

An appeal

- by -

Lindsay Markin
("Markin")

- 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: David B. Stevenson

FILE No.: 2007A/51

DATE OF DECISION: August 8, 2007

10. I would add the following fact to this appeal, although it does not appear specifically in the Determination or the file but is a matter of general and public knowledge: the Victoria Branch Office is not open for business on Saturday or Sunday.

ARGUMENT AND ANALYSIS

11. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

(a) the director erred in law:

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

12. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to show an error in the Determination under one of the statutory grounds.

13. In this appeal, Markin has grounded the appeal on a failure by the Director to comply with principles of natural justice in making the award. The appeal does not, however, raise a natural justice issue, but rather a question of law, which is whether the Director correctly interpreted and applied Sections 74(3) and 76(3)(a) of the *Act* in the circumstances of this case. The Tribunal has stated that choosing the “wrong” box on the appeal form is not fatal to an appeal. A common sense and plain language approach dictates that the substance of an appeal – provided the substance is true to the finite grounds of appeal found in Section 112 of the *Act* – should be addressed by both the Tribunal and the parties (see *J.C. Creations Ltd o/a Heavenly Bodies Sport*, BC EST #RD317/03).

14. The parties have addressed the substance of this appeal, which is whether the Director correctly interpreted and applied the *Act* in rejecting the complaint.

15. The reply of the Director to the appeal expounds the position that the Determination was one dictated by applying the provisions of the *Act*. The Director says that by applying Section 74(3) and using the definition of “month” found in the *Interpretation Act*, RSBC 1996, ch. 238, the last day for Lindsay Markin to file a complaint within the six month time limit was April 21, 2007.

16. Markin says the real issue is the refusal of the Director to accept the complaint. He points out that the purposes of the *Act*, found in Section 2, emphasize fairness and had his daughter been aware of the position the Director would take to her delivering the complaint by hand on April 23, 2007, she could have mailed or faxed the complaint on April 20 or April 21, 2007. He says the result of refusing to accept the complaint when it was delivered on April 23, 2007 is unfair.

17. This appeal must succeed. My conclusion is not grounded on any particular notion of fairness, which is a relative concept that must be read in light of the operative provisions of the *Act* as well as its purposes, but on a reading of Section 74(3) and the *Act* as a whole.
18. I accept, based on a plain reading of the language of Section 74(3), that the last day of the six month period for filing an appeal was April 21, 2007. This conclusion is also consistent with the Tribunal's decision in *Lonnie Schmermerhorn*, BC EST #D205/98. That fact, however, is only determinative if the six month period expired on that day. That day was a Saturday – a day when the Victoria Branch Office is not open for business. The following day, April 22, 2007, was a Sunday, which is also a day when that office is not open for business, as well as being a holiday. Neither Section 74(3) nor any other provision of the *Act* indicates what happens when the six month period ends, or expires, on a holiday or non-business day.
19. Since there is no such provision in the *Act*, the Director should have referred to the *Interpretation Act* on that point. The *Interpretation Act* applies to the *Act*, (see Section 2 of the *Interpretation Act*). Section 25 of the *Interpretation Act* deals with calculations of time or age. Subsections 25(1), 25(2) and 25(3) are applicable. Those subsections state:
25. (1) *This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.*
- (2) *If the time for doing an act falls or expires on a holiday, the time is extended to the next day that is not a holiday.*
- (3) *If the time for doing an act in a business office falls or expires on a day when the office is not open during regular business hours, the time is extended to the next day that the office is open.*
20. “Enactment” is defined in Section 1 of the *Interpretation Act* as meaning “*an Act or a regulation or a portion of an Act or regulation*”, a definition that would encompass the *Act* and, more specifically, Section 74(3).
21. The Victoria Branch Office is not open during regular business hours on Saturday or Sunday. As well, although it has no bearing on the result in this case, holiday is defined in the *Interpretation Act* to include Sunday. There is no doubt that the Victoria Branch Office of the Employment Standards Branch is a business office for the purpose of the above provision.
22. The effect of the above in the circumstances of this case is to extend the time for filing the complaint to April 23, 2007. The Director was wrong to find the time for filing the complaint had expired. As a result of that error, there was no basis for the exercise of discretion under Section 76(3)(a) and that decision must be set aside as being unreasonable (see *Jody L. Goudreau and Barbara E. Desmarais*, BC EST #D066/98).
23. The appeal succeeds and the Determination is cancelled.

ORDER

24. Pursuant to Section 115 of the *Act*, I order the Determination dated May 10, 2007 be cancelled and the matter referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal