

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 -

Prisal Holdings Ltd.
Operating LaRustica Ristorante Italiano

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	John M. Orr
FILE No:	1999/312
DATE OF DECISION:	August 13, 1999

DECISION

OVERVIEW

This is an appeal by Prisal Holdings Ltd. operating LaRustica Ristorante Italiano ("Prisal") pursuant to Section 112 of the Employment Standards Act (the "Act") from a decision of the Acting Chair of the *Employment Standards Tribunal* ("the Tribunal") declining, on behalf of the Tribunal, to consider an appeal by Prisal of a Determination dated April 26, 1999 by the Director of Employment Standards (the "Director").

The Acting Chair of the Tribunal advised Prisal by letter dated May 25, 1999, that Prisal's appeal was dated, and received by the Tribunal, May 21, 1999 and that the deadline for receipt of an appeal was May 19, 1999. The letter went on to advise that the appeal would not be considered as it did not comply with section 112(2) of the *Act*.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Tribunal should grant an extension of time for consideration of the appeal pursuant to section 109 (1)(b) of the *Act*.

FACTS AND ANALYSIS

The timelines for filing an appeal of the Director's Determination are set out in section 112 of the *Act* as follows:

- 112 (1) *Any person served with a Determination may appeal the determination to the Tribunal by delivering 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).*

Section 109 (1)(b) of the *Act* allows the Tribunal to "*extend the time period for requesting an appeal even though the period has expired*".

In this case the Determination was made on April 26, 1999. It was served by registered mail and receipt was acknowledged on April 27, 1999. The 15th day thereafter would have been May 12th and therefore the appeal should have been received within that 15 day period - by the end of business on May 12, 1999. The Determination sets out "Appeal Information" and states that the appeal must be delivered to the Tribunal by May 19, 1999. The Acting Chair accepted this date as

calculated by the Director but in any case the application for appeal was not delivered until May 22, 1999. By any calculation the application for appeal was delivered after the period had expired.

In exercising the discretion under section 109 the Tribunal has developed a number of guiding principles. To seek an extension, appellants should satisfy the following criteria:

1. there is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
2. there has been a genuine and ongoing bona fide intention to appeal the determination;
3. the respondent party and the Director have been made aware of this intention;
4. the respondent will not be unduly prejudiced by the granting of an extension; and
5. there is a strong *prima facie* case in favour of the appellant;

(*Re Niemisto* [1996] BC EST #D099/96 and *Re Pacholok* [1997] BC EST #D526/97 *et al*)

The above is not an exhaustive list of the criteria that the Tribunal will consider and it is clear that extensions of time for filing an appeal will be granted only for compelling reasons and the burden is on the appellant to show that the time period should be extended, *Re South Delta Motors Ltd* [1997] BCEST #D240/97 *et al*. It is considered by the Tribunal that the short time limits in the *Act* are in accordance with the purpose of the legislation which is to provide a fair and efficient process for dispute resolution, *Re Francis Mushrooms Ltd*. [1997] BCEST #D108/97.

In this case Prisal submits that the Determination was issued prematurely because the Director's delegate was aware that Prisal was searching for further documentation to submit to the delegate as part of the delegate's investigation. Prisal also submits that the appeal information is not set out clearly and was missed by the company. Prisal says that the delegate was aware of the intention to appeal and two days prior to the expiration of the appeal period they had submitted further information to the delegate. In substantial terms Prisal says that they have now recovered records which will show a number of "cash" payments to the employee not included in the regular time cards and payroll records and that it would be unfair for the employee to now receive additional payment for work already paid for. In essence Prisal seeks to re-open the investigation.

The Director's delegate points out that before the Determination was issued Prisal had ample opportunity to provide all of the information to the delegate. Prisal was served with a "*Demand for Employer Records*" on January 12, 1999, which requires the employer to provide *all* records relating to wages to the Director by January 29, 1999.

The Director's delegate submits, and I accept, that on March 25, 1999, a month before the Determination was issued, the delegate personally attended on the employer and hand delivered her calculations of wages owing to the employee. The delegate also returned the employer's records and requested the employer to review all the calculations for accuracy prior to the Determination being issued. During the same visit the delegate outlined to the employer the anticipated Determination and the subsequent appeal process. The delegate advised the employer that he had two weeks to make any further submissions about the calculations or any aspect of the Determination. No further submissions were made by the employer at that time and the

Determination was issued one month later.

On all of the submissions before me I can find no merit in the employer's application for an extension of time to appeal. The onus is on the employer to keep up-to-date and accurate records of an employee's hours of work and wages paid. I am satisfied that the employer was given ample opportunity to respond to the complaint and adequate information about the appeal process. Prisal can not rely on its own failure to keep proper accounting records and its own *laches* to now seek to re-open the investigation.

Accordingly, I agree with and confirm the decision of the Acting Chair in declining to extend the time for submitting the employer's appeal herein.

ORDER

The application for an extension of time pursuant to section 109 of the *Act* is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal