

**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 -

John Chorney  
("Chorney")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2000/140

**DATE OF DECISION:** May 2, 2000

**DECISION**

**DECISION**

**OVERVIEW**

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by John Chorney (“Chorney”) of a Determination that was issued on February 8, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination addressed a complaint that had been filed by Chorney against his former employer, New Chelsea Society (“New Chelsea”), for money alleged to be owing to him. The Determination found that the only matter in the complaint falling within the jurisdiction of the *Act* was Chorney’s claim for annual vacation pay on a money paid to him for the period from August 6, 1997 to August 31, 1998. The Director concluded, however, that the money paid to Chorney during this period was not wages for the purposes of the *Act* and consequently no vacation pay was owed on it.

The appeal was not filed within the time limits set out in the *Act* and, as a preliminary matter, the Tribunal must consider whether we should exercise our discretion under Section 109(1)(b) of the *Act* to allow this appeal to proceed on its merits.

**ISSUES TO BE DECIDED**

The issue to be decided in this decision is whether the Tribunal should extend the time for filing this appeal.

**FACTS**

The Determination was issued on February 8, 2000 and was probably received by Chorney on that date. The Determination clearly notified Chorney that any appeal of the Determination was required to be delivered to the Tribunal no later than March 2, 2000.

On March 2, 2000, Chorney called the Tribunal office and requested an extension of the filing date to March 3, 2000. He indicated that he had been ill. He was given an additional day to deliver the appeal to the Tribunal. The appeal was not delivered to the Tribunal on that day. In his submission, Chorney provides the following explanation:

. . . while driving to Vancouver this Friday afternoon I encountered extremely heavy traffic conjection [sic] and by the time I arrived at the Tribunal’s office it was already closed for the weekend. I did however deliver my appeal the following Monday, . . .

The appeal was received by the Tribunal at approximately 2:00 pm Monday afternoon, March 6, 2000.

**ANALYSIS**

The Tribunal has a discretion under section 109(1)(b) to extend the time limits for requesting an appeal.

In *Christopher Rasmussen*, BC EST #D341/99, the Tribunal noted that its discretion to extend the time limited for requesting an appeal is granted only on rare occasions and outlined the matters it would consider when exercising that discretion:

. . . to obtain an extension of these time limits, an appellant is required to prove that; (1) there is a reasonable and credible explanation for the failure to file within the time period; (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 that intention; (4) the respondent party will not be prejudiced by the granting of an extension; (5) there is a strong prima facie case in favour of the appellant.

There is an obligation on the party wishing to appeal a Determination to exercise due diligence in pursuit of that appeal.

The delay in this case was minimal. Chorney has provided an explanation for his failure to deliver the appeal on March 2. The appeal was delivered on the next business day. The Director, at least, knew before the Determination was issued that Chorney intended to appeal. Neither the Director nor New Chelsea are prejudiced by the granting of an extension. The issue on appeal raises a significant question under the *Act* about whether money paid to a former employee to settle a wrongful dismissal claim is, in whole or in part, “wages” for the purpose of the *Act*.

On balance, I am satisfied that this is an appropriate case to exercise the Tribunal's discretion under Section 109(1)(b) of the *Act* to enlarge the time limits for requesting an appeal.

The Tribunal will consider the merits of the appeal.

---

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