

**BC EST #D334/99**

**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 -

Daniel Egan

(“Egan or employee”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Paul E. Love  
**FILE NO.:** 1999/341  
**DATE OF DECISION:** August 24, 1999

## DECISION

### OVERVIEW

This is an appeal by Daniel Egan (the “employee”) of a Determination dated April 28, 1998 . The principal issue to be determined is whether Mr. Egan ought to be given an extension of time to file his appeal. Mr. Egan indicated that a reason that he could not file an appeal in time was that he was working lengthy hours, and that he had a learning disability which required the assistance of another person to file the appeal. I determined that the appeal should not be dismissed as Mr. Egan formed an intention to appeal before the expiration of the appeal period, that there was a bona fide reason for lateness, that the delay was not inordinate, that the appeal was not frivolous or vexatious and there was a strong prima facie case, and that further there was no prejudice to the Director or to the employer.

### ISSUES TO BE DECIDED

Should the appeal of this matter be dismissed for lack of timeliness in the filing of the notice of appeal?

### FACTS

Mr. Egan was terminated from his employment with Red Robin Restaurants of Canada Ltd. on March 20, 1999. He alleges that he was not paid compensation for length of service. The delegate in his determination of April 28, 1999 found that Mr. Egan was terminated for cause. Mr. Egan wrote to the Tribunal on May 20, 1999 indicating that he intended to appeal. In his letter he stated as follows:

I have been working 16 hours a day and the person who was helping me is now on his deathbed in the hospital. I would also like to let you know the most of the information in this Determination is false information. I would like to send you the appeal but I would need a few more day to get it on paper if possible your help is greatly appreciated. (sic)

Mr. Egan filed an appeal of the Determination with the Tribunal on June 1, 1999. Along with a written submission of 4 pages.

The Directors delegate has filed a written submission, opposing the extension of time. The Delegate sent the Determination to Mr. Egan by certified mail. The determination included a statement that the Determination could be appealed and that the appeal must be delivered to the

Tribunal office by May 19, 1999. The Determination also included a one page summary of how to appeal a Determination to the Tribunal. The Delegate had telephone contact with Mr. Egan and advised him of the deadlines to appeal.

On June 30, 1999 Mr. Egan filed a further letter with the Tribunal and indicated that part of the problem with lateness was that he had a learning disability, that he needed assistance in dealing with the appeal, and the person assisting him originally could not assist him due to sickness.

The employer has not made any submission with regard to this issue, although invited by the Tribunal to do so by letter dated June 2, 1999.

## **ANALYSIS**

The Act provides a scheme for the speedy resolution of employment related disputes. It provides for time limits for the filing of an appeal.

It is clear that this appeal was filed out of time. The Tribunal has jurisdiction to dismiss an appeal, without a hearing, where the appeal has not been requested within the time limit set out in section 112(2) of the *Act*. The wording in section s. 114 of the *Act* indicates that there is a discretion with regard to a dismissal of an appeal based on non-compliance with the time limits.

The Tribunal will not as a matter of course grant an extension of time when an appeal is filed late: *Oriental Tea Garden Restaurant Ltd*, *BCEST # D450/97*. There must be compelling circumstances before the Tribunal will exercise its discretion in favour of an appellant: *Tang*, *BCEST # D211/96*. While it appears, from a review of the case law, that an appellant may have an uphill battle in persuading the Tribunal that there are exceptional circumstances, it is clear that I must exercise my discretion with regard to the facts advanced in this case, and not fetter my discretion by the application of any rigid rule or precedent.

In my view this issue ought to be resolved by determining:

- (a) Did the person seeking the extension form a decision to appeal the Determination within the appeal period?
- (b) What is the extent of the delay and is there a reasonable excuse for the delay?
- (c) Is there a strong prima facie case in favour of the applicant?
- (d) Is there any prejudice to the respondent?

From the material before me I am persuaded that Mr. Egan formed his decision to appeal the Determination within the appeal period. It is clear that he communicated his intention to appeal to the Delegate, who then referred him to the Tribunal. He contacted the Tribunal one day after

**BC EST #D334/99**

the expiration of the appeal period. He perfected his appeal 12 days after the appeal period. I do not find that the delay in this matter is inordinate. His excuse for failing to file in time is reasonable - he is learning disabled and required assistance. The person on whom he relied for assistance was apparently ill and could not assist. The appeal process is designed for ease of accessibility to persons who are unrepresented by counsel. There is some degree of literacy required for an appellant to access the processes of the Tribunal. I am concerned that it would be unfair for me to exercise my discretion against an appellant who has suggested that he had the intention to appeal, and could not obtain the assistance necessary to file in time.

Without commenting upon whether Mr. Egan would be ultimately successful in his appeal, it appears that there is some merit to the appeal. This case deals with an issue of cause, and no progressive discipline was applied. Mr. Egan was dismissed because of one incident of misconduct. This appeal does not appear to be frivolous or vexatious.

There is no evidence in this case of prejudice to the employer or to the Director.

I decline to dismiss this appeal on the point of timeliness, and grant an extension of time to permit the appeal to proceed. The appellant filed his material on June 1, 1999, and therefore is in a position to proceed should an extension be granted.

**ORDER**

Pursuant to section 114 of the *Act*, I decline to dismiss the appeal on the issue of timeliness and grant an extension of time to June 1, 1999, which is the date upon which the appellant perfected his appeal.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**