

**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 -

Marcella's Mercato Enterprises Ltd.  
(“Mercato”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 98/608

**DATE OF DECISION:** November 3, 1998

## DECISION

### OVERVIEW

This is an appeal by Marcella's Mercato Enterprises Ltd. ("Mercato") pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination issued by a delegate of the Director of Employment Standards on August 24, 1998. The Director's delegate found that Mercato owed Teena Wakeling ("Wakeling") compensation for length of service. The Determination stated that an appeal of it had to be received by the Tribunal by September 16, 1998. The Tribunal received an appeal on September 20, 1998. Mercato effectively requested that the Tribunal extend the deadline to file an appeal. The other parties to the appeal were invited to make submissions on a possible extension of the deadline under Section 109(1)(b) of the *Act*. Wakeling opposed the granting of an extension. The Director's delegate stated he had no objection to the appeal proceeding if all parties were in agreement. This appeal was decided based on the written submissions of the parties.

### ISSUE IN DISPUTE

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

### FACTS

The Determination which was issued on August 24, 1998 found that Mercato did not have just cause to summarily dismiss Wakeling for leaving a shift early without permission and, therefore, it owed her compensation for length of service in the amount of \$252.36 (including interest). The Determination stated that an appeal of it had to be received by the Tribunal no later than September 16, 1998.

The Determination was sent by registered mail and it was received by Mercato on August 27, 1998 as evidenced by Canada Post Corporation's "Acknowledgment of Receipt" document.

The Tribunal received an appeal from Mercato on September 20, 1998 at 6:37 p.m. In the appeal, Priscilla Vaandering ("Vaandering"), on behalf of Mercato, effectively requested that the Tribunal extend the deadline to file an appeal. She offered the following explanation for why the appeal was late:

On August 24, 1998, I was advised by Steve Mattoo of The Ministry of Labour Employment Standards of his determination regarding Tina Wakeling. On my request, he was sending the forms for an appeal of Determination along with a copy of the Determination which was to be filed

before September 16, 1998. I had called and left a message with Mr. Mattoo, to advise him that the copies were lost and that I needed them mailed or faxed. Mr. Mattoo was away on Holidays and I did not make contact until September 18th, which was past my due date for appeal. He faxed a copy of the determination and I was also faxed the forms for appeal.

Although I am late for the appeal, I ask that under the circumstances, my appeal be considered. I feel that some of the information given to Mr. Mattoo was misunderstood and I would like to clarify the circumstances surrounding Ms. Wakeling's dismissal.

(reproduced as written)

Vaandering goes on to state that Wakeling left early from a shift without consent and that a warning (in contrast, presumably, to a dismissal) was inappropriate as she displayed irresponsibility on the job and disrespect for the security of the store.

In a subsequent submission dated September 18, 1998 (although received by the Tribunal on October 2, 1998) Vaandering said:

On August 24, 1998, I was advised by Mr. Steve Mattoo of the Ministry of Labor employment standards of his determination file ER:090-767. On my request he was to send the forms for appeal of Determination along with a copy of the Determination, which was to be filed before September 16, 1998. In early September I called Mr. Mattoo to advise him that the copies were lost, requesting that he fax the paperwork. I was only able to reach his answering service as he was on vacation. I was not able to make contact with him until September 18th at which time he faxed the documents. The same day I contacted your office to advise the Tribunal of the situation. Shannon faxed an appeal form and directed me to fax all my paperwork to speed things up.

Although I was late for my appeal, I ask that under the circumstances, my appeal still be heard. I feel that some of the information given to Mr. Mattoo was misunderstood and I would like to clarify the circumstances surrounding the employee's termination.

(reproduced as written)

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109(1)(b) of the *Act*.

In a submission dated October 19, 1998, the Director's delegate stated that Vaandering left him a message on September 8, 1998 and a message was left in return, and that he had a discussion on September 16, 1998 regarding faxing the Determination which had been lost. He further stated "I am satisfied that the employer did attempt to contact me with a concern. Whether the employer had read the Determination and should have known that an appeal was to be lodged through the Tribunal directly rather than through me is unknown. In view

of the fact that the appeal was received only two days late, I have no objection to an appeal proceeding if all parties are in agreement.”

In her reply dated October 6, 1998 Wakeling stated that she opposed any extension of the time period within which Mercato may request an appeal. She said “Ms. Vaandering certainly had ample time to deliver to the Tribunal by September 16, 1998. Her contact should have been directly with the Employment Standards Tribunal and not with Mr. Mattoo. Information given to Mr. Mattoo was very clearly understood.

## **ANALYSIS**

I am not satisfied that it would be appropriate to extend the appeal period given the facts of this case.

Mercato was validly served the Determination and had until September 16, 1998 to file an appeal.

I have considered Vaandering’s explanation for the delay in filing an appeal and I find it to be inadequate. Based on her own evidence, she was aware on August 24, 1998 of the Determination and the deadline for an appeal of the Determination. Further, Mercato was in receipt of the Determination on August 27, 1998 but despite the clear direction contained in the Determination regarding how and when an appeal could be filed with the Tribunal, it did not file an appeal, nor did it make any contact with the Tribunal until after the expiration of the appeal period. Mercato had an opportunity to file a timely appeal, particularly prior to the date when it advised the Director’s delegate that it had lost the Determination, but it chose not to exercise its option of disputing the Determination until after the deadline to do so had expired.

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

- 1) there is a reasonable and credible explanation for the failure to request an appeal with 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.

In my view, Mercato has failed to satisfy any of the above-mentioned criteria. The obligation is on the Appellant to exercise reasonable diligence in the pursuit of an appeal.

In this case, Mercato has failed to persuade me that it has 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**

Mercato's application under Section 109(1)(b) of the *Act* to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the *Act* the appeal is dismissed and accordingly the Determination is confirmed as issued in the amount of together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

---

**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**