



An appeal

- by -

Jerry Ryan Allen operating as Footlights Theatre

- 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:** John M. Orr

**FILE No.:** 2001/51

**DATE OF DECISION:** May 16, 2001

## DECISION

### APPLICATION

This is a consideration of an application by Jerry Ryan Allen ("Allen") operating as Footlights Theatre pursuant to Section 109 of the Employment Standards Act (the "*Act*") to extend the time period for requesting an appeal from a determination numbered ER# 097391 dated June 15, 2000 by the Director of Employment Standards (the "Director") even though the time period for requesting an appeal has expired.

The main issue addressed in the determination was whether certain claimants were employees of Allen, who was the producer in an operation known as Footlights Theatre, and entitled to wages and benefits provided for in the *Act*. On June 15, 2000 a delegate of the Director issued a determination in which he found that the claimants were in fact employees and entitled to the payment of wages and benefits that totalled \$20,413.69.

The determination was sent by registered mail to the last known address of Jerry Ryan Allen at 210 –1030 Harwood Street, Vancouver, B.C. V6E 1R5 as well as his previous business address.

The *Act* provides for service of the determination as follows:

- s. 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 be served eight days after the determination or demand is deposited in a Canada Post Office.

In this case the determination was deposited in a Canada Post Office on June 15, 2000 and therefore it was deemed to have been served on June 23, 2000. The time limit for filing an appeal is 15 days after the date of service, if the person was served by registered mail. That time limit would have expired on July 10, 2000.

The appeal herein by Allen, although dated January 09 2001, was received by the Tribunal, January 08, 2001 at 4:07 p.m. The determination advises on the last page that:

Any person served with this Determination may appeal it to the Employment Standards Tribunal. **The appeal must be delivered to the Tribunal no later than 4:30 PM on July 10, 2000.** Complete information on the appeal procedure

is attached. Appeal forms are available at any office of the Employment Standards Branch. (*bold added*)

The time limits for appeals are set-out in Section 112 of the *Act* as follows:

*Right to appeal director's determination*

112. (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*
- (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).*

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include that:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine and ongoing intention to appeal;
3. the respondent and the Director were aware of the intention to appeal;
4. the prejudice to the employee will be considered;
5. there is a *prima facie* case set out in the appeal.

Allen claims that he did not become aware of the determination until December 11, 2000 and then only through his solicitor. Allen claims that he has intended to appeal the determination since becoming aware of its contents. He says that he was unable to immediately file an appeal because his solicitor was on holidays over the Christmas period and did not return to his office until sometime in the week of January 2, 2001.

Allen states that no person residing at the address to which the determination was mailed was willing or able to accepting the determination or to provide the Director with a forwarding address for Allen. However, Allen has not disputed that this address was the last address given to the Director. He does make some suggestion that it was up to the Director to ascertain any further new addresses. I do not accept this submission. Allen was aware of the investigation

and, if he changed his address, it was his obligation to make sure that the Director was kept informed of any such changes.

I do not believe that this is a case that warrants the exercise of the discretion contained in section 109. Allen had given an address to the Director but made no arrangements to receive his mail properly. When he did find out about the determination on December 11 2000 he did not submit his appeal until January 8, 2001, four weeks later. This does not indicate a genuine and ongoing intention to appeal.

The holidays taken by his solicitor are not a reasonable explanation for the delay in filing the appeal. There was time both before and after the holiday during which the appeal could have been filed promptly. There is also no reason given why another solicitor in the firm could not have filed the appeal on Allen's behalf.

There is also considerable prejudice to the employees in further delay of these proceedings and there is little merit to the substantive allegations in the appeal.

In conclusion, the application for an extension of time for requesting an appeal pursuant to s.109 (1)(b) is denied and the appeal is dismissed without a hearing in accordance with s. 114 (1)(a) as I am satisfied that the appeal has not been requested within the time limit in section 112(2).

## **ORDER**

Accordingly, pursuant to section 109(1)(b), I decline to extend the time for filing of the appeal herein. The appeal is dismissed without a hearing pursuant to section 114(1)(a).

***JOHN M. ORR***

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**John M. Orr  
Adjudicator  
Employment Standards Tribunal**