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.: 98/228

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 9th, 1997 under file number 068-554 (the "Determination").

The Director determined that Swift River failed to comply with a Demand for Employer Records, issued on August 27th and again on September 8th, 1997, and accordingly, levied a penalty in the amount of $500 (see section 28 of the *Employment Standards Regulation*).

FACTS

The August 27th Demand, relating to former Swift River employee, Lee Alston, was sent to Swift River's registered and records office located at a Quesnel law office. The Demand was, in turn, transmitted by that law firm to Mr. Leif Andersen, the principal of Swift River, with a direction regarding the time limit for compliance with the Demand. On September 8th, 1997, a second Demand for Employer Records, also relating to Mr. Alston, was sent to Swift River's usual business address to the attention of Mr. Andersen (this same business address was noted on Alston's Record of Employment and on company payroll cheques). Swift River failed to produce the records as demanded and, in due course, the $500 penalty determination now before me was issued.

As noted above, the Determination was issued on December 9th, 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. On December 9th, the Determination was sent out by certified (registered) mail to Swift River's usual business address to the attention of Leif Andersen. The determination was returned, unclaimed, to the Prince George office of the Employment Standards Branch on January 21st, 1998. The Determination was also sent to Swift River's registered office situated at a Quesnel law firm.

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 Mr. Leif Andersen 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 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.*

Thus, by reason of the above-noted statutory provisions, Swift River was validly served with the Determination on December 17th, 1997 and, accordingly, had until January 2nd, 1998 (January 1st being a holiday) 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.

There appears to be a demonstrated pattern on the part of Swift River of ignoring communications from the Employment Standards Branch. The evidence before me discloses that Director's delegate sent to Swift River, by certified mail, a Demand for Employment Records relating to Mr. Alston on two separate occasions but, in each case, the Demands went unheeded; indeed, the September 8th Demand was returned as unclaimed mail.

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.

Swift River's appeal is based on the assertion that:

> "The Determinations of $500.00 each for failing to produce records should be set aside because the principal of he Company did not have notice of the demands."

This assertion is contradicted by the evidence of Swift River's solicitors who maintained the company's registered and records office--as noted in the Determination, the August 27th Demand was personally picked up by Mr. Andersen from the law office who maintained the company's records along with an explanatory covering letter specifically directing Mr. Andersen's attention to the time limit for producing the employment records in question.

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, while there would not be any undue prejudice to the Director if the appeal was to go forward, the appeal appears to have virtually no chance of success and, in any event, the appellant has failed to satisfy the other 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 amount of **$500**.

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Kenneth Wm. Thornicroft, ***Adjudicator***
Employment Standards Tribunal