

An appeal

- by -

Alma Calderoni
("Calderoni")

- 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: David B. Stevenson

FILE No.: 2004A/53

DATE OF DECISION: June 23, 2004

DECISION

SUBMISSIONS

Alma Calderoni	on her own behalf
J. Ross Gould	on behalf of the director

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Alma Calderoni (“Calderoni”) of a Determination that was issued on February 13, 2004 by a delegate of the Director of Employment Standards (the “Director”).

Calderoni had filed a complaint with the Director alleging Key Fund Raising Ltd. (Key) had contravened the *Act* by failing to pay wages owed to her for work performed.

Following a hearing by teleconference on December 29, 2003, the Director issued the Determination, which found the *Act* had not been contravened. The basis for this finding was a conclusion that Calderoni was not an employee for the purposes of the *Act*, but rather was an independent contractor in a business relationship with Key.

Calderoni says that conclusion was wrong.

PRELIMINARY ISSUE

A preliminary issue relating to the timeliness of the appeal has arisen. On June 1, 2004, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal. There was an initial perception by the Tribunal that the appeal was late.

THE FACTS

The facts relating to the preliminary issue are as follows:

1. The Determination was issued on February 13, 2004. The record indicates the Determination was initially sent to Calderoni by regular mail on the same date.
2. The appeal was received by the Tribunal on April 5, 2004. Included with the appeal was an explanation for its apparent late delivery.
3. Calderoni states that following the complaint teleconference hearing the Director indicated a decision would be delivered “in a few weeks.” She claimed that she phoned several times to inquire when the decision would be coming, but was unable to communicate directly with the delegate of the Director responsible for issuing the Determination.

4. Calderoni says, and the record confirms, that she left a voice message with the delegate on March 3, 2004 inquiring about the decision.
5. On that day, the delegate forward, by registered mail, a copy of the Determination. The cover letter with the Determination included the following:

I have attached for you, another copy of the Determination (decision) that you enquired about in the voice mail message you left for me today. The original copy of this was mailed to you on February 13, 2003 (sic) at the address shown above.
6. Calderoni says she received both the Determination sent by regular mail and the Determination sent by registered mail the last half of March.
7. There is nothing in the file indicating when either the Determination sent by ordinary mail or the one sent by registered mail was received by Calderoni.

ARGUMENT AND ANALYSIS

The Director argues the appeal should have been filed no later than March 22, 2004 and, as it was not delivered to the Tribunal until April 5, 2004, is out of time.

Calderoni says simply that there are reasons for the appeal not being delivered to the Tribunal until April 5, 2004, including the Director misdirecting the Determination mailed on February 13, 2004 to a wrong address, a delay in getting the appeal papers and a delay by the delegate in getting “the stuff” (a term which probably includes the appeal papers) to her.

Section 81 of the *Act* requires, among other things, that the Director to serve any person named in a Determination with a copy of it. Section 122 of the *Act* speaks to service and, generally, says that a Determination or demand required to be served on a person under the *Act* is deemed to be served if served personally or sent by registered mail to the person’s last known address and, in the case of service by registered mail, is deemed to be served 8 days after the deposit of the Determination or demand in a Canada Post Office.

Subsection 112(2) requires, among other things, that an appeal of a Determination to the Tribunal be filed within the appeal period. The appeal period is described in paragraphs 112(3), which says:

112 (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).

Subsection 122(3) allows electronic or fax service at the request of a person – a circumstance that does not arise in this case.

The *Act* does not recognize service by ordinary mail nor does Section 112 describe any appeal period that is referable to cases where service by the Director of a Determination is purported to have taken place by ordinary mail. That would not typically be a concern where the person acknowledges receipt by ordinary mail and files an appeal within the time frame indicated in the Determination. Where, however, as here, the person says the Determination sent by ordinary mail was not received, the Director will have some difficulty raising a time bar to an appeal, since the Director will have failed to make service in the manner required by the *Act*. The Tribunal will not recognize that any service has occurred and the time period described in subsection 112(3) will not begin to run.

The result, for the purposes of this case, is that there was no statutory requirement for Calderoni to submit her appeal within the time identified by the Director in the Determination. In the circumstances, the statement in the Determination that Calderoni “must” deliver her appeal to the Tribunal no later than March 22, 2004 was both wrong and misleading.

In respect of the copy of the Determination sent by registered mail, that Determination was deposited with Canada Post on March 3, 2004. In the absence of any proof of the specific date it was delivered to Calderoni, that copy is deemed to have been served March 11, 2004, 8 days after March 3, 2004. Calderoni had a period of 30 days following deemed service by registered mail to deliver the appeal to the Tribunal. The instant appeal was delivered on April 5, 2004, well within the appeal period allowed. The appeal is timely and will be addressed by the Tribunal on the merits.

The circumstances of this case does not raise the question of whether a person not properly served with a Determination will be allowed to deliver an appeal to the Tribunal if there is an unreasonable delay in pursuing an appeal.

The Tribunal will notify the parties of the deadline for any further submissions.

David B. Stevenson
Member
Employment Standards Tribunal