

An appeal

- by -

Frank Miccolis operating as Frankie's Two for One Pizza

- 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: Fernanda Martins

FILE No.: 2001/151

DATE OF DECISION: June 12, 2001

DECISION

OVERVIEW

This is an appeal by Frank Miccolis operating as Frankie's Two for One Pizza (the "employer"), pursuant to Section 112 of the *Employment Standards Act* (the "Act"). The appeal is from the Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 2, 2001. The Director determined that the employer had contravened Part 3, section 16 and Part 4, Sections 36(2) and 40(2) of the *Act*. The employer was ordered to pay \$791.13 for minimum wage, overtime, vacation pay and interest by January 31, 2001 and was assessed a zero dollar penalty. The Director attached appeal deadline information to the Determination which advised the employer that the appeal deadline was January 31, 2001.

The Tribunal received the appeal form dated February 12, 2001, on February 19, 2001. The appeal included reasons for late submission.

The Tribunal will decide whether it should exercise its discretion to extend time to appeal without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

The Director issued the Determination on January 2, 2001 and sent it to the Employer by registered mail. The Director submitted a copy of the Canada Post "Priority Courier Track and Trace System" print-out which indicates that "F.M." signed for the package on January 4, 2001. The Employer does not dispute the date of service.

In the Determination the Director stated:

I further order Frank Miccolis operating as Frankie's Two for One Pizza to pay \$791.13. Please send to this office a certified cheque or money order by January 31, 2001 made out to Lesley Loftus in the amount of \$791.13.

Under the *Act*, I may file this Determination in the British Columbia Supreme Court and begin collection proceedings. Directors and officers of companies can also be required to pay wages owed to employees. If payment is not received by January 31, 2001, additional interest will accrue, and the amounts owing may be referred to a collection agency without further notice to you.

At the conclusion of the Determination the following appears.

Enclosed:
Appeal Deadline Information

The Determination as provided by the appellant was missing the last page which was provided later by the Director upon request by the Tribunal. On the last page of the determination was the following notice:

IMPORTANT INFORMATION

You can appeal this Determination

The appeal deadline is 4:30 p.m. on January 31, 2001

1. Your appeal must be made to the Employment Standards Tribunal.
2. Information on how to appeal a Determination, including the Appeal Form, is in the Guide to the Appeal Process. The Guide and Appeal Form are available at offices of the Employment Standards Branch, the Government Agent and the Employment Standards Tribunal.
3. The Employment Standards Tribunal office is at Suite 890, 360 West Georgia Street, Vancouver, BC. Telephone number (604) 775-3512 and fax, (604) 775-3372.
4. You must use the Appeal Form and attach a copy of this Determination to it.

The Employer attached a letter dated February 6, 2001, to his appeal form, which elaborated on his reasons for appeal and also stated:

This appeal is late because the appeal papers never arrived until Feb 05-2001 after I placed two phone calls to the government agent. I would prefer an oral hearing to state my case as I have a hard time communicating in writing.

ISSUE TO BE DECIDED

The sole issue to be decided is whether the Employer should be granted an extension of the statutory period in which to appeal pursuant to section 109(1) (b) of the *Act*.

THE LAW

Section 81 (1)(d) of the *Act*, requires the Director to serve any person named in the Determination with a copy of the Determination that includes the time limit and a process for appealing the Determination to the Tribunal.

The *Act* provides strict time limits in which an appeal may be filed. Section 112 provides as follows:

- 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).
- 122 (1) A determination or demand that is required to be served on a person under this *Act* is deemed to have been served if
- (a) served on the person, or
 - (b) sent by registered mail to the person's last known address.
- (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.

The *Act* allows the Tribunal to extend the time for filing an appeal in section 109(1)(b) which states:

- 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
- ...
 - (b) extend the time period for requesting an appeal even though the period has expired;

The time limits in section 112 are consistent with the purpose of the *Act* as set out in section 2(d):

to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*.

In *Niemisto (Re)* [1996] BCEST #D099/96 the Tribunal enumerates the criteria which should be considered for granting an extension of time for filing an appeal. Appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

- ii) there has been a genuine and on-going bona fide intention to appeal the Determination;
- iii) the respondent party (i.e., the employer or employee), as well as the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong prima facie case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique, factors ought to be considered.

EVIDENCE AND ANALYSIS

In submissions to the Tribunal dated March 2, 2001, the Director states:

It should also be noted that I contacted Mr. Miccolis on the first week of February 2001 to discuss the payment of the determination amount. He, at that time, stated that he intended to appeal the decision. When advised that the appeal period has expired, he stated that he is waiting for the appeal form to be mailed to him from the Employment Standards Tribunal (the "Tribunal"). He said that he contacted the Tribunal quite some time ago and that he has not received the appeal form yet. Given the information in the determination regarding the availability of the appeal form and the Guide to the appeal process at the Government Agent, I asked the Employer (Mr. Miccolis) if he has visited the Government Agent in Quesnel (a town in which he lives) to pick up the form. He said he didn't know he could do that and that he contacted the Tribunal instead.

The Employer has not replied to the Director's submissions. On the evidence before me I find that the Employer had not made the Director or the Employee aware of his intention to appeal the Determination prior to the contact initiated by the Director after the appeal deadline had already passed.

The Director argues that there is an inconsistency between the reasons for the delay which were given to the Director and the reasons provided in the appeal. That is, the Director was told by the Employer that he had contacted the Tribunal and was unaware of the availability of the forms from the Government Agent, but claims in his appeal that the appeal papers never arrived until February 5, 2001 after he placed two phone calls to the Government Agent.

I note that the appeal information attached to the Determination does indicate that the appeal form is available at the Government Agent as well as the Tribunal, but the address, telephone and fax numbers of the Tribunal are included whereas those of the Government Agent are not. This

is likely because it is the Tribunal which must receive the appeal. However, given that the Tribunal is listed as one of the sources for the Appeal Form, it is reasonable that an Appellant might more readily contact the Tribunal if he is unaware of the existence of a Government Agent in his community.

The "inconsistency", as noted by the Director, in reasons given by the Employer may or may not have been intentional. However, even if I give the Employer the benefit of the doubt and allow that he may be confusing the two "agencies", I find that the reason given for delay of waiting for the receipt of the Appeal Form is unreasonable in light of the Employer taking an additional fourteen days to file the appeal once he had the form. The Employer provides no reason for this additional delay. By the time the Employer had received the Appeal Form, he had been notified in writing of an already generously extended appeal deadline, and then was advised by the Director on the telephone that the deadline had passed.

The Employer was given an appeal deadline which extended beyond the statutory time limit of fifteen days. Although there may be some question as to the authority of the Director to grant time limits beyond those required by the *Act*, the Tribunal has held in *Stohlstrom (Re)* [1998] BCEST #D453/98 that "it is preferable for the Director to continue with the established practice of setting out, in the determination itself, a fixed deadline for appeal rather than simply parroting the language of section 112(2). It should be remembered that, for the most part, parties are not legally represented either during the investigation of a complaint or on an appeal to this Tribunal."

The Employer claims that there are discrepancies in the facts that were submitted to the Tribunal. He submits that the complainant could not have worked the hours claimed because they fell outside the advertised hours for deliveries. The Employer provides a menu flyer which indicates delivery times. The Determination sets out that the Employer failed to respond to a "Demand for Employer Records". The Director relied on records provided by the Employee and on information provided by another witness. The Employer had every opportunity to provide this information to the Director during the investigation. Nevertheless, advertised delivery times are not evidence that the employee was not working outside those hours.

The Employer also claims in his appeal:

When rate of pay was discussed complainant agreed to a per piece rate of \$2.00 per delivery because as any delivery service charges per delivery ie: contract drivers self employed delivery services.

The Director determined that Ms. Loftus was an employee who worked between five and seven hours daily over a twenty day period. There was no evidence to indicate that she was a "contractor". During the investigation, the Employer claimed that he had given Ms. Loftus a job because she begged him, whereas she and another witness claimed that she had been hired to replace the delivery person who had quit. There was no claim that she was "self employed".

The Employer then claims in his appeal that the complainant was on call and did not need to be present at the premises. She could stay home or be in touch and come when needed. Complainant never performed any work on the premises except to deliver pizzas and was not asked nor expected to.

I do not find any error in the Director's determination that "the complainant was under the Employer's control and direction in that she was delivering the company's products to the company's customers based on the calls or demands received by the company." The Director set out in the Determination that "Karin Morgan, the Employer's representative, contacted the Complainant on August 15, 2000 and asked her if she could start working on August 16, 2000 because the delivery person quit earlier than anticipated. Ms. Patty Spinks contacted the complainant the next day (August 16, 2000) to confirm if she could come in to work that day. The Complainant agreed to start on August 16, 2000 and continued working till September 4, 2000." In light of the foregoing I cannot accept that the Employer had actually designated the employee's residence as the "on call" location.

I have determined that the facts do not support the exercise of the Tribunal's discretion to extend the time for an appeal. If the extension had been granted, there does not appear to be any basis on which the appeal would have succeeded.

ORDER

The request to extend the time period for requesting an appeal is denied.

Fernanda Martins
Adjudicator
Employment Standards Tribunal