



An appeal

- by -

Beverley Wilson, a Director or Officer of Rabbit Hut Automotive (1998) Inc.
("Wilson")

- 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: David B. Stevenson

FILE No.: 2001/112 and 2001/214

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Beverley Wilson, a Director or Officer of Rabbit Hut Automotive (1998) Inc. (“Wilson”) of a Determination which was issued on September 11, 2000 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Wilson was a Director or Officer of the company and as such was required to pay an amount of \$2,165.25, the extent of her statutory obligation under Section 96 of the *Act*.

The appeal was filed late and a preliminary matter has arisen concerning whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for requesting the appeal. This decision deals with the preliminary objection. The Tribunal has decided this matter can be decided on the written submissions of the parties.

Wilson has also filed a request under Section 113 of the *Act*, which will only need to be addressed if the Tribunal decides to exercise its discretion to extend the time period in the *Act* for requesting the appeal.

ISSUE

The issue being considered in this decision is whether the Tribunal should extend the time period in subsection 112(2) of the *Act* for requesting an appeal of the Determination. If the time period is not extended, the appeal will be dismissed. If the appeal is accepted, the substantive issue raised in this appeal is whether Wilson is liable under Section 96 of the *Act*.

FACTS

Wilson claims she did not receive the Determination until February 7, 2001.

The Director has established that the Determination, addressed to Wilson at her place of residence, was deposited with Canada Post for delivery by registered mail on September 13, 2000 and was successfully delivered on September 15, 2000.

ARGUMENT AND ANALYSIS

Subsections 122(1) and (2) of the *Act* state:

- 122 (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 have been served 8 days after the determination or demand is deposited in a Canada Post Office.

The *Act* deems delivery by registered mail to be service on the person to whom the Determination is sent. Accordingly, for the purpose of the issue being considered in this decision, the Determination was served on Wilson on September 21, 2001. The appeal of the Determination is late by more than 3½ months.

The Tribunal has consistently held that it will not grant extensions under Section 109(1)(b) of the *Act* as a matter of course and will exercise its discretionary powers only where there were compelling reasons to do so (see, for example, *Re Metty M. Tang*, BC EST #D211/96). In deciding whether “compelling” reasons exist in a particular request for an extension, the Tribunal’s decision in *Re Niemisto*, BC EST #D99/96, stated the following:

Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

- i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii. there has been a genuine and on-going bona fide intention to appeal the Determination;
- iii. the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
- v. there is a strong prima facie case in favour of the appellant¹.

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

¹ See also the comments in *Re Berg*, BC EST #D212/97 in respect of this factor.

I am not convinced this is an appropriate case to exercise my discretion in favour of extending the time for requesting an appeal. The explanation given by Wilson for the delay is neither reasonable nor credible. Wilson claims she did not receive the Determination until February, 2001, yet it is clear from the material filed by the Director that the Determination was delivered to her residence, addressed to her, on September 15, 2000.

Practical reality suggests that a registered letter addressed to Wilson and successfully delivered to her residence would, at the very least, be brought to her attention. If there is some reasonable explanation for avoiding that practical reality, it is incumbent on Wilson to provide it. None has been given. In the circumstances of this case, it is insufficient for Wilson to simply say she did not receive the Determination until February, 2001.

The appeal has not been requested within the time limits in the *Act* and, pursuant to Section 114(1)(a) of the *Act*, is dismissed.

In light of the above decision is not necessary to consider the application under Section 113 of the *Act* to suspend the effect of the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated September 11, 2000 be confirmed in the amount of \$2,165.25, together with any interest that has accrued pursuant to Section 88 of the *Act*.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal