

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 -

Mrs. Edith L. Tawar

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 99/230

DATE OF DECISION: June 10, 1999

DECISION

OVERVIEW

This is an appeal by Mrs. Edith L. Tawar 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 December 21, 1998. That Determination directed Mrs. Tawar to pay \$761.91 (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 January 13, 1999. The Tribunal received an appeal from Mrs. Tawar on April 19, 1999.

The Director's delegate, Mr. Wayne Mackie, and Mrs. Tawar 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.

FACTS

A Determination was issued against Dr. Vinod C. Tawar Inc. ("Tawar Inc.") on July 9, 1998. The Determination requires Dr. Vinod C. Tawar Inc. to pay \$742.09 (including interest accrued to the date of the Determination) for unpaid wages to Ms. Carr.

A Determination was issued against Mrs. Tawar on December 21, 1998. The Determination requires Mrs. Tawar, as Director and Officer of Dr. Vinod C. Tawar Inc., to pay \$761.91 (including interest accrued to the date of the Determination) to Ms. Carr.

Mr. Mackie conducted a company search on December 8, 1998, which revealed Mrs. Tawar as a Director and Officer of the company with an address at 102-7343 Hurd St, Mission. The Determination was subsequently mailed to Mrs. Tawar at her home address. It was returned "Unclaimed".

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, Mrs. Tawar contends that she was not able to request an appeal within the statutory time limit because she was unaware of the Determination. 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*.

Three issues relating to service require mention. First, the specific mailing date of the Determination is not available. Despite this omission, it is clear on the evidence that the Determination was mailed in December 1998. The package was mailed to Mrs. Tawar's home address at Stonecroft Place, Abbotsford and was subsequently re-directed by Canada Post to a Regina address. A stamp on the envelope indicates the Regina Office received the package on January 1, 1999. The package was returned "Unclaimed".

Second, according to Mrs. Tawar's submission received May 25, 1999, between August to December 1998 she "relocated to several destinations". Mrs. Tawar has been aware of Ms. Carr's complaint since June 1998. Her failure to inform the Director of her change in address and her failure to claim registered mail is not sufficient to warrant an extension of the time period.

Third, Mr. Mackie sent the Determination to the home address on Stonecroft. He sent it to this address knowing that a company search revealed Mrs. Tawar's address as 102-7343 Hurd St., Mission. It is my opinion that Mr. Mackie's actions were reasonable when he sent the Determination to the Stonecroft address despite the results of the company search. It was reasonable for him to assume that the Stonecroft address was Mrs. Tawar's last known address. Mr. Mackie had visited Mrs. Tawar at her home on Stonecroft in the summer of 1998. He had no reason to believe that the address had changed. Mr. Mackie had also sent the original corporate Determination dated July 9, 1998 against Tawar Inc. by certified mail to the Stonecroft address. It was returned marked "Unclaimed". On the other hand, when the same Determination was sent to the Hurd St. address, it was returned marked "Moved, Address unknown". This would suggest that no one was at the Hurd St. address to receive the Determination whereas it could have been claimed at the Stonecroft address. Therefore, it was reasonable for Mr. Mackie to conclude that Mrs. Tawar's last known address was at the Stonecroft address.

I also find it questionable whether Mrs. Tawar had a *bona fide* intention to appeal the Determination. Mrs. Tawar has been aware of the complaint since June 1998. Her efforts to appeal the Determination did not arise until attempts 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 December 21, 1998. The time limit for filing an appeal of the Determination expired on January 13, 1999 and the Tribunal received an appeal from Mrs. Tawar on April 19, 1999. Mrs. Tawar's application is several months late. There is also no indication that either Ms. Carr or the Director was made aware of any intention on her part to appeal the Determination. As a result, there is concern that given that the wages owed date back to July 1998 and 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.

The appeal by Tawar Inc. of the July 9, 1998 corporate determination has been denied (See *Dr. V.C. Tawar Inc.*, BC EST #D239/99). As a result, Mrs. Tawar's appeal is

limited to the issue of whether or not she is a director of Tawar Inc. and hence liable for Ms. Carr's unpaid wages.

Mrs. Tawar argues that according to the Rules and Regulations of the College of Physicians and Surgeons of British Columbia she can not act as a Director of a company carrying on the practice of medicine. Therefore, any role she played in the Tawar Inc. was merely honorary.

According to Section 96 of the *Act*,

(1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.

A company search dated December 8, 1998 reveals that Mrs. Tawar is a Director and Officer of Tawar Inc. Therefore, notwithstanding any contravention of the Rules and Regulations of the College of Physicians and Surgeons of British Columbia, Mrs. Tawar is a Director and Officer of Tawar Inc. for the purposes of the *Employment Standards Act*. Mrs. Tawar has not provided any evidence that would suggest otherwise.

In light of the foregoing, it is my opinion that Mrs. Tawar 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 Mrs. Tawar has not provided any notable evidence illustrating an error by the Director or a prima facie case in her favour.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated December 21, 1998 be confirmed in the amount of \$761.91 together with any interest that has accrued pursuant to Section 88 of the *Act*.

Norma Edelman
Adjudicator
Employment Standards Tribunal