

An appeal

- by -

Zonia Kernested
("Kernested")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/011

DATE OF DECISION: March 23, 2004

DECISION

OVERVIEW

This is an appeal filed by Zonia Kernested (“Kernested”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”). Ms. Kernested appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on October 9th, 2003 (the “Determination”).

Following a hearing conducted by teleconference on August 29th, 2003, the Director’s delegate issued reasons for decision on October 9th, 2003 in which she concluded that Ms. Kernested voluntarily resigned her position with her former employer, 572984 B.C. Ltd. operating as “Nutrition House” (the “Employer”), and, accordingly, was not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*].

Ms. Kernested filed an appeal with the Tribunal on January 23rd, 2004 in which she alleged that the Director’s delegate failed to observe the principles of natural justice in making the Determination [see section 112(1)(b) of the *Act*]. However, in reviewing her appeal documents, they do not appear to raise a *bona fide* issue with respect to natural justice. I am of the view that Ms. Kernested’s appeal is probably more correctly characterized as an appeal based on an alleged error of law [see section 112(1)(a) of the *Act*]. More particularly, Ms. Kernested’s position appears to be that the evidence does not support a determination that she voluntarily quit her employment.

In any event, these reasons for decision do not directly address the merits of Ms. Kernested’s appeal; rather it is the timeliness of the appeal that is of immediate concern. This latter issue is being adjudicated based on the parties’ written submissions as directed by the Tribunal’s Vice-Chair in her letter to the parties dated March 11th, 2004.

TIMELINESS OF THE APPEAL

An appellant 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*]. The Determination was forwarded to Ms. Kernested by registered mail on October 9th, 2003. 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, this appeal should have been filed by no later than Monday, November 17th, 2003. As noted above, this appeal was filed on January 23rd, 2004.

On January 26th, 2004, 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 (to be filed by February 11th, 2004) regarding the timeliness of the appeal and whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* to extend the appeal period.

THE PARTIES’ SUBMISSIONS

The material before me indicates that Ms. Kernested prepared her appeal form on October 27th, 2003 and on that same day mailed her signed appeal form to the Director of Employment Standards, in Victoria, as

per item number 5 on the appeal form. The appeal form is date-stamped November 3rd, 2003 by the “Ministry of Skills Development and Labour, Office of the Director, Employment Standards Branch”. Very obviously, Ms. Kernested misunderstood the appeal procedure and neglected to actually file her appeal form with the Tribunal. Had Ms. Kernested filed her appeal form with the Tribunal on November 3rd, 2003, the appeal would have been timely.

It appears that Ms. Kernested’s appeal form languished in the Director’s office in Victoria for several weeks. On January 15th, 2004--when Ms. Kernested apparently made some sort of follow-up telephone inquiry to the Director’s office--Ms. Kernested first realized that her appeal should have been initially filed with the Tribunal and that item number 5 on the appeal form only directed her to deliver a *copy* of the appeal form to the Director’s office in Victoria (as per section 112(2)(b) of the *Act*).

ANALYSIS

Clearly, Ms. Kernested has had an ongoing and *bona fide* intention to file a timely appeal. The Director’s delegate, in a submission dated January 28th, 2004, advised: “I take no position regarding the Tribunal’s decision to grant this late appeal”. The Employer has not filed any submission regarding the matter of Ms. Kernested’s late appeal. I see no real prejudice to any party by extending the appeal period and, on the face of things, the appeal could not be fairly characterized as frivolous.

In light of the above circumstances, I am satisfied that an 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 January 23rd, 2004. Accordingly, this appeal is properly before the Tribunal and thus will now be adjudicated on its merits.

In my view, this is a case where an oral appeal hearing might be appropriate but I make no order to that effect.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal