

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 -

Admiral's Fleet Subs Ltd.: Mayflower Bakery Ltd.
("Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Richard S. Longpre

FILE NO.: 1999/523

DATE OF DECISION: October 25, 1999

On September 1, 1999, the delegate issued a written response to the Employer's request for an extension of time limits. The delegate agreed that he held the original time cards after the Determination was issued. He said that he talked to the Employer on July 9 and 16, 1999. His reply submission does not address whether he was asked by the Employer to return the time cards to them for their review. His reply submission goes on to explain the basis on which he made his Determination.

On September 6, 1999, the Employer filed a reply submission. It reads in part:

Gerry Olmstead [the delegate] came to Admirals Subs to pick-up the payroll records. Since this was our first time going through this, I gave Gerry the original paperwork. I made sure he knew he had our original paperwork and we would need them back. After a couple of weeks we received the determination, we were shocked when we saw the figure he had come up with. I phoned Gerry and briefly discussed the determination, I also asked for the payroll records to be sent back.

After some time had passed I made another attempt to get the payroll records. I called Gerry but I got his voice mail which stated he would be on holidays for about 3 weeks. I then called the main office and spoke with a woman named Anne. I explained our situation and she told me Terry Hughes was taking care of Gerry's files while he was away. I left a message for Terry on his voice mail but did not receive a call back. He too was on holidays for a week or two.

I had taken note of when Gerry was due back and called then. When I spoke with him, I asked for the paperwork he thought it had gone out in the mail already. Gerry put me on hold to check and surely enough it was still there. He mailed them out and I received them a couple of days later (Aug 19 '99). I soon found some faults which could decrease the amount on the determination.

On September 11, McAllister filed her reply submission with the Tribunal. She began with a review the evidence. She argued the evidence clearly supports the delegate's Determination. She also argued that the Employer's written submissions "have made two different statements in which the dates do not agree; not to mention, why are part of my time cards blacked out?" McAllister went on to argue that the Employer's reliance on unpaid meal breaks did not apply in this case. Employees were provided with 15 minute breaks and not 30 meal breaks.

McAllister says that she contacted Hughes on July 26 and during the second week of August. Hughes told her that he had not heard from the Employer. McAllister strongly questioned the "ethics" of the Employer in making the appeal.

ANALYSIS

Section 112 of the *Act* requires that an appeal be filed within a certain time following the issuance of the determination:

Right to appeal director's determination

112 (1) Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.

(2) The request must be delivered within

(a) 15 days after the date of service, if the person was served by registered mail, and

Section 109(1)(b) of the *Act* gives the Tribunal the ability to extend these time limits.

Other powers of tribunal

109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

.....

(b) extend the time period for requesting an appeal even though the period has expired

In *Swift River Ranch Ltd.*, BC EST #D314/98, the Tribunal set out the basis its discretion to extend a time limit would be applied.

In previous Tribunal decisions, several material considerations have been identified when a request for an extension of the appeal period including:

- i) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time period;
- 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 the employee), as well as the Director, must have been aware of this intention;
- iv) the respondent party will not be unduly prejudiced by granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant. (p.4)

The Employer provided a reasonable explanation for the delay. The Employer accepts that it owes McAllister compensation. The question is quantum. The Employer wanted to see the pay roll records before filing its appeal. That certainly makes sense. The delegate acknowledges that he spoke to the Employer on two occasions after issuing the Determination. In his reply submission of September 1, 1999, he says that one of those discussions related to statutory deductions. The delegate does not suggest that the parties did not discuss that the compensation ordered was excessive. He did not deny that the Employer wanted him to return the payroll records; which he failed to do. It is most probable that he was aware that the Employer intended to appeal the Determination.

The Employer contacted the delegate while he was on holidays and after he returned from holidays. The delegate thought the records had already been mailed back to the Employer. When he found them still at the Employment standards office he had them mailed to the Employer. The Employer filed its appeal shortly after receiving the document the Determination was based upon.

McAllister's submission states that Hughes was not aware that the Employer had left messages asking him to return their call. That may well be Hughes' recollection of events. I note that neither the delegate nor Hughes made a submission on this point. The point remains that the Determination was issued on June 30, 1999. The delegate was aware from July 9 that the Employer was waiting for the payroll records to be returned.

Critical to a question of accepting an appeal after the 15 day period is the prejudice the respondent will suffer. I understand the employee's frustration with the delay. However, a delay of one month does not affect her ability to reply to the Employer's case.

Finally, the appellant must establish a strong *prima facie* case. The delegate's reply submission states:

The employer contends that I did not take into consideration that Ms. McAllister had lunch and that a half-hour should have been deducted from the daily time records. Ms. Toora indicated that the company paid straight time rates for all hours worked. I have reviewed the daily time records and the payroll ledger indicating the hours paid and have been unable to establish how the company arrived at the hours actually paid.

The delegate obtained the records from the Employer. The Employer says that the next time that it had contact with the delegate was after the Determination was issued. If the delegate did not understand how the Employer arrived at the hours actually paid, the obligations of a fair hearing required him to contact the Employer and review the records before issuing a binding Determination. By the delegate's own submission, the *prima facie* case for review of the Determination is met.

ORDER

Pursuant to Section 109 of the Act, the Employer's application to appeal the Determination dated June 30, 1999 is granted. The parties will be notified of the matter in the near future.

Richard S. Longpre
Adjudicator
Employment Standards Tribunal