

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 -

J.A.S. Pharmacy Ltd.
("J.A.S.")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/645

DATE OF DECISION: November 25, 1998

DECISION

OVERVIEW

This is an appeal by J.A.S. Pharmacy Ltd. (“J.A.S.”) under Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination which was issued on September 15, 1998 by a delegate of the Director of Employment Standards (the “Director”). The Determination requires J.A.S. to pay \$361.83 to Stephanie J. Hodson as compensation for length of service under Section 63 of the *Act*.

The Determination contained a notice that any appeal “...must be delivered to the Tribunal by October 8, 1998.” J.A.S. notified the Tribunal of its intention to appeal the Determination on October 9, 1998 and submitted its appeal on October 14, 1998. Accordingly, J.A.S. requests the Tribunal to extend the time period for making its appeal by exercising its discretionary power under Section 109(1)(b) of the *Act*.

The Director opposes J.A.S.’s application for an extension of the time period to make its appeal.

ISSUE TO BE DECIDED

The issue to be decided is whether the Tribunal should exercise its discretionary power under Section 109(1)(b) of the *Act* to extend the time period within which J.A.S. must file its appeal under Section 112(2) of the *Act*.

ANALYSIS

Section 112(2) of the *Act* sets out the time periods for appealing a Determination. A person served with a Determination has either 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.

These 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.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BC EST #D211/96). In deciding whether “compelling reasons” exist in a particular request, the Tribunal has required appellants seeking a time extension to meet the following criteria:

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

Liisa Tia Anneli Niemisto, BC EST #D099/96

In reviewing the request by J.A.S. and the Director’s response I find the following factors to be relevant to the issue which I must decide:

- The Determination contained a clear notice that any appeal must be delivered to the Tribunal by October 8, 1998.
- The Determination was served by Certified Mail on Joseph DuQuesnay (President of J.A.S.) on September 16, 1998 and on J.A.S.’s registered and records office on September 17, 1998. A copy of the Determination which was delivered by certified mail to J.A.S. at its business address in Brentwood Bay was returned as “refused”.
- Gary Candy (Secretary of J.A.S.) sent an incomplete appeal application to the Tribunal by facsimile on October 9, 1998. One of the Tribunal’s staff contacted him by telephone to explain the requirements of the *Act* and the Tribunal’s rules.
- J.A.S.’s completed appeal was received by the Tribunal on October 14, 1998. It offered two reasons for its late appeal. First, an employee of Human Resources Development Canada (a federal government agency) advised Mr. Candy that it was not necessary to complete an appeal form. Second, J.A.S. had opened a new store on August 27, 1998 which required Mr. Candy’s attention for “7 days a week, 12 hours a day”. The application for appeal was disclosed to the Director and to Ms. Hodson.
- There are contradictory statements by Ms. Hodson, Mr. Candy and Mr. Price (Brentwood Bay store manager) concerning what Mr. Candy said to Ms. Hodson during a meeting in mid-October, 1997:

Ms. Hodson states that she was not offered her former position at the Saanichton store while Mr. Price and Mr. Candy state that she was offered the opportunity to return to her former position with no reduction in hours of work.

When I apply that factual matrix to the criteria described above, I am not satisfied that I ought to grant an extension of time limits so as to allow J.A.S. to make an appeal. While Mr. Candy has offered an explanation for *his* failure to deliver an appeal on or before October 8, 1998, he offers no explanation for the fact that Mr. DuQuesnay did not deliver an appeal nor why service of the Determination was refused at the company's address in Brentwood Bay. Also, he offers no explanation for directing his inquiries about an appeal to Human Resources Development Canada (a federal government agency) rather than the Employment Standards Branch (for which an address and telephone number were included on the Determination). Nothing in J.A.S.'s submissions leads me to conclude that there was a *bona fide* intention to appeal the Determination during the statutory appeal period which expired on October 8, 1998. J.A.S. did not notify either the Director or Ms. Hodson of its intention to make an appeal to the Tribunal.. Notification was given to the other parties for the first time by the Tribunal on October 14, 1998. The amount of compensation which the Director determined to be owing to Ms. Hodson (\$361.83) is not a large amount and there would not be undue prejudice to her if I were to grant J.A.S.'s request for an extension. However, J.A.S. has not established that there is a strong *prima facie* case that the Tribunal would find, if the merits of its appeal were to be heard, that the Determination should be cancelled. By finding that there is not a strong *prima facie* case, I do not wish to be misunderstood. I have not made any decision about the actual merits of the appeal - that could be done properly only after a hearing and a finding of fact made about the conflicting statements about the meeting in mid-October, 1997. For that very reason, however, there cannot be a strong *prima facie* case to be made that J.A.S. would likely be successful if its appeal were to be heard.

ORDER

I order, under Section 114(1)(a) of the *Act*, that the appeal by J.A.S. has not been requested within the time limit in Section 112(2) and, for the reasons given above, I decline to extend the time period by way of Section 109(1)(b) of the *Act*.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/bls