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 -

Microb Resources Inc.
operating Salt Spring Roasting Company
("Microb" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 1999/517

DECISION DATE: October 19, 1999

DECISION

SUBMISSIONS

Mr. Michael Walton ("Walton")	on behalf of the Employer
Ms. Jennifer Lineger ("Linegar")	on behalf of herself
Mr. Gerry Omstead	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 a Determination of the Director of Employment Standards (the "Director") issued on July 13, 1999 which determined that Jennifer Lineger ("Lineger") was owed $3,319.18 on account of overtime wages, minimum daily pay, vacation pay, deduction from wages and compensation for length of service.

The Employer appeals the award of compensation for length of service. There is no dispute that Lineger quit her employment some eight weeks after her hours of work were reduced by more than 50%. The delegate found that the reduction in hours and earnings constituted "constructive dismissal" under Section 66 of the Act.

FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated August 20, after the August 5, 1999 deadline. However, the Employer had written to the delegate on August 4, i.e., prior to the expiry of time for filing an appeal, indicating that its counsel was not available due to vacation and requesting an extension of the time to file an appeal. On August 10, counsel wrote to the Tribunal confirming the intention to appeal and requesting an extension until August 20. With respect to the extension of the time in his appeal application dated August 20, 1999, counsel wrote:

> "It is apparent from the enclosed documents that the Company intended to appel the Determination and prior to the deadline notified Mr. Omstead, the only person from the Employment Standards Branch that it had dealt with. The request to wait until the Company could meet with legal counsel was reasonable. I was on vacation for part of both July and the first week of August. Given the brief nature of the

> extension it is the Company's submission that the respondent could not have been unduly prejudiced. It is respectfully submitted that the reasons for appealing constitute not only a prima facie but a case that has sufficient merit to succeed."

In *Blue World It Consulting Inc.* (BC EST #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."

The delegate and the respondent opposes the request for an extension of time. The delegate and the respondent say, among others, that the Employer had ample time to appeal and could have sought other counsel. The delegate also says that there is no strong *prima facie* case in favour of the Employer. In the circumstances, I am prepared to grant the extension. In my view, the Employer's application meets the criteria discussed in *Blue World*. I accept that there is a reasonable and credible explanation for the failure to appeal in time. It is clear from the correspondence that the appellant Employer had a bona fide intention to appeal and that it advised the delegate of that intention. I am not satisfied that there is any undue prejudice to the respondent. Moreover, and in particular, I am of the view, that there is a strong prima facie case in favour of the appellant Employer. The delegate found that the reduction in hours of work, and the resulting reduction in pay, constituted a layoff. The delegate also found that Lineger quit her employment after eight weeks of reduced hours. Counsel argues that the delegate erred in law and cannot rely on Section 66 in the circumstances of a layoff.

> "The delegate then relied on Section 66 and decided that a reduction of hours constituted a substantial alteration of conditions of employment. The Company contends that in making that determination he committed a reviewable error. The delegate has overridden a specific Section of the Act with a general Section. The Act in section 63 specifically states that liability resulting from length of service is deemed to be discharged if the employee terminates the employment. As well the Act specifically includes in the definition of "termination of employment" a layoff other than a temporary layoff. Further the Act defines "temporary layoff" as a layoff of up to 13 weeks in any period of 20 consecutive weeks. Clearly the layoff of Ms. Lineger was a temporary layoff and therefore is not termination of employment by the employer until the temporary layoff exceeds 12 weeks....."

In the circumstances, I am prepared to exercise my discretion to extend the time for filing the appeal.

ORDER

The application to extend time to file an appeal of the Determination dated July 13, 1999 is granted.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal