

August 11, 2000

BC EST #D343/00

To: Interested Parties

**Re: Employment Standards Act - Part 13
Appeal of a Determination issued by the Director of Employment Standards on
March 22, 2000
Bravo Cuccina Restaurante Italiano Ltd.-and- John A. Stevens
Tribunal File No. 2000/423 CDET**

ISSUE: TIMELINESS OF THE APPEAL

The Director of Employment Standards (the "Director") issued a Determination against Bravo Cuccina Restaurante Italiano Ltd. (the "Appellant") on March 22, 2000. The Determination awarded \$1542.44 to John Stevens, a former employee, (the "Respondent") for statutory holiday pay, minimum daily pay and statutory holiday pay. The appeal deadline was April 14, 2000. The Appellant filed an appeal on June 15, 2000.

The Tribunal must decide whether to extend the appeal deadline from April 14, 2000, to June 15, 2000 and this decision deals only with that issue.

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

The *Employment Standards Act* (the "Act") imposes an appeal deadline to ensure appeals are dealt with promptly. That is consistent with one of the purposes of the *Act*, which is to provide fair and efficient procedures for resolving disputes. Under section 109(1)(b) of the *Act*, the Tribunal can extend the time for requesting an appeal, even though the appeal period has expired.

The Tribunal does not grant extensions automatically but it may extend a time limit if there are compelling reasons to do so. To decide if there are compelling reasons, the Tribunal has consistently applied a policy involving six criteria. Appellants who are seeking a time extension for an appeal, should satisfy the Tribunal on balance that:

1. there is a good reason they could not appeal before the deadline;
2. there is not an unreasonably long delay in appealing;
3. they always intended to appeal the determination;
4. the other parties (the respondent and the Director) are aware of the intent to appeal;

5. the respondent will not be harmed by an extension; and
6. they have a strong case that might succeed, if they get an extension.

ANAYLSIS

I find as fact that the following events occurred in this case:

- Mr Bentroudi, who filed the appeal on behalf of the Appellant, knew from the Director's phone call on February 24th that there was an investigation involving the Respondent's claim for wages;
- Mr Bentroudi told the Director on February 24th that he was preparing to leave the country for 2 weeks and wouldn't be able to provide details but would be happy to provide them when he returned;
- the Director sent a Demand for Payroll Records to the Appellant's workplace by registered mail on February 25, 2000 and it was returned as 'refused by addressee';
- Mr Bentroudi had approximately 2 weeks after he returned home and before the Determination was issued on March 22nd, when he could have contacted the Director and provided the details he referred to in the February 24th phone call, but he did not do so;
- the Determination was sent by registered mail to 3 places: the workplace, Mr Bentroudi's home and the Appellant's registered and records office; the ones sent to the workplace and to the home were not claimed while the one sent to the registered and records office was returned to the sender because the address was wrong;
- after the Determination was issued, the Appellant did not respond during the next 2.5 months until after its bank called it on June 8, 2000 about a claim against its account for wages; the Appellant still did not appeal for another week, until June 15th.

Applying the six factors described above, to this case:

1. Mr Bentroudi's reason for filing the late appeal is that he was not aware of the Determination because he never saw any documentation on it. That is because he did not pick up the registered mail sent to his home or the registered mail sent to the workplace.

Those reasons are not sufficient for being late. Under section 122 of the *Act*, a determination is deemed to be served if sent by registered mail to the person's last known address. That was done here, so the Appellant was served in two instances. As Mr Justice Pitfield stated in *Laguna Woodcraft (Canada) Ltd. and the Employment Standards Tribunal and the Director of Employment Standards, BCSC, (April 28, 1999), Vancouver Registry, Docket A982962*:

- ' . . . if (a party) chooses not to claim its certified mail it does so at its peril, particularly where the statute under which the certified mail is issued provides that in a certain number of days following delivery by certified mail or attempted delivery by certified mail, delivery is deemed to have been made.'
2. The appeal was 2 months late – a substantial delay.
 3. There was no evidence of intent to appeal until the Tribunal received the late appeal.
 4. The other parties would not have learned of this intent until the Tribunal sent notice of the late appeal to them.
 5. There is no evidence of harm to the Respondent.
 6. The Appellant does not appear to have a strong case. The Appellant wants a chance to explain the facts from its point of view but it already had that opportunity with the Director, and did not take advantage of it.

Mr Bentrouti says that the Respondent is owed nothing because:

- under section 34(2), no minimum daily pay is owed because when the Respondent was sent home, it was due to bad weather preventing outdoor dining and/or a lack of customers, both of which were shortages of work beyond the Appellant's control, and many other times the Respondent chose to leave due to lack of work and the Appellant shouldn't be penalized for that;
- under section 40(1), overtime is not paid to employees on a flexible work schedule and the Respondent's work schedule was at all times extremely flexible;
- under section 43(c), holiday pay is not applicable due to the non-existence of a regular work schedule;
- the Respondent quit his job in March 1999 but did not file his claim until September 1999 and that shows the claim is not an honest one;
- plus, Mr Bentrouti would like an explanation of the difference between the amount the Determination awarded (\$1542.44) and the amount taken from the Appellant's bank account (\$1651.69).

None of the Appellant's reasons for appeal shows that the Determination might be incorrect, which is what the Appellant must do to succeed in an appeal.

Dealing with each of the Appellant's reasons for appeal:

Lack of customers or work does not qualify under section 34, to avoid the 4-hour minimum daily pay requirement, nor did the Appellant provide any evidence that bad weather prevented the Appellant's entire business from proceeding.

There is no evidence the Respondent was on a flexible work schedule, which has to comply with the requirements of section 37 of the *Act*. Instead, the Appellant appears to refer to a casual work schedule, which varied somewhat.

Section 43(c) does not exist, the Respondent was not on a flexible work schedule and holiday pay is applicable.

The Act allows a person 6 months to file a complaint.

Finally, the Director explained in his July 17th letter that the difference between the amount in the Determination and the amount taken from the Appellant's account is interest.

CONCLUSION

The Appellant knew there was an investigation it had to address, but chose to not deal with it and to not look at the material the Director sent.

The Appellant had a right to appeal the Determination before the deadline. It also had a matching responsibility to exercise that right before the deadline. The Appellant did not discharge that responsibility, or exercise reasonable diligence in pursuing an appeal. The Appellant was properly served with the Determination and has failed to provide any good reason for being substantially late in its appeal. The Appellant has also failed to show it has a strong case on the merits.

The balance of these factors does not establish any compelling reason to extend the appeal deadline.

ORDER

The Tribunal does not extend the appeal deadline and the appeal will not proceed.

Norma Edelman
Vice-Chair
Employment Standards Tribunal