Employment Standards TRIBUNAL

An appeal

- by -

Brenda McEwan carrying on business as New Wave Hair Studio & Tanning

- 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.: 2007A/76

DATE OF DECISION: October 9, 2007

DECISION

OVERVIEW

1. Brenda McEwan, carrying on business as New Wave Hair Studio & Tanning ("Ms. McEwan") appeals a determination dated June 4, 2007 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") following an investigation, in which the Delegate decided that Ms. McEwan had contravened sections 58 and 63 of the *Employment Standards Act* (the "*Act*") in respect of a complaint filed by Lynn Weiser ("Ms. Weiser"), one of Ms. McEwan's former employees.

2. The Delegate ordered Ms. McEwan to pay compensation for length of service, annual vacation pay, and interest in the amount of $976.02. The Delegate also imposed an administrative penalty in the amount of $500.00 pursuant to s.29 of the *Employment Standards Regulation*. The Determination therefore provided that Ms. McEwan pay a total of $1,476.02.

3. Ms. McEwan's Appeal Form was received by the Tribunal on July 20, 2007. It being thought that Ms. McEwan had filed her appeal late, the Tribunal invited the parties to deliver submissions addressing the issue whether the time for filing the appeal should be extended pursuant to section 109(1)(b) of the *Act*. It is this issue of timeliness which is now before me.

4. In deciding this aspect of the appeal, I have considered Ms. McEwan's Appeal Form and attached submission, the Determination and the Reasons for Determination prepared in support of it, a submission from Ms. Weiser, a submission from the Delegate together with documents I infer the Delegate has delivered in compliance with her obligation under section 112(5) of the *Act* to provide the record that was before her at the time the Determination was made, and a final submission received from Ms. McEwan.

5. The Tribunal has determined that I will decide this aspect of the appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

6. Ms. McEwan operated a hair and tanning salon in Kelowna. Ms. Weiser was employed as a hair stylist by Ms. McEwan at the salon commencing in September 2003.

7. On November 1, 2006 Ms. Weiser received a letter from Ms. McEwan's lawyer stating that Ms. McEwan had sold the business effective November 8, 2006 and that Ms. Weiser's employment with Ms. McEwan was terminated on that date.

8. Ms. Weiser continued to work at the salon after the sale, under its new owner, Loyal Wooldridge ("Mr. Wooldridge"). As Mr. Wooldridge made it clear to her that he would be treating her as a new employee, and that her previous years of service with Ms. McEwan would not be considered by him for the purpose calculating any employment benefits which might accrue to her thereafter, Ms. Weiser filed a complaint with the Employment Standards Branch in March 2007 in which she claimed compensation for length of service from Ms. McEwan.

9. On April 5, 2007 the Delegate and Ms. McEwan spoke by telephone regarding Ms. Weiser's complaint. Ms. McEwan denied that Ms. Weiser was entitled to compensation for length of service. She further informed the Delegate that she had made arrangements with Mr. Wooldridge for Ms. Weiser to continue working at the salon, but that her lawyer had advised her that a letter of termination should nevertheless be delivered. That same day, April 5, 2007, the Delegate wrote to Ms. McEwan requesting a formal response to the complaint, and payroll records. By letter dated April 19, 2007, Ms. McEwan advised the Delegate that she disputed Ms. Weiser's claim for relief under the *Act*, on the grounds that she had notified Ms. Weiser of the impending sale, and that Ms. Weiser continued to be employed by Mr. Wooldridge at the same wage.

10. The Delegate then forwarded to Ms. McEwan, by certified mail, a letter dated May 2, 2007, in which the Delegate informed Ms. McEwan that her preliminary findings supported a conclusion that Ms. Weiser was entitled to compensation for length of service and vacation pay under the *Act*. The Delegate's letter stated that she had had discussions with Mr. Wooldridge in which he confirmed that a term of the sale was that Ms. McEwan's employees were to be terminated, leaving him to hire them himself thereafter should he so wish. Mr. Wooldridge had also told the Delegate that although he had decided to hire Ms. Weiser, he had explained to her that her previous years of service for Ms. McEwan would not be considered when calculating her vacation pay, holidays and any compensation for length of service should he discharge her, as she was starting with him as a new employee. The Delegate also invited Ms. McEwan either to pay the wages owed, or to provide, by May 16, 2007, written reasons and supporting evidence challenging the preliminary findings made consequent upon the investigation conducted to that point. The Delegate's letter further stated that if Ms. McEwan did not respond to the letter, or if the material she submitted in response to it did not support a substantive change to the Delegate's preliminary findings, the Delegate would have no alternative but to issue the appropriate determination ordering Ms. McEwan to pay the wages owed, together with the administrative penalty mandated by the *Act.*

11. The Delegate says that her May 2, 2007 correspondence to Ms. McEwan was returned by Canada Post, unclaimed. Having received no response to that correspondence, the Delegate then issued her Determination on June 4, 2007.

12. As I have indicated, Ms. McEwan did not file her Appeal Form with the Tribunal until July 20, 2007.

ISSUES

13. Has Ms. McEwan filed her appeal late?

14. If she has, should the Tribunal exercise its discretion to extend the time for the filing of the appeal so that it may be determined on its merits?

ANALYSIS

Was the appeal filed late?

15. 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. Section 112(3) of the *Act* provides that a person served with a determination has either thirty days or twenty-one days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is thirty days after the date of service.

Section 122(1)(b) stipulates that a determination that is required to be served on a person is deemed to have been served if sent by registered mail to the person's last known address. Further, in section 122(2), 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.

16. In her submission delivered in response to this appeal the Delegate states that the Determination was sent to Ms. McEwan by registered mail on June 4, 2007. I digress to say that the Determination is addressed to Ms. McEwan at the same address that the Delegate says Ms. McEwan verbally confirmed to her would be her address for the purpose of receiving material relevant to the complaint. It is also the address where the Delegate had sent previous correspondence to Ms. McEwan during the course of her investigation, to which Ms. McEwan had replied, and the address that Ms. McEwan identifies as her own on the Appeal Form.

17. The Delegate has included in the record delivered to the Tribunal a copy of tracking information received from Canada Post indicating that an attempt was made at delivery on June 5, 2007, and a delivery notification card left with pick-up details. No one having attended to retrieve the item, it was returned unclaimed to the Delegate on June 22, 2007.

18. On June 26, 2007, the Delegate forwarded the Determination, and a copy of the registered mail envelope showing that it had been returned, via regular mail to Ms. McEwan. On July 17, 2007, the Delegate spoke with Ms. McEwan, who informed her that she had received the Determination. In her submission delivered with her Appeal Form, Ms. McEwan states that she received the Determination "at my home in the mail box on July 16/07". In that submission Ms. McEwan also acknowledges that the Appeal Form was being filed late.

19. In my view, Ms. McEwan's appeal has indeed been filed late. There is evidence to support a conclusion that the Delegate sent the Determination to Ms. McEwan's last known address, by registered mail, on June 4, 2007. Section 122(2) of the *Act* mandates that the Determination was deemed to have been served on Ms. McEwan 8 days later. Ms. McEwan cannot escape this result on the basis that she did not claim her registered mail (see *Re Nature's Choice Foods Ltd* BC EST #D206/04). Ms. McEwan then had 30 days within which to file her appeal. That period of time expired some days prior to her actually filing her Appeal Form on July 20, 2007.

20. The fact that Ms. McEwan filed her appeal within a few days of her actually receiving the Determination in her mail box is of no assistance in determining when the appeal period actually expired. The Delegate's forwarding a further copy of the Determination by regular mail on June 26, 2007 was, therefore, purely a courtesy. Service under the *Act* had already been perfected by that time.

21. I find, therefore, that Ms. McEwan's appeal was filed late.

Should the time to appeal be extended?

22. The time limits within which one must appeal a determination are to be construed having regard to the purposes of the *Act*, set out in section 2. One of those purposes is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly. It is perhaps for this reason that section 114(1)(b) of the *Act* provides that the Tribunal may dismiss an appeal if it is not filed within the applicable time limit.

23. Pursuant to section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. In considering whether to extend the time, the Tribunal is exercising a discretion, and it will not grant an extension as a matter of course. Rather, the appellant has the burden of demonstrating that there are compelling reasons why the appeal should be permitted to proceed on the merits, notwithstanding that it has been filed late (see *Niemisto* BC EST #D099/96; *Tang* BC EST #D211/96).

24. The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered when it determines whether an appeal filed late should be permitted to proceed on its merits:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing *bona fide* intention to appeal the determination;
- The respondent party and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent party will not be unduly prejudiced by the granting of the extension, and;
- There is a strong prima facie case in favour of the appellant.

25. Other decisions have added a sixth: whether the period of time from the expiry date to the date on which the appeal is actually brought is unreasonably long (see, for example, *Bravo Cuccina Restaurante Italiano Ltd.* BC EST #D343/00).

26. With the exception of the sixth factor, I will deal with these factors in order.

27. Ms. McEwan's explanation for filing her appeal late is that she did not learn that the Determination had been issued until she received it in the mail on July 16, 2007. This explanation is credible, in the sense that I have no reason to doubt its veracity. However, I cannot conclude that it is reasonable. Ms. McEwan should have claimed her registered mail promptly. If she had, she would have received the Determination at a time that would have permitted her to file her appeal well before the appeal period expired.

28. In her submissions filed in support of the appeal Ms. McEwan nowhere states that she had a genuine and ongoing bona fide intention to appeal the Determination, notwithstanding that it was filed late. However, Ms. McEwan did act promptly to file her appeal once she received actual notice of the existence of the Determination on July 16, 2007. Accordingly, I am prepared to infer that Ms. McEwan possessed the requisite intention to appeal, at least from that date. Having said that, I do not think it assists Ms. McEwan regarding the exercise of my discretion in the circumstances of this case. The more significant factor here is not that Ms. McEwan responded quickly once she learned of the existence of the Determination. The real difficulty for Ms. McEwan is that she could have formed a genuine and ongoing bona fide intention to appeal within the appeal period if she had but claimed her registered mail.

29. I am also prepared to conclude that Ms. Weiser and the Delegate were made aware of Ms. McEwan's intention to appeal the Determination very shortly after Ms. McEwan became aware of its existence. But again, on the facts of this case, I do not think this factor weighs heavily in favour of Ms. McEwan. A rationale for giving consideration to an appellant's advising the other parties of an intention to appeal is

that those other parties will have notice that an appeal is coming, whether it happens to be filed late, or not. Depending on the circumstances, the appellant filing late may then at least be able to argue that the other parties are prejudiced in a less compelling way by the late filing, owing to the earlier notice. Here, however, it cannot be said that an early notice was given. By the time Ms. Weiser and the Delegate learned of Ms. McEwan's intention to appeal the Determination, the appeal period had already expired.

30. While I discern no evidence of unusual prejudice should I extend the time for the filing of Ms. McEwan's appeal, it is trite to say that any delay must be considered prejudicial to the extent that it deprives a successful party of the monies to which she has been found to be entitled. The Tribunal may be prepared to overlook a short delay, if the other factors it must consider on an application to extend argue cogently that the appeal should be heard on the merits. In my view, this factor does weigh in Ms. McEwan's favour, however slightly. She did respond promptly to the Determination once she actually received it. Further, the time between the date on which the appeal period expired, and the date on which Ms. McEwan filed her appeal, was not inordinately long.

31. I am not persuaded that Ms. McEwan has demonstrated a strong *prima facie* case in support of the appeal on its merits. Ms. McEwan has identified on her Appeal Form that she challenges the Determination on the basis that the Delegate failed to observe the principles of natural justice. In layman's terms, this means that she alleges the proceedings before the Delegate were in some manner conducted unfairly in a procedural sense, resulting in her either not having an opportunity to know the case she was required to meet, or an opportunity to be heard in her own defence. The Delegate's obligation to follow fair procedures is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

32. Having reviewed the material generated by this appeal, I am not persuaded that it reveals any breach of the rules of natural justice. What it does show is that the Delegate spoke with Ms. McEwan by telephone concerning the complaint on April 5, 2007. The record confirms, and Ms. McEwan nowhere denies, that she discussed whether Ms. Weiser was entitled to compensation for length of service with the Delegate on that occasion, and informed the Delegate that no such compensation was warranted because Ms. Weiser had continued her employment with Mr. Wooldridge, and the termination letter had only been delivered on the advice of her lawyer.

33. The Delegate then wrote to Ms. McEwan, also on April 5, 2007, again advising her that Ms. Weiser was claiming compensation for length of service. The letter requested Ms. McEwan's payroll records and solicited a formal response to Ms. Weiser's complaint. The record shows that Ms. McEwan received this letter and forwarded a responding letter to the Delegate dated April 19, 2007. That letter once again denied Ms. Weiser's entitlement to compensation for length of service, principally on the basis that Ms. Weiser's employment at a particular rate of pay was not disrupted by the sale.

34. The Delegate followed up with her letter to Ms. McEwan outlining her preliminary findings, dated May 2, 2007. As with her April 5, 2007 correspondence, this letter states on its face that it was sent by certified mail. I pause here to say that section 29 of the *Interpretation Act* RSBC 1996 c.238 provides that certified mail is included within the definition of registered mail. In her submission filed for the purpose of this appeal the Delegate says that her May 2, 2007 correspondence was returned to the Employment Standards Branch by Canada Post on May 23, 2007, marked unclaimed. Ms. McEwan nowhere takes issue with the fact that this correspondence was sent to her at the time and in the manner described, but I am unprepared to draw any significant conclusion from that fact because it appears Ms. McEwan did not,

in the event, actually receive it. I also observe that there is no Canada Post tracking information with respect to this letter included within the record which confirms the Delegate's statement. In the absence of any evidence to the contrary, however, I accept that the Delegate's May 2, 2007 letter was forwarded to Ms. McEwan by certified mail and later returned to the Branch, marked unclaimed.

35. The fact that Ms. McEwan did not receive the May 2, 2007 correspondence from the Delegate is important, because not only did it contain the Delegate's preliminary findings, it also included references to communications the Delegate had received from Ms. Weiser and Mr. Wooldridge in respect of which she invited Ms. McEwan's comment. The correspondence also included the Delegate's calculation of the amounts she had concluded, on a preliminary basis, that Ms. McEwan owed to Ms. Weiser under the *Act*. Apart from the attempt the May 2, 2007 correspondence constituted, the record does not disclose that any of this information was shared with Ms. McEwan in any other manner prior to the Delegate's issuing the Determination on June 4, 2007.

36. Does the fact that Ms. McEwan did not actually receive the May 2, 2007 correspondence prior to the Delegate's issuing the Determination mean that there has been a denial of natural justice? I do not believe so. While it is no doubt true that Ms. McEwan did not have an opportunity to respond to the May 2, 2007 correspondence before the Determination was made, the reason Ms. McEwan did not avail herself of the opportunity presented was that she declined, or neglected, to claim her certified mail. Section 77 of the *Act* requires that if an investigation is conducted, a delegate must make *reasonable* efforts to give a person under investigation an opportunity to respond. In my view, the Delegate's forwarding the May 2, 2007 correspondence to Ms. McEwan via certified mail provided her with a reasonable opportunity to respond to the information presented. The Delegate had sent previous correspondence by certified mail to Ms. McEwan at the same address and Ms. McEwan had claimed it. Ms. McEwan therefore knew that an investigation was ongoing and that it was probable the Delegate would attempt to contact her further via certified mail. Her failure to claim her certified mail, in the circumstances presented here, cannot, in my opinion, be employed by her to ground an argument that the Delegate failed to provide her with a reasonable opportunity to respond to Ms. Weiser's complaint.

37. Is there any other basis on which Ms. McEwan can be said to have established a strong *prima facie* case in her favour should the appeal proceed on the merits? I do not think that she has. In her submission attached to her Appeal Form, and also in later communication forwarded to the Tribunal, Ms. McEwan argues that Ms. Weiser should not be entitled to compensation for length of service because she lost no time from work when Mr. Wooldridge took over the business. Ms. McEwan submits, in effect, that it would be unfair for Ms. Weiser to receive compensation for length of service because it would mean that Ms. Weiser will be "paid double". This submission raises a question concerning the proper interpretation to be given to section 63 of the *Act* regarding compensation for length of service. As such it raises a question of law. Ms. McEwan did not indicate in her Appeal Form that she intended to challenge the Determination on the basis that the Delegate committed an error of law. Nevertheless, previous decisions of the Tribunal have suggested that I should not be overly fastidious in limiting an appellant to arguments which fall squarely within the confines of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST #D141/03). Accordingly, I will consider Ms. McEwan's argument on this point for the purposes of determining whether she has presented a strong *prima facie* case supporting my exercising my discretion to extend the time for her to file her appeal.

38. In my opinion, Ms. McEwan's submission fails to establish a strong *prima facie* case, because it fundamentally misconceives the purpose behind the requirement that employers pay compensation for length of service under s.63 of the *Act*. Here, the purpose of the requirement is to compensate Ms. Weiser

for her length of service in the employ of Ms. McEwan, not Mr. Wooldridge. It follows that in the circumstances of this case it matters not that Mr. Wooldridge employed Ms. Weiser after the business was sold. The compensation for length of service in Ms. McEwan's employ that Ms. Weiser should receive, and the wages she received for her work in Mr. Wooldridge's employ after the sale of the business, are sums that must be paid to Ms. Weiser for purposes that the *Act* renders distinct. There is nothing in respect of them which connotes double compensation on the facts of this case.

39. The critical event which makes Ms. McEwan liable to pay compensation for length of service is the termination letter Ms. McEwan's lawyer forwarded to Ms. Weiser informing her, *inter alia*, that her employment with Ms. McEwan was terminated effective the date of the sale of the business to Mr. Wooldridge. The argument underlying Ms. McEwan's submissions on this appeal is that the obligation to pay compensation for length of service to Ms. Weiser in respect of her years of service working in the employ of Ms. McEwan was shifted in law to Mr. Wooldridge due to the operation of section 97 of the *Act*, which reads:

> 97. If all or part of a business or a substantial part of the entire assets of a business is disposed of, the employment of an employee of the business is deemed, for the purposes of this *Act*, to be continuous and uninterrupted by the disposition.

40. As the Delegate noted in her Determination, previous decisions of the Tribunal have interpreted section 97 to mean that obligations under the *Act* owed by a vendor employer to her existing employees may be shifted to a purchasing employer unless the vendor employer terminates the employment of those employees effective at or prior to the time of disposition (see *British Columbia (Director of Employment Standards) re Primadonna Ristorante Italiano* BC EST #RD046/01).

41. Ms. McEwan's submissions filed in support of her appeal appear to assert that Ms. Weiser's employment was not terminated, as Ms. Weiser continued to be employed after the sale by Mr. Woodridge. Ms. McEwan also points to the fact that she issued no Record of Employment to Ms. Weiser following the sale, again because "she never stop[ped] working". In my view, none of these assertions are sufficient to overcome the potency of the fact that Ms. McEwan's lawyer terminated Ms. Weiser's employment effective at or before the time set for Mr. Wooldridge to take charge of the business. The Determination states that Ms. McEwan told the Delegate the termination letter was forwarded to Ms. Weiser on the advice of her lawyer. Ms. McEwan nowhere denies this fact. The letter is unequivocal; it notifies Ms. Weiser that her employment was to be terminated as of the date the business was to change hands. It matters little, for the purpose of her establishing a strong *prima facie* case in her favour on this aspect of the appeal, that Ms. McEwan believes Ms. Weiser's employment was continuous for the purposes of section 97. In light of the material I have before me, I am not persuaded that Ms. McEwan has shown a strong *prima facie* case that it was, in law. In the circumstances of this case, section 97 cannot be employed by Ms. McEwan to avoid her obligation under section 63 to pay compensation for length of service to Ms. Weiser.

42. Ms. McEwan also submits, implicitly, that the Determination should be set aside, or at least varied, on the basis that the Delegate miscalculated the amount of compensation for length of service that Ms. Weiser should receive. She bases this argument on the assertion that she gave Ms. Weiser a raise over the last few weeks she was employed because Ms. McEwan was taking an insurance course and she asked Ms. Weiser to "look after the shop" in her absence. Ms. McEwan's contention is that if Ms. Weiser's compensation for length of service is to be calculated on the basis of her wages earned over a period of

time, the wages she earned during the last few weeks she was employed should be excluded because they are deceptively high. In addition, Ms. McEwan states that Ms. Weiser was overpaid on her last cheque.

43. In my view, these submissions also do not establish a strong *prima facie* case in favour of Ms. McEwan. The Delegate's calculation of the amount of compensation for length of service was based entirely on the payroll records supplied to her by Ms. McEwan. Section 63(4) of the *Act* provides that the amount of compensation for length of service an employer is obliged to pay is calculated by adding all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work. It is nowhere suggested that the regular wage the Delegate employed included overtime or premium rates of pay, or benefits payments of any sort. What Ms. McEwan argues instead is that the wage paid was temporarily higher than usual because she had asked Ms. Weiser to supervise the operation of the business because Ms. McEwan would be absent. In my opinion, the motive behind Ms. McEwan's paying Ms. Weiser a higher regular wage during the last few weeks she employed her is of little consequence when one attempts to determine the amount of that regular wage for the purpose of the calculation to be made under section 63(4) of the *Act*. The important matter for the purpose of the calculation is that Ms. McEwan paid Ms. Weiser that sum by way of regular wage during the relevant time period.

44. Ms. McEwan's bald assertion that she overpaid Ms. Weiser on her last paycheque, without more, is insufficient to demonstrate a strong *prima facie* case that the Determination is wrong. At the very least, one would have expected an explanation setting out the particulars of the overpayment, how it occurred, and why in the circumstances it should be construed as a genuine overpayment. None of this is provided.

45. Weighing these various factors, I have concluded that Ms. McEwan has not, on balance, provided compelling reason why I should exercise my discretion to extend the time for the filing of her appeal of the Determination.

ORDER

46. Pursuant to section 114(1)(b) of the *Act*, I order that the appeal be dismissed.

Robert Groves
Member
Employment Standards Tribunal