

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 -

Brent and Linda Geen
("Geens")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE NO.: 97/661

DATE OF DECISION: October 1, 1997

DECISION

OVERVIEW

This is an appeal by Brent and Linda Geen (the “Geens”) 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 “delegate”) on June 23, 1997. The time limit for filing an appeal of the Determination expired on July 16, 1997. The Tribunal received an appeal from the Geens on August 28, 1997.

The parties were invited to make submissions on the question of whether the Tribunal should exercise its discretion under Section 109(1)(b) of the Act and extend the time period for requesting an appeal.

I have considered those written submissions and have made my decision based on the reasons which are set out below.

ISSUE TO BE DECIDED

Should the Tribunal extend the time period within which the Geens may request an appeal even though the period has expired?

FACTS

The Determination which was issued on June 23, 1997 found that the Geens were required to pay \$499.18 to Amanda McDermid (“McDermid”) on account of wages, vacation pay and interest.

The Determination was sent by registered mail to the Geens at their last known address. The Determination was returned to the delegate on July 21, 1997 as “unclaimed”. The delegate then telephoned the Geens about the Determination and Mr. Geen picked up the Determination at the Employment Standards Branch office in Port Coquitlam.

On the Determination it is printed clearly that an appeal of the Determination must be delivered to the Tribunal within 23 days of the date of the Determination.

The Tribunal received an appeal from Mr. Geen, on behalf of the Geens, on August 28, 1997.

In a submission received by the Tribunal on September 18, 1997 Mr. Geen offered the following reasons for not delivering the appeal within the 23-day time period:

I must initially note that exact dates that certain events transpired have not been provided....I did not keep a detailed record of events.

The main reason for the delay in filing the objection is that I did not receive the notification by registered mail due to my family moving homes at the end of June. I was not aware that the Director had made a formal determination in writing as I had not heard from him in some time after he indicated that he would file a determination. I was expecting something in the mail sooner. In addition, I had never been given any indication that I had such a short time period to file an appeal. Further, I did not think to file a forwarding address to the director to ensure receipt of any future correspondence. Upon the director receiving notification from Canada Post that the determination had not been delivered the director telephoned me to let me know and to pick up the determination in person. Even at this time the appeal would have been late. This telephone call was received during a period when I was on three weeks vacation and was out of town for the majority of the time and was unable to complete the appeal.

I..feel that it is extremely unfair in stating that a determination is deemed to have been served when delivered to the last known address. I feel that given the circumstances surrounding my move and not receiving the determination, and the director's willingness to waive the delay in providing the appeal, that the appeal should be allowed to proceed.

The Tribunal did not receive a response from McDearmid on this issue. The delegate did respond and he opposes any extension of the time period within which the Geens may request an appeal. In a submission dated September 17, 1997, the delegate stated that after the Determination was returned as "unclaimed", he left a message for the employer on July 21, 1997. On July 22, 1997 the employer left a message for him indicating that he had moved and wanted to appeal the Determination. The delegate said that he then left a message for the employer on July 22, 1997 asking if he wanted to pick up the Determination or have it mailed to his new address. The delegate stated that the employer picked up the Determination and an appeal form on July 30, 1997 and he was told at that time that although he was out of time to file an appeal, if he insisted on appealing, it would be in his best interest to do it immediately. The delegate stated that the employer did not file an appeal until August 28, 1997, which was more than twice the allowable time in which to file an appeal, and the appeal should not be allowed.

ANALYSIS

This decision deals solely with the question of whether the Tribunal should extend the time period within which the Geens may request an appeal.

Section 122(1) of the Act provides that a Determination that is required to be served on a person is deemed to have been served if either served on the person or sent by registered mail to the persons last known address.

Section 112(2) of the Act sets out the time periods for appealing a Determination. A person served with a Determination has only 8 or 15 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 15 days after the date of service; the time period is only 8 days if the Determination is personally served.

The Tribunal's approach to extending the time periods for an appeal was set out in an earlier decision, *Metty M. Tang* [BC EST #D211/96], as follows:

(The) relatively short time limits are consistent with one of the purposes of the Act which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act. It is in the interest of all parties to have complaints and appeals dealt with promptly.

Section 109(1)(b) of the Act provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

When I review the facts of this appeal I find that the Determination was served properly, in accordance with Section 122(1) of the Act. That is, the Determination was sent to the last known address of the Geens.

The delegate was made aware of the new address of the Geens only after the Determination was returned to him as "unclaimed". In the absence of any specific dates provided by Mr. Geen, I accept that the delegate advised Mr. Geen of the existence of the Determination on July 21, 1997 and that he advised Mr. Geen on the following day that he could either pick up the Determination or have it mailed to his new address. I further accept that Mr. Geen finally picked up on the Determination and an appeal form on July 30, 1997.

Mr. Geen was aware, by at least July 30, 1997, that the time period for filing an appeal had already expired. The time period was clearly indicated on the Determination and I find it likely that the delegate brought this to Mr. Geen's attention when he picked up the Determination. However, Mr. Geen did not immediately contact the Tribunal to advise that he intended to appeal the Determination, nor did he request additional time to file an appeal. Mr. Geen chose not to exercise his option of disputing the Determination until 29 days later.

I have considered Mr. Geen's explanation for the delay in filing an appeal, and I find it to be neither reasonable or adequate. I am not satisfied that being on vacation or "out of town for the majority of the time" prevented him from contacting the Tribunal about an appeal immediately upon receipt of the Determination. I am not convinced that Mr. Geen genuinely intended to file an appeal in a timely manner as he did not file an appeal until 29 days after receiving a Determination which clearly indicated that the time period for delivering an appeal to the Tribunal had expired 2 weeks earlier.

The obligation is on the employer to exercise reasonable diligence in the pursuit of an appeal. In this case, the Geens have failed to persuade me that they have done so. I find no compelling reasons to allow this appeal.

For the above reasons, I have decided not to extend the time limit for requesting an appeal in this case.

ORDER

The Geens' request to extend the time period for requesting an appeal is denied. The appeal is dismissed pursuant to Section 114 of the Act. I order under Section 115 of the Act that the Determination dated June 23, 1997 be confirmed.

Norma Edelman
Registrar
Employment Standards Tribunal

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