

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 -

A.D.W. Engineering Ltd.
("ADW")

- and -

Kent Delwisch
("Delwisch")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE NO.: 2000/165 and 2000/166

DATE OF DECISION June 6, 2000

DECISION

APPEARANCES:

For the Employee Kent Delwisch by Written Submission
For the Employer Albert Low by Written Submission
For the Director John Dafoe by Letter

OVERVIEW

This is an application from the Employer for an extension of time to file an appeal of Determination ER #055-941. The Employer, A.D.W. through its sole director, Albert Low submits that he was unable to appeal within the statutory time period because he did not receive the Determination until February 29, 2000 the day after the appeal was to be filed. The appeal was filed on March 10, 2000, 11 days after the Employer states he received the Determination.

FACTS

The Employee's employment ended in March 1999 after more than 5 years of employment. Delwisch sought compensation for March wages and length of service from his employer. The Employee filed a complaint with the Employment Standards Branch. The Employer is a B.C. company with one director, Albert Low, who also works for the company. The Employer has a registered office in Smithers, B.C. The Employer provided the Director of Employment Standards' delegate with pay records and its position on the facts. After reviewing the documentation and the information provided by the Employer and the Employee the delegate made a Determination, ER #: 055-941.

The delegate made the Determination on February 3, 2000 and mailed it by priority courier of Canada Post to the employer, A.D.W. at its registered office in British Columbia, its post office box in Smithers, B. C., where the Employee worked, and Albert Low's office in Calgary, Alberta. The delegate submitted copies of the Canada Post confirmation of the documents delivery. All the mail was delivered and signed for on either February 4, 2000 or February 7, 2000. The Determination was sent to the Employee's working address was signed for by G. Kwan on February 7, 2000. A copy of the Determination was sent to A.D.W.'s registered office and was signed for by Lori Derby on February 4, 2000. Another copy was sent to Albert Low's office in Calgary was signed for by L. Dauncey on February 4, 2000.

At the conclusion of the Determination the following appears.

Appeal Information

Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunals not later than 4:30 on 28 February 2000. Complete information on the appeal procedure is attached. Appeal forms are available at any office of the Employment Standards Branch.

Under section 122 of the *Employment Standards Act* (“Act”), the Determination was deemed to have been received on February 11, 2000. Under section 112 (2) of the *Act*, A.D.W. had until Saturday, February 26, 2000, to file an appeal. Pursuant to the *Interpretation Act* section 25(3) of British Columbia, when the date for filing documents in a business office falls on a day the office is not open then the effective day is the next day the office is open for business.

On March 9, 2000, Albert Low, a director of A.D.W. spoke with the delegate and wrote on behalf of A.D.W. to the Employment Standards Tribunal setting out the basis of A.D.W.’s proposed appeal of the Determination. In the letter Mr. Low indicated that the Determination was not received until February 29, 2000 because A.D.W. had its mail rerouted from Smithers to Calgary. An appeal was filed on March 10, 2000.

In the Determination the Director’s delegate found that the Employer had contravened sections 18(1) in failing to pay Delwisch his March 1999 earnings which was not in dispute. The Employer had deducted an amount claimed as excess vacation pay from this amount leaving a negative amount owing.

He found that the Employer had given Delwisch very short notice to move from Smithers to Calgary. Specifically the Employer told the Delwisch on March 2, 2000, after over 5 years of continuous employment in Smithers with some travel to Calgary, that he would have to move at his own expense from Smithers to Calgary by March 11, 2000. The Employee told the Employer on March 10, 2000 that he would not move to Calgary. When the Employee went to work in Smithers on March 11, 2000, he found the locks on the doors had been changed and he could not enter. The Director’s delegate concluded in the Determination that the Employer’s conduct “was a substantial alteration of a significant term of employment to the extent that I find it to constitute a termination”.

The Delegate found that Delwisch was entitled to compensation for length of service of less than 6 years and more than 5 years. The Delegate based his conclusion on information received from the employee, Kent Delwisch and the employer, A.D.W. The Determination directed A.D.W or, in default, its sole director, Albert Dat Wai Low, to pay Kent Delwisch

Wages for March 1999:	\$1,379.34
Compensation for length of service	\$4,076.92
Interest	<u>\$ 312.58</u>
Total	\$5,768.84

In the Determination the delegate stated

“If payment is not received by 28 February 2000, additional interest will accrue, and the amounts owing may be referred to a collection agency without further notice to you.”

Delwisch states in his submission on the appeal that the delegate and he had difficulty obtaining an address or phone number for Albert Low since the commencement of this process. He points

out that even on the letter of March 9, 2000 and the appeal documents that Albert Low has not provided a home or business phone number or an address.

ISSUE TO BE DECIDED

The sole issue to be decided is whether A.D.W. should be granted an extension of the statutory period in which to appeal pursuant to section 109(1) (b) of the *Act*.

THE LAW

In *Suter (Re)*, [2000] BC EST #D171/00, Adjudicator M. Thompson considered a request for extension of time for filing an appeal where the Determination was made and mailed on November 23, 1999. The appeal was to be filed by December 16, 1999 and was actually filed December 23, 1999. The mail had not been claimed by the Employer and had been returned to the Employment Standards Branch on December 14, 2000. The appeal was filed when the Employer received a demand notice from her bank. An extension of time was denied after citing the statutory requirements for timeliness of appeals.

The *Act* provides strict time limits in which an appeal may be filed. Section 112 provides as follows

- “112 (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*
- (2) *The request must be delivered within*
- (a) *15 days after the date of service, if the person was served by registered mail, and*
- (b) *8 days after the date of service, if the person was personally served or served under section 122(3).”*

The *Act* allows the Tribunal to extend the time for filing an appeal in section 109 (1) (b)

- “109 (1) *In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: . . .*
- (b) *extend the time period for requesting an appeal even though the period has expired;”*

The timelines in these sections is consistent with the stated purpose of the *Act* section 2 (d) “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*”.

The criteria for granting an extension of time for filing an appeal have been developed in a number of Tribunal decisions. Many Tribunals refer to the criteria set out in *Niemisto (Re)* [1996] BC EST #D116/00, where an Employee filed an appeal over three months after the appeal

period expired. Adjudicator Thornicroft took the view that an appellant seeking an extension of time for an appeal “should satisfy the Tribunal that

- ii) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going bona fide intention to appeal the Determination;
- iii) the respondent party (i.e., the employer or employee), as well as the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong prima facie case in favour of the appellant.”

Niemisto’s appeal was dismissed as out of time.

In *Agvale Industries Ltd. (Re)*, [2000] BC EST #D104/00, a March decision of the Tribunal the appellant was two weeks late in filing her appeal and the extension of time was refused.

In *Neil (c.o.b. Chuck’s Window Cleaning)(Re)*, [2000] BC EST #D126/00, Adjudicator Orr granted an extension of time to file the appeal where the delegate had dealt with the Employer’s bookkeeper throughout the investigation but had not sent a copy of the Determination to the bookkeeper. The Determination was sent to the registered office and returned to the Director with a stamp ‘Return to Sender’. No other steps were taken by the delegate to serve the Employer. Adjudicator Orr determined that the Determination had not been served.

EVIDENCE AND ANALYSIS

The appellant is a corporation registered in British Columbia. The appellant is required by law to provide a current address for notices and information to be sent to the appellant as a corporation. The Determination was sent to this registered address on February 3, 2000 and was accepted and signed for on February 4, 2000. The *Act* deems the sending of notices and other documents to be deemed served 8 days after mailing. In fact the appellant had from February 4, 2000 to February 28, 2000 to file an appeal.

The instructions for how to file an appeal were attached to the Determination.

The appellant did provide evidence to the delegate for the purposes of the investigation. The letter dated March 9, 2000 and attached to the appeal document does not dispute any of the findings in the Determination about the earnings in March 1999 or the length of service. The letter does not make any claims for deductions of unearned vacation. The letter suggests that there is more information to be considered. Specifically it alleges Delwisch quit his employment to set up a private practice in Smithers rather than continuing to work for the Employer in Smithers and Calgary. These are the same issues that were before the delegate during the investigation. If there was more information the Employer should have provided it during the

investigation. Tribunals do not consider new evidence that was available during an investigation and not provided to the delegate of the Director.

The appeal documents do not suggest that there is anything other than a difference of opinion on the facts and that the employer has a 'feeling' that the delegate did not examine pertinent information from the employer. If there was more evidence on these issues the onus was on the employer to present them to the delegate at the time of the investigation. There is no mention of new evidence for this appeal in the documents submitted.

From the Determination the delegate appears to have considered the Employer and Employee's evidence and where there was a discrepancy he accepted the evidence of the Employee. The Employer has not disputed the findings of fact in the Determination. For example, the evidence of the locked worksite is not addressed by the Employer. The evidence of the need to move to Calgary for work is not disputed. The conclusions of the delegate are supported by this evidence.

I find that the delegate made every reasonable effort to inform the Employer of the Determination by sending it to 3 locations. All the copies were received well within a reasonable time frame by someone who felt they could receive registered mail for the Employer and sign for it. The arrangements of the Employer that prevented them from receiving mail promptly are not the responsibility of the delegate or the Employee.

The Employee has waited over a year for this matter to be resolved. Any further delay would prejudice the Employee. I have considered the circumstances of service and the criteria for granting an extension of time. I have determined that the facts do not support the exercise of the Tribunal's discretion to extend the time for an appeal. If the extension had been granted, there does not appear to be any basis on which it would have succeeded.

ORDER

Albert Dat Wai Low, a director of A. D. W. Engineering Ltd. and A. D. W. Engineering Ltd.'s application for an extension of time to file an appeal of Determinations ER #: 055-941 is denied. The appeal is dismissed pursuant to section 114 (1)(a) of the *Act*.

The effect of this decision is to confirm the Determinations of February 3, 2000. Albert Dat Wai Low, a director of A. D. W. Engineering Ltd. and A. D. W. Engineering Ltd. are required to pay Kent Delwisch \$5,768.84 plus any additional interest due from the date of the Determinations under Section 88 of the *Act*.

April D. Katz
Adjudicator
Employment Standards Tribunal