

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 -

Dr. Vinod Chandra Tawar Inc.
("Tawar Inc.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 99/228

DATE OF DECISION: June 10, 1999

DECISION

OVERVIEW

This is an appeal by Dr. Vinod Chandra Tawar Inc. ("Tawar Inc.") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 9, 1998. That Determination directed Tawar Inc. to pay \$742.09 (including interest accrued to the date of the Determination) to Ms. Maureen Carr for contravention of Section 58 (vacation pay) and 63 (length of service pay) of the *Act*.

The time limit for filing an appeal of the Determination expired on August 4, 1998. The Tribunal received an appeal from Dr. Tawar on April 19, 1999.

The Director's delegate, Mr. Wayne Mackie, and Dr. Vinod Chandra Tawar on behalf of Tawar Inc. have made submissions on this appeal. These submissions have been given due consideration

ISSUES 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.

ANALYSIS

Pursuant to Section 112(2) of the *Act*, a determination may be appealed to the Tribunal by written request. This request must be delivered to the Tribunal within 15 days after the date of service.

Pursuant to Section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. The appellant bears the onus of satisfying the Tribunal that it should exercise its discretion. However, compelling reasons are required for an extension to be granted (*Moen & Sagh Contracting Ltd.* BC EST #D298/96). In deciding whether to grant an extension, the factors that an appellant must establish are set out in *Niemisto* (BC EST #D099/96). These factors are:

- i. 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 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.

This is not an exhaustive list. The Tribunal may consider other relevant criteria as they arise in each particular appeal.

In the situation at hand, Tawar Inc. contends that it was not able to request an appeal within the statutory time limit because it was unaware of the Determination against the company. Pursuant to Section 122 of the *Act*,

- (1) *A determination or demand that is required to be served on a person under this Act is deemed to have been served if*
 - (a) *served on the person, or*
 - (b) *served by registered mail to the person's last known address.*
- (2) *If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*

The Determination was sent by registered mail in accordance with Section 122(1) of the *Act*. It was sent by certified mail to Dr. Tawar's home address at 35917 Stonecroft Place, Abbotsford. The returned package indicates it was carded on July 17, 1998, but remained unclaimed.

Copies of the Determination were also sent to:

1. Dr. Vinod C. Tawar Inc. Dir/Officer at 102-7343 Hurd St., Mission on July 16, 1998;
2. Mrs. Edith L. Tawar, Dir/ Officer at 102-7343 Hurd St., Mission on July 16, 1998; and,
3. Registered & Records Office, Dr. Vinod C. Tawar Inc. at 102-7343 Hurd St., Mission.

The company's last known operating address was 102-7343 Hurd St., Mission.

All copies of the Determination sent to Hurd St. were returned with the envelopes marked "Moved, Address unknown". It is apparent on the evidence that Mr. Mackie took reasonable steps to locate and inform the appellant company of the Determination.

I also find it questionable whether Tawar Inc. had a *bona fide* intention to appeal the Determination. Dr. Tawar has been aware of the complaint since June 1998. His efforts to appeal the Determination against the company did not arise until Dr. Tawar himself

was found personally liable in a subsequent Determination dated December 21, 1998 and efforts to collect the outstanding amount were made.

Furthermore, section 2(d) of the *Act* provides that one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes. It is in the interest of all parties to have complaints and appeals dealt with promptly (*Dr. H. S. Bergman* BC EST #D088/97). Therefore, extensions to time limits should not be given as a matter of course. In this case, the Determination was issued on July 9, 1998. The time limit for filing an appeal of the Determination expired on August 4, 1998 and the Tribunal received an appeal from Tawar Inc. on April 19, 1999. Tawar Inc.'s application is over eight months late. There is also no indication that either Ms. Carr or the Director was made aware of any intention on the company's part to appeal the Determination. As a result, there is concern that given the delay in submitting an appeal, Ms. Carr would be unduly prejudiced by the granting of an extension.

It is also necessary to consider the substance of the appeal in order to decide whether there is a strong *prima facie* case in favour of the appellant. This is not to consider and decide the appeal itself. Instead, it necessary to assess whether there are compelling reasons to allow an extension of the appeal period.

Firstly, the appellant argues that it did not have sufficient opportunity to respond to Ms. Carr's complaint. In my view, the evidence indicates otherwise. As a Director of Tawar Inc., Dr. Tawar was made aware of the complaint pursued by Ms. Carr for unpaid wages both by way of a letter from Mr. Mackie dated June 9, 1998 and in person. The letter provided Dr. Tawar with Mr. Mackie's tentative conclusions. On June 30, 1998, Dr. Tawar responded to this letter in writing. In his letter, Dr. Tawar refers to a conversation he had with Mr. Mackie around June 20th. Dr. Tawar himself acknowledges in his appeal application that Mr. Mackie attended his home to discuss the complaint during "the Spring-early Summer of 1998". I am not convinced that Tawar Inc. lacked sufficient opportunity to express its view in this matter. It appears that the appellant merely disagrees with Mr. Mackie's assessment of the facts. This is not sufficient in itself to extend the time limit.

Secondly, in his June 30th letter to Mr. Mackie and in his submission to the Tribunal received May 25, 1999, Dr. Tawar makes serious allegations against Ms. Carr. He alleges that she insisted on being given a lay-off so that she could collect employment insurance and that she went so far as to make threats against him and his company. Dr. Tawar has not substantiated these allegations. He refers to several witnesses who could support his claim and yet has only actually provided one witness, Tracey Williams. In his letter dated April 20, 1999, Mr. Mackie indicates that he spoke to this witness and that she did not provide any evidence in support of Dr. Tawar's claim. Ms. Williams merely indicated that she overheard Ms. Carr requesting a layoff date, but did not know why she was making the request. Dr. Tawar now submits a letter signed by Ms. Williams which states that she advised Mr. Mackie that she was present "on several occasions when Ms. Carr verbally demanded a lay-off" so that she could collect employment insurance. I am not satisfied that Ms. Williams comments, true or not, go to any great length to support Dr.

Tawar's claim that Ms. Carr did not work for him during the relevant period or that she was not owed wages.

Thirdly, Dr. Tawar takes issue with the hours worked by Ms. Carr yet has not submitted any evidence as to the correct hours worked (e.g. he has not provided any time sheets, schedules, or payroll records). He argues that Ms. Carr was an employee of the physician who took over his office and yet has not provided any documentation to that effect.

In light of the foregoing, it is my opinion that Tawar Inc. has not met the burden of illustrating that the Tribunal should exercise its discretion to extend the time period. The Determination was sent by registered mail in accordance with Section 122(1) of the *Act* and the appellant has not provided any notable evidence illustrating an error by the Director.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated July 9, 1998 be confirmed in the amount of \$742.09 together with any interest that has accrued pursuant to Section 88 of the *Act*.

Norma Edelman
Adjudicator
Employment Standards Tribunal