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 -

B.C.C.E. Communications Inc.
("B.C.C.E." or the "Employer")

-and-

Olia Mak operating Genius Communications
("Genius Communications" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/331 and 1999/327

DECISION DATE: September 2, 1999

DECISION

SUBMISSIONS

Ms. Olia Mak	on behalf of Genius Communications
Mr. Stan Mak	on behalf of B.C.C.E.
Ms. Diane H. MacLean	on behalf of the Director

OVERVIEW

This is an application for extension of time under Section 109(1)(b) of the *Employment Standards Act* (the "*Act*") in respect of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against two Determinations of the Director of Employment Standards (the "Director") issued on April 23, 1999. The Determinations found that B.C.C.E. owed Mr. George Thebeau ("Thebeau") $479.75 and Genius Communications owed him $1,305.48 on account of wages.

As I understand it from the Determination, Thebeau worked for the Employers between October of 1995 and February 15, 1997. Between October 1995 and June 1996, he worked exclusively for Genius Communications and after that time he worked for both.

The Determination raises the issue of "associated employers" (Section 95 of the *Act*), but makes no decision in that regard, because Thebeau agreed to have his complaint decided on the basis of the Employers being separate business entities. Accordingly, I make no decision with respect to that issue.

FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated April 20, 1999. The grounds of appeal are set out in that letter as follows:

> 1) the delegate erred in calculating the amounts owed, and
>
> 2) that B.C.C.E. and Genius Communications are separate employers.

A letter dated May 20, 1999 to the Tribunal sets out the grounds for the extension of the deadline for filing a appeal:

> "The reason for the late submission of the appeal is due to the misunderstanding of the procedure from our part. We had received the determination package from the Employment Standards office at

> the end of April. After receiving the package, we noticed some miscalculation occurred. We then brought that up to Ms Diane MacLean's attention. Initially we thought the Employment Standards office will suspend the appealing procedure while we were doing the recalculation. The whole process took about 10 days between our discussion with Ms Diane MacLean ...."
>
> After the adjustment had been made, Ms Diane MacLean fax us the correct calculation on May 14, 1999. We telephoned Ms Diane MacLean on May 18 and accepted the revised calculation. We then realised the appeal form has to be submitted disregard the fact that the amount in the determination is incorrect. ..."

The delegate opposes the application to extend time. Her argument may summarized as follows:

> 1) There is no reason why the Employers should have assumed that there would be an extension of time. Particularly where, as here, the Employers were expressly advised in writing by the delegate of the deadline for filing an appeal (in addition to the deadline set out on the face of the Determination).
>
> 2) The Employers have had ample opportunity to correct mistakes in the delegate's calculations. Initial calculations were sent to the Employers on December 5, 1997. The Employers did not take issue with the calculations. Subsequent calculations, based on the assumption that the Employers were separate business entities, *i.e.*, not "associated employers", was provided by the delegate on March 11, 1999. The Employers did not question these calculations until the Determination had been issued.
>
> 3) The calculations are based on the two Employers being treated as separate entities. Thebeau agreed to this to facilitate an expeditious resolution of the complaint.

The Employers do not respond to the delegate's submissions. In particular, the Employers do not deny that they did not respond to the delegate as alleged. The Tribunal could well find from that conduct that the appellant Employers were, as the delegate put it, "were sitting in the weeds".

Section 112 provides that an appeal must be delivered to the Tribunal within 15 days after the date of service if the person was served by registered mail and within 8 days after the date of service if the person was served personally or transmitted via fax or electronically (see also Section 122(3)). The Determination clearly states that "any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by May 17, 1999." Service does not appear to be an issue in this case. As well, the an information sheet with respect to appeal procedure was attached to the Determination. This sheet stated: "A completed appeal form must be delivered to the Tribunal **on or before the appeal deadline shown on the Determination**." Ultimately, in any event, whether or not an appeal is filed in a timely manner depends on whether or not the appeal is filed in accordance with Section 112 of the *Act.* It is clear that the appeal is not filed in a timely manner.

In *Blue World It Consulting Inc*. (BCEST #D516/98), the Adjudicator summarized the considerations applicable to a request for an extension of the appeal period:

> "1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
> 2) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
> 3) the respondent party (*i.e.*, the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
> 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
> 5) there is a strong *prima facie* case in favour of the appellant."

In my view, the application fails to satisfy these criteria. In particular, I am of the view, that the Employers have not provided any reasonable explanation for failing to file the appeal in time. The deadline and the procedure for filing the appeal is set out clearly on the face of the Determination the attached information. In addition, the delegate advised the Employers in separate correspondence of the deadline. Moreover, there is no strong *prima facie* case made out here. The Employers question the delegate's calculations but do not set out or explain how the calculations are in error. Similarly, the Employers argue that they are separate employers (which is accepted for the purposes of the Determination) but fail to suggest how that, if accepted, would affect the Determination.

In the circumstances, I dismiss the application for extension of time to file the appeal.

ORDER

The application to extend time to file an appeal of the two Determination dated April 23, 1999 is dismissed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal