

An appeal

- by -

The Pacific Investment Corporation Limited operating as Peaks Coffee House

- 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:** John M. Orr

**FILE No.:** 2001/274

**DATE OF DECISION:** May 30, 2001

## DECISION

### APPLICATION

This is a consideration of an application by The Pacific Investment Corporation Limited ("Pacific") operating as Peaks Coffee House pursuant to Section 109 of the Employment Standards Act (the "Act") to extend the time period for requesting an appeal from a determination numbered ER# 094394 dated March 8, 2001 by the Director of Employment Standards (the "Director") even though the time period for requesting an appeal has expired.

The two main issue addressed in the determination were whether Ms Sheila Westwell ("Westwell") was a manager of the coffee shop and the hours that she worked. In the determination a delegate of the Director decided that Westwell was not manager and was entitled to wages of \$6,611.48.

The determination was dated March 8 and included a notice that the appeal deadline was 4:40 p.m. on April 2, 2001. There is no issue raised around service of the determination.

The appeal herein by Pacific was received by the Tribunal on April 6, 2001 at 2:57 p.m.

The time limits for appeals are setout in Section 112 of the *Act* as follows:

*Right to appeal director's determination*

- 112.** (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*
- (2) *The request must be delivered within*
- (a) *15 days after the date of service, if the person was served by registered mail, and*
  - (b) *8 days after the date of service, if the person was personally served or served under section 122(3).*

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine and ongoing intention to appeal;

3. the respondent and the Director were aware of the intention to appeal;
4. the prejudice to the employee will be considered;
5. there is a *prima facie* case set out in the appeal.

In this case Pacific says that they made it very clear to the delegate that they had every intention of appealing the determination and this is not disputed by the delegate. The appeal was filed four days after the deadline and the reason given for the delay is that the President of the company was called out-of-town suddenly to manage a business crisis in Toronto. He returned on the day following the expiration of the appeal period. The President says that he immediately contacted the delegate to find out what he could do about the missed time limit. He then drafted his appeal and filed it and an application for an extension of time.

At this stage in the proceedings I will not comment on the merits of the appeal except to say that the submissions made on behalf of Pacific demonstrate that there is a triable issue or in other words it sets out a *prima facie* case. Pacific notes that the delegate concedes that his calculations only represented a "best estimate" based on the personal memory of the employee. Pacific has produced time records that are alleged to be in the handwriting of the employee and which would refute the claim in whole or in part.

While delay in and of itself can be prejudicial to one or more of the parties, in this case the delay was only a matter of four days. I do not find in this case that the delay results in significant prejudice.

I conclude that this is a proper case for the exercise of the discretion allowed in section 109 and therefore I grant the extension and the hearing of this appeal will be scheduled as soon as practicable.

## **ORDER**

Accordingly, pursuant to section 109(1)(b), I extend the time for filing of the appeal herein.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**