

An appeal

- by -

Mimi Chou operating as Wayside Motel

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2001/597

DATE OF DECISION: October 15, 2001

DECISION

APPLICATION

This is a consideration of an application by Mimi Chou (“Chou”) operating as Wayside Motel pursuant to Section 109 of the Employment Standards Act (the “Act”) to extend the time period for requesting an appeal from a Determination dated May 31, 2001 by the Director of Employment Standards (the “Director”) even though the time period for requesting an appeal has expired.

The main issues addressed in the Determination were whether a person who worked at the Motel was a “manager”, “contractor” or “employee” and whether wages were owing including overtime. On May 31, 2001 a delegate of the Director issued the Determination in which it was determined that the worker was an employee and entitled to unpaid wages in the amount of \$1,082.63.

The Tribunal received notice of the appeal herein by Umendra on August 17, 2001 at 1:32 p.m. The Determination advises on the last page that:

IMPORTANT INFORMATION

You can appeal this Determination

The appeal deadline is 4:30 p.m. on June 25, 2001.

(instructions follow on how to appeal)

The time limits for appeals are set out in Section 112 of the Act 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, and*
 - (b) *8 days after the date of service, if the person was personally served or served under section 122(3).*

The *Act* also provides for how service of the Determination may be established:

Service of determinations and demands

- 122** (1) *A determination or demand that is required to be served on a person under this Act is deemed to have been served if*
- (a) *served on the person, or*
 - (b) *sent by registered mail to the person's last known address.*
- (2) *If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*
- (3) *At the request of a person on whom a determination or demand is required to be served, the determination or demand may be transmitted to the person electronically or by fax machine.*

In this case the determination was sent by registered mail and in accordance with section 122 (above) would be deemed to be served on June 8, 2001. However, it is conceded by the Director that service was not “actually” achieved until June 27 2001. Thus Chou did not actually have possession of the determination until 2 days after the appeal period had already expired.

In accordance with the deemed service provisions the appeal deadline would have been June 25th as calculated by the Director and as set out clearly in the determination. Even if the appeal period were calculated from actual personal service the appeal deadline would have expired 8 days after June 27 2001, which would be, at the latest, July 6, 2001. It was not received until August 17, 2001, some 7 weeks after the latest deadline.

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine and ongoing intention to appeal;
3. the respondent and the Director were aware of the intention to appeal;
4. the prejudice to the employee will be considered;
5. there is a prima facie case set out in the appeal.

In this case Chou submits that she had a number of difficulties in gathering evidence in order to pursue the appeal and that it was difficult for her because of her travel schedule to and from the

United States. She also notes that she had some deaths in her family that caused her stress and difficulties in organizing her affairs.

Chou claims that she needed extra time to sort out the facts and to talk to people in the community where the Motel is situated. However, in my opinion, this is work that should have been done during the investigation and provided to the Director's delegate. It was not work that should be done after a determination is issued.

In my opinion there is no reasonable and credible explanation for the delay between June 27th and August 17th. Chou has presented no evidence to indicate that the respondent or the director had any notice of her intention to appeal and in this case there is prejudice to the employee in further delay in remaining unpaid. I am also not satisfied that there is a *prima facie* case that would lead the Tribunal to overturn the conclusion of the delegate.

On all of the material and submissions before me I am not satisfied that this is an appropriate case to exercise my discretion under section 109(1)(b) to extend the time for filing the appeal. Therefore the appeal is dismissed.

ORDER

Pursuant to section 109(1)(b), I decline to extend the time for requesting the appeal herein. The appeal is dismissed pursuant to section 114(1)(a) of the *Act*.

John M. Orr
Adjudicator
Employment Standards Tribunal