Employment Standards TRIBUNAL

An appeal

- by -

Nature's Choice Foods Ltd.

- 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/165

DATE OF DECISION: December 14, 2004

DECISION

OVERVIEW

This decision relates to the timeliness of an application made by Nature's Choice Foods Ltd. (the "Employer") to appeal a Determination made by a Delegate of the Director (the "Delegate") dated May 14, 2004 and filed in the Supreme Court of British Columbia on August 3, 2004.

FACTS

On February 2, 2004, the Delegate sent a letter and a Demand for Documents by registered mail to various addresses, including the address of the Employer's Registered and Records office as listed in the Delegate's corporate search, the address of the Employer's President (who is also the Employer's representative in this appeal) at her address as listed in the same corporate search, as well as the address of the premises to which the Employee believed the Employer had moved. Each was returned marked "moved", "unclaimed" or "refused".

On May 4, 2004, the Determination was sent by registered mail to various addresses, including the address of the Employer's Registered and Records office, the address of the Employer's President, and the address of the premises to which the Employee believed the Employer had moved. Each was returned marked either "unclaimed" or "moved".

The Employer's appeal was received by the Employment Standards Tribunal on September 16, 2004. The Employer's representative says that the Employer never received notification of any demands from the Employment Standards Branch, it never received any documents, and it did not realize anything was happening. The Employer's representative says she went to the New Westminster Courthouse on September 15, 2004 and received a copy of the filed Determination. Other than claiming the Employer did not receive the Determination and other communications relating to the Employee's claim, the Employer's representative provides no argument respecting the merits of extending the time limits for the Employer's appeal in the event that it is found to be untimely.

In response, the Delegate says that the efforts made to serve the Employer complied with s. 122(1) and (2) of the *Employment Standards Act*, that service by registered mail in the manner undertaken is sufficient to constitute deemed service in accordance with that section of the *Act*, and that, accordingly, the appeal is late and ought to be denied.

In response, the Employer's representative says that she has received legal advice that service was not properly accomplished because she was not served in person. Additionally, she says, the Employer's last known address was 11789 Stewart Crescent. It vacated those premises on September 30, 2003 and never moved to another location.

At my request, a copy of the record that was before the Delegate was forwarded to me. As a result, copies of the record were sent to the parties. Although the Employee sent a brief additional letter stating that the Employer was still in business at one of the addresses listed in the Delegate's record, no further submissions were received on behalf of the Employer.

There is no dispute that the Employer was not served, personally. Nor is there any dispute that, if the Determination was properly served, the appeal was filed out of time. The time period for appealing a Determination is 30 days after the date of service of the determination, if the appellant was served with the Determination by registered mail in accordance with s. 112(3)(a). Service by registered mail is deemed to have occurred 8 days after it was deposited in the mail (s. 122(1) & (2)). That was done on May 4, 2004. As noted above, the Tribunal received the appeal on September 16, 2004.

ISSUE

The issue in this case is whether or not the Employer was served with the Determination in a manner that constitutes deemed service within the meaning of s. 122 of the *Act* and, if not, should the time limit for filing this appeal be extended.

REASONS

The first question in this appeal is whether the Employer was served with the Determination in accordance with s. 112. In my view, the Employer was properly served with both the Demand for Documents and the Determination by registered mail in accordance with s.112.

Sub-sections 122(1) and (2) state:

> **122.Service of determinations and demands -**
>
> (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
>
> (b) 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 or demand is deposited in a Canada Post Office.

It is notable that the Employer's representative does not deny that the Determination was sent to the Employer's last known address or its Registered and Records office. Indeed, her submissions support the conclusion that it was sent to the Employer's last known address, since she says that the Employer vacated the premises at one of the addresses to which the Determination was sent, but did not move elsewhere.

The fact that the Employer did not accept service of a Determination served in accordance with s. 112 at its last known address does not, without more, excuse the Employer from the deemed service provisions. It is the Employer's responsibility to set in place processes to respond to its obligations. On the facts of this case, the inference can be drawn that it is only because of the Employer's failure to make arrangements to deal with its obligations at law, including under the *Employment Standards Act*, that it failed to receive the Determination, which was sent by registered mail in accordance with s. 122 of the *Act* (*Cross-Current Divers Ltd.* [2003] B.C.E.S.T.D. No. 129, at para. 11, *Forrest (c.o.b. Proficiency Plus Foodservice & Consulting*, [2003] B.C.E.S.T.D. No. 216 at para. 7).

A person cannot avoid service in accordance with s.112 by failing to claim or refusing to receive registered mail sent to its last known address. Nor can it avoid service in accordance with that section by failing to make arrangements to receive registered mail after having moved from its last known address.

A corporate employer is obliged to maintain up-to-date Registered and Records office addresses at all times with the Registrar of Companies (ss. 34 to 37 of the *Business Corporations Act*, S.B.C. 2002 c. 57, see also ss. 39 and 40 of the *Company Act*, R.S.B.C. 1996, c. 62 and *Western Outdoor Advertising Inc*. [2000] B.C.E.S.T.D. No. 390). In this case, the Registered and Records office address is the same as the address that the Employer says was its last place of operation. Accordingly, mailing the Determination to that address in accordance with s. 122 amounts to deemed service on the Employer.

Therefore, the Employer's appeal of the Determination is untimely.

The next question is whether or not the time to appeal ought to be extended. The Tribunal has the power to extend a time limit for requesting an appeal, even though the period has expired (s.109(1)(a) of the *Act*).

The Tribunal's jurisprudence indicates that extensions are not granted automatically, although a time limit may be extended if there are compelling reasons to do so. In order to determine whether there are compelling reasons, the Tribunal has consistently applied a policy involving the following six criteria:

1. Is there a good reason why the appeal could not be filed before the deadline?
2. Was there an unreasonable delay in appealing?
3. Did the appellant always intend to appeal the Determination?
4. Were the other parties aware of this intent to appeal?
5. Is an extension of the appeal deadline harmful to the interests of the respondent? and
6. Does the appellant have a strong case that might succeed if an extension were granted?

In my view, the Employer's representative has not supplied compelling reasons for extending the time limit to appeal. First, no good reason has been provided as to why the appeal could not have been filed before the deadline. Closing down the business and/or vacating premises, without arranging for forwarding of mail is not a sufficient reason. More importantly, the Appellant has not demonstrated a strong case that the appeal might succeed that the appeal might succeed if an extension were granted. In fact, no reason at all has been supplied to justify setting aside the Determination on its merits.

Accordingly, I conclude that the appeal is untimely and no extension of the time limit to appeal will be granted. Therefore, the appeal is dismissed.

Alison H. Narod
Member
Employment Standards Tribunal