

An appeal

- by -

636104 B.C. Ltd. operating as Nerve Center Café

- 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.:** 2005A/112

**DATE OF DECISION:** September 8, 2005

## DECISION

### OVERVIEW

1. This is an appeal by 636104 B.C. Ltd. operating as Nerve Center Café (“Nerve”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on April 22, 2005 in favour of one Kaylee Stepura (“Stepura”).
2. Having made a finding in the Determination that Nerve had contravened section 63 of the *Act*, the Delegate ordered Nerve to pay \$605.75 in respect of compensation for length of service and accrued interest, and an administrative penalty of \$500.00, for a total of \$1,105.75.
3. The time limit for filing an appeal of the Determination appears to have expired on May 30, 2005. The Tribunal received an Appeal Form from Nerve on June 29, 2005.
4. It being thought that Nerve had filed its appeal late, the Tribunal wrote to the Delegate and Stepura on June 30, 2005, inviting them to make submissions on the question whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and extend the time period for requesting an appeal. The Delegate replied to the Tribunal by letter dated July 13, 2005, enclosing the record (the “Delegate’s Submission”).
5. By letter dated July 26, 2005, the Tribunal forwarded a copy of the Delegate’s Submission to Nerve and Stepura and invited them to make further replies by August 10, 2005. No replies were received.
6. By letter dated August 11, 2005, the Tribunal informed the parties that the issue of the timeliness of Nerve’s appeal would be decided by a Member based on the written submissions received, and that if the late appeal was accepted by the Tribunal, the parties would have an opportunity to respond on the merits.

### ISSUE TO BE DECIDED

7. The following are the issues I consider I must decide on this appeal at this time:
  - Was Nerve’s appeal filed at a time when the period within which it was required to file its Appeal Form with the Tribunal had expired?
  - If so, should the Tribunal extend the time period within which Nerve may request an appeal, notwithstanding it had expired when Nerve filed its Appeal Form with the Tribunal on June 29, 2005?

### FACTS

8. I have considered the contents of the Appeal Form submitted on behalf of Nerve, the Determination and Reasons for the Determination dated April 22, 2005, the Delegate’s Submission dated July 13, 2005, and the correspondence to which I have referred. They reveal the following facts:
  - Nerve operated an internet café in Surrey, British Columbia, at which Stepura was employed in customer service from May 16, 2002 until she was discharged on August 3, 2004.

- Stepura filed a complaint against Nerve pursuant to Section 74 of the *Act* alleging that Nerve had contravened the *Act* by failing to pay her statutory holiday pay and compensation for length of service.
- At a meeting of the Delegate, a representative of Nerve, and Stepura held on March 18, 2005, the parties agreed that statutory holiday pay had been paid to Stepura in accordance with the *Act*. This meant that the sole issue before the Delegate was whether Stepura's claim for compensation for length of service should be dismissed because Nerve had demonstrated just cause for the discharge.
- Following at least one further meeting with the parties, at which evidence and submissions were received, and subsequent correspondence, the Delegate concluded that Nerve had failed to meet the onus resting on it to prove just cause, with the result that Stepura was found to be entitled to compensation for length of service.
- As is usual, the Determination contained the following information:

*Appeal Information:*

*Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by **4:30pm on May 30, 2005**. Information on the Tribunal and how to appeal a Determination can be found at the Tribunal's website: [www.bcest.bc.ca](http://www.bcest.bc.ca) or by contacting the Employment Standards Tribunal at (604) 775-3512. The Tribunal is separate and independent from the Employment Standards Branch.*

- Nerve faxed a copy of the Tribunal's Appeal Form to the Employment Standards Branch on May 30, 2005. The Delegate assumed that the Appeal Form had also been forwarded to the Tribunal.
- Sometime after May 30, 2005 Nerve must have discovered that its Appeal Form had not been received by the Tribunal because it faxed an Appeal Form, dated May 30, 2005, to the Tribunal on June 28, 2005 at 17:56 hours, which was stamped as received by the Tribunal at 8:30am the next day.
- On its Appeal Form, under heading 7 marked "Late Appeals", Nerve gave an explanation, and while the ends of some of the lines did not survive transmission (marked "..."), it appears to read as follows:

*This was filed on time but was not received by fax somehow. I also faxed the director of Employment Standar... at the same time. I will send this again, can you ca... me so I know you have received this. Greg Brown also... a copy of this (604) 586-4241.*

- The Delegate's Submission concedes that it was the Delegate's understanding that Nerve fully intended to appeal the Determination.

## ANALYSIS

### ***Was Nerve's appeal filed at a time when the period within which it was required to file its Appeal Form with the Tribunal had expired?***

9. Section 81(1) of the *Act* requires that on the making of a determination, the Director must serve any person named in the determination with a copy of the determination. One of the items that must be included in the determination served is a notification of the time limit and process for appealing the determination to the Tribunal. As I have noted, the Determination here includes information advising that Nerve might appeal the Determination to the Tribunal by 4:30pm on May 30, 2004.
10. Section 122(1) of the *Act* provides that a determination that is required to be served on a person under the *Act* is deemed to have been served if it is served on the person, or sent by registered mail to the person's last known address. Section 122(2) of the *Act* provides that 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.
11. Section 112(3) of the *Act* sets out the time periods within which a person may appeal a determination. A person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, section 112(3)(a) mandates that the time period is 30 days after the date of service. Pursuant to section 112(3)(b), the time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically by fax machine.
12. Here, the record does not disclose, conclusively, how the Determination was served on Nerve. There is, for example, no evidence whatsoever relating to personal service, or to service by fax. The record does contain a copy of a Canada Post manifest dated April 22, 2005 indicating that materials were forwarded by XpressPost courier to Nerve on that date. Even if I were to infer that those materials included the Determination, it is by no means certain that Nerve can be said to have been properly served by registered mail either, because there are no particulars in the record indicating whether that XpressPost delivery was "registered" in the sense that a signature was required upon receipt. Further, there is no evidence in the record that Nerve actually received the Determination by means of that XpressPost courier delivery.
13. Given that Nerve did deliver an Appeal Form to the Employment Standards Branch on May 30, 2005, however, I conclude that Nerve did somehow receive the Determination on or before that date.
14. If the April 22, 2005 deposit of the Determination with Canada Post was a registered mailing, the deeming provision in section 122(2) of the *Act*, in combination with section 112(3)(a), means that the last day on which Nerve could have filed a timely appeal with the Tribunal was on May 30, 2005. If Nerve can be said to have been "served" by some other means on or before May 30, 2005, the effect of section 112(3) is that Nerve would have had to file its appeal on June 20, 2005, at the latest. In either case, Nerve's filing its Appeal Form with the Tribunal on June 29, 2005 put it out of time, and I so find.

### ***Should the Tribunal extend the time period within which Nerve may request an appeal, notwithstanding it had expired when Nerve filed its Appeal Form with the Tribunal on June 29, 2005?***

15. The time limits within which one must file an appeal are consistent with one of the purposes of the *Act*, which is to provide for 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.

16. Section 109(1)(b) of the *Act* provides that the Tribunal may extend the time period for requesting an appeal even though the period has expired. That provision gives the Tribunal a discretion to extend the time limits for an appeal. However, the Tribunal will not grant an extension as a matter of course. Indeed, an extension is only granted where there are compelling reasons to do so. In every case the burden is on the appellant to show that the time period for an appeal should be extended. See in this regard Niemisto BCEST #D099/96 and Tang BCEST #D211/96.
17. The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered on applications of this sort:
  - 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 bone 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 an extension; and
  - There is a strong prima facie case in favour of the appellant.
18. Having regard to these factors, it is my view that Nerve's request for an extension of time within which to file its appeal should be allowed.
19. The main fact which persuades me that I should exercise my discretion so as to permit an extension of time is that Nerve delivered its Appeal Form to the Employment Standards Branch within time. This demonstrates, and indeed the Delegate has conceded, that Nerve had a genuine and ongoing bona fide intention to appeal the Determination. It also fulfills the requirement that the Director, at least, was made aware of Nerve's intention to appeal.
20. Less compelling is Nerve's explanation for the failure to file its Appeal Form with the Tribunal within the statutory time limits, which explanation is to the effect that the Form was filed on time "but was not received by fax somehow." In the absence of any evidence directly contradicting Nerve on this point, however, I am prepared to conclude that Nerve did attempt to file its Appeal Form with the Tribunal within time, but was unsuccessful.
21. While delay in the processing of an appeal may be said to cause mischief in every case, I am unable to conclude, in these circumstances, that either the Director, or Stepura, will be "unduly" prejudiced if I allow an extension.
22. On the material before me, I cannot conclude that Nerve has established a strong prima facie case, but I do not find that that fact alone outweighs what I have said regarding the other factors I must consider.

23. For the above reasons, I have decided that it would be appropriate for me to exercise my discretion to extend the time period for Nerve to request an appeal in this case.

**ORDER**

24. Pursuant to Section 109(1)(b) of the *Act*, I order that the time period within which Nerve may request an appeal be extended to June 29, 2005.

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**Robert Groves**  
**Member**  
**Employment Standards Tribunal**