

An appeal

- by -

Fiction Restaurant Ltd.

- 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

**TRIBUNAL MEMBER:** Robert Groves

**FILE No.:** 2004A/141

**DATE OF DECISION:** October 26, 2004

## DECISION

### OVERVIEW

This is an appeal by Fiction Restaurant Ltd. (“Fiction”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on June 29, 2004 ordering Fiction to pay an administrative penalty of \$500.00 for contravening Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) when it failed to produce employer records as required under Section 85(1)(f) of the *Act*.

The assessment of the administrative penalty was made in accordance with Section 29 of the *Regulation*, and arose as a result of a complaint filed with the Employment Standards Branch by one Jeff Wernbacher (“*Wernbacher*”) claiming that Fiction had contravened Sections 18, 21, 25 and 58 of the *Act*.

While Fiction delivered a request for an appeal in Form 1 to the Tribunal before the close of business on August 6, 2004, the last day of the time period within which the *Determination* stated an appeal could be filed under the *Act*, the Form 1 was incomplete, and it was not accompanied by the materials in support of the request specified in the Form 1, or the Rules of Procedure of the Tribunal concerning appeals. Fiction did not deliver a completed Form 1, and the other documents required to perfect its appeal, until August 13, 2004.

On August 16, 2004, the Tribunal invited the *Delegate* to make submissions on the question whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and extend the time period for requesting an appeal. The *Delegate* delivered a submission to the Tribunal dated August 31, 2004 asserting that no extension should be granted (the “*Delegate’s Submission*”).

By letter dated September 1, 2004, the Tribunal forwarded a copy of the *Delegate’s Submission* to Fiction and invited it to make any further reply by September 16, 2004. No reply was received.

On September 20, 2004, the Tribunal gave notice that the issue whether the deadline for requesting an appeal should be extended would be decided on the basis of the written submissions received from the parties.

### ISSUE TO BE DECIDED

Should the Tribunal extend the time period within which Fiction may request an appeal to August 13, 2004, the date Fiction delivered a proper request to the Tribunal?

### FACTS

The record provided to the Tribunal reveals the following:

- Wernbacher having filed a complaint, the *Delegate* contacted the principal of Fiction, one Sean Sherwood (“*Sherwood*”) on March 18, 2004 and, *inter alia*, requested Fiction’s response to the complaint, and “records”.

- Having received no response by April 19, 2004, the Delegate telephoned the restaurant premises operated by Fiction and requested of an employee that Sherwood call the Delegate. Sherwood did not call, and on April 27, 2004 the Delegate sent a registered letter to Fiction enclosing a Demand for Employer Records pursuant to Section 85 of the *Act*, with a stipulated return date of May 17, 2004. The Demand stated that a failure to produce the records would result in a determination being issued which, if a contravention of the *Act* were found to have occurred, would result in the imposition of an administrative penalty of at least \$500.00.
- The records did not arrive by May 17, 2004. On May 18, 2004 the Delegate left another message for Sherwood to call.
- On May 20, 2004 the April 27, 2004 registered letter was returned to the Branch, marked “unclaimed”. The Delegate telephoned the Fiction premises again on May 21 and 27, 2004, leaving messages for Sherwood.
- On June 1, 2004, Sherwood left a message to return his call. On either June 2 or 3, 2004, the Delegate reached Sherwood on his cell phone. According to the Delegate, Sherwood explained that “no one picked up registered mail as the restaurant didn’t open until later in the day and that in any event registered mail usually meant bad news.” Sherwood promised a response and the records.
- On June 10, 2004, the Delegate sent, by regular mail, a further letter to Fiction, attaching a copy of the April 27, 2004 correspondence, and advising that if Fiction did not supply the records within 10 days an administrative penalty of \$500.00 would be levied.
- No response or records having been received within the 10 days stipulated, the Delegate issued the Determination dated June 29, 2004 and forwarded copies by registered mail to Fiction’s business address, the registered and records office of the company, and to Sherwood’s personal address set out on the corporate search for Fiction the Delegate had obtained.
- Fiction’s registered and records office received the Determination on June 30, 2004. The copies of the Determination sent to Fiction’s business address, and to Sherwood’s home address, were returned “unclaimed”. The Delegate’s Submission states the return occurred on June 22, 2004, but this would seem to be impossible. I note that the documents attached to the Delegate’s Submission indicate the return occurred on July 22, 2004 and that the copies of the Determination were re-mailed by regular mail on August 3, 2004.
- Sherwood states that a copy of the Determination “arrived in the mail” on August 5, 2004, but since his business “is not one that conducts any business through the mail”, he did not open the mail until the afternoon of August 6, 2004, the last day on which the Determination indicated a timely appeal could have been requested. The instant Sherwood opened and read the Determination he telephoned the Tribunal and was advised to fax the Form 1 to the Tribunal office immediately, which he did.
- Some days later Sherwood was contacted by the Tribunal and advised that his Form 1 was incomplete, and that further material would be required. While the Form 1 delivered August 6, 2004 did indicate that the ground for the appeal was that there was a failure to observe the principles of natural justice, it did not set out the relevant facts, or identify the reasons for the

appeal as required by Section 5 of the Rules of Procedure of the Employment Standards Tribunal: Appeals.

- Thus informed, Sherwood delivered a second, and this time compliant, Form 1 on August 13, 2004.

## ANALYSIS

Section 81(1) of the *Act* requires that on the making of a determination, the Director must serve any person named in the determination with a copy of the determination. One of the items that must be included in the determination served is a notification of the time limit and process for appealing the determination to the Tribunal. In the case now before me, the Determination included information advising that Fiction might appeal the Determination to the Tribunal by 4:30 p.m. on August 6, 2004.

Section 122(1) of the *Act* provides that a determination that is required to be served on a person under the *Act* is deemed to have been served if it is served on the person, or sent by registered mail to the person's last known address. Section 122(2) of the *Act* provides that if service is by registered mail, the determination is deemed to be served 8 days after the determination is deposited in a Canada Post Office.

Section 112(3) of the *Act* sets out the time periods within which a person may appeal a determination. A person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 30 days after the date of service. The time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically by fax machine.

Here, the Determination was sent by registered mail to Fiction's proper business address, the registered and records office of the company, and to Sherwood's personal address set out on the corporate search for Fiction the Delegate had obtained. While the Delegate's Submission does not indicate the date on which these registered mailings occurred, there is evidence that the communication to the registered and records office was claimed on June 30, 2004. I infer from this that the registered mailings must have been deposited with the Canada Post Office no later than that date. The combined effect of Sections 122(2) and 109(3) therefore satisfies me that the incomplete Form 1 delivered by Sherwood to the Tribunal on August 6, 2004 was filed within time, but the second Form 1 and accompanying materials filed on August 13, 2004 were not.

The time limits within which one must file an appeal are consistent with one of the purposes of the legislative scheme, which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly.

Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time period for requesting an appeal even though the period has expired. That provision gives the Tribunal a discretion to extend the time limits for an appeal. However, the Tribunal will not grant an extension as a matter of course. Indeed, an extension is only granted where there are compelling reasons to do so. In every case the burden is on the appellant to show that the time period for an appeal should be extended. See in this regard Niemisto BCEST #D099/96 and Tang BCEST #D211/96.

The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered on applications of this sort:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing bone fide intention to appeal the determination;
- The respondent party and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent party will not be unduly prejudiced by the granting of an extension; and
- There is a strong prima facie case in favour of the appellant.

Having considered these factors, I have concluded, reluctantly, that Fiction's request for an extension of time within which to file its appeal should be allowed. I say reluctantly because the record discloses circumstances which argue cogently that an extension should be denied.

Sherwood's explanation for Fiction's failure to deliver a proper request for appeal in time is that he was unaware of the Determination until August 6, 2004, the last day on which a request for appeal could have been made, and that in his hurry to deliver a Form 1 to the Tribunal, he failed to complete it properly. While I accept Sherwood's explanation to be true, I do not find it to be reasonable.

Notice of the Determination was forwarded to Fiction by registered mail to its proper business address, to its registered and records office, and to Sherwood's residence. When some of these registered mailings were returned "unclaimed", the Delegate re-mailed them by ordinary mail. Sherwood acknowledges that he received the Determination in the mail on August 5, 2004, a full day before the deadline, but he was unaware of it because he did not open that mail until the next day. Earlier, he had told the Delegate that no one at Fiction picked up registered mail, at least in part because it "usually meant bad news".

Previous decisions of the Tribunal make it clear that the consequences of Section 122 of the *Act* cannot be avoided by Fiction's neglecting or refusing to claim its registered mail. See in this regard #1 Low-Cost Moving & Hauling Ltd. BCEST #D484/02.

In my opinion, Fiction's filing its request for appeal late was in large measure due to its neglecting or refusing to claim its registered mail, or to open its regular mail in a timely way. In the result, when Sherwood became aware of the Determination he was left with but a short period of time to make a request for appeal, and his attempt to do so on behalf of Fiction did not meet the requirements of the *Act* or the Tribunal's Rules of Procedure. Sherwood's neglect would appear to be particularly egregious because in his material submitted with his request for appeal on August 13, 2004 he stated that he did, in fact, receive notices from Canada Post saying he had mail "at a post office somewhere in the neighbourhood". However, it would appear he did not claim it. In my view, if Sherwood, or someone else on behalf of Fiction, had simply claimed its registered mail, or deigned to open and read its regular mail in a timely way, the problem of Fiction's delivering its request for appeal late may well have been avoided.

Having said this, it is clear that Fiction had a genuine and ongoing bona fide intention to appeal, from the first moment it had actual notice of the Determination. Indeed, Fiction did deliver a Form 1, albeit incomplete, before the appeal period had expired. In circumstances such as this, it is useful to recall the sentiments expressed in Street BCEST #D162/99:

*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.*

I am also unable to say that Wernbacher would be unduly prejudiced if the appeal were to proceed. The Determination related to a procedural matter involving Fiction and the Delegate, and imposed a penalty payable to the Director of Employment Standards. The investigation and adjudication of Wernbacher's complaint may proceed concurrently with any appeal of the Determination, and there is evidence that the Delegate is attempting to press on, which persuades me that extending the time for Fiction to appeal the Determination imposing the administrative penalty will not result in undue delay in the completion of the substantive elements of the process.

Finally, I have concluded that Fiction may have a strong prima facie case as a basis for supporting its application that the period within which it may request an appeal should be extended. It is true that in his first communication with Sherwood on March 18, 2004, the Delegate requested Fiction's employer records relating to Wernbacher, and he renewed that request on several occasions thereafter, without result. Indeed, it appears that as of the August 31, 2004 date of the Delegate's Submission in this matter Fiction had still not delivered the records.

Moreover, Sherwood says that all the "tools" the Delegate needed "were a telephone and one working finger" in order to achieve compliance. But the record shows that the Delegate did communicate at least twice by telephone with Sherwood, during which discussions he requested the employer records.

Further, on April 27, 2004, the Delegate forwarded by registered mail, to Fiction's correct business address, a Demand for Employer Records pursuant to Section 85 of the Act, with a stipulated return date of May 17, 2004. Section 122(2) of the *Act* specifies that since service was by registered mail, the Demand was deemed to be served 8 days after it was deposited in a Canada Post Office. No records were delivered in response to the Demand, notwithstanding that Sherwood received notices from Canada Post advising that he had mail.

What troubles me, however, is that it does not appear that the Delegate issued the Determination imposing the administrative penalty as a result of Fiction's failure to respond to the Demand for Employer Records sent on April 27, 2004, which stipulated a return date of May 17, 2004. Rather, the Determination was issued because Fiction did not respond to further correspondence from the Delegate dated June 10, 2004 advising that if Fiction did not supply the records within 10 days thereafter, an administrative penalty of \$500.00 would be levied. That June 10, 2004 correspondence was sent by regular mail, and there is no evidence that Fiction, Sherwood, or anyone else on behalf of the company ever received it.

As was stated in D.E. Installations Ltd. BCEST #D397/97 the Tribunal takes a strict view that fair procedures be followed when serving Determinations and Demands for Employer Records. Here, the deadline which caused the penalty was the 10 day deadline set out in the June 10, 2004 correspondence from the Delegate to Fiction. Since that correspondence was sent by regular mail, there is no deemed

service under the *Act*. In the absence of proof that Fiction received that correspondence, and therefore became aware of the final deadline, it is arguable that the administrative penalty was improperly imposed.

For these reasons, I have decided that it would be appropriate for me to exercise my discretion to extend the time within which Fiction may appeal the Determination.

### **ORDER**

The request of Fiction to extend the time period for requesting an appeal of the Determination to August 13, 2004 is allowed.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**