

**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-

Brad Vince operating 4-Play Bingo Supply & Service  
("4-Play")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** C. L. Roberts

**FILE NO:** 1999/219

**DATE OF DECISION:** June 18, 1999

## DECISION

This is a decision based on written submissions by Brad Vince for 4-Play Bingo Supply & Service ("4-Play"), and Lynne Egan for the Director of Employment Standards.

### OVERVIEW

On March 19, 1999, a delegate of Director of Employment Standards ("the Director") determined that 4-Play had contravened Section 46 of the *Employment Standards Act* (the "Act ") in failing to maintain and or produce proper payroll records in response to a Demand for Records. The Director's delegate ordered 4-Play to pay \$500.00 to the Director for the contravention, pursuant to Section 28(b) of the *Act*.

4-Play filed a Notice of Appeal of the Determination on April 14, 1999, which is outside the time provided under Section 112 of the *Act*.

### ISSUE TO BE DECIDED

Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

### FACTS

During the investigation of a complaint by Darell F. MacLellan for non payment of overtime wages, statutory holiday pay, unauthorized deductions from wages, and entitlement to compensation for length of service, the Director's delegate issued a Demand for Records on Brad Vince, as previous requests had not resulted in documents being delivered. The Demand, which required 4 Play to produce certain specified employment records by March 1, 1999 was issued February 12 by registered mail. Receipt of that demand was acknowledged on February 15.

An employee from 4-Play contacted the delegate on February 26, advising her that Vince was out of town until March 9, and the demand could not be complied with by the date specified. The delegate extended the date for production to March 15.

The documents and records were not produced by March 15, and no reasonable explanation for failing to deliver them was offered.

The Director's delegate determined that failure to produce the records as demanded frustrated the investigation, and imposed the penalty noted above.

In his notice of appeal, Vince stated that his wife had recently been diagnosed with cancer. His evidence is that he had been absent from his office for extended periods of time and "unable to

comply with the deadlines." He stated that most mail addressed to his attention "has remained unopened" and in this case he "was not aware of the imposed deadline for appeal because mail sat unopened in my absence from the office...".

Vince suggests that the additional work made necessary by his wife's illness was unusual and that he hoped it would return to normal shortly.

The Director's delegate argues that the Tribunal should not consider the late appeal. She contends that the Demand for Records was only issued when other requests for information had failed. She further states that on February 26, she had been contacted by an employee of 4-Play, who indicated that the Demand for Records had been received. The delegate extended the deadline at his request, to a date after Vince returned to town. She indicated that she would have willingly extended the deadline further had she been advised of a legitimate reason for doing so, but was not.

The Director's delegate further indicated that the Determination had not been appealed, and the requested records have still not been produced

## **ANALYSIS**

Section 112 provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing bona fide intention to appeal the determination;
- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong prima facie case in favour of the appellant.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.* BC EST #D298/96.)

Having reviewed the evidence and the submissions of Vince, I decline to extend the time in which 4-Play may file an appeal. While I am not unsympathetic to Vince's family circumstances, I note that there has been no ongoing intention to appeal the Determination.

The evidence is that the Demand was received, opened and responded to by an employee of 4-Play. In that instance, an extension to provide the requested documents was granted by the delegate. This raises a doubt as to the explanation for the failure to request an appeal within the time limits. Furthermore, as the delegate notes, Vince has yet to comply with the Demand, even though he has taken the time to file an appeal. The investigation has been hindered as a result of 4-Play's failure to provide those documents. Consequently, the complainant and the Director will be prejudiced by a granting of an extension.

I also note that the Determination is an interim determination, rather than a final one, in that it is in respect of a penalty for failing to produce documents. A Determination on the substance of the complaint has yet to be determined. Therefore, there is no prejudice to 4-Play with respect to a final determination on the issue as to whether MacLellan is owed wages and compensation in denying the time to request an appeal.

In *Hnidan* (BC EST #D025/98), the employee filed his appeal one week out of time because, he stated, he had cancer and was under considerable stress. The Tribunal denied the extension request, finding that the employee could have contacted the Tribunal and sought an extension. I find little to distinguish this case from that of *Hnidan*.

**ORDER**

I decline to extend the time for filing an appeal. The Determination, dated March 19, 1999, is confirmed.

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Carol Roberts  
Adjudicator  
Employment Standards Tribunal