

An appeal

- by -

Kimberley Case

- 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: John Savage

FILE No.: 2005A/46

DATE OF DECISION: June 7, 2005

DECISION

SUBMISSIONS

Kimberley Case, for the Appellant

Pat Keegan, for the Director of Employment Standards

Dave Schneider, for Toby Creek Outfitters Ltd.

OVERVIEW

Kimberley Case says she was employed by Toby Creek Outfitters Ltd. as a Trail Guide and Cook. She was kicked in the knee by a horse and because of her injury says she was on modified work from June 1, 2004 until June 15, 2004. Ms. Case was not paid by Toby Creek Outfitters Ltd. for that period.

Mr. Schneider says that she was not employed during that time by Toby Creek Outfitters Ltd. but, presumably while injured, “was in camp receiving taxidermy business from our hunting customers under the business (sic) name Predator Country Taxidermy”.

Ms. Case made a complaint by completing the Complaint and Information Form August 9, 2004.

On August 10, 2004 and August 12, 2004 the Delegate investigating the complaint left messages on the answering machine at the number given by Ms. Case on her complaint form. A return phone call on August 12, 2004 advised the Delegate that Ms. Case no longer lived at that residence. A letter sent by the Delegate August 24, 2004 required a response by September 9, 2004 but was unanswered.

On September 16, 2004 the Delegate dismissed the complaint pursuant to section 76(3)(d) of the *Employment Standards Act* as Ms. Case had not “taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint”.

The Record before me does not include a copy of the letter enclosing the Determination or any other information concerning when, and to whom, and how the Determination was served on or received by Ms. Case.

On November 29, 2004 Ms. Case informed the Employment Standards Tribunal of her intention to appeal the Determination issued September 16, 2004. Ms. Case advises that she was contacted by Employment Standards Branch on November 1, 2004.

Ms. Case subsequently contacted the Employment Standards Tribunal. She was requested by the Employment Standards Tribunal to complete and submit an appeal form by December 10, 2004. No Appeal Form was submitted as required. On December 20, 2004 the Employment Standards Tribunal advised Ms. Case that since no Appeal Form had been submitted it was unable to proceed with the appeal. A completed appeal form was eventually received by the Tribunal March 30, 2005.

Ms. Case appeals the Determination of the Director not to investigate the complaint on the grounds that (1) the Director failed to observe the principles of natural justice in making the Determination, and (2)

that evidence has become available that was not available at the time the determination was made. She seeks an extension of the period of time allowed for appealing the Determination.

Both the Director and Toby Creek Outfitters Ltd. say that the appeal should not be heard as it is out of time. The Director's position to not further investigate the complaint turns on the finding that Ms. Case failed to avail herself of "numerous opportunities" to make out her position to the Delegate.

ISSUES

Is the appeal out of time?

If the appeal is out of time, should the Employment Standards Tribunal extend the time for appealing the Determination of the Director of Employment Standards in the circumstances of this case?

If the appeal is not out of time, or if the time should be extended, did the Director err in law in or act in breach of the rules of natural justice, in failing to investigate further the complaint in the circumstances of this case.

LEGISLATION

The Delegate of the Director refused to investigate this complaint based on powers specified in Section 76 of the *Employment Standards Act*.

Specifically the Delegate refused to investigate the complaint basing the refusal on subsection 76(3)(d). Section 76 provides as follows:

- 76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.
- (2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.
 - (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
 - (a) the complaint is not made within the time limit specified in section 74(3) or (4),
 - (b) this Act does not apply to the complaint,
 - (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
 - (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,
 - (e) there is not enough evidence to prove the complaint,
 - (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,
 - (g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,
 - (h) the dispute that caused the complaint may be dealt with under section 3(7), or
 - (i) the dispute that caused the complaint is resolved.

An appeal from a Determination of the Director of Employment Standards is governed by section 112 of the *Employment Standards Act*. The *Act* provides:

- 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 being made.
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
- (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
 - (i.1) a copy of the director's written reasons for the determination, and
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (b) deliver a copy of the request under paragraph (a)(i) to the director.
- (3) The appeal period referred to in subsection (2) is
- (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3)....

Section 122 of the *Act* provides for deemed service as follows:

- 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.
- (4) A determination or demand transmitted under subsection (3) is deemed to have been served when the director receives an acknowledgment of the transmission from the person served.
- 1995, c. 38, s. 122.

On an appeal the Director is required to provide the Tribunal with the record that was before the Director at the time of the determination:

- 112 (5) On receiving a copy of the request under subsection (2)(b) or amended request under subsection (4)(b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.

Section 109 of the *Act* provides that the Employment Standards Tribunal may extend the time period for requesting an appeal even though the appeal period has expired:

- 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
- (a) [Repealed 2002, c. 42, s. 58(a)]

- (b) extend the time period for requesting an appeal even though the period has expired;

DISCUSSION & ANALYSIS

Service of Determination of Director

As I have noted, the Determination of the Director is dated September 16, 2004. The Record before me includes a copy of that Determination, together with a copy of the covering letter enclosing the Determination of the Director addressed to Toby Creek Outfitters Ltd. The cover letter is dated September 16, 2004 and includes a notation that it is sent by registered mail to Toby Creek Outfitters Ltd.

The letter also includes the notation “cc: Kimberley Case” at the bottom. There is no indication of the address to which the letter was sent to Ms. Case, or whether it was sent by registered mail or by some other method.

As part of the record, the Delegate of the Director has included a copy of the Complaint and Information Form which is dated August 9, 2004 and stamped received on that date. Section B “Information About You” has been obliterated from the form, so I am unable to determine whether an address was left with the Director or other contact information that could have been of assistance in this case.

Sections 112 and 122 make it clear that the appeal period runs from the date of service.

If service is effected by registered mail, as provided for in subsection 112(3)(a), “...the appeal period is ... 30 days after the date of service of the determination...”. If service is effected by personal service, as provide for in subsection 112(3)(b), “...the appeal period is ... 21 days after the date of service of the determination...”. If service is by registered mail, subsection 122(2) deems service to be effected “...8 days after the determination or demand is deposited in a Canada Post Office”.

From this information, and the documents and correspondence in the rest of Record before me, I am simply unable to determine whether and when the Determination of the Director was either personally served on Ms. Case, or served upon her by registered mail, as required by subsection 112(3) or whether the deeming provisions of section 122 have been satisfied.

In the circumstances, since neither personal service nor service by registered mail nor deemed service of the Determination has been shown, the appeal is not out of time.

Extension of Time

In recent decisions, *Round Table Enterprises* (ESTD# D052/05) and *Mac's Convenience Store*, this Tribunal has followed the leading case of *Niemisto* in describing the circumstances under which an extension of time would be granted as follows:

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:

- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;

- (3) the respondent party as well as the director has been made aware of this intention;
- (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
- (5) there is a strong *prima facie* case in favour of the appellant.

The question ordinarily is whether these circumstances have been met in this case. In this case I have found that there is no proof of service of the Determination. It is not therefore necessary to analyze the circumstances to determine whether the principles in *Niemesto* would apply to permit an extension of the appeal period.

Investigation

The Delegate in his Determination sets out the facts and evidence regarding the efforts made to contact Ms. Case and carry out the investigation. The facts and evidence as set out in the Determination are as follows:

“On August 10, 2004 I left a message on the answering machine at the number given by Ms. Case on her complaint form asking her to return my call. On August 12, 2004 I again left a message on the answering machine. On the same day, August 12, 2004, the lady who lives at this residence returned my call. She said that Ms. Case no longer lives with her as she was asked to leave the residence. She said that she has no idea where Ms. Case is but would pass on the message to call me if she saw her. I did not receive any correspondence from Ms. Case. On August 24, 2004 I sent a letter to Ms. Case stating that if she did not contact this office by September 9, 2004 that a Delegate of the Director of Employment Standards would assess her file on the basis of the information provided and issue the appropriate determination, closing her file. There has not been any response to this letter.”

The only other evidence before the Director was a copy of the Complaint and Information Form which is dated August 9, 2004 and date stamped received on August 9, 2004.

The Complaint and Information Form indicates that the Employment Standards self-help kit was used and the problem not resolved.

After referencing the provisions of Section 2 and of the Act the Delegate concluded:

“In the case at hand, as noted above, the Employment Standards Branch has provided numerous opportunities to Ms. Case to provide evidence in support of her position. These efforts included telephone calls and correspondence sent to the address she provided”

In my opinion the facts found by the Delegate of the Director cannot support the conclusion reached.

The finding of the Director is that “...the Employment Standards Branch has provided numerous opportunities to Ms. Case to provide evidence in support of her position”. The opportunities are referred to as the “...telephone calls and correspondence sent to the address she provided”.

The Director under the Heading “Facts and Evidence” quoted above references two phone calls, one on August 10, and one on August 12, 2004 where a message was left on an answering machine. On August 12, 2004, however, the Director received a phone call saying that Ms. Case “no longer lives with her as she was asked to leave the residence” and the caller stated that “she has no idea where Ms. Case is but would pass on the message to call if she saw her”. There is no indication that these messages were passed

on to Ms. Case, indeed the caller indicated “she has no idea where Ms. Case is”, so there is no evidence that these phone messages provided Ms. Case with an opportunity to provide evidence in support of her position.

The only other evidence in support of the Director’s position is a single letter dated August 25, 2004 addressed to Ms. Case c/o a post office box in Canal Flats BC. According to the Delegate, this letter was sent to the address she had provided. The letter on its face is not registered and there is no evidence that Ms. Case received this letter. In fact, the Delegate knew that Ms. Case had left the address where she formerly resided from the phone call noted above.

The letter asked Ms. Case to respond by September 9, 2004, i.e., within two weeks. The letter gave an alternative of withdrawing the complaint and enclosed a “Withdrawal of Complaint” form directing Ms. Case to complete the form if she wished to withdraw the complaint. No completed “Withdrawal of Complaint” is in evidence.

As I have said, based on this information the Delegate concluded that the Employment Standards Branch provided “numerous opportunities” to Ms. Case to provide evidence to support her position. As there is no evidence that the phone messages were passed on, or that the letter was received in a timely way, there is simply no evidence before the Director that these efforts, commendable as they might be, provided any opportunity to Ms. Case to make her complaint known to the Branch.

I am not aware of any decisions of this Tribunal interpreting subsection 76(3)(d) which allows the Director to refuse to investigate a complaint if “...the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint”. There are, however, a number of Tribunal decisions that interpret the obligations of the Director under section 77 of the *Act* to obtain the positions of the opposing party to a complaint. Those decisions, in my view, provide some guidance in this case, which relates to the obligations of the Director while investigating the position of a person making a complaint.

When investigating a complaint, the Director is acting in a quasi-judicial capacity: *Re BWI Business World Inc.*, BCEST #D050/96 (Thornicroft).

A failure to give a party an opportunity to provide evidence in support of their position, whether intentional or not, at the investigative stage, is a failure to observe the principles of natural justice. See, for example, *Re Fleming Financial Corp.*, BCEST #123/03 (Love), where an unintentional denial to give an opportunity to respond was found to be in breach of natural justice.

Similarly, where addresses of an employer were not properly updated in the corporate registry, so mail was sent to “correct” addresses but not received, there was failure to observe the principles of natural justice when the position of the Employer was not ascertained: *Re Him-Mat Enterprises Ltd.*, BCEST # 123/03 (Roberts).

In *Evans (c.o.b. Evans Trucking)*, BCEST #D384/98, this Tribunal held that the Delegate failed to make a reasonable attempt to permit the employer to respond, where the Delegate issued a Determination, on the basis of employee information only, after “unreturned” telephone calls to the Employer.

In my opinion these principles apply to this proceeding. In this case the Delegate dismissed the complaint in short order after two phone calls and a letter, even though the Delegate knew or ought to have known

that the phone messages did not reach Ms. Case, and the information given was that she had moved from where she had resided.

By making this finding I do not mean to suggest that there is no obligation on a complainant to keep in touch with the Employment Standards Branch and make themselves available to assist in the investigation of a complaint. There is such an obligation, and in some but not all respects Ms. Case's predicament in dealing with the Branch and this Tribunal is one she has herself authored.

Notwithstanding that observation, however, I find that in these particular circumstances the complainant was not given an opportunity to present her complaint. Moreover, she cannot be found to have failed to take the requisite steps required by the Director, if those steps have not been communicated to her prior to issuance of a Determination. The Determination cannot stand.

ORDER

In the result, the appeal is allowed. The appeal is timely. The Determination is cancelled.

The matter is referred back to the Director to contact the parties to investigate and determine the merits of the complaint.

In light of the difficulties that the Director and this Tribunal has had maintaining contact with Ms. Case, Ms. Case is directed to provide the Director with current contact information and advise the Director of any change of address or telephone number until the investigation is complete and resolved, or a Determination on the merits issued.

John Savage
Member
Employment Standards Tribunal