

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 -

Parsons Catering Ltd.
("Parsons")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE No.: 2000/193

DATE OF DECISION: May 8, 2000

DECISION

This is a decision based on written submissions by Steve Parsons for Parsons Catering Ltd. ("Parsons"), and Sharon L. Cott for the Director of Employment Standards.

OVERVIEW

On February 25, 2000, a delegate of Director of Employment Standards ("the Director") determined that Parsons had contravened Sections 17, 18, 36, 40 and 58 of the *Employment Standards Act* ("the Act") in failing to pay Emil Stauber ("Stauber") wages and overtime pay. The Director's delegate ordered Parsons to pay \$5,134.00 to the Director on behalf of Stauber.

Parsons filed a Notice of Appeal of the Determination on March 21, 2000, one day outside the time provided under Section 112 of the *Act*.

ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS

Stauber worked for Parsons from February 1 to 22, 2000. He claimed wages and overtime pay. Parsons claimed Stauber was hired as a manger at an annual salary, and not entitled to overtime wages. Parsons did not keep a record of hours worked.

Stauber alleged he was hired as a cook at a rate of pay of \$15.00 per hour, with an opportunity to become a manager at another location. He provided a copy of his daily hours of work to the delegate.

After investigating the complaint, interviewing two other employees, and reviewing the statements of four other employees, the delegate determined that Stauber was not a manager.

She found no evidence that demonstrated that Stauber had exercised any authority to act as a manager.

The delegate further determined that Stauber's primary employment duties did not consist of supervising and directing other employees, and therefore, that Stauber would not be defined as a manager. She therefore concluded that overtime pay was owed.

In his notice of appeal, Parsons stated that the appeal was one day late because his wife "underwent abdominal surgery 2 weeks ago and I have been doing my best to balance looking after the house, kids and my business. I will require 1 further week to collect more information in support of my position."

Parsons sets out his grounds of appeal as follows:

1. Stauber lied as per his offer of employment as a cook at an hourly rate. I will provide further evidence to support this.
3. The facts in dispute are the interpretation of manager and further evidence will be introduced to support this.

The Director's delegate argues that the Tribunal should not consider the late appeal. She states that the Determination was sent by registered mail on the day it was issued, and received by Parsons on February 28, in sufficient time to meet the appeal deadline of March 20.

ANALYSIS

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing bona fide intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong prima facie case in favour of the appellant.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.* BC EST #D298/96.)

Having reviewed the evidence and Parson's submissions, I decline to extend the time in which to file an appeal. While I am not unsympathetic to Parson's family circumstances, and note that it was received only one day late, there is no evidence that there has been an ongoing intention to appeal the Determination. Parsons had sufficient time to notify the Tribunal of his intention to appeal, and did not do so.

In *Hnidan* (BC EST #D025/98), the employee filed his appeal one week out of time because, he stated, he had cancer and was under considerable stress. The Tribunal denied the extension

request, finding that the employee could have contacted the tribunal and sought an extension. I find little to distinguish this case from that of *Hnidan*.

I also note that Parsons indicates that he intends to provide further evidence to support his position on appeal.

I have reviewed the Determination and note that Parsons provided the delegate with substantial information during the investigation. He now apparently seeks to introduce on appeal evidence which was available at the time the Director's delegate was investigating the complaint. The Tribunal has held on many occasions that it will not accept evidence at a hearing which ought properly to have been put to the Director's delegate at first instance. (see *Kaiser Stables* BC EST #D058/98, and *Tri West Tractor Ltd.* BC EST #D268/96). Consequently, this new evidence will not be admissible on appeal.

Having no evidence of a strong *prima facie* case in Parson's favour, I find that two of the criteria in determining whether to allow an extension to file an appeal have not been met.

Given that there is little chance of Parsons succeeding on appeal, I decline to extend the time under Section 109.

The Determination, dated February 25, 2000, is confirmed.

C. L. Roberts
Adjudicator
Employment Standards Tribunal