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/-

Oriental Tea Garden Restaurant Ltd.
(the "Appellant")

-of a Determination issued by-

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	E. Casey McCabe
FILE NO.:	97/387
DATE OF DECISION:	September 24, 1997

DECISION

APPEARANCES

J. Michael Hutchison, QC for Oriental Tea Garden Restaurant Ltd.

Lawrence Yuk Hung Cheng for himself

Ivy Hallam for the Director of Employment Standards

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination dated April 17, 1997. The Determination found that the Respondent, Mr. Cheng, was entitled to compensation pay for length of service and overtime pay in the total amount of $3,537.19.

ISSUE(S) TO BE DECIDED

Is the employer's appeal out of time?
If the Tribunal exercises its discretion and considers the arguments on appeal is Mr. Cheng entitled to compensation pay for length of service?
If the Tribunal exercises its discretion and considers the arguments on appeal is Mr. Cheng entitled to overtime pay?

FACTS

Mr. Cheng was employed as a dim sum cook from July 6 to November 1, 1996. Mr. Cheng was employed at the employer's operations at Vancouver International Airport. On October 31, 1996 Mr. Cheng visited his physician who was treating him for injuries suffered in a motor vehicle accident. The physician recommended that Mr. Cheng take a week off work and provided a note stating same. Mr. Cheng reported for work the following day, November 1, 1996 and worked until approximately 10:00 a.m. Mr. Cheng's supervisor, Mr. Vincent Yu,

approached Mr. Cheng. Mr. Cheng informed Mr. Yu that he had a doctor's note stating he should take a week off.
There is a conflict in the evidence at this point. It is the employer's position that although Mr. Cheng produced the doctor's note he did not give it to Mr. Yu. It is Mr. Cheng's position that he gave the note to Mr. Yu and that Mr. Yu returned it. However, it is common ground that at this point Mr. Yu informed Mr. Cheng that he would be laid off on November 15, 1996 in any event. Mr. Cheng then left the work place and did not return. A letter dated October 30, 1996 informing Mr. Cheng of his layoff had been prepared but was not given to him at that time. The layoff notice was verbal and given after Mr. Cheng had informed Mr. Yu of the requirement for a medical leave of absence.

It should be noted at this point that Mr. Cheng's employment contract provided that he was to be paid $2,500.00 per month for a minimum 40 hour week. The payroll records show that Mr. Cheng worked 8.5 hours a day for 6 days a week totaling 51 hours. He was not paid overtime for the excess hours. Furthermore, the engagement letter which was dated July 17, 1996 contained a specific clause dealing with overtime. I will return to this clause later in the decision.

The Determination was issued on April 17, 1997. Ms. Hallam indicates in her submission dated June 13, 1997 that she sent this Determination, along with Determinations for two other employees of this employer, by certified mail. Section 112 governs a person's right to appeal a determination made by the Director. Section 112(2) states:

> The request must be delivered within:
> 15 days after the date of service, if the person was served by registered mail, and
> 8 days after the date of service, if the person was personally served or served under Section 122(3).

Section 122(3) states:

> If service is by registered mail, a determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.

The file material does not indicate how service was effected on the employer or if Ms. Hallem's reference to certified meant registered mail. It is clear from perusing the material that the parties proceeded on the basis that the expiry date of the appeal process was 23 days from April 17, 1997. Since that day was Saturday May 10, 1997 the parties assumed that the time to file the appeal expired on Monday May 12, 1997. For the purposes of this appeal decision I accept that the time for filing the appeal expired at 5:00 p.m. Monday May 12, 1997.

ANALYSIS

Counsel for the appellant asks that the Tribunal exercise its discretion pursuant to Section 109(1)(b) to extend the time period for filing an appeal. That Section reads:

> 109. (1) In addition to its powers under Section 108 and Part 13, the tribunal may:
>
> extend the time period for requesting an appeal even though the period has expired,

The employer filed its initial appeal submission on May 14, 1997 some two days after the expiry of statutory time period. The appeal submission was on the Employment Standards Tribunal Standard STL028(Form 1) but did not include any submission regarding reasons for the appeal nor did it include supporting documentation. The submission and supporting documentation was received on May 20, 1997. On May 27, 1997 counsel for the employer submitted a request pursuant to Section 109(1)(b) requesting an extension of the time period for appeal.

In its May 27, 1997 submission the employer states that the management and operation of the restaurant at which Mr. Cheng was employed and which is owned by the Oriental Tea Garden Restaurant Ltd. is conducted by a management firm, C.T.E.W. Hospitality Inc. ("CTEW") The employer further states that a representative of CTEW was not available to provide instructions to counsel or the documentation which had to be obtained from the restaurant files in time to provide that material for the appeal. Counsel further states that this appeal represents the response of the owner and the operator to one of three matters which were all adjudicated on the same date by the Director and that only the instant matter necessitated in appeal. Counsel further argues that the owner has posted full security and throughout has sought legal advice regarding the Determination. Counsel argues that his client has posted the full amount of the Director's Determination in good faith and that no prejudice would be suffered by any party if an extension were granted. Counsel further submits that there are material factual issues and legal issues to be decided and that denying an appeal hearing would deprive the employer of natural justice with respect to the issues in dispute.

Counsel for the employer further clarified his client's position in a submission dated June 23, 1997. He states in that letter that before formally appealing the decision the owner and its management company must decide whether or not an appeal should be launched. He further states that the solicitors engaged for the purpose of the appeal are located in Victoria rather than Vancouver where the companies are located and that this causes some delay in the delivery of documents. Counsel further states that in this particular case "the management company's employee in charge of providing instructions to the appellant's counsel was out of town on business resulting in a delay in marshalling and providing to counsel the necessary documents." Counsel further argues that the bone fides of his client are clear and that it was simply inadvertent that the standard appeal form with full documentation was not provided by May 12, 1997.

Sections 112 and 122 of the Act set out the time periods for the filing of appeals. The time frames are short but that is not unusual in legislation that is administered by a tribunal. This tribunal has consistently stated that time limits will not be extended as a matter of course. (see Niemisto v. British Columbia (Director of Employment Standards) BCEST No. 099/96). Furthermore, the tribunal has stated that extensions will only be granted where there are compelling reasons present. (see Moen and Sagh Contracting Ltd. v. British Columbia (Director of Employment Standards) BCEST No. 298/96). I do not find compelling reasons present in this case.

Counsel for the employer acknowledges that the employer was aware of time limits governing the filing of appeals. The employer argues that because coordination was required between the employer and its management company and that because a key person involved in this coordination was absent during the appeal period a delay was unavoidable. Furthermore, once the documents were compiled it was necessary to deliver them to Victoria for consideration by counsel. I am not prepared to find that delay caused by the employer's management structure and absence of certain employees is a reasonable basis to grant an extension of time. Furthermore, I am concerned that the request for the extension was not received until after the time for filing had expired. I do not accept that the employer has shown a bone fide intention to appeal the determination despite not being able to file its material within the specified period. There was no indication to the Director or Mr. Cheng that, subsequent to the issuance of the Determination, the employer intended to appeal. I do not accept counsel's reference in its letter of February 26, 1997 to Ms. Hallam as sufficient indication of an intention to appeal. I say that because that letter was written prior to the Determination and states, in the context of the three complaints that were before the Director, that any order to make a payment under the Employment Standards Act would be "immediately appealed".

Finally, I do not find that the employer has presented a strong prima facie case. With respect to the claim for compensation for length of service I find that the employer's notification to Mr. Cheng was given after Mr. Cheng had informed the employer of the necessity that he take a medical leave of absence. Despite the fact that the notification letter was dated October 30, 1996 that letter was not delivered to Mr. Cheng nor was Mr. Cheng verbally notified prior to Mr. Cheng informing the employer of the need for leave. The employer's layoff notice is contrary to Section 67(1) because it was given coincidentally with a period during which the employee was on a leave for medical reasons.

Secondly, I do not accept that the employer had just cause for terminating Mr. Cheng. In its appeal submission the employer raised issues of tardiness and failure to appear at work as a basis for arguing that Mr. Cheng was not entitled to termination pay. Those reasons were not discussed with the Director's Delegate during the investigation nor were they given to Mr. Cheng as reasons for the termination of his employment on November 1, 1996. I am not prepared to accept, on appeal, arguments that the employer had just cause to terminate when those arguments were not raised at the time of the termination or during the investigation. (Tri-West Tractor BCEST No. D268/96).

I turn to the issue of overtime pay. Mr. Cheng was provided with an engagement letter dated July 17, 1996. Point 3 of that letter states:

"Any overtime worked will be as per the following terms and conditions:

Prior approval must be sought before any overtime is to be worked;
Overtime worked will be reimbursed by way of time off which will be equivalent to the amount of overtime entitlement; and
Overtime will only be reimbursed by way of time off."

Section 4 of the Act states:

"The requirements of this Act or the Regulations are minimum requirements, and a agreement to waive any of those requirements is of no affect, subject to Sections 43, 49, 61 and 69."

In the instant case Sections 43, 49, 61 and 69 do not apply. I find that the employer, through its engagement letter, has attempted to contract out of the Act. Such conduct is expressly prohibited by the legislation.

In summary I find that the employer has not provided a reasonable explanation for the failure to request an appeal within the prescribed time limits of the legislation. I further find that there has not been a genuine ongoing bone fide intention to appeal expressed to either the Director or Mr. Cheng. I further find that the employer has not made a strong prima facie case for appeal. For the above reasons I refuse to exercise my discretion to abridge the time limits for the consideration of this appeal.

ORDER

I confirm the Determination of the Director dated April 17, 1997 in this matter.

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E. Casey McCabe
Adjudicator
Employment Standards Tribunal