

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 -

Tallheo Marine Ltd.
("Tallheo Marine" or the "employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/658

DATE OF DECISION: April 4, 2000

DECISION

OVERVIEW

Tallheo Marine Ltd. (“Tallheo Marine” or the “employer”) appeals, pursuant to section 112 of the *Employment Standards Act* (the “Act”), a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 9th, 1999 under file number ER 92-432 (the “Determination”).

The Director’s delegate determined that Tallheo Marine owed its former employees, Marnie Eyford (“Eyford”) and Bernard Guay (“Guay”), a total sum of \$5,749.72 on account of unpaid wages and unlawful wage deductions (Eyford) and unpaid wages and compensation for a section 8 misrepresentation (Guay). By way of the Determination, the delegate awarded Eyford \$4,685.05 and Guay \$1,064.67; both sums include interest calculated pursuant to section 88 of the *Act*.

ISSUE TO BE DECIDED

Pursuant to section 122(1)(b) of the *Act*, the Determination was served on the employer by registered mail. The Determination was actually received by the employer’s principal on October 8th, 1999. Section 112(2)(a) of the *Act* states that when a Determination has been served by registered mail, an appeal to the Tribunal must be filed “within 15 days after the date of service”.

Accordingly, Tallheo Marine’s appeal period expired on October 23rd, 1999 although, since that day was a Saturday, the final day extended to the next business day, namely, October 25th. In fact, Tallheo Marine’s appeal was not filed until November 4th, 1999.

Tallheo Marine now seeks, pursuant to section 109(1)(b) of the *Act*, an extension of the appeal period. *These reasons address only this latter application.*

FACTS AND ANALYSIS

The Tribunal’s Acting Chair wrote to all interested parties on November 8th, 1999 requesting that written submissions be filed with the Tribunal regarding the timeliness of this appeal. Both Eyford and Guay filed submissions opposing Tallheo Marine’s application for an extension of the appeal period. Tallheo Marine, in a submission filed by its solicitor, asserts that:

- the original Determination, which was received on October 8th, 1999 did not contain a notice setting out the appeal deadline;
- upon receipt of the Determination, the appellant’s principal contacted the nearest Employment Standards Branch office and was advised that the appeal period had already expired on October 4th;
- somewhat inadvertently (or so it would appear: “It was only in passing that [the appellant] contacted my office...”), the Determination came to the

appellant's solicitor's attention who advised that an appeal should be filed forthwith; the solicitor promptly did so (the next business day).

The Director's delegate opposes the appellant's application and notes that:

- the employer seemingly refused to meaningfully participate in the original investigation of the two employees' unpaid wage complaints--the employer ignored voice mail messages, correspondence and demand notices (one of which was sent by registered mail) forwarded to it;
- the Determination (along with a related section 96 determination issued against the employer's principal, Mr. Jim Newkirk) was forwarded, by registered mail, to Tallheo Marine on September 10th, 1999.

[I should note that by reason of the "deemed service" provision--section 122(2) of the *Act*--the Determination was legally served on the employer as of September 18th, 1999; thus, the appeal period actually expired not on October 25th but, rather, on Monday, October 4th, 1999, one month prior to the actual filing of the within appeal.]

- it can be reasonably inferred from the employer's inaction that it deliberately ignored the delegate during his investigation and did not diligently proceed with an appeal once it learned that a Determination had been issued against it.

I am not satisfied that this is a proper case for the exercise of the Tribunal's discretionary authority to extend an appeal period. It seems apparent that the employer's principal did not consider the delegate's various inquiries during the course of his investigation to be worthy of any sort of response. I am satisfied that the employer knew that the delegate was conducting an investigation regarding Eyford and Guay's unpaid wage complaints but chose to ignore the entire matter. Accordingly, given the Tribunal's decisions in cases such as *Tri-West Tractor Ltd.* (B.C.E.S.T. No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. No. D058/97) I seriously doubt whether this appeal has any reasonable prospect of success.

Further, and more importantly, even when the Determination did come to Tallheo Marine's attention (certainly by no later than October 8th, 1999), it did not proceed diligently with its appeal. Tallheo Marine was correctly advised by the Employment Standards Branch that the appeal period had already expired. Even so, upon actual receipt of the Determination, Tallheo Marine's principal did not immediately seek legal advice, did not immediately attempt to file an appeal or attempt to contact the Tribunal and, seemingly, only raised the matter--nearly one month later--in a rather oblique fashion with its solicitor. Having considered the relevant "section 109(1)(b)" criteria set out in various Tribunal decisions commencing with *Niemisto* (B.C.E.S.T. Decision No. 099/96), none of which has been satisfied, I am of the view that the present application for an extension of the appeal period must be refused.

ORDER

The appellant's request for an extension of the appeal period is refused. Accordingly, pursuant to subsections 114(1)(a) and (c) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal