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 -

Avondale and Associates Protective Services Ltd.,
and Response Force Security Ltd.

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: April D. Katz

FILE No.: 2000/532

DATE OF DECISION: October 12, 2000

DECISION

APPEARANCES:

For the Employer	Keith Olstrom by Written Submission
For the Employees	James Wilson, Rischca Boutilier, Faroon Abdul Aziz by Written Submission
For the Director	Terry Hughes by Written Submission

OVERVIEW

The Director of Employment Standards (the "Director") issued a Determination against Avondale and Associates Protective Services Ltd. and Response Force Security Ltd. jointly as associated companies on July 6, 2000. This Determination awarded $38,652.10 to nine former employees (the "Respondents") for unpaid wages, unpaid vacation pay, statutory holiday pay, and statutory holiday pay.

A second Determination against Keith Olstrom for $32,636.68 was issued on July 6, 2000. Keith Olstrom appealed this Determination on July 31, 2000. The Director satisfied this claim against the assets of Keith Olstrom as a Director.

Avondale and Associates Protective Services Ltd. and Response Force Security Ltd. and Keith Olstrom are the "Appellants". The appeal deadline was July 31, 2000. The Appellants filed this appeal on August 3, 2000.

ISSUE – TIMELINESS OF APPEAL

The Tribunal must decide whether to extend the appeal deadline from July 31, 2000 to August 3, 2000 and this decision deals only with that issue.

PRINCIPLES FOR EXTENDING AN APPEAL DEADLINE

The Tribunal has been asked to extend the time to file an appeal on many occasions. In each case the Tribunal is mindful of the purpose of the *Employment Standards Act* (the *"Act"*) under section 2 (d) is "to provide fair and efficient procedures for resolving disputes". The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly. 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 must assess an appeal and ensure that there are compelling reasons to extend a time limit. Recently Adjudicator Edelman set out the six criteria for determining timeliness of appeals based on previous cases in *Bravo Cuccina Restaurante Italiano Ltd.* BC EST #D343/00. She stated:

"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."

After reviewing the specific facts against the criteria Adjudicator Edelman denied the appeal.

FACTS

On May 25, 2000 the Director's Delegate wrote to the Appellants advising of six complaints. In the letter the Appellants advised in great detail the nature of the complaints and the Appellants were asked to provide employment records. On June 1, 2000 the Appellants were sent a letter advising of an additional complaint, restating the previous request and including an additional request for information in relation to the employment of the new complainant. Each of the letters set out the employees individual claims in great detail with dates of NSF salary cheques and the specifics of other claims. The NSF salary cheques were from December 1999, January 2000, February 2000, March 2000, April 2000 and May 2000. The claims for overtime pay and vacation pay were for the same period.

The Appellants responded on June 19, 2000 in a general letter to the Delegate plus specific letters for each complaint. None of the records requested were provided. In the letter to the Delegate the Appellants offered to settle all the claims for a one lump sum payment. The Appellants indicated that they were not in a financial position to pay the claims in full.

The Appellants indicated that if the employees did not accept the offer, the Appellants would all need to declare bankruptcy and there might be no money to pay anyone. The offer to settle with the employees expired on June 30, 2000.

The Appellants letters for each claim acknowledged responsibility for the NSF salary cheques and some of the other claims. Each letter had a proposal for a smaller lump sum payment reiterating the Appellants poor current financial circumstances. Some claims were acknowledged in full.

The aspects of specific claims that the Appellants specifically disputed were addressed in the Determinations. For example one employee used a company vehicle to perform work. He was stopped and issued a fine of $575 for operating an uninsured motor vehicle. The employee had

not been advised not to drive the vehicle. The vehicle's insurance had lapsed two weeks before he was stopped. The Determination allowed the employee's claim against the Appellants.

A letter advising that there were two additional complaints and enclosing a Demand for Employer Records was sent on June 23, 2000. The deadline for a reply was June 30, 2000. One employee withdrew his claim and one employee accepted the offer.

The Determinations were completed and each sent separately to 3 different locations by registered mail on July 6, 2000. The Delegate submitted copies of the Canada Post confirmation of the documents delivery.

At the conclusion of the Determinations the following appears.

Appeal Information
Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be **delivered** to the Tribunals not later than 4:30 on July 31, 2000. **Complete information on the appeal procedure is attached. Appeal forms are available at any office of the Employment Standards Branch.**

On July 6, 2000 the Appellants sent two letters concerning the latest complainants to the Delegate by courier. No payroll records were provided.

The money to satisfy the claims was obtained from the Mr. Olstrom's personal assets and is held in trust by the Director. The amount owing under the Determination against Mr. Olstrom is $27,342.81 as a result of the two employees no longer pursuing their claims.

LAW AND ANALYSIS

In *Suter* (Re), BC EST #D177/00, Adjudicator Thompson considered a request for extension of time for filing an appeal where the Determination was made and mailed on November 23, 1999. The appeal was to be filed by December 16, 1999 and was actually filed December 23, 1999. The mail had not been claimed by the Employer and had been returned to the Employment Standards Branch on December 14, 2000. The appeal was filed when the Employer received a demand notice from her bank. An extension of time was denied after citing the statutory requirements for timeliness of appeals.

I will now apply the six factors described above to the facts in this appeal.

1. "There is a good reason they could not appeal before the deadline"

The Appellants' reason for filing the appeal late is that there was a procedural error on the part of the Employment Standards' Branch by attributing the two Determinations the same employer number. The Appellants state that they submitted an appeal on time but that it was not accepted because it did not have separate appeals for each claimant.

The Appellants filed this appeal dated August 3, 2000 on behalf of Avondale and Associates and Response Force Security Ltd. and Keith Olstrom on August 3, 2000.

The Appellants complied with the requirements for an appeal of the Determination issued against Keith Olstrom. It does appear that there was a misunderstanding about the procedures and the fact that there were two different Determinations, one involving the two corporations and one involving Mr. Olstrom personally as a Director.

2. "There is not an unreasonably long delay in appealing"

The delay of 3 days was not unreasonable.

3. "They always intended to appeal the determination "

There is no evidence about the Appellants' intentions regarding an appeal.

4. "The other parties (the respondent and the Director) are aware of the intent to appeal

The other parties, the Director and the Respondents had no information about the Appellants intended to appeal.

5. "The respondent will not be harmed by an extension"

There is a continuing harm to the Respondents as they wait to have this matter resolved. The Appellants have not met their payroll since December 1999. Many employees have suffered loss of credit rating and credibility with their families and creditors as a result of their pay cheques being dishonored at the bank. The sooner the employees can pay their debts and restore their credit rating the better it will be.

6. "They have a strong case that might succeed, if they get an extension."

The final criteria is the greatest challenge to this appeal. The Appellants allege in their correspondence dated July 29, 2000 that they wish to appeal on a "matter of an error of law and failure to comply with the principles of natural justice." The letter goes on

> "there has been additional evidence which has become available that would have led the adjudicator to a different decision or would have significantly changed the final determination."

The letter then states the Appellants are entitled to a hearing where they can cross examine the employees based on the

> "Rules of Evidence of the Supreme Court . . as the employer has reasonable and probable grounds to believe that [the employees] have provided false statements or fact to the adjudicator".

The letter does not provide any specifics of any evidence or denial of natural justice. There is no evidence in any of the material that supports a conclusion that the Determinations contain errors of fact or law. The letters do not provide any evidence to support a dispute to any specific claim.

The onus is on the Appellants to provide the evidentiary basis for an appeal which would result in varying or canceling the Determinations. There is nothing in the documentation filed by the Appellants to suggest that the Determinations are in error.

CONCLUSION

The Appellants knew there was an investigation they had to address. They were asked for specific information in relation to the 9 complaints filed. The information was not provided. The Appellants acknowledged their liability for most of the claims. The Appellants were given a deadline for the evidence and failed to meet it. The Determinations followed within a week. The Appellants were properly served with the Determinations.

The Appellants have a right to appeal the Determinations before the deadline. They have a matching responsibility to exercise that right before the deadline. The Appellants did file one appeal within the time period. They failed to understand that two Determinations had been made one involving the corporate Appellants and one involving the director of the companies personally. This appeal shows that this is still not understood. This appeal is the only one naming the director of the companies but it also names the corporations although one of them had already filed an appeal.

The delay is not great and I find on balance that there was a misunderstanding of the implications of the Determinations and whom they effected. In spite of the hardship to the Respondents, I allow the extension of time and allow this appeal to proceed.

It is important that the Appellants understand that an appeal before the Tribunal is not intended to consider evidence that was available at the time of investigation but was not provided to the Director's Delegate during the investigation.

ORDER

The Tribunal extends the appeal deadline and the appeal may proceed.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal