

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-

Swift River Ranch Ltd.

(“Swift River”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/227

DATE OF DECISION: July 10, 1998

DECISION

OVERVIEW

This is an appeal brought by Swift River Ranch Ltd. (“Swift River”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by the Director of Employment Standards (the “Director”) on December 10th, 1997 under file number 068-554 (the “Determination”).

The Director determined that Swift River owed its former employees, Lee Alston (“Alston”) and Dale Givens (“Givens”), \$3,660.29 and \$16,764.24, respectively, on account of unpaid wages including vacation pay, statutory holiday pay and overtime pay and interest.

FACTS

As noted above, the Determination was issued on December 10th, 1997; as set out in the Determination itself, an appeal to the Tribunal was required to be filed within 23 days of the date of the Determination. The Determination was sent out by certified (registered) mail to Swift River’s registered and records office--531 Reid Street, Quesnel, B.C.--on December 10th, 1997. It was also mailed out that same day to Swift River’s usual business address to the attention of Leif Andersen (this same business address was noted on the two employees’ Records of Employment and on company payroll cheques). The former mailing was returned, unclaimed, to the Prince George office of the Employment Standards Branch on January 21st, 1998. Swift River’s solicitors acknowledged, in a letter dated April 6th, 1998 addressed to the Tribunal, that the Determination was, in fact, received at the company’s registered office on December 19th, 1997.

The within appeal was filed with the Tribunal on April 15th, 1998 although a letter from Swift River’s solicitor was faxed to the Tribunal on April 6th, 1998 advising that the solicitor intended to meet with Swift River’s principal on April 14th, 1998 and that formal appeal documents would be filed shortly thereafter. Although the solicitor’s letter requests that the April 6th letter be “accept[ed]...as the beginning of the appeal”, section 112(1) clearly states that a written request for an appeal must include “reasons for the appeal” and no such reasons were included in the April 6th letter. However, in my view, nothing turns on whether the appeal was filed on April 6th or 14th; either way, the appeal was filed well after the statutory appeal period had expired.

ISSUE TO BE DECIDED

Section 112(2)(a) of the *Act* provides that an appeal from a determination must be filed within “15 days after the date of service, if the person was served by registered mail”. Further, section 122(1) and (2) of the *Act* provide as follows:

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.

Finally, pursuant to section 204 of the B.C. *Company Act*, a corporation can be validly served by sending the document by registered mail to the corporation's registered office.

Thus, by reason of the above-noted statutory provisions, Swift River was validly served with the Determination on December 18th, 1997 and, accordingly, had until January 2nd, 1998 to file an appeal.

As noted above, the instant appeal was not filed until April 15th, 1998--well after the statutory appeal period had expired. Swift River now seeks an extension, pursuant to section 109(1)(b) of the *Act*, of the time for filing an appeal.

ANALYSIS

According to the information appended to the appellant's appeal form:

"Reasons Why This appeal Is Late.

Lief Andersen, principal of Swift River Ranch Ltd., heard about the Certificate of Judgment registered against the Company in the Supreme Court of British Columbia on or about February 8, 1998. On or about February 10, 1998, Mr. Andersen telephoned Del Bulman, of Employment Standards. Mr. Bulman faxed the Determination to the government agent in Quesnel. Mr. Andersen picked it up from there. Mr. Bulman told Mr. Andersen that it was too late to appeal.

Mr. Andersen had never received the Notice of Determination before that time. It had not been forwarded from the Company's registered office. Mr. Andersen had also never received any of the Demands for Employee Records.

Subsequently, Mr. Andersen consulted a lawyer and that lawyer referred Mr. Andersen to my firm.

Mr. Andersen has acted expeditiously in the circumstances."

I am not satisfied that it would be appropriate to extend the appeal period given the facts of this case.

First, there appears to be a demonstrated pattern on the part of Swift River of ignoring communications from the Employment Standards Branch. The uncontradicted evidence before me is that the Director's delegate sent, by certified mail, Demands for Employment Records issued with respect to both Mr. Alston and Mr. Givens on September 8th and October 17th, 1997, respectively. Both Demands were returned as unclaimed mail. Further, another "penalty" determination, issued for failure to produce records was similarly mailed to Swift River by certified mail and then subsequently returned unclaimed.

Second, by his own admission, Mr. Andersen was aware of the Determination by no later than February 8th, 1998 but, despite the clear direction contained in the Determination itself regarding how and when an appeal could be filed with the Tribunal, there was a further delay in excess of two months before an appeal was filed.

Third, Swift River now concedes that the Determination was received at the company's registered office on December 19th, 1997 but I have no information before me as to any communications between Swift River's registered office and the principals of the Swift River between December 19th, 1997 and February 8th, 1998 when Mr. Andersen says he first learned about the existence of the Determination.

Fourth, the employer acknowledges some liability to each of the two employees and, in my view, should make submissions to the Director under section 86; I fail to see why the employer should be granted a dispensation from this Tribunal given its rather cavalier attitude throughout these proceedings. I note that the two employees' wage claims date from mid-August 1996 (Givens) and mid-February 1997 (Alston)--these employees, who have yet to be paid, should not be further prejudiced in obtaining their wages by a still further delay that an appeal would entail. Further, my cursory review of the material before me suggests that, even if the appeal did go forward, it has little prospect of success particularly in light of the *Kaiser Stables* doctrine (see EST Decision No. D058/97).

In previous Tribunal decisions, several material considerations have been identified when considering a request for an extension of the appeal period including:

- i) there is a reasonable and credible explanation for the 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 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.

In my view, the appellant has failed to satisfy any of the above-mentioned criteria.

ORDER

Swift River's 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 within appeal is dismissed and accordingly, the Determination is hereby confirmed as issued in the amounts of **\$3,660.29** (Alston) and **\$16,764.24** (Givens) together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal