

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Jane Suter  
(" Suter ")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** Mark Thompson

**FILE No.:** 1999/769

**DATE OF DECISION:** May 4, 2000

## DECISION

### OVERVIEW

Jane Suter (“Suter”) appealed a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 23, 1999 pursuant to Section 112 of the *Employment Standards Act* (the “Act”). The Determination found that Suter owed Amy Elep (“Elep”), \$2,061.15 for unpaid overtime wages, vacation pay and interest pursuant to a contract of employment.

Suter filed her appeal on December 23, 1999 on the grounds that the Director’s delegate had relied upon Elep’s records of hours worked, and that Elep had not worked the hours claimed. Suter further argued that she was entitled to charge Elep for meals eaten during her employment and that Elep had been paid for time worked in April 1999.

The Director’s delegate argued that the appeal was out of time. The Director further argued that the evidence on which the Determination was based was sufficient to support the conclusions reached.

This decision was based on written submissions from the parties.

### ISSUE TO BE DECIDED

The issues to be decided in this case are: whether Suter should be allowed to appeal after the expiry of the statutory time limit for an appeal and if the appeal should proceed whether Suter’s evidence demonstrates that the Determination was incorrect.

### FACTS

Elep was employed by Suter from July 28, 1998 until April 30, 1999. Elep’s job title was in dispute, but the record is clear that she provided cleaning and child care services in Suter’s home. Suter gave written notice of termination to Elep on April 9, 1999, effective April 30. Elep’s final day of work was April 30, 1999. Elep then filed a claim for wages for the month of April 1999, unauthorized room and board deductions, vacation pay and overtime.

The Director’s delegate found that Elep was not a domestic worker as defined in the *Act*, so that Suter was not entitled to withhold wages for room and board. The calculation of wages owing to Elep was based on the minimum wage, \$7.15. Suter could not provide any records of the hours Elep worked. She instructed her accountant to prepare a spreadsheet of wages paid to Elep after Elep filed her complaint. The delegate reported that she could not obtain information about Elep’s employment from Suter, so she relied on information Elep provided, plus the hours of operation of the business Suter and her husband operated. Based on the data available to her, the delegate concluded that Elep had worked overtime from September 1998 through March 1999 and had worked through her notice period until April 30, 1999. Suter did not provide information on Elep’s hours of work, refused to communicate with the delegate by telephone and requested that a written determination be issued. The Director’s calculated Elep’s straight time

and overtime wages based on the statutory minimum, plus vacation pay, less wages paid and found that Suter owed Elep \$2,061.15, including interest from May 1, 1999.

The delegate issued the Determination on November 23, 1999. Evidence presented to the Tribunal showed that the Determination was served on Suter by registered mail. Suter did not claim the Determination, and it was returned to the Employment Standards Branch on December 14, 1999 as unclaimed.

During the course of her investigation, the Director's delegate sent correspondence to Suter on July 14, 1999 by certified mail at her home address, with a postal code of V5L 2H6. Suter claimed the mail. The delegate sent other documents to the same address and postal code on August 31, and Suter acknowledged receiving them. On October 29, 1999, Suter's husband wrote the Director making a number of allegations about the investigation and requested a written reply. The return address on the letter contained a postal code of V5L 2H7. The delegate replied to the October 29 letter by certified mail to Suter's husband on November 8, 1999, using the V5L 2H7 postal code. The letter was not claimed. The Determination was sent to the same address with the V5L 2H6 postal code, which is the correct postal code for Suter's address. Canada Post served the notice to Suter without her postal code, i.e., only her street address was on the notice card.

Suter filed her appeal on December 23, 1999, after she received demand notice from her bank for the amount of the Determination. She advanced arguments on the timeliness of her appeal and the merits of the Determination.

## **ANALYSIS**

Suter argued that she had not received the Determination in time to file an appeal, because it had been served by certified mail and "as such it lay unclaimed at the postoffice for over two weeks."

The Director's delegate argued that this appeal should fail because it was out of time. Although one of the letters to Suter had an incorrect postal code, this was a technical error under Section 123 of the *Act*, and thus the proceeding was valid.

The evidence before the Tribunal demonstrated that the Determination was served on Suter by registered mail, one of the options available to the delegate under Section 112(2) of the *Act*. Section 112(2) regulates requests for appeal of a determination as follows:

- 2) *The request must be delivered within*
  - a) *15 days after the date of service, if the person was served by registered mail, and*
  - b) *8 days after the date of service, if the person was personally served or served under section 122(3).*

*Section 122 regulates the service of determinations as follows:*

- 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*
  - (c) *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 8 days after the determination is deposited in a Canada Post Office.*

In this case, the normal deadline for filing an appeal was December 16, 1999. The statutory scheme for the timeliness of appeals is relatively generous. The recipient of a determination is deemed to have received it after 8 days, after which the 15 day time limit begins to run. Canada Post sent the first notice to Suter on November 24, 1999, and the final notice was sent on December 3. Thus, Suter was in a position to receive the Determination well within the 8-day period in the *Act*, had she acted on the notice. Within this statutory framework, the statute is directive on the issue of time limits. It states that a "request must be delivered" within 15 days. Suter failed to comply.

Suter has not presented any grounds for exercising the Tribunal's discretion to receive her appeal. She requested a written determination rather than discuss the case with the Director's delegate. After the Determination was issued properly, she did not claim it, despite two notices from Canada Post. The error in the postal code, which Suter did not raise as a ground for appeal, was purely technical and did not affect the service of the Determination.

## **ORDER**

For these reasons, Suter's appeal is dismissed, pursuant to Section 114(2) of the *Act*. The effect of this decision is to confirm the Determination of November 23, 1999. Suter is obligated to pay Elep \$2,061.15 plus any additional interest due under Section 88 of the *Act* from the date of the Determination.

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**Mark Thompson**  
**Adjudicator**  
**Employment Standards Tribunal**