

An appeal

- by -

LaVonne Girard

- 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 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2006A/14

DATE OF DECISION: April 10, 2006

DECISION

OVERVIEW

1. This is an appeal by LaVonne Girard (“Ms. Girard”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a determination (the “*Determination*”) issued by a delegate of the Director of Employment Standards (the “*Delegate*”) on December 16, 2005.
2. The *Delegate* investigated the complaint Ms. Girard had filed against her alleged employer, Oakridge Productions Ltd. (“Oakridge”), and decided that since it had not been demonstrated that Ms. Girard was an employee of Oakridge for the purposes of the *Act*, the investigation must be stopped pursuant to section 76(3)(b).
3. Ms. Girard delivered an Appeal Form to the Tribunal on January 25, 2006. The next day, one Bob Bottieri (“Mr. Bottieri”) forwarded a message to the Tribunal on behalf of Ms. Girard purporting to give an explanation for what Mr. Bottieri obviously assumed was a late-filed appeal.
4. The Tribunal wrote to the *Delegate* and Oakridge on January 26, 2006 inviting them to make submissions on the question whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* to extend the time period for requesting an appeal. The *Delegate* replied by letter dated February 3, 2006 advising that the Director did not oppose the late filing of the appeal. Oakridge responded on February 13, 2006, but refrained from expressing a position on the issue of the late filing of the appeal, stating merely that it supported the *Determination* and would be making no further submissions.
5. The Tribunal wrote to the parties on February 20, 2006 enclosing copies of the submissions received from the *Delegate* and Oakridge, and inviting final replies on the timeliness issue no later than March 6, 2006. No further submissions were received.
6. By letter dated March 7, 2006, the Tribunal informed the parties that the timeliness issue would be determined having regard to the written submissions received.

FACTS

7. Oakridge is a film production company for whom Ms. Girard provided services as a set decorator on a film project from June to September, 2005.
8. On September 10, 2005, Ms. Girard filed a complaint under section 74 of the *Act*, alleging that Oakridge had unlawfully failed to pay her regular wages, overtime wages, and business expenses.
9. The *Delegate* commenced an investigation pursuant to section 76. She made requests for evidence and submissions from Ms. Girard, which Ms. Girard provided. On October 28, 2005 the *Delegate* forwarded a memorandum to Ms. Girard outlining the *Delegate's* preliminary finding that Ms. Girard had not demonstrated that she fell within the definition of “employee” under the *Act*, and requesting further submissions. Ms. Girard did not respond, but the *Delegate* subsequently made contact with her. Ms. Girard informed the *Delegate* that she was disappointed in the preliminary finding but had no other submission to make, as she planned to pursue her claim in the courts.

10. Notwithstanding this statement, the Delegate gave more time for new material to be submitted. Receiving nothing further within the time allowed, the Delegate then issued her Determination. It contained the admonition that any appeal Ms. Girard might wish to bring must be delivered to the Tribunal by 4:30pm on January 23, 2006. As indicated earlier, the Appeal Form was not delivered until January 25, 2006.
11. Mr. Bottieri's submission filed on January 26, 2006 says this:

Both LaVonne and myself are appealing determinations in which we are both named. We felt it would be best to file together. I took on the responsibility of filing the appeals. The deadline for mine was Jan 30, 2006, LaVonne's Jan 23, 2006, a fact that I misread. I therefore implore the tribunal to forgive LaVonne's late filing and to consider her appeal. It was human error on my part and I would hate to see her penalized for my mistake.

ISSUES TO BE DECIDED

12. There would appear to be two issues:
1. Was Ms. Girard's appeal filed late?
 2. If so, should the Tribunal extend the time within which Ms. Girard may request an appeal, so as to permit Ms. Girard to proceed with her appeal on the merits?

ANALYSIS

13. Section 81(1) of the *Act* requires that on the making of a determination, the Director must serve any person named in it with a copy. One of the items that must be included in the determination served is a notification of the time limit and the process for appealing the determination to the Tribunal. As I have noted, the Determination here includes information advising that Ms. Girard had to appeal the Determination to the Tribunal by 4:30pm on January 23, 2006.
14. Section 122(1) of the *Act* provides that a determination that is required to be served on a person is deemed to have been served if it is served on the person, or sent by registered mail to the person's last known address. Section 122(2) provides that if service is by registered mail, the determination is deemed to be served 8 days after the determination is deposited in a Canada Post Office.
15. Section 112(3) of the *Act* sets out the time periods within which a person may appeal a determination. A person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, section 112(3)(a) mandates that the time period is 30 days after the date of service. Pursuant to section 112(3)(b), the time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically by fax machine.
16. The copy of the Determination which is before me indicates on its face that it was, or was to be, "Sent by Certified Mail". Certified mail is included within the definition of registered mail, by virtue of the operation of section 29 of the *Interpretation Act* RSBC 1996 c.238. However, nowhere in the material provided to the Tribunal by any party to this appeal is there any indication as to when the Determination was actually deposited in a Canada Post Office. Moreover, the copy of the Determination that appears in

the record is not even addressed to Ms. Girard. Rather, it is addressed to Oakridge. I am unable to conclude, therefore, that the Determination was forwarded to Ms. Girard's last known address.

17. Mr. Bottieri's January 26, 2006 submission purports to explain why Ms. Girard's Appeal Form was filed late. Clearly, Ms. Girard must have been aware of the Determination in order to appeal it. But should I assume from this fact alone that the Determination was properly served on her, and in the timely manner that would make it necessary for her to file her appeal by 4:30pm on January 23, 2006 as the notification on the Determination stipulated? I think not.
18. The time limits within which one must file an appeal are consistent with one of the purposes of the *Act*, which is to provide for fair and efficient procedures for resolving disputes over its application and interpretation. It is at least in part for this reason that the Tribunal will not normally grant extensions of time in order to accommodate an appeal, absent compelling reason.
19. If, however, an appellant is to be denied an opportunity to have an appeal heard by the Tribunal for failure to file within time, it is axiomatic that the Tribunal be provided with ample proof that service of a determination has been effected on the party who wishes to appeal, and when that service occurred. For it is only then that the time limits can be calculated with precision.
20. In *Randhawa Farm Contractors Ltd.* BCEST #D475/98 the Tribunal made it clear that it is the Director who bears the burden of showing that the statutory obligation to serve a determination has been met. I would go further and say that in a case where the timeliness of the filing of an appeal is in issue, as it is here, that burden incorporates an obligation to provide evidence sufficient in the particular circumstances to demonstrate that the specific requirements for service set out in the *Act* have been met, and when, therefore, that service was effected.
21. It follows that Mr. Bottieri's submission as to the reason why Ms. Girard's Appeal Form was filed at a time that he believed was late is really of no moment. There is no burden on Ms. Girard to disprove proper service. Mr. Bottieri's submission may be based on nothing more than an assumption that the appeal had been filed late because of the statement in the Determination that the Appeal Form had to be delivered to the Tribunal by 4:30pm on January 23, 2006. On the evidence that has been presented to the Tribunal, we do not know. What is known, however, is that the January 23, 2006 deadline expressed in the Determination could only be the true deadline if the Director were able to show that proper service of the Determination had occurred, and when that proper service occurred. This the Director has not done. It follows that I am not persuaded Ms. Girard's appeal is out of time.
22. In light of this conclusion, it is unnecessary for me to consider whether the appeal period should be extended pursuant to section 109(1)(b) of the *Act*.

ORDER

23. I order that the appeal proceed on its merits.

Robert Groves
Member
Employment Standards Tribunal