

An appeal

- by -

Norma Ruth Short  
("Short")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2003A/297

**DATE OF DECISION:** January 27, 2004

## DECISION

### SUBMISSIONS

Lyndon Dorrington, and  
Dr. L.A. (Lee) Cowley, Counsel

on behalf of the Appellant, Norma Short.

Bernie Gifford

on behalf of the Director

### OVERVIEW

This is an appeal filed by Norma Ruth Short (“Short”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Ms. Short appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on October 17th, 2003 (the “Determination”).

Following an oral hearing conducted on June 23rd, 2003, the Director’s delegate issued reasons for decision on October 10th, 2003 in which he concluded that Ms. Short voluntarily resigned her position with her former employer, Compass Group Canada operating as Eurest Dining Services (“Compass”), and that she was a “manager” as defined in the *Employment Standards Regulation* and, accordingly, not entitled to any overtime pay. By way of the Determination issued on October 17th, 2003 the delegate dismissed Ms. Short’s complaint on the basis that the Act had “not been contravened” and that “no wages are outstanding”.

Ms. Short filed an appeal with the Tribunal on November 26th, 2003. In her appeal form she alleges that the Director erred in law and failed to observe the principles of natural justice. More particularly, Ms. Short alleges that she was entitled to compensation for length of service because she was “constructively dismissed” (see section 66 of the Act). Ms. Short does not appear to challenge the delegate’s conclusion that she was a “manager”; indeed, she asserts that she had worked for the past 11 years “in a manager’s position”.

These reasons for decision do not address the merits of Ms. Short’s appeal; they only address the timeliness of the appeal a matter to which I now turn.

### TIMELINESS OF THE APPEAL

As the Act now stands, appellants must file their appeal with the Tribunal within “30 days after the date of service of the determination, if the person was served by registered mail” [see section 112(3)(a) of the Act]. In a submission dated December 12th, 2003 the delegate asserts that the appeal is “out-of-time” and further advised that although Ms. Short was represented by legal counsel at the hearing before the delegate, the Determination was only mailed to Ms. Short and to the Compass business office in Burnaby (in accordance with the usual policy of the Employment Standards Branch).

In his December 12th submission, the delegate does not indicate when the registered letter containing the Determination was actually received by Ms. Short. However, section 122(2) states that a determination served by registered mail “is deemed to be served 8 days after the determination...is deposited in a Canada Post Office”. Thus, assuming the envelope was mailed on October 17th (I have no firm proof of this fact

before me although I have no reason to doubt the delegate's assertion in this regard), the Determination was deemed to have been served on October 25th, 2003. As noted above, the appeal was filed on November 26th, 2003--within a day or so after the expiration of the statutory appeal period.

On November 27th, 2003, the Tribunal's vice-chair wrote to the parties and advised that the appeal appeared to have been filed after the expiration of the appeal period. The vice-chair requested that the parties make submissions on the timeliness of the appeal. As noted above, the delegate filed a submission dated December 12th, 2003--in this submission the delegate does not appear to oppose the granting of an extension of the appeal period pursuant to section 109(1)(b) of the *Act*.

Ms. Short's counsel, in his submission dated November 26th, 2003, asserts that he was advised by the delegate on September 29th, 2003 that the Determination was not yet completed and that it would be forwarded to counsel "when he [the delegate] was finished and not to contact him [the delegate] again". There is evidence before me that prior to September 29th--and following the conclusion of the hearing before the delegate--counsel contacted the delegate on several occasions enquiring about the status of the yet to be issued Determination. Counsel says that he never did receive a copy of the Determination; the delegate concedes that a copy of the Determination was never forwarded to Ms. Short's counsel.

Compass has not filed any submission with the Tribunal; I would have thought that if Compass opposed an extension of the appeal period it would have advised the Tribunal to that effect.

As matters now stand, no one (neither the delegate nor Compass) claims that they would be prejudiced if this appeal was to go forward on its merits. The appeal is not obviously frivolous. There does appear to be some confusion or perhaps miscommunication between the delegate and Ms. Short's counsel which might account for some of the delay in getting this appeal filed within the statutory time frame.

In light of the above circumstances, I am satisfied that a very short extension of the appeal period is appropriate in this case.

## **ORDER**

Pursuant to section 109(1)(b) of the *Act*, I order that the appeal period governing the filing of an appeal of the Determination be extended to November 27th, 2003. Accordingly, this appeal is properly before the Tribunal and thus will now be adjudicated on its merits.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**