

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Sound Contracting Ltd.
("Sound Contracting" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/442

DATE OF DECISION: September 14, 1998

DECISION

OVERVIEW

Sound Contracting Ltd. (“Sound Contracting” or the “employer”) has, pursuant to section 112 of the *Employment Standards Act* (the “Act”), appealed a Determination issued by the Director of Employment Standards (the “Director”) on June 24th, 1998 under file number 080689 (the “Determination”).

Following an audit conducted by a delegate of the Director, it was determined that Sound Contracting failed to pay 20 employees the overtime pay to which they were entitled under the *Act*. Further, the delegate also determined that Sound Contracting failed to pay six employees all of the wages to which they were entitled under the *Skills Development and Fair Wage Act* and accompanying *Regulation*. The employer’s total liability under the Determination is \$8,260.64

ISSUE TO BE DECIDED

Sound Contracting filed its appeal with the Tribunal on July 10th, 1998. The issue now before me concerns the timeliness of that appeal. More particularly, the issue before me is whether or not Sound Contracting’s application for reconsideration of the Tribunal’s decision to dismiss the appeal should be granted. The appeal was dismissed pursuant to section 114(1)(c) of the *Act* which provides that “[t]he tribunal may dismiss an appeal without a hearing of any kind if satisfied after examining the request that...(a) the appeal has not been requested within the time limit in section 112(2)”. The employer’s request for reconsideration is made pursuant to section 116 of the *Act*.

FACTS AND ANALYSIS

There appears, immediately below the delegate’s signature on page 4 of the Determination, the following information box (**boldface** in original):

<p>Appeal Information</p> <p>Any person served with this Determination may appeal it to the Employment Standards Tribunal. An appeal of this Determination must be received by the Employment Standards Tribunal not later than July 2, 1998. Complete information on the appeal procedures is attached. Appeal forms are available at the Employment Standards Branch offices.</p>

Immediately upon receipt of the employer's appeal, the Tribunal Registrar wrote to the employer stating, in part:

"I am in receipt of your appeal dated July 8, 1998 and note that it was received in this office on July 10, 1998. [The] Determination dated June 24, 1998 states clearly that the deadline for receipt of an appeal by the Tribunal was July 2, 1998. It is the responsibility of the appellant to ensure that the Tribunal has received an appeal by the deadline indicated on the Determination.

I regret that your appeal will not be considered since it does not comply with the requirements of Section 112(2) of the [Act]."

Sound Contracting's request for reconsideration of the Tribunal's decision to refuse to consider the appeal is contained in a letter to the Tribunal dated July 14th, 1998.

According to the uncontested information before me, the Determination was personally served on Mr. Rick Sing on June 24th, 1998; on that same day, a copy of the Determination was sent by registered mail to the employer's registered and records office. Section 112 of the *Act* provides as follows:

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).

(3) The filing of a determination under section 91 does not prevent the determination being appealed.

(4) This section does not apply to a determination made under section 119.

Thus, if the Determination was served only by registered mail, the appeal would still have been filed outside the statutory time limit. However, in this case, the Determination was in fact "personally served" on June 24, 1998. Accordingly, the appeal period expired on July 2, 1998 (i.e., the appeal period expiration date set out in the Determination) - the employer's appeal, as noted above, was not filed until July 10, 1998.

A corporation, being a legal but not a natural person, cannot be "personally served" in the usual sense of that phrase. However, section 204 of the *Company Act* states that a document may be served on a company by "personally serving any director [or] officer...of the company". While the

employer, in its July 14th reconsideration request, specifically denies that Mr. Sing (upon whom the Determination was personally served) was an employee, officer or director of Sound Contracting, Mr. Sing did, nonetheless, carry out the *functions* of an officer or director and thus could be considered to be an officer or director by reason of the definitions of “director” and “senior officer” set out in section 1 of the *Company Act*.

That Mr. Sing carried out the functions of an officer or director is evidenced by the fact that he dealt with the Director’s delegate throughout the investigation (including endeavouring to settle the matters in dispute) and also by his having filed the appeal on behalf of the employer that is now before me. If, as is now alleged by the employer, Mr. Sing was never an employee, officer or director of Sound Contracting, one must query his authority to have filed an appeal on behalf of that firm.

Accordingly, I am satisfied that the employer was “personally served” on June 24th and thus an appeal ought to have been filed by no later than July 2nd. The appeal was not filed until July 10th. This is a situation where the appellant was very clearly advised of its appeal rights and of the deadline for filing such an appeal. I have no satisfactory explanation before me as to why the appeal was not filed in a timely fashion.

The Tribunal Registrar, exercising the discretion that is given to her by reason of section 114(1)(a) of the *Act*, dismissed the appeal. In my view, I should not, *on a reconsideration*, interfere with that exercise of discretion unless I am satisfied that, in exercising her discretion, the Registrar proceeded on some fundamentally wrong principle or otherwise seriously misperceived the material facts. I cannot so find.

ORDER

The employer’s application for reconsideration is dismissed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal