

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 -

Neil's Carpet Services Ltd.

Re: Beverley Davidson

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/187

DATE OF DECISION: June 15, 2000

DECISION

TIMELINESS

This is a review of the timeliness of an appeal by Neil's Carpet Services Ltd ("Neil's") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination numbered ER# 089937 dated January 26, 2000 by the Director of Employment Standards (the "Director").

The main issue addressed in the Determination was whether wages were owing to a certain worker, Beverley Davidson. The Director determined that there were wages owing in the amount of \$2,489.68. The Determination is dated January 26, 2000 and the "Appeal Information" contained on the Determination showed that any appeal must be received by the Tribunal no later than 4:30 p.m. on February 21, 2000.

There are two other files pending appeal in relation to employees of the same employer during the same time frame. One of those employees is "James Aldrich". The Aldrich appeal was dated and received by the Tribunal on February 17, 2000.

In a letter, dated March 22, 2000, to the Tribunal, Counsel for Neil's states as follows:

Thank you for your letter dated March 21, 2000. Neil's Carpet Services Ltd. believes that it appealed the determination regarding Beverley Davidson in time. We are advised that the appeal with respect to Ms Davidson was sent in the same package as the appeal regarding James Aldrich.

We were advised by the Tribunal last week that they have no record of the appeal. Accordingly, our client sent a copy of what had previously been sent (or at least what they thought they had sent).

As a result of the above it appears that the receipt of this appeal is not confirmed until late March 2000 approximately one month after the final due date.

The time limits for appeals are set-out in Section 112 of the Act as follows:

Right to appeal director's determination

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 Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include (1) that there must be a reasonable and credible explanation for the delay; (2) there must have been a genuine and ongoing intention to appeal; (3) the respondent and the director must have been aware of the intention to appeal; (4) the prejudice to the respondent should be considered; and (5) there must be a strong *prima facie* case set-out in the appeal.

In this case I am satisfied that the first three criteria above have been met. I have some doubt about whether there is a strong *prima facie* case in light of the fact that the appeal seems to depend on adducing "new evidence". This Tribunal has generally not been inclined to accept new evidence unless there is some very sound reason why it was not adduced previously.

However, the discretion to allow or disallow such "new evidence" should be exercised by the adjudicator hearing the appeal and therefore I am not inclined to reject the appeal on this basis.

I conclude that Neil's intended to appeal and has provided a reasonable and credible explanation why the appeal was not filed in time. Apart from some further delay there is no prejudice to the employee in this case and there appears to be a triable issue worthy of consideration.

Pursuant to Section 109(b) I hereby extend the time for filing the appeal herein.

John M. Orr
Adjudicator
Employment Standards Tribunal