

An appeal

- by -

Karen Mandair

- 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: Carol Roberts

FILE No.: 2006A/112

DATE OF DECISION: November 20, 2006

DECISION

SUBMISSIONS

Karen Mandair	on her own behalf
Greg Brown	on behalf of the Director of Employment Standards
Updesh Ghuman	on her own behalf

OVERVIEW

1. This is an appeal by Karen Mandair pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards ("the Director") issued August 18, 2006.
2. Ms. Mandair filed a complaint against Updesh Ghuman carrying on business as Garden Gate Wedding Centre, The Décor House, Art of the Wedding, Art of the Wedding at The Décor House, The Décor House at Garden Gate and Garden Gate ("Ghuman"), claiming unpaid wages, statutory holiday pay and annual vacation pay from January 2005 until June 2005.
3. Following an investigation, the Director's delegate concluded that the parties had a business relationship rather than an employment relationship, and determined that the *Act* did not apply to the complaint.
4. Ms. Mandair filed an appeal with the Tribunal on September 26, 2006 alleging that the delegate failed to observe the principles of natural justice in making the Determination. She contends that the delegate was biased, and that the Determination was not in accordance with the evidence.
5. Pursuant to section 112 of the *Act*, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Ms. Mandair's appeal period expired September 25, 2006.
6. These reasons address only the timeliness of Ms. Mandair's appeal, and are based on the written submissions of the parties.

ISSUE

7. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

8. Ms. Mandair says that she only realized the time period had expired on September 26, 2006, one day after the deadline. She says that she believed the deadline to be September 26, 2006, and was surprised she had missed it by one day.

9. Ms. Mandair's appeal consists of 11 pages of narrative in which she sets out her version of the business arrangement she had with Ms. Ghuman. I infer that she provided all this information to the delegate at first instance. Ms. Mandair provided no new evidence, did not address any legal error made by the delegate, and does not say how the delegate was biased against her. In essence, Ms. Mandair's submission is that the delegate arrived at the wrong conclusion on the evidence.
10. The delegate provided the section 112(5) "record", including the complaint and documents he accepted during the investigation. He submits that Ms. Mandair participated fully in the investigation, and that her appeal is simply an attempt to have the Tribunal "re-weigh" the evidence. He contends that the extension should be denied.
11. In her reply submission, Ms. Mandair suggests that the delegate failed to consider the evidence provided by her 'witnesses' at "the hearing". This is a puzzling submission, since the delegate appeared to conduct an investigation rather than hearing, and the delegate does not refer to any evidence given by any third party. Although Ms. Mandair says that the "witnesses" gave the delegate information "under oath", no oral hearing was conducted. Furthermore, although Ms. Mandair alleges that although Ms. Ghuman did not appear at the hearing, the delegate "went out of his way to visit her store or place of business".
12. Ms. Ghuman opposes an extension of time being granted. She says that she was never aware of Ms. Mandair's intention to appeal the Determination.

THE FACTS AND ANALYSIS

13. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.
14. These time limits are in keeping with one of the purposes of the Act. Section 2(d) provides that one of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include 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.

17. These criteria are not exhaustive.
18. I grant Ms. Mandair's request for an extension for the following reasons.
19. Ms. Mandair says that she simply forgot the appeal deadline was September 25, 2006. I find this explanation reasonable and credible.
20. Given that Ms. Mandair filed the appeal less than one day after the appeal deadline, I find that she had a genuine, ongoing intention to file an appeal of the Determination before the deadline. Although none of the parties made submissions on the issue of prejudice, I infer that there is none in this circumstance.
21. I also find that Ms. Mandair has disclosed a *prima facie* case.
22. In response to a request from the Tribunal to clarify whether the delegate held a hearing or conducted an investigation, and whether or not he spoke to any witnesses, the delegate advised that the matter was set for a hearing, and Ms. Ghuman did not appear. The delegate considered that Ms. Ghuman did not have knowledge of the hearing and decided to conduct an investigation instead. He also says that he took the evidence of two witnesses Ms. Mandair brought to the hearing. The Determination makes no references to these witnesses, what they said, or how the delegate assessed their evidence. I find that Ms. Mandair has disclosed a strong *prima facie* case on the issues of natural justice and error of law, and grant the application.

ORDER

23. Pursuant to section 109(1)(a) of the *Act*, I allow the application to extend the time for filing an appeal.

Carol Roberts
Member
Employment Standards Tribunal