An appeal

\- by -

Kelly Kerr operating as Sunscape Tanning Studios
(“Kerr”)

\- 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.: 2005A/49

DATE OF DECISION: June 20, 2005

DECISION

SUBMISSIONS

Kelly Kerr	on behalf of SunScape Tanning Studios
Lynne L. Egan	on behalf of the Director

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Kelly Kerr operating as SunScape Tanning Studios ("Kerr") of a Determination that was issued on February 24, 2005 by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Kerr had contravened Part 3, Sections 18 and 27 and 28, Part 4, Section 40 and Part 7, Section 58 of the *Act* in respect of the employment of Richelle M. Onyschtschuk ("Onyschtschuk") and ordered Kerr to pay Onyschtschuk an amount of $441.03, an amount which included wages and interest.

2. The Director also imposed administrative penalties on Girn under Section 29(1) of the E*mployment Standards Regulation* (the *"Regulation"*) in the amount of $2000.00.

3. The total amount of the Determination is $2,441.03.

4. Kerr says the Director failed to observe principles of natural justice in making the Determination, as he did not receive notice of the complaint hearing.

5. The Tribunal has reviewed the appeal and the materials submitted with it and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue in this appeal is whether the Director failed to observe principles of natural justice in making the Determination.

THE FACTS

7. Kerr operates three tanning studios in the greater Vancouver area under the name SunScape Tanning Studios, one in Vancouver and two in North Vancouver, one of those two is on Mountain Highway and the other on Westview Drive. Onyschtschuk was employed by Kerr from June 9 to July 11, 2004 at the Westview Drive location as a tanning attendant at a rate of pay of $8.00 an hour. She filed a complaint with the Director on August 23, 2004, alleging Kerr had contravened provisions of the *Act* by failing to pay regular wages, statutory holiday pay and annual vacation pay.

8. The record indicates the Director first communicated by telephone with Kerr in respect of the complaint on November 1, 2004. On November 5, 2004, Kerr was advised, through a telephone message, that the Director was setting November 25, 2004 at 1:00 pm as a date and time for an attempt at mediating a settlement of the complaint and a notice was being sent to that effect. That notice was sent to Kerr by

registered mail on November 12, 2004. The notice was addressed to the Mountain Highway location of SunScape Tanning Studios. The tracking information shows an unsuccessful delivery attempt was made to that address on November 15, 2004 and that delivery was made to that address on November 27, 2004. In his appeal, Kerr says he notified the Employment Standards Branch by letter following its receipt that it had not been received in time to attend the scheduled mediation. He has attached a copy of that letter to the appeal. It is dated December 6, 2004 and states:

> This letter is to advise that I did not receive the enclosed notice until 2-3 days after the scheduled mediation.

9. The letter was written on SunScape Tanning Studios letterhead, which lists their web-site address and three location addresses and telephone numbers, including the Mountain Highway location to which the notice of mediation was delivered. The letter does not indicate the Director sent the notice to the wrong address or that the Director should send any future correspondence to a different address.

10. The Director decided to conduct a complaint hearing. On December 14, 2004, a Demand for Employer Records and Notice of Complaint Hearing were prepared by the Director and once again were sent to Kerr by registered mail to the Mountain Highway location. The record shows the Notice and Demand were successfully delivered at that location on December 16, 2004.

11. The Demand required Kerr to produce all employment records for Onyschtschuk to the Employment Standards Branch office in Burnaby by January 11, 2005. No employer records were ever received by the Director. The Notice indicated that a complaint hearing would be held on February 1, 2005 commencing at 10:00 am at the Employment Standards Branch office in Burnaby, BC.

12. The Determination states that Kerr was not present at the hearing on the appointed date and time, that he was contacted by a delegate of the Director, that he stated he did not receive the Notice and that he was too busy to attend. Kerr was advised by the delegate that the complaint hearing would start in thirty minutes, with or without his presence. Kerr did not attend and the hearing commenced, and continued to completion, in his absence.

13. Following the complaint hearing, the Director found Onyschtschuk was owed regular wages, overtime wages and annual vacation pay. The Director also found Kerr had failed to pay wages within 48 hours of termination of employment and had failed to provide proper wages statements.

ARGUMENT AND ANALYSIS

14. The grounds upon which an appeal may be made are 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.*

15. The burden of demonstrating a breach of natural justice is on Kerr (see *James Hubert D'Hondt operating as D'Hondt Farms*, BCEST #RD021/05 (Reconsideration of BCEST #D144?04).

16. This appeal is based on the assertion by Kerr that he did not receive sufficient notice of the complaint hearing. In the appeal submission, he states:

> I did not receive any notice of the "demand for Employer Documents" that supposedly included notice of a hearing for February 1st, 2005.

17. He says the first time he heard about the complaint hearing was on the morning of February 1st, 2005 when he received a telephone call telling him if he was not at the hearing within thirty minutes, it would take place without him. He says that even though he told the delegate he was not available to attend the complaint hearing the Director went ahead with the hearing, heard evidence from Onyschtschuk, made findings of fact on that evidence and issued a Determination without hearing his position.

18. In the appeal submission, he says. "I am certain that you will find no verification of the February 1st hearing notice being sent to myself, Kelly Kerr, and ask you to grant my appeal."

19. Kerr has also challenged the conclusion that Onyschtschuk was owed wages and has included with his appeal all of the reasons why he disagrees with it, together with supporting documents. He has asked the Tribunal to reject the complaint. I do not intend to consider the merits of the complaint. If I agree with Kerr on the natural justice ground, the appropriate course in the circumstances is to refer the matter back to the Director. If I do not agree with Kerr on the natural justice issue, the appeal will be dismissed applying the principle enunciated in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97 - that a party to a complaint process may not "lie in the weeds", failing to cooperate or participate in the complaint process, and later seek to appeal the resulting Determination with evidence that should have, and could have, been provided during the complaint process.

20. In replying to the appeal, the Director submits that Kerr was served with the Notice and Demand, was aware of the hearing and chose not to attend. In support of that submission, the Director has included evidence, which I accept, confirming the successful delivery of the Notice of Complaint Hearing by registered mail addressed to Kelly Kerr operating as SunScape Tanning Studios at the Mountain Highway location. The Notice was delivered with the Demand for Employer Records.

21. The Director also refers to subsections 122(1) and (2) of the *Act*. That provision reads:

> ***122*** *(1) A determination or demand that is required to be served on a person under this Act is deemed to nave been served if*
>
> *(a) served on a 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.*

22. The above provisions are determinative of service of the Demand for Employer Documents. I accept the Mountain Highway address qualifies as Kerr's "last known address". The Director had made delivery of the notice of mediation in November 2004 to the same address. That delivery was acknowledged by Kerr. His subsequent communication to the Director to indicate the mediation notice was received too late for him to attend is on letterhead listing that address and contains no indication that such

correspondence should have been sent, or in the future should be sent, to the address identified by Kerr as the "head office" for SunScape. While the term "last known address" is not defined in the *Act*, common sense would dictate it would include the address to which the last successful delivery or service of a communication was made. Kerr has not provided any reason why the address on Mountain Highway should not in the circumstances be considered the "last known address" for him. It is worth noting that when the Tribunal has been called upon to interpret and apply Section 122 of the *Act*, it has adopted a strict approach to ensure that these deeming provisions prevail and that the purposes of the *Act* are achieved. For example, see *A-Mil Financial Corp*., BC EST # D193/98; *ScottLynn Contracting Ltd*., BC EST # D012/97; and *Zed*i, BC EST # D308/ 96.

23. The Notice, however, stands on a somewhat different footing. As noted by the Tribunal *in CDL Disposal Ltd.*, BC EST # D190/04, a complaint hearing by the Director is not a process that is addressed in either the *Act* of the *Regulation*. There is no specific legislative direction as to how a "complaint hearing" is to be conducted or how and when (relative to the hearing) a notice of complaint hearing must be delivered or served. The Notice of Complaint Hearing is not a *"determination or demand"* under the *Act* and is therefore not a document that is accorded the statutory presumption that is described in subsections 122(1) and (2).

24. The question then becomes, absent a statutory presumption of service, what rules should apply to the delivery of the Notice. There is no reason why the Tribunal should not approach a question concerning delivery of the Notice of Hearing with the same perspective it applies to the interpretation of Section 122 of the *Act*. The objectives and statutory purposes of the *Act* justify a strict approach.

25. Accordingly, while a statutory deeming of service does not apply, the circumstances of the delivery of the Notice can give rise to a factual presumption of service. In this case, a strong presumption of effective service arises. The presumption may be rebutted but the evidence necessary to rebut the presumption must be convincing.

26. Kerr has not rebutted the presumption of service.

27. In the appeal submission, Kerr challenged the Director to verify that the hearing notice was sent to him. The Director provided that verification. The evidence clearly shows the Notice was successfully delivered by registered mail to a location where a registered mail delivery had been made less than three weeks before and had been received and acknowledged by Kerr.

28. Kerr refers to the location on Mountain Highway as "one of our store locations" and says he does not visit each store location on a regular basis to check the mail. He says the Director has provided no proof, by way of a signature, that the Demand and Notice were received by him or one of his employees. It is a simple enough thing for a person to refuse to sign for registered mail. That does not affect the evidence of confirmation of delivery by Canada Post. As well, even if I accepted the Mountain Highway location was just a store location, having no particular importance relative to the business, Kerr's assertion that he did not receive the registered mail because he "does not check the mail [at the store locations] on a regular basis" strains credulity. Accepting that assertion would require me to believe that Kerr did not visit that location to check for mail for a period of more than six weeks - from December 16, 2004 to February 1, 2005 - and that the person who received the registered mail (if it was someone other than Kerr) did not notify him of its delivery.

29. I am not prepared to accept that Kerr was unaware of the complaint hearing. I accept the submission of the Director that Kerr was given an opportunity to be heard and chose not to participate in the complaint process. In the circumstances there was no failure by the Director to observe principles of natural justice.

30. As indicated above, the Tribunal will not allow Kerr to challenge the conclusions made by the Director on the merits of the complaint with evidence that should have been provided to the Director during the complaint process.

31. For the above reasons, the appeal is dismissed.

ORDER

32. Pursuant to Section 115 of the *Act*, I order the Determination dated February 24, 2005 be confirmed in the total amount of $2,441.03, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal