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 -

D & G Collector's Records Ltd.
("D & G" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/240

DATE OF DECISION: July 7, 1999

DECISION

SUBMISSIONS

Ms. Gloria D. Schaefer ("Schaefer") — on behalf of the Employer

Ms. Gina Hayden ("Hayden" or the "Employee") — on behalf of herself

Mr. Jennifer Ip — on behalf of the Director

OVERVIEW

This is an application for extension of time under Section 109(1)(b) of the *Employment Standards Act* (the "*Act*") in respect of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the *"Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on January 8, 1999 which determined that Hayden was owed $883.98 on account of vacation pay and compensation for length of service.

As I understand it from the Determination, Hayden was terminated from her employment due to "low sales, misconduct and insubordination". The incidents relied upon by the Employer as the grounds for the termination of Hayden are set out in the Determination and included responsibility (from the Employer's standpoint) of a set of records being stolen, being rude towards an important customer (causing loss of business), re-pricing CDs without authority, poor sales on days when she was responsible for the store, and closing the store to attend to personal banking. The delegate noted that the onus of proving cause for termination rests with the Employer. In the circumstances, the delegate concluded that "there is insufficient evidence to prove that the complainant was adequately notified her employment was in jeopardy by continuing failing to meet the standards".

FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated April 20, 1999. In a letter attached to the appeal form, Schaefer states:

> "I was misinformed and believed I had six months to enter an appeal. Consequently, I missed the appeal deadline of February 1, 1999."

Section 112 provides that an appeal must be delivered to the Tribunal within 15 days after the date of service if the person was served by registered mail and within 8 days after the date of service if the person was served personally or transmitted via fax or electronically (see also Section 122(3)). The Determination clearly states that "any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by February 1, 1999." As well, the an information sheet with respect to appeal procedure was attached to the Determination. This sheet stated: "A completed appeal form must be delivered to the Tribunal **on or before the appeal deadline shown on the Determination**." Ultimately, in any event, whether or not an appeal is filed in a timely manner depends on whether or not the appeal is filed in accordance with Section 112 of the *Act*. It is clear that the appeal is not filed in a timely manner.

In *Blue World It Consulting Inc.* (BC EST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

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 and ongoing *bona fide* intention to appeal the Determination;
3. the respondent party (*i.e.*, the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
4. the respondent party will not be unduly prejudiced by the granting of the extension; and
5. there is a strong *prima facie* case in favour of the appellant."

In my view, for the reasons set out below, the application fails to satisfy these criteria.

The *Act* specifically provides that a determination is deemed to have been served if it is "sent by registered mail to the person's last known address" (Section 122(1)(a)). In this case, there is no issue that the Determination was not served in accordance with the *Act*.

In this case, the Employer argues that it was "misinformed". The appeal file contains several lengthy letters from the Employer, including one dated March 12, 1999, addressed to the delegate, where Schaefer explains:

> "On November 6, 1998 I was admitted to hospital and was away from work for almost a month. I explained at our meeting that I am in poor health. ... My health necessitated that I stay away from work much of the latter part of January 1999. Your determination letter dated Jan 8/99 was sent by registered mail. An employee signed for the letter during my absence and *by the time I was aware that I had*

> *the right to appeal your decision, it was already too late to meet your February 1, 1999 deadline. I feel I was not given enough time to exercise my right to appeal*." (emphasis in original)

It is clear, from a careful reading of the above, and other letters, that there is no explanation of when exactly the Employer received the Determination. Moreover, there is no explanation of why the Employer did not appeal immediately following her return to work or waited until mid-March before indicating it intention to file an appeal. (Indeed, the appeal itself was not filed with the Tribunal until April 20)

In a reply to submissions by the delegate and the Employee, Schaefer does, however, admit the following:

> "I received Ms Ip's "Letter of Determination" *late in January.* In that letter, Ms Ip advised me the appeal deadline was February 1. Attached to that letter was a form advising that I could pick up appeal forms at a branch of the Employment Standards. *This was the first time that I became aware that I did not have 6 months within which to appeal her decision*." (emphasis added)

It is clear, therefore, that Schaefer, in fact, was aware, *before* the expiry of the appeal deadline, of her appeal rights. Nevertheless, it is not until the March 12 letter--apparently received by the delegate on March 15, *i.e.*, almost a month and a half after the expiry of the appeal deadline--that she indicates the Employer's intention to appeal. I note, as well, that the correspondence reveals that the delegate wrote to the Employer twice requesting payment of the Determination amount, namely on February 1 and March 1. The Employer wrote to the delegate on February 11, enclosing an amount on account of vacation pay, without making any mention of her intention of appealing the determination.

The delegate says:

> "The employer has made no attempt to contact this branch or seek an appeal of the Determination after she returned to work. On February 8, 1999, I wrote to the employer advising her that the Determination had expired and that the company was required to pay the amount of wages as stated on the Determination. The employer paid the vacation pay but not the compensation for length of service. At that time she did not indicate her intention of appealing the Determination.
>
> On March 1, 199, I again wrote to the employer requiring payment of the compensation for length of service. It was not until March 15, 1999 that this office received a letter from the employer indicating

> that she did not agree with the Determination that compensation for length of service is owing. On March 23, I wrote to the employer advising her to contact the Employment Standards Tribunal which has the power to extend the period of requesting an appeal."

Employer argues that it was informed by the Employment Standards Branch that it had six months to appeal. Even if I accept this as factual, the Determination clearly provides the necessary information regarding the appeal process. Moreover, in this case Schaefer was, in fact, by her own admission, in possession of the correct information *prior* to the expiry of the deadline.

Moreover, despite the fact that the Employer was--again--made aware, due to the letter from the delegate dated March 23, 1999, that it would have to pursue its appeal through the Tribunal, it did not file an appeal until April 20. There is no reasonable or credible explanation for this delay.

In the circumstances, the Employer has not provided a reasonable and credible explanation for the delay. In the result, I dismiss the application for extension of time to file the appeal.

ORDER

The application to extend time to file an appeal of a Determination dated January 8, 1999 is dismissed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal