

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-

Mei Yuan Wu

(“Wu”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/528

DATE OF DECISION: October 6th, 1999

DECISION

OVERVIEW

This is an appeal brought by Mei Yuan Wu (“Wu”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 10th, 1999 under file number ER076-436 (the “Determination”).

The Director’s delegate determined that Wu’s former employer, D & T Taiwanese Restaurant Ltd. (the “employer”), owed her the sum of \$582.65 on account of unpaid weekly overtime pay and interest. The delegate dismissed Wu’s claim for compensation for length of service (see section 63), finding that the employer had just cause for termination based on Wu’s repeated tardiness. Prior to her dismissal, the employer warned Wu that further instances of tardiness would result in her termination.

TIMELINESS OF THE APPEAL

The Determination contains, at page 8, a notice stating, in part, that an appeal of the Determination may be filed with the Tribunal and that such an “appeal must be delivered to the Tribunal by April 6, 1999”. Further particulars regarding the appeal process were also set out in the Determination.

This appeal was not filed with the Tribunal until August 30th, 1999, nearly five months after the statutory appeal period expired [see section 112(2) of the *Act*]. Accordingly, Wu seeks, pursuant to section 109(1)(b) of the *Act*, an extension of the appeal period. These reasons for decision address only this latter application.

FINDINGS AND ANALYSIS

According to the information appended to Wu’s appeal notice, her appeal was late because “I was in Taiwan when the application period terminated” and “I didn’t receive the notice because change of address” [sic].

Among the documents before me is a letter dated August 26th, 1999 from the delegate to Wu--this letter appears to confirm Wu’s assertions. The delegate’s letter states:

“This is further to your contacting our office on August 25, 1999. I understand that you have been absent from Canada and also you have changed your address.

I have enclosed copies of the Determinations that were issued on March 10, 1999, and a letter concerning collection of wages sent to you on July 14, 1999. These letters were returned to the branch as undeliverable”.

In a letter to the Tribunal dated September 17th, 1999 the delegate also noted that letters from the delegate to Wu, dated February 5th and March 2nd, 1999, were both returned as “undeliverable” as was the letter enclosing the Determination.

The Acting Chair of the Tribunal wrote to the employer on August 30th, 1999 requesting its written submission, to be received by September 20th, with respect to the timeliness of the appeal, however, the employer has not filed any submission whatsoever. I infer from this inaction on the employer's part that it does not object to an extension of the appeal period. The Director does object to any such extension.

Having reviewed the material before me, I cannot conclude that the appeal is obviously frivolous. The appellant does appear to have advanced a reasonable explanation for her failure to file a timely appeal. I am troubled by the fact that this appeal was filed so very late but also note that the employer does not apparently object to the appeal going forward. The appellant's first language is not English and she may well have misunderstood the nature of the employment standards process and her obligation to keep the delegate informed of her whereabouts.

Finally, the appellant was not personally served with the Determination, nor was she served by registered mail (the Determination was sent out by regular prepaid post); thus, the "deemed service" provisions set out in subsections 122(1) and (2) of the *Act* are inapplicable. It appears that Wu may not have actually received a copy of the Determination until after August 26th, 1999 when a copy was enclosed in the delegate's letter to her (see above) in which case this appeal was arguably filed within the statutory appeal period.

ORDER

Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period in this matter be extended to August 30th, 1999. Thus, this appeal is properly before the Tribunal and, in due course, the merits of the appeal will be adjudicated following an oral hearing, or alternatively, based solely on the parties' written submissions.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal