

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 -

Selkirk Waterway Restaurant Ltd.
("Selkirk")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 1999/425

DATE OF DECISION: September 16, 1999.

DECISION

OVERVIEW

This is an appeal by Dean Ross ("Ross") on behalf of Selkirk Waterway Restaurant Ltd. ("Selkirk") pursuant to Section 112 of the *Employment Standards Act* (the "Act"), against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 12, 1999. That Determination directed Selkirk to pay \$1,873.78 to Dale Nordstorm ("Nordstorm") for outstanding wages including vacation pay, statutory holiday pay, unauthorized deductions, and interest accrued.

This decision is based on written submissions.

ISSUES TO BE DECIDED

The issue to be decided is whether the time limit for requesting an appeal, as set out in Section 112 of the *Act*, should be extended in this case.

FACTS

Nordstrom placed a complaint against Selkirk with the Employment Standards Branch. As a result, the Director issued a Demand for Records to Selkirk on March 10, 1999. Selkirk responded by indicating that it did not employ Nordstrom, and that in fact Waterfront Café Ltd. ("Waterfront") employed Nordstrom. A Demand for Records was issued to Waterfront. Their response was that Selkirk employed Nordstrom. A second Demand for Records was issued to Selkirk on March 31, 1999. The records were due on April 19, 1999. On April 17, 1999 Selkirk requested an extension to the Demand for Records. An extension was provided until May 3, 1999. On May 4, 1999, Selkirk indicated it was not able to obtain records from Waterfront.

On May 12, 1999 a Determination was issued against Selkirk in the amount of \$1873.78. According to the Determination, Selkirk did not participate in the investigation.

The deadline to appeal the Determination expired on June 4, 1999. On June 9, 1999 the Employment Standards Branch ("Branch") received a hand-delivered letter from Ross dated June 4, 1999 appealing the May 12, 1999 Determination. In a letter dated June 10, 1999, the Director informed Ross that his letter had been received. This letter further stated that the Determination had been sent to him as well as clear instructions that any appeal to the Determination had to be submitted to the Employment Standards Tribunal ("Tribunal") by June 4, 1999. The Branch received Ross' letter after the expiration of the appeal deadline.

On July 12, 1999, the Tribunal sent Ross a letter indicating that a complete appeal application had not been received to date and that the appeal deadline had expired. As a

result, the Tribunal would close its file. The letter indicates that an appeal form had been sent to Ross and that the Tribunal had requested the submission of the application with reasons as well as a copy of the Determination. In addition, the letter states that the Tribunal had previously explained the appeal process to Ross.

On July 14, 1999, Ross submitted the appeal application along with reasons why, in his view, the Tribunal should extend the appeal deadline and consider his appeal. These reasons can be summarized as follows:

1. His wife is the Director of the company and responsible for the books. She had a baby in mid-May which made it difficult to gather the required information.
2. He was waiting for information from Waterfront.
3. He was unsure what was required.
4. He sent the appeal to the Branch by mistake.
5. All the allegations against Selkirk are false and "he has an answer for everything Dale alleges".

ANALYSIS

Pursuant to Section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. The appellant bears the onus of satisfying the Tribunal that it should exercise its discretion. However, compelling reasons are required for an extension to be granted (*Moen & Sagh Contracting Ltd.* BC EST #D298/96). In deciding whether to grant an extension, the factors that an appellant must establish are set out in *Niemisto* (BC EST #D099/96). These factors are:

- i. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. There has been a genuine and on-going *bona fide* intention to appeal the Determination;
- iii. The respondent party (i.e. the employer or employee), as well the Director, must have been made aware of this intention;
- iv. The respondent party will not be unduly prejudiced by the granting of an extension; and
- v. There is a strong *prima facie* case in favour of the appellant.

This is not an exhaustive list. The Tribunal may consider other relevant criteria as they arise in each particular appeal.

In the situation at hand, I find that the appeal fails on the first ground in that Ross has not provided a reasonable and credible explanation for the failure to request an appeal within the statutory time limit.

Ross states that he had difficulty gathering the information required because his wife is responsible for the books and she had a baby in mid-May. Ross has been aware of the allegations against Selkirk since March 10, 1999 when the Director first made a Demand for Records. He has had at least three months until the appeal deadline to put together "the things we needed" to respond to Nordstrom's allegations. Even if I were to accept that Ross' ability to file a timely appeal was affected by his wife having a baby, I cannot accept that he required until July 14, 1999 to provide the Tribunal with his appeal application and reasons for submitting his application late.

I do not accept Ross' claim that he was unsure of what was required of him or that he sent the appeal to the Branch by mistake. As stated in the Director's letter to Ross, Ross was sent the Determination along with clear instructions on how to proceed with an appeal. The process was also explained to Ross by staff at the Tribunal. These facts lead me to conclude that Ross chose, of his own volition, not to respond to allegations made by Nordstrom during the time frame provided by the *Act*. In terms of receipt of the appeal by the Branch, it is sufficient to note that the Branch received Ross' appeal on June 9, 1999, after the expiration of the appeal deadline, and that the Tribunal did not receive a completed appeal application until July 14, 1999. Ross also claims he was waiting for information from Waterfront. This in itself does not justify filing a late appeal.

Furthermore, section 2(d) of the *Act* provides that one of the purposes of the *Act* is to provide fair and efficient procedures for resolving disputes. It is in the interest of all parties to have complaints and appeals dealt with promptly (*Dr. H. S. Bergman* BC EST #D088/97). Therefore, extensions to time limits should not be given as a matter of course.

In light of the foregoing, I do not consider it necessary to address Ross' assertion that all the allegations against Selkirk are false and "he has an answer for everything Dale alleges". It is my opinion that Ross has not met the burden of illustrating that the Tribunal should exercise its discretion to extend the time period.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated May 12, 1999 be confirmed in the amount of \$1,873.78 together with any interest that has accrued pursuant to Section 88 of the *Act*.

Norma Edelman
Acting Chair
Employment Standards Tribunal