

An appeal

- by -

Tessa Carter  
(“Ms. Carter”)

- 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:** Shafik Bhalloo

**FILE No.:** 2011A/142

**DATE OF DECISION:** November 14, 2011

## DECISION

### SUBMISSIONS

Tessa Carter	on her own behalf
Sarah Hynd & Shannon Quinn	on behalf of Roberts Creek Childcare Society
Tami Wilson	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal filed by Tessa Carter (“Ms. Carter”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) of a determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on August 16, 2011 (the “Determination”). In the Determination, the delegate summarily dismissed Ms. Carter’s complaint against her former employer, Roberts Creek Childcare Society (“Roberts Creek” or “Employer”), for unpaid wages, annual vacation pay and compensation for length of service (the “Complaint”), as having been filed outside of the time limits prescribed under section 74(3) of the *Act*.
2. Ms. Carter appeals the Determination on the sole basis that the Director failed to observe the principles of natural justice in making the Determination.
3. Ms. Carter is seeking the Tribunal to cancel the Determination and order the Director to investigate her Complaint on its merits.
4. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated in section 103 of the *Act* and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. Ms. Carter is not seeking an oral hearing of her appeal and, in my view, the matter can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

### ISSUE

5. The issue in this appeal is whether the Director erred in refusing to accept and investigate Ms. Carter’s complaint.

### FACTS

6. On April 7, 2011, Ms. Carter electronically filed the Complaint with the Employment Standards Branch (the “Branch”). In her Complaint, she indicated that she worked as the Executive Director/Manager for Roberts Creek and was terminated from her employment by the latter after her last shift on September 27, 2010, and issued a letter of termination dated September 28, 2010.
7. By way of a letter dated May 11, 2011, the delegate informed Ms. Carter that the time for filing her Complaint ended six months after the termination of her employment, on March 27, 2011. However, since March 27 was a Sunday, she had until Monday, March 28, 2011, to file her Complaint but failed to do so. Instead, she filed her Complaint on April 7, 2011, outside the six-month time limit under the *Act*.

8. In the same letter, the delegate informed Ms. Carter that before her Complaint could be investigated on its merits, the Director would have to, by way of a preliminary determination, consider whether there was any basis to extend the time period for her to file her Complaint. In order to address the said preliminary question, the delegate requested Ms. Carter to provide, in writing, her explanation of why she failed to file her Complaint within the six-month time limit, including any details of efforts she made to resolve her Complaint during the same period.
9. In her letter dated May 24, 2011, in response to the delegate's letter of May 11, 2011, Ms. Carter informed the delegate that she misunderstood the instructions on the Self-Help Kit (the "Kit") she employed to attempt to resolve her dispute with Roberts Creek. She states she thought that she had to make her claim (using the Kit) to her employer within six months of the termination of her employment and then wait to see if the employer responded. She also explained she was under some considerable stress and anxiety due to how she had been "grossly mistreated" by the Directors of Roberts Creek, and therefore, it took her a long time to employ the Kit and file the Complaint against her Employer.
10. Roberts Creek, in its correspondence dated April 12, 2011, in response to Ms. Carter's Kit, asserted that Ms. Carter's employment was terminated with just cause and, therefore, she was not due any compensation for length of service.
11. On August 16, 2011, the delegate issued the Determination finding that Ms. Carter's Complaint was filed outside the time limit set out in section 74(3) of the *Act* and exercised her discretion under section 76(3)(a) to refuse to accept or investigate Ms. Carter's Complaint. In so deciding, the delegate reasoned as follows:

Section 2 (d) of Act [sic] identifies that one of the purposes of the Act is 'to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act'. One method of attaining this purpose is to require complaints be submitted to the Branch within the time limit specified in Section 74(3) of the Act. This provides all parties; including an employer, complainant and Branch; with a consistent and reasonable period of time to deal with complaints.

Ms. Carter notified the Employer of her claim for wages in a Self-Help Kit and letter to them which was dated as March 12, 2011. This notification to the Employer was within the thirty-day period of the end of the six-month period to file a complaint with the Employment Standards Branch.

Ms. Carter's explanation for filing late was that she misunderstood the instructions on the Self-Help Kit. Her understanding was that she had to wait for a response from the Employer prior to filing a complaint with the Branch. She explained that she thought she had to apply to the employer within 6 months by using the Self-Help Kit.

The Self-Help Kit is designed to help employees and employers resolve disputes quickly and fairly. There are explicit instructions on the first page of the Kit detailing the procedures for using the Kit and for filing complaints.

The Kit states the following:

Using the Kit **does not mean** a complaint has been filed or accepted by the Employment Standards Branch. You may file a complaint up to six months from when the problem took place or your employment ended.

**If you are within 30 days of the end of the six-month period you should file your complaint with the Employment Standards Branch and then use the Kit to resolve the problem. If you work under a union collective agreement you should seek assistance from your union.**

In addition to the above noted instructions noted directly on the Kit, there is [sic] Self-Help Kit Factsheet that states the following:

**Time limits for filing a complaint**

If an employee is still employed by an employer, a complaint must be filed within six months of an alleged contravention. If the employee is no longer employed, a complaint must be filed within six months of the last day of work.

If an employee is nearly out of time for filing a complaint before using the Self-Help Kit, he/she should file a complaint. The Branch will not act on the complaint until the employee advises that he/she used the Self-Help Kit and was not successful.

The date the employee filed the complaint is used to determine whether the complaint was filed within the time limit, even if the complaint was filed before the Self-Help Kit was used.

The requirements to file a complaint and how to use the Kit are very explicit and detailed. In addition, if individual employees or employers have questions about process or the requirements of the Act they may contact the Branch for clarification.

Being unaware of the requirements to file a complaint is not a compelling reason to continue an investigation when a complaint is out of time.

12. Accordingly, pursuant to section 76(3) of the *Act*, the delegate exercised her discretion and decided to stop investigating Ms. Carter's Complaint.

**ARGUMENT AND ANALYSIS**

13. Section 112(1) of the *Act* delineates the limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director. This section reads as follows.

**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 being made.

14. The onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which, the appellant's appeal will be dismissed.

15. In this case, Ms. Carter has grounded her appeal on a failure by the Director to observe the principles of natural justice in making the Determination but her appeal does not raise a natural justice issue. Instead, Ms. Carter's appeal more appropriately raises a question of law, namely, whether the Director correctly interpreted and applied sections 74(3) and 76(3)(a) of the *Act* in refusing to investigate Ms. Carter's Complaint. Having said this, I note that failure on the part of the appellant to check-off the appropriate box in the Appeal Form to identify the proper ground of appeal is not, in itself, fatal to her appeal. This Tribunal, in *Re: Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, that when adjudicating an appeal, the Tribunal should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off" but rather examine the nature of the appellant's challenge and what statutory ground of appeal that challenge is invoking:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether the challenge, *prima facie*, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

16. In the case of Ms. Carter's appeal, having reviewed her submissions, it appears that she is invoking the error of law ground of appeal. More specifically, she is contending that the Director erred in refusing to accept and investigate her complaint. However, I note that in her appeal submissions, Ms. Carter does not dispute that she filed her Complaint on April 7, 2011, past the six-month deadline in section 74(3) of the *Act*.
17. I also note that Ms. Carter attaches to her Appeal Form her letter of May 24, 2011, to the delegate, which she previously sent to the delegate in response to the latter's request for an explanation why Ms. Carter filed the Complaint out of time.
18. I also note that Ms. Carter reiterates in her written appeal submissions that she was diligent in her pursuit of her claim and followed instructions in the Kit as she understood them and, therefore, she should not be penalized. She submits the Director should exercise his discretion and investigate the Complaint on its merits because her Complaint "was underway and proceeding and the self-help kit had been sent and received by [her] former employer prior to the six month time limit". The balance of her submissions, including reply submissions to the Director's submissions, deal with the merits of her claim, and I do not find it necessary to review those here.
19. In response to Ms. Carter's appeal submissions, the Director states "the Determination largely speaks for itself". The Director also submits that the delegate provided Ms. Carter an opportunity, during the investigation of her Complaint, to provide information explaining why her Complaint was filed outside the six-month time limit and she obliged and the delegate in the Determination then considered her explanations.
20. I note Roberts Creek does not make any submissions on the issue of the timeliness of the Complaint, but makes submissions on the merits of the Complaint. I do not find it necessary to review those submissions here as my decision turns on the preliminary or the timeliness issue in this appeal.
21. Having reviewed the submissions of all parties, I find that the delegate correctly interpreted and applied section 74(3) of the *Act* to the evidence in this case when she concluded that Ms. Carter's appeal was filed outside of the six-month time limit set out in the said section. I also note that the delegate, after making that determination, properly considered the submissions of Ms. Carter and the objectives of the *Act* in deciding whether to exercise her discretion under section 76(3)(a) of the *Act* and refuse to investigate the Complaint. I note that I have carefully reviewed the delegate's reasons for opting to exercise her discretion under section 76(3)(a) of the *Act* to refuse to investigate Ms. Carter's Complaint, and do not find any basis to challenge her reasons and conclusion in the matter. To the contrary, I find the delegate's reasoning in the Determination persuasive. More particularly, I agree with the Director that the Kit and the Factsheet relating to the Kit provide express instructions governing the process and requirements of the *Act*, including the deadline for filing her claim under the *Act*. I find that Ms. Carter's misinterpretation or ignorance of those express requirements gave the delegate proper cause to exercise her discretion under section 76(3) to refuse to investigate the complaint. I also find that the delegate properly referred to and relied on section 2(d) of the *Act* which identifies one of the essential purposes of the *Act*, namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*" in support of her decision. In the circumstances, I dismiss Ms. Carter's appeal.

**ORDER**

22. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**