EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

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

-by-

Kammi Anne Stohlstrom

("Stohlstrom" or the "appellant")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 98/287

DATE OF HEARING: September 16th, 1998

DATE OF DECISION: October 16th, 1998

DECISION

APPEARANCES

David Walker for Kammi Anne Stohlstrom

Michael Hunter for Famous Players Inc.

Catherine Hunt for the Director of Employment Standards

OVERVIEW

This is an appeal brought by Kammi Anne Stohlstrom ("Stohlstrom" or the "appellant") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on April 15th, 1998 under file number 52399 (the "Determination").

The Director determined that Stohlstrom had not been constructively dismissed (see section 66 of the *Act*) by her former employer, Famous Players Inc. ("Famous Players" or the "employer").

TIMELINESS AND SUFFICIENCY OF THE APPEAL

At the outset of the appeal hearing, counsel for the employer objected to the appeal proceeding on the basis that it was filed beyond the statutory time limit set out in section 112(2)(a) of the *Act* and, in any event, because it was not sufficiently particularized [see section 112(1)].

Mr. Walker, on behalf of the appellant, submits that the appeal documents filed with the Tribunal are sufficient and that the appeal was filed in a timely manner. If the appeal was not filed in a timely manner, Mr. Walker requests that I extend the appeal period pursuant to section 109(1)(b) of the *Act*. Ms. Hunt, on behalf of the Director, took no position on the sufficiency of the appeal documents but did argue in favour of the timeliness of the appeal; Ms. Hunt's submissions as to timeliness were adopted by the appellant. Ms. Hunt took no position on the substantive merits of the appeal.

The relevant statutory provisions are reproduced below:

> 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:...
>
> (b) extend the time period for requesting an appeal even though

the period has expired;

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).

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 8 days after the determination or demand is deposited in a Canada Post Office.

Timeliness of the appeal

The Determination contained the following notice at the bottom of the last page immediately below the delegate's signature:

> **Appeal Information**
>
> Any person served with this Determination may appeal it to the Employment Standards Tribunal. The appeal must be delivered to the Tribunal by May 8, 1998. Complete information on the appeal procedures is attached. Appeal forms are available at Employment Standards Branch offices.

Ms. Stohlstom's appeal, dated May 7th, was filed with the Tribunal on May 8th, 1998 and thus appears to have been filed in a timely fashion. However, counsel for the employer asserts, and I believe correctly, that the appeal period expired on May 4th, rather than May 8th, 1998.

The Determination was posted to Ms. Stohlstrom by certified (registered) mail on April 15th, 1998; an "Acknowledgement of Receipt" was signed by Mr. Walker on behalf of Ms. Stohlstrom (Mr. Walker is Ms. Stohlstom's stepfather) on April 17th, 1998. Given that Ms. Stohlstrom was served by registered mail rather than in person, the governing time limit for appeal is set out in

section 112(2)(a) of the *Act*, namely, "15 days after the date of service". The calculation of time limits is, in turn, governed by section 25(5) of the *Interpretation Act* which states that in calculating the time limit the first day is excluded and the last day included. Thus, the time limit for appealing the Determination expired on May 2nd, 1998. Because May 2nd was a Saturday, section 25(3) of the *Interpretation Act* mandates that the appeal period be extended to Monday, May 4th, 1998. Accordingly, in my opinion, this appeal was filed four days after the expiration of the governing appeal period.

Counsel for the Director submits that the "deemed service" provision contained in section 122(2) of the *Act* governs the situation and that the date of "actual service" is irrelevant. Certainly, it would appear that the delegate relied on this latter provision in fixing the deadline for appeal set out in the notice contained in the Determination and reproduced above (*i.e.,* 8 days after posting by registered mail plus 15 days to file an appeal = May 8th, 1998). Counsel for the Director advances a number of policy reasons for fixing an appeal deadline based on the presumption of service by registered mail rather than a deadline that is based on the actual date of service. For example, the party named in the Determination is not required to guess as to the final appeal deadline (often parties do not know if the appeal period includes or excludes weekends and holidays); evidence regarding the actual date of service need not be produced; the "deemed service" date is the only date that can be known in advance of actual service.

While there is much to commend in the approach suggested by counsel for the Director, in my view, section 122(2) is a "default" provision that only applies when, for example, a person named in a Determination refuses--as often occurs--to take delivery of registered mail. In the absence of proof of receipt, the statutory presumption is that the Determination was served 8 days after posting by registered mail. However, when a party receives the Determination by registered registered mail within the 8 day period period, the appeal period begins to run as and from the date of actual service. Section 112(2)(a) refers to the date that a person "was served"; I cannot agree with the Director's counsel's submission that even though a person received the Determination by registered mail on on a date within the 8 day period, the appeal period does not begin to run until that person is deemed to have been served under section 122(2). Such an interpretation would not put all potential appellants on an even footing as some--those who received their registered mail more quickly than others would have, in effect, a longer appeal period. In my view, the intent of the *Act* is that all parties be governed by the same appeal period. As noted above, the rationale for the deemed service provision contained in section 122(2) is to deal with those parties who might seek to unduly extend their appeal period by evading personal service and/or by refusing to accept or to acknowledge delivery of registered mail addressed to them.

Notwithstanding the foregoing comments, I am nonetheless of the view that it is preferable for the Director to continue with the established practice of setting out, in the determination itself, a fixed deadline for appeal rather than simply parroting the language of section 112(2). It should be remembered that, for the most part, parties are not legally represented either during the investigation of a complaint or on an appeal to this Tribunal. As noted above, some parties, even if advised that an appeal must be filed "within 15 days after the date of service" will not fully appreciate when their particular appeal period expires--for example, some parties are of the view that the 15-day time period excludes weekends and other holidays--and thus there is a great deal of

merit in the Director's practice of setting out in the Determination itself a fixed date by which an appeal must be filed.

Obviously, the Director and her delegates cannot know, when they sent out a determination by registered mail, the exact date that the envelope will be received by the addressee. For that reason, the Director has taken what I believe to be an eminently sensible approach, namely, setting out in the determination an appeal deadline based on the date of "deemed service" rather than the "actual service" date. I recognize that in so doing, some appellants will, in effect, be given a somewhat greater time to file an appeal than will others. Further, I also recognize that in some cases, appellants, relying on the appeal deadline set out in the determination, will file their appeals after the statutory time limit for filing an appeal has expired---exactly the scenario in the present case.

In my view, the appropriate way to deal with the present situation is to grant a time extension of the appeal period under section 109(1)(b) of the *Act* to May 8, 1998. I might add that I granted this order at the oral hearing, prior to hearing any evidence but I also indicated that I would deliver written reasons along on this issue with my decision on the merits of the appeal.

I also heard argument on the issue of the sufficiency of the appeal notice itself but reserved on that question. My ruling now follows.

Sufficiency of the appeal

Section 112(1) of the *Act* provides that an appeal must be submitted in writing and contain "the reasons for the appeal". In an effort to assist appellants (most of whom are unrepresented and unsophisticated in matters of legal procedure), the Tribunal has prepared a form of appeal document which includes a section where the "Reasons for this Appeal" may be set out. In the instant case, the "reasons for appeal" were set out in a one-page typed document appended to the appeal form which reads, in part, as follows:

> "I will be arguing that there are errors in fact made by the adjudicator in reaching his determination and that questions bearing on the primary issues do not appear to have been examined or given sufficient consideration by the adjudicator in arriving at this determination.
>
> I am also requesting that an oral hearing be granted in this matter as there are issues of credibility which cannot be properly addressed in written submissions alone.
>
> The relevant facts have already been outlined in my previous submissions to the Ministry and I am prepared to outline them again in a hearing for the benefit of the Tribunal should that be required.
>
> The remedy I seek is as previously stated in my October 5th *Complaint and Information* form, a copy of which is attached for your information and consideration."

In my view, *considered collectively,* the appeal form and attached documents (and those incorporated by reference) contain an adequate--indeed, a very complete--summary of the relevant facts and the reasons for appeal. This is manifestly not a case where the appellant simply states that the determination is "wrong" and ought to be set aside. The appellant's position is set out in some detail in the various documents and, although at odds with the employer's view (and that of the delegate as set out in the Determination), I do not think it can be fairly said that the employer did not know why Ms. Stohlstrom was appealing the Determination. I can only add that having reviewed the appeal documents in question prior to the appeal hearing, I was of the view that I had a reasonably good understanding of the basis upon which the Determination was being challenged.

I therefore find that this appeal cannot be dismissed on the basis that the appeal documentation did not adequately set out the "reasons for the appeal". I now turn to the substantive question raised by the appeal, namely, whether or not Ms. Stohlstrom was "constructively dismissed".

FACTS AND ANALYSIS

Section 66 of the *Act* provides as follows:

> 66. If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

If such a determination is made, the employer would then be liable to pay compensation for length of service under section 63 of the *Act* or give appropriate written notice in lieu of such payment. Ms. Stohlstrom says that she was "constructively dismissed" as defined in section 66; the delegate did not so find.

Ms. Stohlstrom commenced her employment in March 1992 and averaged about four shifts of four to five hours' duration each week. The employer operates a theatre complex situated in North Vancouver known as "Esplanade Cinemas". The appellant worked more often during the Christmas and spring breaks and during the summer. She worked in one of two areas--the concession stand and the box office.

Although the box office shifts are generally of only fours' duration, these shifts are generally preferred by the theatre staff to the five hour concession stand shifts. The concession stand is generally considered to be a more stressful, less pleasant working environment as compared to the box office. Some (including the appellant), but not all employees, were "cross-trained" to work in both areas. Typically, the appellant worked about one-half of her shifts in each area.

In early June 1997, Ms. Stohlstrom fractured her ankle while at a work-related social gathering. She was on crutches for 2 weeks, wore a solid cast for 2 weeks and a walking cast for another 4 weeks; following the removal of the walking cast her leg was weak and she underwent some 12 weeks of physiotherapy. Immediately after her injury, she asked for and received a week off work. Shortly thereafter she approached one of her supervisors and indicated that while she was willing to return to work, she was not physically able to work in the concession stand and asked that all

four of her usual weekly shifts be in the box office. However, during the period from her return to work until her resignation in September she only worked about 1 or (usually) 2 shifts per week in the box office; she asked not to be scheduled for shifts in the concession stand and this request was honoured by the employer.

Ms. Stohlstrom claims that she was "constructively dismissed" when the employer refused to accommodate her by ensuring that all of her usual four weekly shifts were worked in the box office. As noted earlier, the appellant usually worked four weekly shifts but only about one-half of those in the box office. In essence, following her injury she continued to receive her box office shifts but the employer did not honour her request that her other two regular concession stand shifts be switched to box office shifts. In not scheduling Ms. Stohlstrom for her regular concession stand shifts the employer was only honouring her request and following the instructions of Ms. Stohlstrom's doctor who reported to the employer that Ms. Stohlstrom "should be seated only at work".

On September 4th, 1997, Ms. Stohlstrom submitted her resignation which reads as follows:

> "I would like to submit this letter of resignation. I am hereby giving you 2 weeks notice that September 18th, 1997 will be my final day. I would also like to request at this time, a complete record of my employment from my start with the company in March 1992, to the present."

I note that there is nothing in this resignation letter to suggest that Ms. Stohlstrom was resigning due to the employer's refusal to schedule all of her regular weekly shifts in the box office. Indeed, there is nothing in the evidence before me to suggest that once Ms. Stohlstrom returned to full health and was once again fit to work in the concession stand, that the employer would not have returned her to her pre-injury schedule.

Section 66 of the *Act* only applies where the employee's conditions of employment have been substantially and detrimentally altered by the unilateral action of the employer. That is simply not the situation in the case at hand. The appellant, unfortunately, but certainly not due to any action on the employer's part, was unable to continue with her regular work pattern following her ankle injury. She continued to work her usual shifts in the box office but was unable to work her usual concession stand shifts. In my view, the employer was not under an affirmative duty to, in effect, unilaterally alter the terms and conditions of other employees so that Ms. Stohlstrom could work all of her usual 4 shifts in the box office. It should be remembered that all employees, including Ms. Stohlstrom, viewed the box office as the more desirable working area. In order to give that which Ms. Stohlstrom sought, namely, extra shifts in the box office, some employees would have been forced to give up their box office shifts in order to replace Ms. Stohlstrom in the concession stand. Had the employer chosen to meet Ms. Stohlstrom's request, it may have left itself open to a claim under section 66 by certain other employees.

In any event, I am satisfied that the employer is not obliged to pay Ms. Stohlstrom any compensation for length of service because she was not terminated, either constructively or directly, she voluntarily resigned--see section 63(3)(c) of the *Act*.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination be confirmed as issued.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal