

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 -

Heritage Car & Truck Rentals Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No.: 2000/481

DATE OF DECISION: September 11, 2000

DECISION

TIMELINESS

This is a consideration of an application by Heritage Car & Truck Rentals Ltd. (“Heritage”) pursuant to Section 109 of the Employment Standards Act (the “Act”) to extend the time period for requesting an appeal from a Determination numbered ER# 073561 dated April 20, 2000 by the Director of Employment Standards (the “Director”) even though the time period for requesting an appeal has expired.

The main issue addressed in the Determination was whether a manager of Heritage’s car and truck rental business on Salt Spring Island had been paid his wages and vacation pay as required by the Act. On April 20, 2000 a delegate of the Director issued a Determination in which he found that the manager was entitled to wages, vacation pay and interest in the amount of \$23,928.43.

The appeal herein by Heritage is dated July 6th, 2000, and was received by the Tribunal, July 6th at 2:55 p.m. The Determination advises on the last page that:

Any person served with this Determination may appeal it to the Employment Standards Tribunal. **The appeal must be delivered to the Tribunal no later than 4:30 PM on May 15, 2000.** Complete information on the appeal procedure is attached. Appeal forms are available at any office of the Employment Standards Branch. (bold added)

The time limits for appeals are set-out in Section 112 of the Act as follows:

Right to appeal director’s determination

- 112.** (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office 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).

The Act also provides for how service of the Determination may be established:

Service of determinations and demands

- 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.*
- (3) *At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.*

In this case, on April 20, 2000 the Director's delegate sent the Determination by depositing copies of it in a Canada Post Office to two addresses for Heritage. The first package was to the registered and records office for Heritage in Vancouver. Canada Post documents confirm delivery of the Vancouver package on April 27, 2000.

The second package was sent registered mail to the last known street address for Heritage on Salt Spring Island. Canada Post records that delivery was attempted on April 26 and 27th. The customer was not available and a card was left to advise the customer to pick up the package. Canada Post records indicate that the package was picked up on May 12, 2000 in Victoria. On April 25th Mr Kelln asked by telephone that a copy of the Determination and appeal forms be sent to a post office box on Salt Spring Island. It is evident that Mr Kelln was at least aware of the issuing of the Determination no later than April 25, 2000.

By law service of the Determination was deemed to have occurred by April 29th - 8 days after the determination was deposited with Canada Post and sent to the last known address for Heritage. As noted on the face of the Determination the last day, even counting generously, for filing an appeal would have been May 15th. The appeal was not delivered until July 6th.

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine and ongoing intention to appeal;
3. the respondent and the Director were aware of the intention to appeal;
4. the prejudice to the employee will be considered;
5. there is a strong prima facie case set out in the appeal.

In this case Heritage recites an extensive tale of woe. Heritage says that their post office box was shared with a business called B+B Ganges Marina Ltd which was placed in receivership on April 12th and that all subsequent mail was taken by the receiver. Heritage say that they were not notified of this until early July.

Heritage claims that the copy of the Determination which was mailed to their records office was forwarded by their lawyer, Mr Bennett, to their post office box - the very one which was being seized by the receiver. Mr Bennett apparently tried to contact Mr Kelln by phone but the phone had been disconnected also by the receiver.

Heritage claims that the receiver also raided the second mail box to which the Determination had been sent and that again it wasn't until early July that Heritage discovered that the receiver had their mail.

The acts of the receiver in this case in seizing mail not addressed to their debtor company, if true, appear to be outrageous and may well be actionable in law but, in my opinion do not excuse the lack of effort made by Heritage to acquire a copy of the Determination. As allowed by s.122(3) Heritage could have requested an electronic copy or a faxed copy. Heritage could have attended to the Employment Standards Branch or made any other arrangements to acquire a copy of the Determination.

I am not suggesting that there is any onus on a party to ensure that they are "served" but where they are legally served and have appealed nearly 60 days late and are now seeking an extension of time some due diligence must be shown.

The undisputed fact is that Heritage knew of the Determination by April 25th and did not file an appeal until July 6th.

I also note that Heritage says that they did not receive their mail until early July but the submission attached to the notice of appeal is dated June 13th, 2000 some 23 days before the appeal was delivered to the Tribunal.

On all of the material and submissions before me I am not satisfied that this is an appropriate case to exercise my discretion under section 109(1)(b) to extend the time for filing the appeal. Therefore the appeal is dismissed for being out of time.

ORDER

Accordingly, pursuant to section 109(1)(b), I decline to extend the time for filing of the appeal herein. The appeal is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal