

An appeal

- by -

Suzanne Ashley operating as Body & Soul Health & Beauty Center
("Body & Soul")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/125

DATE OF DECISION: June 6, 2002

DECISION

OVERVIEW

This is a decision based on written submissions by Suzanne Ashley on behalf of Body & Soul, and by D. Lynne Fanthorpe, on behalf of the Director of Employment Standards. This Decision is on the issue of the timeliness of the appeal only.

OVERVIEW

Three former employees filed complaints with the Director of Employment Standards ("the Director") alleging that Body & Soul Health and Beauty Center, operated by Suzanne Ashley ("Body & Soul") owed them compensation for length of service and vacation pay. A delegate of the Director investigated the complaints. On February 13, 2002, the delegate issued a determination finding Ashley in contravention of section 46 of the Employment Standards Regulations for failing to provide payroll records, and imposed a \$500.00 penalty, pursuant to s. 28(b) of the *Employment Standards Act* ("the Act"). The deadline for the appeal of this determination was 4:30 p.m., February 28, 2002.

Ms. Ashley filed her Appeal of the Determination on March 13, 2001. She acknowledged that the appeal was filed late, and could therefore be considered out of time. She contended that the Tribunal should extend the time period pursuant to section 109(1)(b) of the *Act*.

The delegate notes that, on January 30, 2002, Ms. Ashley did communicate to her that she was "having personal issues that were taking a lot of her time", but does not specifically oppose the application.

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

On August 13, 2001, the delegate sent a Demand for Records to Body & Soul seeking records relating to hours of work, wages and conditions of employment, and "all records and employer is required to keep pursuant to Part 3... and Part 8.. of the Employment Standards Act" for three former employees (Ms. Janzen, Ms. Tice and Ms. Brandt). Attached to the demand were excerpts of the Act. The records were to be provided to the delegate by September 10. At the bottom of the Notice, in bold type, was the following sentence:

Failure to comply with a record requirement may result in a \$500 penalty for each contravention as stated in Section 28 of the Regulations.

For Ms. Janzen, Ms. Ashley provided the delegate with an ROE issued January 2, 2001, and payroll summaries for 2000 and 2001.

For Ms. Tice, Ms. Ashley provided the delegate with a hand written letter dated September 10, 2001 indicating that documents would be forwarded to her as soon as possible. No further information was

received until February 21, 2002, when Body & Soul's accountant sent the delegate a letter indicating that an analysis of wages and ROE was being prepared.

For Ms. Brandt, Ms. Ashley provided an ROE and time sheets for the period of January 8 to March 16, payroll summaries and an EI Appeal Board decision.

On November 28, 2001, the delegate sent Body & Soul another Demand for Records, which were to be provided December 14, 2001. The demand was accompanied by a letter setting out in some detail what records were required, and indicating that payroll summaries were inadequate. The letter specified that original payroll documents including the daily record of hours worked and payments made were required, and set out s. 28 in full.

In response to that Demand, Ms. Ashley sent a letter to the delegate dated December 13, indicating that she was still unclear what the delegate required. She indicated that she was still working on the records for Ms. Tice, and that she had hired a person to help her with her filing who would assist her in obtaining the material sought. However, she noted that it was unlikely that she could provide the information on the date specified, as December was her busy season. She indicated that she would make every effort to have the information to the delegate "by January 21 or earlier".

On January 8 or 9, 2002, the delegate sent another letter to Body & Soul indicating that neither of the Demands had been complied with, and that she was prepared to conclude her investigation based on the evidence provided. The delegate then outlined her conclusions, and indicated that a penalty Determination in the amount of \$500 would be issued after January 23, 2002 if she had not heard from Ms. Ashley by that date.

The penalty determination was issued February 5. The Determination stated as follows:

If there are no disincentives against employers who fail to participate in an investigation, then such conduct may be repeated. The Director issues a penalty in order to create a disincentive against employers who frustrate investigation through failure to provide proper payroll records. (sic)

ARGUMENT

Ms. Ashley contends that her receptionist received the Determination by registered mail and did not pass it on to her until it was past the deadline for appealing. She also indicated that just prior to Christmas, she had pressing personal issues to deal with, and was not at work for the month of January. She stated that, in March, she asked her book-keeper to assist her with file organization, and during this process, discovered the Determination. She states that she attempted to prepare the documents for the appeal between that date and the date the appeal was filed.

Further, Ms. Ashley contends that she did not understand what was being asked of her, and that the delegate did not provide her with specific details of what she was to provide. She says that the documents she provided were sufficient to enable the delegate to make a Determination.

The delegate says Ms. Ashley provided her with incomplete and inadequate information in response to her Demand for Records, despite repeated attempts over a six month period to obtain the records for the employees in question. She says that the information she received did not comply with the records required to be kept under the *Act*.

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.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. 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.

(see: *Niemisto v. British Columbia (Director of Employment Standards)* BC EST # D099/96) and *Pacholak v. British Columbia (Director of Employment Standards)* BC EST # D526/97

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

Bona fide intention to appeal the determination and notice to the parties of this intention

I am not persuaded that Ms. Ashley had a bona fide intention to appeal the Determination and that the Director was notified of that intention.

Reasonable explanation for the failure to request an appeal within the time limits

I am unable to conclude, on the submissions presented, that there is a reasonable explanation for the delay. Ms. Ashley sets out a failure to discover the Determination and a lack of time as reasons for her failure to file her appeal on time. I do not find these constitute extenuating circumstances over which she had no control. Ms. Ashley was aware, by way of a letter sent January 8 or 9, that a Determination would be issued after January 23. This letter was not sent registered mail. I accept that Ms. Ashley was preoccupied by personal matters in January, however, there is no evidence she attempted to contact the delegate at any time after the letter was received.

The appeal deadline was February 28. If Ms. Ashley was indeed only aware of the Determination on March 3, she made no attempt to contact the Tribunal to determine whether the deadline could be extended at that time. Rather, she waited until March 13 to do so.

Strong prima facie case

I am unable to find that there are serious issues that ought to be dealt with on appeal.

Section 28 of the Employment Standards Act provides that for each employee, the Employer must keep records of a number of matters, including

- (b) the date the employment began
- (d) the hours the employee worked on each day,
- (e) the benefits paid to the employee
- (f) the employee's gross and net wages for each pay period, and
- (g) each deduction made from the employee's wages and the reason for it.

Section 85 provides that all records are to be provided to the Director when requested. In 478125 B.C. Ltd. v. British Columbia (Director of Employment Standards) B.C.E.S.T. D. 279/98) the Tribunal emphasized that the requirement to maintain records relating to employment and hours of work is on the employer. The Tribunal held that it was the employer's responsibility to structure its affairs to comply with the Act.

Two separate demands were made over a six month period. The delegate did not issue a penalty Determination in September, as she could have done. The second demand was very specific about what records were required. Ms. Ashley could not have failed to understand what was being asked of her. Had Ms. Ashley kept the records she was required to keep under the Act, it would, in my view, be reasonable to infer that she would have provided those within the time frame provided to her by the delegate. Ms. Ashley was given fair notice not only what records were required to be produced, but also the consequences of failing to do so.

Prejudice to the Respondent

The delegate made no submissions on the issue of prejudice.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the extension should not be granted. I am not able to conclude that there is a fair issue to be addressed on appeal.

ORDER

Pursuant to Section 114 of the *Act*, I deny Body & Soul's application for an extension of time to file the appeal.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal