dated December 9, 1997 be confirmed and the amount of the Determination paid out to the employee together with such interest as may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal