Employment Standards TRIBUNAL

An appeal

\- by -

Kenneth Diamond

\- 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: Alison H. Narod

FILE No.: 2004A/55

DATE OF DECISION: June 23, 2004

DECISION

This matter concerns an appeal by Kenneth Diamond of a Determination of a Delegate of the Director of Employment Standards issued on February 24, 2004. The Delegate decided that Mr. Diamond's complaint against K.T. Auto-Motion Limited of non-payment of wages to Mr. Diamond was not substantiated because Mr. Diamond was not an "employee" within the meaning of the *Employment Standards Act* ("*Act*"). Rather, he was an owner of the Company.

The issue before me is whether or not Mr. Diamond requires an extension of the deadline to file his appeal and, if so, whether an extension ought to be granted.

I received submissions from Mr. Diamond and from the Delegate as to whether or not an extension of the time to appeal ought to be granted. However, in view of my disposition of the case, I do not need to address them.

I have decided that no extension is required, as Mr. Diamond made his appeal within the applicable time limits.

As noted, the Delegate issued the Determination on February 24, 2004. Despite Mr. Diamond's prior advice to the Delegate, by e-mail dated February 12, 2004, of his change of address and particulars of his new address, the Delegate admittedly and inadvertently sent the Determination to the wrong address and not to the corrected one. The Determination was returned to the Delegate.

Mr. Diamond sent a second notice of change of address to the Delegate, by e-mail dated March 16, 2004. Mr. Diamond supplied a transcript of a voice mail message that the Delegate left for him on or about March 17, 2004. In that voice mail message, the Delegate advised that he had received Mr. Diamond's change of address. Additionally, the Delegate said that he had previously issued and mailed a Determination, but it had been returned. Moreover, the Delegate advised that he would send another copy to the correct address. The Delegate also said that the limitation dates for appealing the Determination would remain the same, but that since the Determination was in "your" favour, the Delegate did not imagine "you'd" want to appeal it.

The Delegate acknowledges leaving the voice mail message for Mr. Diamond. He admits that his advice that the Determination was in Mr. Diamond's favour was in error and explains that his "confusion" in how he described the outcome was because the principal of the Company and Mr. Diamond each have the same first name.

The Delegate says the Determination was sent out to Mr. Diamond to his correct address on March 16, 2004. Mr. Diamond has produced a copy of the envelope containing the notice of Determination and points out that it is postmarked March 18, 2004.

The time limit for filing an appeal of a Determination is, in the case of a person served by registered mail, "thirty days after the date of service of the Determination" (s.112(2) of the *Act*). The Tribunal received Mr. Diamond's Notice of Appeal on April 5, 2004.

The issue, then, is whether or not Mr. Diamond was "served" with the Determination within thirty days before the Tribunal received his Notice of Appeal.

The *Act* permits service to be "deemed" in certain circumstances. Subsections 122 (1) and (2) state:

122. Service of determinations and demands –

(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 eight days after the determination or demand is deposited in a Canada Post Office.

There is no dispute that the only method used to endeavour to serve Mr. Diamond with the Determination was by means of registered mail. There is no dispute that the Determination was first sent to an address which Mr. Diamond had previously notified the Delegate was no longer correct. Therefore, it was not Mr. Diamond's "last known address". A Determination that was sent to an address other than the "last known address" cannot be deemed to have been served in accordance with s. 122.

In any event, I note that the presumption of deemed service under s. 122 is rebuttable (*Him-Mat Enterprises Ltd.* [2003] B.C.E.S.T.D. No. 123). In the circumstances, given that it is agreed Mr. Diamond did not receive the Determination because it was not sent to Mr. Diamond's last known address, the presumption, if it was applicable (and as noted above, it is not), is rebutted.

As mentioned above, the Delegate re-sent the Determination by registered mail. The evidence is that the mailing was postmarked March 18, 2004. Service of that re-sent Determination on Mr. Diamond is deemed by subsection 122(2) to have occurred eight days after its deposit in a Canada Post Office. There is no dispute that Mr. Diamond received it. Accordingly, the Tribunal's receipt of Mr. Diamond's Notice of Appeal on April 5, 2004 was well within the time limit for filing that appeal.

I return this matter to the Tribunal to seek submissions of the parties with respect to the merits of the appeal.

Alison H. Narod
Member
Employment Standards Tribunal