

An appeal

- by -

Veena Maharaj

- 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

**ADJUDICATOR:** Carol L. Roberts

**FILE No.:** 2002/95

**DATE OF DECISION:** April 26, 2002

## DECISION

This is a decision based on written submissions by Veena Maharaj, Allan Khan, President of Tri-Force Security Services Ltd., and Murray Superle on behalf of the Director of Employment Standards.

This decision is on the issue of the timeliness of the appeal only.

### OVERVIEW

Ms. Maharaj filed a complaint with the Director of Employment Standards ("the Director") alleging that Tri-Force Security Services Ltd. ("Tri-Force") owed her wages and compensation for length of service. A delegate of the Director investigated Ms. Maharaj's complaint, and on October 17, 2001, issued a determination finding that the Employment Standards Act ("the Act") had not been contravened.

Enclosed with the Determination was appeal deadline information, and a fact sheet entitled "Your Right to Appeal". The appeal deadline was October 25, 2001.

Ms. Maharaj filed her Notice of Appeal of the Determination, which was dated December 28, 2001, on February 25, 2002, along with an explanation of why the appeal was late.

Ms. Maharaj seeks an extension of the time to file an appeal pursuant to section 109(1)(b) of the Act.

Both the delegate and Tri-Force oppose the application.

### ISSUE TO BE DECIDED

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.

### FACTS

As noted above, the Determination was issued October 17, 2001. The appeal information sheet indicated that the appeal deadline was 4:30 p.m. October 25, 2001.

Ms. Maharaj indicated that she spoke to the delegate on October 10, 2001 telling him that she disagreed with the outcome of his letter of September 26. I infer that this was the delegate's preliminary determination which was provided to the parties for an opportunity to respond before it was issued as a final determination. Ms. Maharaj states that the delegate advised her that he would write to her. I infer that this meant he would issue the final Determination which she could then appeal.

Ms. Maharaj contends that on December 20, 2001 she again called the delegate to inquire into the status of the decision. She says that the delegate advised her that a Determination had been rendered and the appeal period had expired. She also says that the delegate told her that although the Determination had been sent to her, it had been returned because it had an incorrect address. The Determination was forwarded to her that day. She says that she was advised by the delegate that she could still file an appeal because she had not received the Determination until December 20, 2001.

Ms. Maharaj contends that the delegate erred in failing to review all of the evidence regarding her rate of pay, specifically, a contract between ICBC and Tri-Force.

Ms. Maharaj says she picked up the appeal forms at the end of December, but that she had to wait to get information from ICBC to enclose with the appeal. She states that, when she was advised by ICBC that she would not receive that information for a further "month or two", she filed the appeal indicating that the information would follow.

The delegate argues that the Tribunal should not consider the late appeal. He states that the Determination was sent by registered mail to Ms. Maharaj's address, and delivered on October 18. He contends that, pursuant to s. 122 of the Act, the Determination is deemed to be served if it is delivered to the person's last known address.

In reply, Ms. Maharaj contends that the letter contained no name, and that there is more than one person living at her address. She says that, upon receiving notification that the Determination had been returned, the delegate ought to have taken steps to properly address it, particularly when she had earlier advised him that she was not satisfied with the decision.

Mr. Khan argues that Ms. Maharaj had "ample opportunity" to bring her concerns to Tri-Force, and that her failure to file the appeal on time is prejudicial to the company. Mr. Khan enclosed a copy of the contract between ICBC and Tri-Force.

## **ANALYSIS**

Section 112 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 office within 15 days of service, if served by registered mail, or 8 days after service, if served personally.

Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

The Tribunal has established a number of criteria for the exercise of discretion extending the time to file an appeal. 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.

(see: *Niemisto v. British Columbia (Director of Employment Standards)* (BCESTD#099/96) and *Pacholak v. British Columbia (Director of Employment Standards)*(BCESTD# 526/97)

Furthermore, extensions will only be granted where there are compelling reasons present. (Moen and Sagh Contracting Ltd., BCESTD#298/96)

### **Bona fide intention to appeal the determination and notice to the parties of this intention**

Although Ms. Maharaj contends that she complained about the decision in September, no Determination was issued until October. I find that she expressed her disagreement with the delegate's conclusion as early as September, when the Determination was in draft form. This disagreement was communicated to the delegate at that time. I accept that when Ms. Maharaj attempted to secure information about the status of her complaint on December 20, she was advised that the Determination had been mailed out, and returned. I accept that she further indicated her intention to appeal the Determination to the delegate at that time. Indeed, Ms. Maharaj's appeal is dated December 28.

### **Reasonable explanation for the failure to request an appeal within the time limits**

The evidence is that Canada Post left a card at Ms. Maharaj's address advising that delivery had been attempted. The address is the same address used by Ms. Maharaj in filing the appeal. The evidence is however, that the Determination was returned.

While section 122 of the Act deems a Determination to have been received if it is delivered, the fact is that, in this instance, it was not delivered. The delegate cannot rely on the provisions of s. 122 to establish service when the Determination is returned to the Branch for reasons that it is improperly addressed. The delegate was aware the Determination had been returned. It had not been refused, or unclaimed. I accept that Ms. Maharaj was not properly served.

The documentation shows that, upon being served, Ms. Maharaj filled out the appeal form immediately. However, the appeal documents were not received by the Tribunal for a further two months. Ms. Maharaj explains the delay in perfecting her appeal by indicating that she sought a copy of the contract between Tri-Force and ICBC, and was advised that ICBC would take several months to process her request. The evidence discloses that Ms. Maharaj filed her request with ICBC on January 15. ICBC's response to Ms. Maharaj was dated February 14, and indicates that her request would be responded to by March 15. I accept that Ms. Maharaj had a bona fide intention to appeal the Determination in December, and that her failure to perfect that appeal for an additional 65 days was due to a delay in obtaining information necessary to support the grounds for the appeal.

I conclude, on the submissions presented, that there is a reasonable explanation for the delay.

### **Strong prima facie case**

The contract between ICBC shows that Tri-Force is to pay its employees no less than a prescribed amount depending on the position. A security operations officer is to be paid \$14.00 per hour, and a trainee guard \$9.00 per hour. In the Determination, the delegate notes "With regard to the rate of pay there does not appear to be the any (sic) contract to pay any other than \$8.25 per hour".

The evidence discloses that there is indeed a contract between the employer and ICBC which requires Tri-Force to pay its employees a prescribed minimum, which is greater than the amount paid to Ms. Maharaj. While Tri-Force suggests that this amount would not be paid to Ms. Maharaj as she was not assigned to

this location on a full time basis, this argument goes to the merits of the claim, not to the issue of timeliness. The fact is that the contract was not analyzed by the delegate, and forms part of the grounds of Ms. Maharaj's appeal.

I conclude that there are serious issues to be dealt with on appeal.

In reviewing the criteria to be applied in determining whether an extension of time ought to be allowed, I find, on balance, that the application should be allowed.

The request for an extension of time to file an appeal is granted.

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**Carol L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**