

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 -

Jason Hudym

re: Prologic Corporation

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE No: 1999/566

DATE OF DECISION: December 02, 1999

DECISION

TIMELINESS

This is a decision in relation to an application to extend the time for filing of an appeal by Jason Hudym ("Hudym") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from a Determination (File No. ER:094-857) dated August 27, 1999 by the Director of Employment Standards (the "Director").

Hudym was employed as a business analyst for Prologic Corporation ("Prologic"), a software company situated in Richmond, from January 1996 to February 1999. His employment was terminated as part of a group termination in relation to a significant downturn in the company's business. All issues of wages, overtime, severance, and holiday pay were resolved between Hudym and Prologic by letter and then by a Release signed by Hudym on February 17, 1999.

Approximately two months later Hudym made a claim to the *Employment Standards Branch* using the Branch's website. A delegate of the Director investigated Hudym's claims but the delegate decided not to pursue the matter because he found that the dispute that caused the complaint was resolved. The delegate wrote a Determination to this effect on August 27, 1999.

Hudym had been advised of the delegates decision orally on July 27 1999 and he was informed of the process and timelines for any appeal. The Determination was mailed to Hudym and he acknowledged receipt on August 31, 1999.

Section 112 of the *Act* provides as follows:

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*

Accordingly Hudym's appeal should have been delivered to the Tribunal before September 15, 1999. However the Determination itself stated that an appeal must be received by the Tribunal not later than September 20, 1999. Despite the difference in dates it would be reasonable for Hudym to rely on the advice that the deadline was September 20th. Hudym had a telephone conversation with the Director's delegate on September 20th and was again reminded of the deadline. Hudym did not file within the statutory time limit. Section 109 of the *Act* provides that:

Other powers of the tribunal

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

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

Although the time had only expired by one day in this case the granting of an extension is still a discretionary matter. This Tribunal has established certain principles upon which the granting of an extension will be considered. Without limiting the circumstances upon which an extension may be granted and certainly without fettering any future decisions I believe the principles can be summarised, at least in part, as follows:

1. the appellant must have acted with reasonable diligence in pursuing the appeal;
2. the appellant should be able to demonstrate that there has been a genuine, ongoing *bona fide* intention to file the appeal within the time limits;
3. there must be a reasonable and credible explanation for failure to meet the time requirements;
4. the tribunal will not usually grant an extension unless there are compelling reasons;
5. the tribunal will consider whether there is any prejudice to any party in granting the extension;
6. there should be a strong *prima facie* case on the merits of the appeal;

Applying these factors to this case it is clear that the appellant did indicate an ongoing intention to appeal and the lateness was minor in nature. However it cannot be said that the appellant acted with reasonable diligence given his obvious early intention to appeal. He knew from July 27, 1999 that he would have to file an appeal and yet did not file before the September 20th deadline. The explanation given for the delay is flimsy and not credible.

The most significant aspect to this application, in my opinion, is that there is no merit to the appeal. The dispute between Hudym and Prologic had been resolved and a release signed. Hudym wanted to reinstate his complaints despite the release and he has worked hard to try to discover a way to set-aside the release. There is nothing in his material that would be likely to be successful. There is no *prima facie* case on the merits and therefore there is no compelling reason to grant an extension of the statutory time limits.

ORDER

The application for an extension of time is denied and pursuant to Section 114 (1)(a) of the *Act* the appeal is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal