

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Metty M. Tang
("Tang")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO: 96/367

DATE OF DECISION: August 9, 1996

DECISION

OVERVIEW

This is an appeal by Metty M. Tang (“Tang”) pursuant to Section 112 of the Employment Standards *Act* (the “*Act*”) against Determination CDET No. 001971 issued by Joanne Kembel (“Kembel”), a delegate of the Director of Employment Standards on April 16, 1996. The time limit for filing an appeal of the Determination expired on May 9, 1996. The Tribunal received an appeal from Tang on June 19, 1996.

The parties to this appeal were invited to make submissions on the issue of whether the Tribunal should exercise its discretion under Section 109 (1) (b) of the *Act* to extend the time limit for requesting an appeal.

I have considered the submissions of the parties and I have decided not to extend the time limit for requesting an appeal.

FACTS

On November 14, 1995, the Employment Standards Branch (the “Branch”) received a complaint from Milton Moore (“Moore”) claiming that he worked as a Resident Manager at an apartment building located at 8619 Cartier Street, Vancouver from January, 1995 to November 30, 1995 and was owed wages by his former employer. On his complaint form, Moore identified his former employer as “Metty Tang c/o Mr. Al Chan”.

Tang is the owner of the apartment building located at 8619 Cartier Street. Al Chan (“Chan”) is the current Property Manager of the apartment building. His predecessor was Henry Lui (“Lui”). Lui hired Moore. Lui and Chan controlled Moore’s work and set his rate of pay.

On April 16, 1996, Determination CDET No. 001971 was issued by Kembel against Tang c/o Midland Pacific Realty 2156 West Broadway Vancouver, B. C. V6K 2C8 (“Midland”) in the amount of \$9,657.94. The Determination was sent by registered mail to the foregoing address, as well as to Moore’s home address, and to 8619 Cartier Street, Vancouver, B.C. V6P 4T9. The Determination indicated that an appeal of it had to be received by the Tribunal no later than May 9, 1996.

The Determination mailed to 8619 Cartier Street, Vancouver was returned to the Branch by Canada Post. The Determination mailed to Midland was received and signed for on April 25, 1996.

On or about May 21, 1996, Kembel placed a Demand Notice on Tang’s bank account and secured approximately \$6,206.43. Kembel continued to serve other Demand Notices in an effort to collect the full amount of the Determination.

On May 28, 1996, Kembel was contacted by Tang's lawyer, Timothy J. Vondette ("Vondette"). Kembel sent Vondette a copy of the Determination which he received on that day.

On June 3, 1996, Vondette advised Kembel that his client had instructed him to commence an appeal.

Between June 3, 1996 and June 17, 1996, Kembel released approximately \$6,206.43 to Moore.

On June 17, 1996, Vondette telephoned Kembel after learning that Moore had received monies from the Branch.

On June 19, 1996 the Tribunal received an appeal from Tang, which was filed by Vondette.

On July 11, 1996, Vondette requested that the Tribunal suspend the effect of the Determination pursuant to Section 113 of the *Act*. In particular, Vondette requested an order preventing the Branch from releasing further monies to Moore pending the outcome of the appeal.

On July 16, 1996, I issued a decision in which I declined to issue an order preventing the Branch from continuing with collection activities. I did, however, order that the monies secured by Kembel, and not disbursed to Moore as of July 16, 1996 be held in trust pending the outcome of the Tribunal's decision on whether to proceed with this appeal

ISSUE TO BE DECIDED

The issue to be decided is whether the time limit for requesting an appeal, as set out in Section 112 of the *Act*, should be extended in this case.

ARGUMENTS

Vondette argues that the appeal should be allowed because neither Tang nor her official representative, Peggy Ma ("Ma"), were contacted before the Determination was rendered, and Tang had no notice of Moore's complaint prior to the Demand Notice being placed on her bank account.

Kembel argues that the appeal should not be allowed. She states that every effort was made to contact Tang and her representatives.

In the Reason Schedule attached to the Determination, Kembel states: "Tang...apparently lives in Hong Kong and cannot be contacted. According to the Land Title office, the Employer's address is c/o Midland Pacific Realty, Vancouver, BC." She goes on to say she interviewed Lui and Chan who said that the employer is Tang, the owner of the

building. She also states that Chan told her that Tang's official representative was Peggy Ma ("Ma") and he provided a cellular telephone number for Ma, but she had no success in reaching Ma and had no response to the messages left with Chan for Ma to contact the Branch.

In her submission of July 8, 1996, Kembel states the following:

- On February 20, 1996, she contacted Chan by telephone. He said that he was employed to "keep an eye" on the apartment building and Ma was his friend. He also asked whether he could get back to her as he wanted to talk to the previous Property Manager and Moore in an attempt to settle the matter.
- On April 2, 1996, Chan informed her that he had decided not to deal with the matter and he asked whether she would talk to Ma, who Chan now said was a friend of Tang. She said she would speak with Ma if Ma called her and she suggested to Chan that he convey this message to Ma. She said that she never heard from Ma and was not concerned about this because no one ever suggested to her that Ma was a legal representative of Tang. Chan then said that Tang was angry about the complaint and wanted nothing further to do with Moore. Kembel said this statement suggested to her that Tang had been informed of the complaint and yet chose not to contact her or to have Ma contact her. She said she told Chan she would be sending a Determination based upon the information he had provided and Chan asked that she not deliver the Determination to him as he did not want to be involved any further.
- On April 10, 1996, she did a Land Title Search which revealed that Tang was the owner of the property located at 8619 Cartier. The owner address for the property was c/o Midland.
- On April 11, 1996, she called Midland and was referred to Lui. Lui informed her that he was the former Property Manager and that Chan had taken over from him in September, 1995. She asked Lui whether he could help her contact Tang and he said that Tang could not be contacted because she had recently moved and her telephone in Hong Kong was not working. Lui refused to give her Tang's former address or telephone number and he suggested she contact Tang through Chan.
- On April 15, 1996, she told Moore that a Determination would be arriving soon and she asked him to mention this to Chan, since Chan had asked her not to send him a copy.
- On April 16, 1996, she served the Determination as required by Section 122 (1) of the *Act*.

- Sometime in May, 1996, Moore told her that he had approached Chan with the Determination and that Chan had read it and they discussed it. Moore also said he suggested that Chan obtain a copy from the Branch and he declined.
- On May 28, 1996, she received a call from Vondette with respect to the Demand Notice served on Tang's bank account. They discussed the requirements of the *Act* and her reasons for issuing the Determination. Vondette indicated that he thought his client would be paying the Determination amount. She said she informed Vondette that since the appeal date of May 9, 1996 had long since passed, she would be disbursing monies held in the Branch's trust account. She faxed him a copy of the Determination.
- On June 3, 1996, when Vondette called her to say he would be commencing an appeal, she suggested he should contact the Tribunal immediately given the timelines and given she was disbursing funds to Moore. She informed Vondette she had a duty to proceed to disburse funds and that he should contact the Tribunal immediately to ask it to suspend action until it could decide whether to accept the appeal. She waited a week, and hearing nothing of an appeal, she disbursed to Moore.
- On June 17, 1996 she received a message from Vondette in which he expressed his concern over learning that Moore had received a cheque from the Branch. He also indicated that he was still thinking about filing an appeal.
- In summary, she made every effort to contact Tang. Tang registered with the Land Title Office saying her representative in the Province was Midland. She contacted that entity and was referred to Chan, the current Property Manager. Chan was contacted and at no time was she told that Ma was a legal representative of Tang. Nevertheless, she did attempt to contact Ma. Furthermore, according to Chan, Tang had been informed of the complaint and chose not to contact her or to have her "legal representative" contact her. Also, Tang's legal counsel took delivery of the Determination and still an appeal was not requested until 24 days later, which is excessive and has severely prejudiced the Branch given that in the meantime monies were disbursed to Moore. Tang was afforded the opportunity to contact the Branch and chose to do nothing further than have Chan contact her. As well, the Determination was served in accordance with the requirements of the *Act*. She contends that the Tribunal should not allow the appeal to be heard.

Moore also argues that the appeal should not be allowed. In his submission of July 19, 1996 he states the following:

- He contacted Chan on several occasions and asked him to have Ma contact Kembel. Chan's response was that Ma said he and Kembel "could kiss her ass".

- Chan read Moore's copy of the Determination and said he would pass the information on to Ma.
- Vondette never served him with the appeal within 48 hours as required on the Appeal Form.
- He cashed his cheque in good faith.

Vondette argues that the appeal should be accepted. In his reasons for the appeal submitted to the Tribunal on June 19, 1996, and subsequent submission dated July 25, 1996, he states the following:

- While Kembel was told by Chan that Ma was the official representative of Tang, she states in her submission she was not concerned about hearing from Ma because no one had suggested that Ma was a legal representative of Tang.
- Chan provided Kembel with Ma's home number which has an answering machine and according to Ma, Kembel never left a message. Kembel also never asked for Ma's address and never pursued service of Tang via her official representative, Ma.
- Ma advises that Chan denies making a statement about Tang being angry about the complaint; that Chan has never spoken to Tang; and that Chan and Tang have never met.
- Lui, who he describes as Tang's agent, did not provide Kembel with Tang's phone number and former address as he didn't think it was appropriate since he no longer was the Property Manager.
- Although Kembel was advised that Ma was the official representative of Tang, she determined to contact Tang through Chan. Although she had learned that Chan was the Property Manager, rather than send the Determination to Chan, who apparently asked her not to send him a copy, she used the indirect and unreliable method of asking Moore to mention it to Chan. This does not constitute service on Tang. She sent the Determination to the apartment building and predictably it was returned. She sent the Determination to Midland and does not suggest it thereby came to the attention of Chan, Lui, Ma or Tang. According to Ma, Midland had been specified as the address for Tang because the first caretaker Lui worked for Midland. When Lui was replaced by Chan in late 1995, Chan telephoned the municipality requesting a new address, care of Ma. The change of address apparently was not effected by the municipality.
- The address of Midland changed in early 1996. The postal forwarding service expired at the end of April, 1996. Ma spoke with the receptionist of Midland on

or about June 3, 1996 and was advised that no registered mail had been received by Midland for Tang.

- While Chan had a conversation with Moore in May 1996 concerning employment standards, Moore flipped the pages of a document in front of him which Chan did not read. In any event, Kembel, in February and April 1996, was told by Chan that Ma was the proper representative for Tang.
- He was advised by Kembel on May 28, 1996 that Tang had been served with a Determination, that the appeal period had expired and that the collections would continue until the full amount of the Determination was obtained. He was advised that a delay in payment of the full amount would give rise to additional interest costs, and that the Branch was also entitled to seize the employer's property and have it sold and, were this to occur, the employer would incur additional expenses for the bailiff. Taking these comments at face value (and without having the benefit of an opportunity to consider the evidence or law) he advised Kembel that it would appear appropriate that Tang pay the Determination amount rather than incur the extra costs. He was not advised that the Branch would be disbursing monies in their trust account.
- Upon receiving instructions from Ma concerning the facts surrounding the appeal he was instructed to commence an appeal and he contacted Kembel to advise her of this on June 3, 1996. Kembel explained that as a result of the recent changes to the *Act* there would not be an internal review and he would have to appeal the Determination to the Tribunal. She provided the Tribunal's phone number and said the Branch would continue collection action pending receipt of an appeal. She did not mention that funds would be disbursed (or were being disbursed) to Moore.
- On June 24, 1996, he phoned Kembel who said that she had already issued a request to release funds to Moore prior to June 3, 1996 and a further cheque was to be sent on June 17, 1996. Payment of the cheques had been expedited at Moore's request.

- While Ma informed Tang there had been an inquiry from the Branch in February, 1996, Tang's first information of the official complaint was following the attachment of her bank account. In Lui's and Chan's previous communications with the Branch there had been no reference to the number of hours claimed or the dollar value of the claim.
- The Branch did not provide prior notice of its intention to release monies to Moore.
- Tang and Ma were not afforded the opportunity to contact the Branch prior to garnishment of the funds in Tang's bank account. Service under Section 122 of the *Act* was never achieved, or in the alternative, the service was not effective. There remain serious issues concerning the merits of the appeal of the complaint which deserve to be heard. The hours claimed are grossly excessive. A contractor has been hired to replace Moore and is being paid \$150.00 per month (\$190.00 during the summer months) to perform the same work. Tang has been seriously prejudiced as a result of her bank account being garnished.
- Once Tang was aware of the Determination she acted as expeditiously as possible in the circumstances. Tang had to collect information from Ma, who, in turn had to collect information from Lui and Chan. Neither Tang or Ma wished to file an appeal prior to talking to Lui and Chan. Upon determining the relevant facts they instructed him to commence an appeal forthwith.

ANALYSIS

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

Section 112 (2) of the *Act* sets out the time periods for appealing a Determination. A person served with a Determination has only 8 or 15 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 15 days after the date of service; the time period is only 8 days if the Determination is personally served.

These relatively short time limits are consistent with one of the purposes of the *Act* 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 the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

In the case at hand I am not satisfied that an extension ought to be granted.

First, the Determination was served in accordance with Section 122 (1) of the *Act*. Kembel sent the Determination to the place of business and Tang's address as indicated on a Land Title search. The Determination was received at the latter address. These were the last known addresses of the employer. Kembel is entitled to rely on these addresses. She was not provided with any other address for Tang or Ma. It is Tang's responsibility to ensure the municipality has her accurate address.

Second, it is my opinion that Kembel made reasonable efforts to notify the employer of the complaint and Determination. Vondette does not dispute Kembel's claim that Tang resides in Hong Kong. Kembel was not provided with any information on how to locate Tang in Hong Kong. Chan is a representative of Tang in the province of British Columbia. Chan was directly involved in Moore's employment and, like Lui, he can be described as Tang's agent. Kembel contacted Chan in February and April of 1996 about Moore's complaint. Chan never provided Kembel with any information on how to locate Tang. Chan did advise Kembel that Ma was Tang's official representative. If Ma was the appropriate contact person to handle the employment standards proceeding then, in my view, Chan had an obligation to ensure that Kembel could contact Ma. Chan provided Kembel with Ma's phone number. However, Ma and Kembel never made any contact via the phone. Chan could have provided Kembel with Ma's address, which would have been a dependable way to ensure that Kembel could contact Ma, but he did not. Chan knew Ma's address because it is claimed he told the municipality to change the owner address of the property to Ma's address. In his capacity as a Property Manager and an agent of Tang, I believe Chan also had some obligation to advise Ma that an employment standards proceeding had been commenced against Tang. If Chan failed to advise Ma or Tang about the proceeding (and this is disputed by Moore and Kembel) then Kembel cannot be faulted for his omission. On the other hand, if he did advise Tang or Ma about the proceeding, then they had some responsibility to make themselves available to Kembel. There is no evidence, however, that either made any effort to contact Kembel.

Third, Tang claims she became aware of the Determination after the Demand Notice was placed on her bank account, and yet she still did not file an appeal until approximately 3 weeks later. Vondette states that the reason for this delay was to allow Tang to collect information about the matter. By May 28, 1996, at the latest, Tang, and her legal counsel, knew that the deadline for an appeal had already passed; that an appeal had to be filed with the Tribunal; and that Kembel was engaged in collections. Yet, they chose not to exercise their option of disputing the Determination until June 19, 1996, after it was learned that Moore had received monies from the Branch. The obligation is on the employer to exercise reasonable diligence in the pursuit of an appeal. In this case, Tang has failed to persuade me that she has done so. I am not convinced that Tang genuinely intended to appeal prior to the disbursement of monies to Moore.

Fourth, Moore would be prejudiced by an extension of the appeal time limits in so far as he has received most of the monies which are claimed in the Determination. Had an appeal been promptly filed on May 28, 1996, including a request to suspend disbursement of funds collected up to that date, then monies may not have been released to Moore. But, in the absence of an appeal or any notice to the Tribunal of an intent to appeal, monies were, quite legitimately, released to Moore, and as he states it he “cashed (the) cheque in good faith”.

For the above reasons, I have decided not to extend the time limit for requesting an appeal in this case.

ORDER

The appellant Tang’s request to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to Section 114 of the *Act*.

Norma Edelman
Registrar
Employment Standards Tribunal

NE:ne