

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 -

Candy Robinson
Opr. Knook & Kranny Cleaning Company
("Robinson")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 96/351

DATE OF DECISION: May 6, 2001

DECISION

OVERVIEW

This is an appeal by Candy Robinson operating Knook and Kranny Cleaning Company (“Robinson”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) against Determination CDET 001619 issued by Lynne Egan (“Egan”), a delegate of the Director of Employment Standards, on March 18, 1996. The time limit for filing an appeal of the Determination expired on April 10, 1996. The Tribunal received an appeal from Robinson on June 10, 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.

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.

FACTS

On October 17, 1995, the Employment Standards Branch (the “Branch”) received a complaint from Candis Rowe (“Rowe”) alleging that she was owed wages by Robinson.

On December 7, 1995, Egan sent a letter to Robinson advising her of the complaint.

On January 8, 1996, Egan received a submission from Robinson dated January 7, 1996 outlining her position on Rowe’s complaint.

Robinson sent a letter to Egan on February 14, 1996 stating she had not heard back from Egan and wanted an update on the file.

Egan sent a letter to Rowe and Robinson on February 27, 1996 advising them that she had reviewed the information that they had provided, and inviting them to attend a meeting on March 8, 1996 for the purpose of trying to settle the complaint. Rowe attended the meeting, but Robinson did not.

On March 18, 1996, Determination CDET 001619 was issued by Egan against Robinson in the amount of \$1,161.73. The Determination was sent by certified mail to Robinson's home/business address at 23369-72 Avenue Langley, B.C. V3A 4P9. As well, the Determination was sent to Rowe. The Determination indicated that an appeal of it had to be received by the Tribunal no later than April 10, 1996. The Determination also indicated that a cheque made payable to the Director of Employment Standards would discontinue collection proceedings.

On April 15, 1996, Egan placed a Demand Notice on Robinson's bank account.

The Determination mailed to Robinson was returned to the Branch on April 15, 1996 by Canada Post marked "unclaimed". The document indicates that a final notice for pick-up at the Fort Langley Post Office was left at Robinson's address on April 4, 1996.

On or about April 23, 1996, Egan received a submission from Robinson dated April 18, 1996 in response to her February 27, 1996 letter. In her submission Robinson outlined her position on Rowe's claim and said she would like another chance to meet Egan and Rowe as she was out of town on March 8, 1996 and only received the February 27, 1996 letter on April 2, 1996.

Egan received funds from Robinson's bank account on April 29, 1996, in compliance with the Demand Notice.

On April 29, 1996, Egan re-mailed the Determination to Robinson by regular mail with a cover letter which stated she had secured funds via a Demand Notice and was in the process of disbursing them to Rowe. On or about May 8, 1996, Robinson received the Determination.

The Branch released monies to Rowe on or about May 17, 1996.

On June 10, 1996, the Tribunal received an appeal from Robinson, which was dated June 3, 1996. The appeal was disallowed as it was out of time.

On June 24, 1996, the Tribunal received a letter from Robinson asking that her appeal be allowed to proceed.

ARGUMENTS

Egan, in her submission of July 16, 1996, argues that the appeal should not be allowed. She gives the following reasons:

- Robinson was away from her place of business during the time an important piece of mail was received. Egan states that her letter of February 27, 1996, which included a consideration of Robinson's January 7, 1996 submission and outlined her investigative findings, arrived at Robinson's place of business when Robinson alleges she was out

of town. Egan finds it unusual that Robinson did not designate another person to act as her agent while she was unavailable. Egan states that this is particularly interesting as Robinson was aware of the investigation at this time.

- Robinson failed to attend to business matters. The Determination was issued and sent by certified mail on March 18, 1996. It was returned as unclaimed on April 15, 1996. Egan finds it unusual that Robinson neglected her business interests for approximately one month without another person being designated to deal with business matters. She finds this especially interesting in view of the employer's claim that she had been away and not attending to business mail during February and March, 1996. Egan states that after receiving no response to her February 27, 1996 letter and the Determination, she issued the Demand Notice. She states she considered Robinson's April 18, 1996 submission, but as no new information was offered, she saw no reason to change her decision. She then re-mailed the Determination to Robinson with the cover letter. Subsequently, she was advised by Robinson that she had received the Determination on May 6, 1996.
- Robinson first made contact with the Tribunal on June 10, 1996. Robinson first said that she received the Determination on May 6, 1996 then later said it was received on May 8, 1996. The appeal period given on the Determination was 23 days. If Robinson received the Determination on May 8 and was allowed to file a late appeal, it might be reasonable to do so if the appeal was received by the Tribunal on or before May 31, 1996, which would be the 23rd day. However, Robinson contacted the Tribunal for the first time on June 10, 1996.
- Consideration should be given to Rowe. Rowe consistently acted in good faith throughout the investigation of her complaint. She received a copy of the Determination and then received payment from the Branch. Later, she was advised of Robinson's appeal and that it would not be considered as it was out of time. Then, she was advised by the Tribunal that it was considering whether to allow the appeal. This has caused considerable uncertainty to Rowe.
- The Director is prejudiced. The Director investigated Rowe's complaint. A decision was rendered and collection action was undertaken. If the Director had been aware that the appeal was to be filed, possibly disbursement of the collected funds may have been delayed pending the Tribunal's decision.

Robinson argues that the appeal should be accepted because she did not receive the Determination until after the appeal period had expired. In her reasons for the appeal received by the Tribunal on June 10, 1996, and subsequent submissions received on June 24, 1996 and on August 8, 12 & 13, 1996, she states the following:

- Regarding her February 14, 1996 letter to Egan she states: "...I sent off a letter requesting an update so that I could go to work as some work was coming up out of town."

- Receiving no response from Egan to her February 14, 1996 letter, she left for an out of town job on February 26, 1996 to March 17, 1996. Cellular phone bills and an airport validation ticket were submitted to support her claim that she was out of town. She said she was not concerned about going out of town as she carried her pager and cellular phone and at all times was available. The fact that she was away did not mean she was not interested in dealing with the complaint. She assumes that the February 27, 1996 letter from Egan arrived at her house on March 4, 5, or 6, 1996, when she was out of town.
- On March 17, 1996 she returned home and then left the next day for a two week holiday.
- On March 31, 1996, April 1 or April 2, 1996 (the dates vary in her submissions), she returned home and went back to work. She opened the letter from Egan dated February 27, 1996 and discovered the meeting date. She then sent the April 18, 1996 letter to Egan.
- On May 3 or 4, 1996, she learned that funds had been taken out of her account. She called Egan on May 6, 1996. On May 7, 1996 Egan returned her call and said: "It's a done deal." Egan confirmed that she had received the April 18, 1996 letter about one week prior, but she accepted Rowe's version of events and would not re-open the investigation. Egan said the time for an appeal was up and therefore there was nothing else to say. Egan knew since at least April 15, 1996, when the Determination was returned to the Branch, that she had not received the Determination, yet she made no attempt to contact her about the Determination and Demand Notice.
- She received the Determination on May 8, 1996 or May 13, 1996 (the dates vary in her submissions). An error was made when she said it was May 6, 1996.
- Between May 9, 1996 and May 17, 1996 she attempted to contact Egan's Regional Manager but had no success. She sent him a letter on May 24, 1996 stating that she was not given the opportunity to present her case.
- On May 21, 23 or 28, 1996 (the dates vary in her submissions), she contacted the Tribunal to obtain appeal papers.
- On May 28, 1996, she received a copy of the *Act*. On May 30, 1996, she received a call from Egan's Regional Manager who said he would talk to Egan and get back to her. She told him she would be appealing the Determination, which she did on June 3, 1996.
- There was no investigation of the complaint. The claim of Rowe is false. She was never given the opportunity to present her case, and there was not enough effort made by Egan to contact her when she knew that she totally disagreed with the claim.

- “It is not unusual not to designate another person to act as an agent for my business while I was unavailable... As I do not have any business matters to attend to, I am hesitant to designate anyone to attend to my business...I work sixteen to twenty hours a day, seven days a week, six to seven months out of the year. I have two children under five, three businesses... I don’t think I would call that “not attending to business.” It just means I don’t have time to sit behind a computer for ten hours at a time sending letters to people who don’t read them...(And the time delay was)... unintentional. All these things take time...(f)irst to find out how to and where to the regulations, then to order...receive...read them and then sit down and wonder what to put on paper...This should cause considerable uncertainty for Rowe. Rowe actually thought that she had gotten away with it...I have consistently acted in good faith and put all my spare time into these letters and communications.”

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*. Egan sent the Determination to Robinson’s home/place of business. This was the last known address of the employer. Egan is entitled to rely on this address. She was not provided with any other address for Robinson.

Second, it is my opinion that Egan made reasonable efforts to notify the employer of the complaint and the Determination, and the effect of the Determination, namely collection proceedings. Egan properly served Robinson with the Determination at her last known address. In her letter of February 14, 1996, Robinson never told Egan she was going out of town and could not be reached via mail, as Egan had done in the past. In my view, Robinson had an obligation to ensure that Egan could contact her given there was a pending employment standards proceeding. Robinson's evidence indicates that when she wrote the February 14, 1996 letter she knew at that time she was going out of town. Therefore, she could have advised Egan in this letter not to contact her via mail, but she did not. Egan cannot be faulted for Robinson's failure to advise her of her whereabouts.

Third, I find Robinson's responses to Egan's efforts to notify her of her actions to be less than adequate. Although Robinson was at home on March 17, 1996 (and by this time the February 27, 1996 letter was likely received), she doesn't check her mail at that time. She waits until March 31, 1996 or April 1 or 2, 1996 and then she doesn't send a reply to Egan for a further two weeks. In the meantime, on April 4, 1996 she is notified by Canada Post that a piece of certified mail is available for pickup and that this is the final notice. There is no evidence that Robinson made any effort to receive the certified mail, which was the Determination.

Fourth, Robinson's evidence on when she first phoned the Tribunal to get appeal papers is inconsistent as is her evidence on when she received the Determination. In my opinion, Robinson likely received the Determination on May 6, 1996, which was the first date she gave concerning receipt of the document. The next date of May 8, 1996 surfaced in Robinson's submissions received June 24, 1996 and the final date of May 13, 1996 only surfaced after she was aware of Egan's submission of July 10, 1996. In any event, whether she received the Determination on May 6, 8 or May 13, 1996, she did not file a proper appeal until at least three weeks later. By May 6, 8, or 13, 1996, she knew that the deadline for an appeal had already passed; that an appeal had to be filed with the Tribunal; and that Egan had secured funds from her account and was in the process of disbursing those funds. Yet, she chose not to exercise her option of disputing the Determination until June 3, 1996 when she sent in an appeal to the Tribunal by regular mail, which ensured a further delay. The obligation is on the employer to exercise reasonable diligence in the pursuit of an appeal. In this case, Robinson has failed to persuade me that she has done so. I am not convinced that Robinson genuinely intended to file an appeal in a timely manner.

Fifth, Rowe would be prejudiced by an extension of the appeal time limits insofar as she has received all the monies which are claimed in the Determination. Had an appeal been promptly filed on May 6, 8, or 13, 1996, including a request to suspend disbursement of funds collected up to that date, then monies may not have been released to Rowe. But, in the absence of an appeal or any notice to the Tribunal of an intent to appeal, monies were, quite legitimately, released to Rowe. It is understandable that Rowe would have considered the matter closed at that point.

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

ORDER

The appellant Robinson'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

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