

An appeal

- by -

Tyler J. Kerr

- 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:** Carol L. Roberts

**FILE No.:** 2004A/184

**DATE OF DECISION:** December 16, 2004

## DECISION

### SUBMISSIONS

Howie Kerr	on behalf of Tyler Kerr
Ken MacLean	on behalf of the Director of Employment Standards
Daryl Hitchcock	on behalf of Rick's Music & Stereo Mart Ltd.

### OVERVIEW

This is an appeal by Tyler Kerr pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director").

Mr. Kerr filed a complaint with the Employment Standards Branch alleging that Rick's Music and Stereo Mart Ltd. ("Rick's") had contravened section 8 of the Act as a result of false representations.

A delegate of Director of Employment Standards ("the Director") investigated the complaint, following which the delegate determined that there had been no contravention of section 8, and took no further action.

The Determination was issued September 15, 2004. The deadline for filing an appeal of the Determination was October 25, 2004. Mr. Kerr filed his appeal on October 27, 2004.

### ISSUE

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 AND ARGUMENT

Rick's is a retail electronic store. Mr. Hitchcock is its President. Mr. Kerr and Mr. Hitchcock had previously had a good employee/employer relationship. Because of that relationship, the parties entered into discussions in which Mr. Kerr would again become Mr. Hitchcock's employee pending an anticipated merger between Rick's and Radio Shack in June 2003.

Mr. Kerr alleged that Mr. Hitchcock discussed his position, rate of pay, type of work and conditions of employment with his father, Howie Kerr, by telephone. Howie Kerr then passed along this information to Mr. Kerr, and the discussions continued, by telephone and email for approximately six months.

Mr. Hitchcock's position was that, although the parties had a discussion about the nature of the position, which was that of a senior salesperson, there had been no discussion of any rate of pay, the conditions of employment or the date of commencement of employment. He also said that the position was dependent on the merger occurring.

The merger never occurred and no new store opened.

On September 29, 2003, Mr. Hitchcock offered Mr. Kerr a sales position at the existing Rick's store, with the opportunity to work up to the position of assistant manager. Mr. Kerr rejected that offer, and filed his complaint under the *Act*.

The delegate concluded that the job offer was contingent on Rick's merger with Radio Shack, and that Mr. Kerr was aware that it was contingent on such a merger. The delegate also found that Howie Kerr knew, or ought to have known, that the corporate arrangements would have an impact on the job offer, and ought to have so advised his son.

The delegate concluded that the evidence did not support the complaint that Rick's had made false misrepresentations (sic), since Mr. Kerr should have been aware that the offer was contingent on the merger. Further, the delegate noted that Mr. Kerr had not provided working notice to his then employer, likely because he was aware it was a contingent offer.

On the face of the Determination, appeal information was set out as follows:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 p.m. on October 25, 2004....

The Tribunal received Mr. Kerr's appeal on October 27, 2004 at 10:30 a.m. The grounds of appeal are that the delegate erred in law, and failed to observe the principles of natural justice in making the Determination.

Mr. Kerr stated that the appeal was late because he was confused as to where to send the documents, and because of his unfamiliarity with "legalities". He also submits that the appeal was two days past the deadline due to the thickness of the appeal file, and the confusing information and the frustration that resulted from that. He also says that, in a discussion with the Tribunal staff on October 26, 2004, he realized he ought to continue with the appeal. He says the delay is not too long, and that he always intended to file an appeal.

The delegate submits that Mr. Kerr has presented no compelling reasons for an extension of time. He submits that Mr. Kerr's contention that he was confused as to where to send the documents was not borne out by the evidence, given the information contained on the front sheet of the Determination as well as the fact that Mr. Kerr in fact contacted the Tribunal, although past the appeal deadline.

Furthermore, the delegate notes that the appeal letter is dated October 18, 2004, and correctly addressed to the Director, the delegate and the Tribunal. He submits that Mr. Kerr was not confused as to where to send the appeal documents.

In addition, the delegate says unfamiliarity with the *Act* or the appeal processes is not a basis for an appeal.

Finally, the delegate submits that Mr. Kerr has not demonstrated that he has a strong case on appeal.

Mr. Hitchcock also opposes the granting of an extension of time, and says that the Determination should stand.

## ANALYSIS

Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination;  
or
- (c) evidence has become available that was not available at the time the determination was being made

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

In *Niemisto* (ESTD#099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that 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.

These criteria are not exhaustive.

Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*) BC EST #D298/96)

I am not persuaded that an extension of time should be granted.

I am unable to conclude that a large amount of documentation and a lack of familiarity with appeal procedures constitutes a reasonable and credible explanation for failing to request an appeal within the statutory time period. Mr. Kerr had one month to file his appeal. Although the appeal letter is dated October 18, 2004, Mr. Kerr did not telephone the Tribunal until one day after the appeal deadline. The Tribunal's telephone number and website address are both contained on the front of the appeal form. The appeal letter discloses that Mr. Kerr has an email account, and thus access to clear, non-legal, appeal information on the Tribunal's website.

I accept that, at least since October 18, 2004, there has been an ongoing, *bona fide* intent to appeal the Determination, but there is no evidence the Director was aware of that intent prior to the appeal actually being filed.

I have no basis to conclude that Mr. Hitchcock will be unduly prejudiced by the granting of the extension.

Finally, I am not persuaded that there is a strong *prima facie* case to be made on appeal.

The appeal documentation does not set out which errors of law Mr. Kerr says that the delegate made, nor does it say how the delegate failed to observe principles of natural justice. Rather, it consists of argument about how the decision is wrong.

I assume that much of the points made in the appeal submission were made to the delegate at the investigation stage. That the delegate has rejected Mr. Kerr's arguments does not substantiate either an error of law or a failure to observe the principles of natural justice.

An appeal is not an opportunity to re-argue a case. An appellant must provide clear and compelling evidence in support of the grounds of appeal. Mr. Kerr has not done so.

In conclusion, I find that Mr. Kerr has not met the Tribunal's criteria for extending the time for filing an appeal.

## **ORDER**

I decline to grant Mr. Kerr's application.

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