

An appeal

- by -

Kudos Fashion Corporation

- 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:** Norma Edelman

**FILE No.:** 2002/256

**DATE OF DECISION:** July 10, 2002

## DECISION

### OVERVIEW

This is an appeal by Kudos Fashion Corporation ("Kudos") pursuant to the Section 112 of the Employment Standards Act (the "Act") against a Determination issued by a delegate of the Director of Employment Standards on April 15, 2002. The delegate found that Kudos owed Van Diem Tang ("Tang") \$6,682.08 representing lost wages as a result of a contravention of Section 54(3) of the Act. The Determination indicated an appeal of it had to be delivered to the Tribunal by May 8, 2002. The Tribunal received an appeal on May 16, 2002. Kudos requested that the Tribunal extend the deadline to file an appeal. This appeal was decided based on the written submissions of the parties.

### ISSUE TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the Act to extend the deadline for filing an appeal?

### FACTS

On April 15, 2002 the delegate issued a Determination in which he found that Kudos failed to reinstate Tang in her former position, or in a comparable position, following her maternity leave and as a result she was owed \$6,682.08 in lost wages for the period September 28, 2001 to February 18, 2002. The delegate stated that Kudos claimed the business was temporarily closed in December, or from mid November to mid January, but since it failed to respond to his request for clarification on this point, he declined to deduct either period from his award.

The Determination indicated that an appeal of it had to be received by the Tribunal no later than May 8, 2002.

The Tribunal received an appeal from Frank Zetler ("Zetler"), on behalf of Kudos, on May 16, 2002. Zetler says he was sick in bed at the time the appeal was due and was unable to deal with this matter. He further says that Tang was laid off work due to an illness (she had cramps in her legs and could not stand) on September 27, 2000 and a Record of Employment was issued to that effect. She did not subsequently advise the company she had given birth. If she had, a new Record of Employment would have been issued showing she was on maternity leave. When Tang returned to work, she and other employees were laid off due to a shortage of work. Tang was given a Record of Employment to that effect dated September 28, 2001. Zetler argues the company has therefore fulfilled its obligations as an employer. He also says that if the Tribunal accepts that Kudos contravened the Act the amount of the award should be reduced by \$2,263.00 to reflect the fact the company was closed for 34 days during the period November 16, 2001 to January 2, 2002.

In further submissions, Zetler says prior to the appeal deadline of May 8 they were busy compiling information to document their appeal and this process was interrupted by his illness. He was ill from May 3 to May 10 and was only able to finalize the appeal and lodge it on May 16. He also says the company was still in the process of setting up new premises and it was in the middle of a busy production period which caused a delay in attending to administrative matters. Zetler says the delay in filing the appeal was

only 8 days and there was always an intent to appeal as they believe they have a valid case. Moreover, the delegate was aware there was an intent to appeal and extending the deadline will not harm the Respondent's case. Finally he believes if the extension is granted the appeal will succeed. He says the Tribunal should consider the fact they have a small business with limited administrative resources and they have had no employee problems in sixteen years with the result they have no experience in this regard. Further, he believes it would be fair and reasonable to be granted an extension.

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109 (1)(b) of the Act. Both the delegate and Tang replied to the appeal.

The delegate says the Determination was delivered to the company at its corporate address and to the Records and Registered Office on April 17 and 18 respectively and therefore the company had 22 days to file a timely appeal. He further says that it is not clear if Zetler was "sick in bed" throughout the 22 days to the extent he could not notify the Tribunal of his intention to appeal. The delegate says he feels Zetler did not give the matter due attention until he was contacted on May 13 to discuss voluntary payment of the Determination. The delegate says he called Zetler on May 10 to discuss payment and left a message suggesting he return the call that day. When he received no response he called again on May 13 and spoke with Zetler. At that time Zetler did not discuss reasons for not appealing or the intent to appeal. Rather, he said he did not receive the Determination. Zetler was then advised that the Canada Post "Last Delivery Status" report showed the Determination was delivered to the corporate address and Records and Registered Office 2 and 3 days after it was issued. The delegate submits the company had ample time to file a timely appeal and failed to do so and has failed to present compelling reasons for the delay. He requests that the appeal be dismissed.

In her replies to the appeal, Tang says she requested maternity leave in November 2000 and advised the company in September 2001 she was available to return to work. Further, as set out in the Determination, Kudos advised her there was no work at that time and she was given a Record of Employment to that effect on September 28, 2001. In other words, Kudos decided not to reinstate her in September, prior to the alleged temporary closure of the business. She further says the award should not be reduced because Kudos failed on at least 6 occasions to provide information to the delegate. Finally she says she received a copy of the Determination on April 19 and doubts that Zetler did not receive his copy of the Determination as he claimed during his May 13 conversation with the delegate.

Zetler was given an opportunity to make a final reply to the submissions of the delegate and Tang. The Tribunal received no reply.

## ANALYSIS

Section 109(1)(b) of the Act provides the Tribunal with the discretion to extend the time limit for an appeal. Kudos has requested that the Tribunal extend the deadline to file an appeal.

The Tribunal has consistently held that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang*)

BCEST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal has identified several material considerations including:

- there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- there has been a genuine and ongoing bona fide intention to appeal the Determination;
- the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must be aware of this intention;
- the respondent party will not be unduly prejudiced by the granting of the extension; and
- there is a strong prima facie case in favor of the appellant.

I have considered the circumstances of the late filing of this appeal and I am not satisfied that Kudos has provided a reasonable and credible explanation for the failure to deliver an appeal to the Tribunal by May 8, 2002. I accept that Kudos received the Determination 2 to 3 days after it was issued, which was 2 weeks before the time Zetler became ill, and well before the appeal deadline. Clear instructions were included in the Determination about how and when to file an appeal. Even if the demands of the business were unusually onerous at the time, Zetler had ample time, particularly prior to his illness, to contact the Tribunal to discuss the situation and request additional time, if necessary, to file an appeal.

Nor am I satisfied there has been an ongoing bona fide intention to appeal the Determination. Kudos received the Determination before the deadline to appeal and an appeal was launched 8 days after the deadline to appeal. The delegate says that his collection activities motivated the appeal. Zetler did not dispute this claim and I agree with the delegate that this appeal was likely prompted by his attempt to collect money. There is nothing before me, which would support the view that Kudos genuinely intended to appeal prior to May 16.

Further, the first the delegate and Tang knew of an actual appeal was when they received notification from the Tribunal on or about May 16, 2002 that an appeal had been received from Kudos. As well, in my view, it is not in Tang's interest to have this matter further delayed by granting an extension to the appeal deadline. One of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act. It is in the interest of all parties to have complaints and appeals dealt with promptly.

Finally, although the appeal is not obviously frivolous, Kudos has not established a strong case in its favour. First, Zetler does not address one of the key findings of the delegate, which is that Tang was laid off work prior to the alleged temporary closure of the business and never recalled after operations resumed. Second, the Tribunal has consistently held that in the absence of a legitimate reason, evidence and information will not be considered on appeal when it could have and should have been presented to the delegate during the investigation process (see *Specialty Motor Cars* BCEST #D570/98). The delegate stated that he made various attempts to get further information from Kudos regarding the time frame for the alleged temporary closure of the business, but Kudos failed to reply to him. Zetler does not dispute this claim and he has not provided any reason why he failed to provide information to the delegate to support his position that the business was closed from November 16 to January 2. Accordingly, if the

appeal was accepted, Kudos would likely not be allowed to present the evidence it seeks to present on the appeal with the result the appeal would be dismissed with respect to the amount of the award.

For the above reasons, I decline to extend the appeal period. The obligation is on the Appellant, Kudos, to exercise reasonable diligence in the pursuit of an appeal. In this case, the Appellant has failed to persuade me it has done so and I find no compelling reasons to extend the time limit for requesting an appeal in this case.

## **ORDER**

Kudos' application under Section 109(1)(b) of the Act to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the Act the appeal is dismissed and accordingly the Determination is confirmed.

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**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**