

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 -

William Street
(“Street”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: David Stevenson

FILE NO.: 1999/121

DATE OF DECISION: April 20, 1999

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by William Street (“Street”) of a Determination a delegate of the Director of Employment Standards (the “Director”) dated January 22, 1999. The Determination concluded that Street was owed \$873.43 by his former employer, Carl Cahoose a.k.a. Archie Cahoose operating as Ta Ka Kaw Ten Holdings (“Cahoose”). Street says the calculation of wages owed done by the Director is wrong and he is still owed \$314.07.

There is a preliminary issue about the timeliness of the appeal.

ISSUE TO BE DECIDED

The first issue raised by these appeals is whether the Tribunal should exercise its discretion in favour of Street and extend the time limited for requesting an appeal under the *Act*. The second issue, in the event the Tribunal does extend the time limits, is whether Street has demonstrated the calculation by the Director of wages owed is wrong in fact or in law.

FACTS

The facts relating to the complaint are set out in the Determination and need not be repeated here in their entirety. For the purpose of this appeal, the significant findings of fact are found in the following passages from the determination:

Neither the respondent nor the complainant have supplied any records to the investigating officer to verify their respective positions. . . .

The finding here is that we cannot accept the claims of either the respondent or the complainant, except where their claims benefit the other party.

The Determination was issued January 22, 1999. Following its issuance, Street called the investigating officer to complain about the result. In response, the investigating officer wrote a letter to Street, part of which states:

If you do have records that were recorded at the relevant times, please submit copies of them along with your summary and the completed appeal form (see attached) to the Employment Standards Tribunal.

When I receive a copy (of your records) from the Tribunal, or from yourself, I will carefully review them.

On February 5, 1999, Street delivered his appeal to the Branch office in Prince George to the attention of the investigating officer. On February 22, 1999, the investigating officer wrote another letter to Street, which stated:

Further to my letter of January 29, 1999, this letter is to advise you that the Employment Standards Tribunal has still not received an appeal from you.

As I stated in my letter, you were required to send your appeal to the Tribunal by February 15, 1999. The address and telephone number of the Tribunal are both listed at the top of the appeal form. We at the Employment Standards Branch do not send in appeals on behalf of any party, but rather, anyone who wishes to appeal must do so themselves by following the instructions on the appeal form.

If you need assistance with this matter you may wish to call the Tribunal . . .

The appeal was delivered by facsimile to the Tribunal on March 2, 1999. The cover message says, in part:

I inadvertently (sic) sent this copy to . . . Prince George, B.C. Feb. 05 1999 where this sat . . . for 3 weeks when he could have faxed me back at the top of this letter head.

In a submission to the Tribunal on the appeal, the Director states:

Although it is felt that the appellant should have known where to send the appeal, we are ready to accept that he sincerely believed he was taking the action required to appeal, when he sent the documents to our office. On this basis, we have no objection if the Tribunal decides to accept the appeal as timely.

I infer from this submission that the Director, at least, does not feel prejudiced by the late filing of the appeal with the Tribunal. Cahoose raise any argument about the timeliness of the appeal and answers the appeal on its merits.

ANALYSIS

The Tribunal has indicated on several occasions that there is an obligation on a person served with a Determination to exercise reasonable diligence in filing an appeal. There is a discretion vested in the Tribunal to extend the time limited for requesting an appeal:

109. (1) *In addition to its powers under section 108 and Part 13, the tribunal may*

(b) extend the time period for requesting an appeal even though the period has expired;

The Tribunal has been reluctant to exercise this area of discretion unless there is a compelling explanation for the delay and there is no actual prejudice to any of the other parties affected by the Determination. The policy reasons for this approach are founded on the purposes stated in Section 2 of the *Act*, most specifically paragraph (d) which states:

2. *The purposes of this Act are to*

(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,

The facts of this case suggest that neither party has been prejudiced by the delay in filing the request for an appeal. In the absence of any apparent prejudice to any of the other parties, if Street's explanation for the delay in requesting an appeal to the Tribunal is sufficiently compelling, the Tribunal would be justified in exercising our discretion in his favour. In the circumstances of this case, I am satisfied with his explanation. The circumstances show that Street intended to appeal and that he was reasonably diligent in filing his appeal request. Of primary significance is the very clear evidence that Street believed he had, in fact, met his obligation when he sent the appeal to the Branch office in Prince George within the time period. The obligation on a person to exercise reasonable diligence in filing an appeal does not demand perfection in every sense, and the Tribunal must be prepared to adjust to obvious misunderstandings when called upon to decide how their discretion under the *Act* will be exercised.

Turning to the merits of the appeal, I am not convinced, upon examination of the material submitted by Street with the appeal, that he has met the burden of demonstrating the Determination was wrong. The burden resting on Street in this case is described in the following statement from the Tribunal's decision *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98:

After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the

contravention is unavailable or incomplete. Consistent with the statutory objective of achieving “efficient” resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing. If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker’s Pub and Grill*, BC EST #D511/98).

Street has provided no information with the appeal that would suggest or establish the conclusion of the Director was manifestly unfair or unreasonable. I do not consider the document dated January 28, 1999, which was quite clearly created for the sole purpose of the appeal, to be the any evidence at all of the day and hours of works or of the actual work performed by Street. The information on this document continues to be unsupported by any original or contemporaneous records and does not provide a reason to reject the conclusions found in the Determination that no records were provided by Street and in the absence of records neither party’s position was particularly believable.

Accordingly, the appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated January 22, 1999 confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal