



An appeal

- by -

Efren (Sonny) R. Serion and Josefina Serion, operating as Terrens Nannies  
("Terrens")

- 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.:** 2001/213

**DATE OF DECISION:** May 23, 2001

## DECISION

This is a decision based on written submissions by Josefina Serion and Efren Serion operating Terrens Nannies ("Terrens"), and J. Paul Harvey for the Director of Employment Standards (the "Director"). This decision is on the issue of the timeliness of the appeal only.

### OVERVIEW

As part of an investigation into a complaint filed against Terrens, a delegate issued a Demand for Records pursuant to s. 85(1)(f) of the *Employment Standards Act* ("the Act").

The Demand, which was issued July 28, 2000, set out those documents Terrens was to produce, and the date for such production. Terrens did not produce any records by the deadline of 3:00 p.m. August 14, 2000.

On February 15, 2001, the delegate found Terrens in contravention of s. 46 of the *Act*, and imposed a \$500 penalty for its failure to comply. The delegate indicated that Terrens had been under investigation in 1999, and was made aware of its obligation to maintain employment records at that time. The delegate noted that no reasonable explanation was given for Terrens' failure to produce the documents. Because Terrens had been made aware of its obligations in 1999, and failed to produce the requisite documents in 2000, the delegate found it appropriate to exercise her discretion to impose a penalty under s. 28(b) of the *Employment Standard Regulations*. Attached to the Determination was a notice that the Determination could be appealed as well as the instructions for filing an appeal. The notice indicated that the appeal deadline was 4:30 p.m. March 10, 2001.

Terrens filed the appeal on March 13, 2001, and sought an extension of time in which to file the appeal.

The delegate opposed 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

As noted above, the Determination was issued February 15, 2001. The Determination indicated that the appeal deadline was 4:30 p.m. March 10, 2001. The delegate acknowledges that this date is incorrect, since March 10 fell on a Saturday. The correct appeal deadline was March 12, 2001. The appeal was therefore received one day late.

Terrens says that the appeal was late because it had to address another Determination issued on substantive issues in respect of the same matter first. Terrens also says that, although the penalty Determination was in respect of the same matter, the deadline for filing an appeal on this Determination was earlier than the other Determination. Finally, Terrens says that it "did not want to answer this particular determination" at first, but after noting that the Tribunal was an independent body, it decided to do so.

The delegate argues that, since Terrens filed its appeal to the Determination on the other matter by the March 12 deadline, it could have included its response to this Determination at the same time. The delegate notes that Terrens acknowledged that it chose not to submit its response at the same time.

The delegate further contends that Terrens failed to meet any of the considerations applicable for an extension of time set out in the Tribunal's decision *Blue World It Consulting Inc.*, BC EST#D515/98. He argues that Terrens provides no reasonable and credible explanation for its failure to file on time, no evidence of a genuine and ongoing bona fide intention to appeal, and no evidence of a prima facie case in favor of the Appellant.

## **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)* (BCESTD#099/96) and *Pacholak v. British Columbia (Director of Employment Standards)*(BCESTD# 526/97)

Furthermore, extensions will only be granted where there are compelling reasons present. (Moen and Sagh Contracting Ltd., BCESTD#298/96)

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

There is no evidence that Terrens had a bona fide intention to appeal the Determination and that the Director was notified of that intention. In fact, the submissions indicate that Terrens had no intention to appeal the Determination until after the deadline had passed. Terrens reconsidered the matter and decided to file the appeal only after the time to do so had passed.

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

I am unable to conclude, on the submissions, that there is a reasonable explanation for the delay. In fact, the only reason advanced is that Terrens was in the process of appealing another determination. It is unclear from the submissions what the appeal deadline was for the other determination. The delegate states it was the same, Terrens says it was earlier.

In Moen and Sagh Contracting Ltd. the reasons for the delay were sudden or serious illness or some other extenuating circumstances over which the appellant had no control. In Hnidan (BCESTD#025/98), 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. There is no evidence any extenuating circumstances existed.

### **Strong prima facie case**

Terrens argues that it did not have a licence to operate an employment agency in 2000, and as such, did not fall within the jurisdiction of the Act. No evidence was provided in support of these submissions.

The delegate argues that all employment agencies must be licensed, and that Terrens had been licensed on an irregular basis between 1987 through 1999. The Delegate determined that the agency was doing business without a licence during the year 2000, and issued a Determination in respect of that matter, which Terrens has also appealed.

Terrens has not established a strong prima facie case. The issue to be addressed is whether Terrens had a reason for ignoring the Demand for Records. On the evidence before me, it appears Terrens did not provide any reply to the Director with respect to the Demand between July 28, 2000 and February 15, 2001. In the absence of any evidence or submissions on this issue, I am unable to conclude that there are serious issues that ought to be dealt with on appeal.

**Prejudice to the Respondent**

The delegate makes no submissions on the issue of prejudice to any party as a result of the late filing of the appeal, and I have assumed, given that the appeal was filed one day late, that there is none.

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 be not granted. Although the appeal was only one day late, there are no good reasons advanced for the reasons for the delay. Furthermore, there was no evidence of an intention to file an appeal on any earlier date, and I am not prepared to find that there is a fair question to be addressed on appeal.

**ORDER**

I deny Terrens' application for an extension of time to file the appeal.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**