An application for Reconsideration

- by -

Kelly Kerr operating as Sunscape Tanning Studios
(“Kerr”)

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

pursuant to Section 116 of the
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2005A/139

**DATE OF DECISION:** September 28, 2005

# DECISION

## SUBMISSIONS

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| Kelly Kerr | on his own behalf |
| Lynne L. Egan | for the Director of Employment Standards |

## INTRODUCTION

1. This is an application filed by Kelly Kerr, doing business as "Sunscape Tanning Studios" ("Kerr"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"). Mr. Kerr applies for reconsideration of Tribunal Member David Stevenson's decision issued on June 20th, 2005 (B.C.E.S.T. Decision No. D082/05.

2. This application is being adjudicated based solely on the parties' written submissions. In addition to submissions from Mr. Kerr and the Director's delegate, I also have before me the entire record that was before Member Stevenson as well as, of course, his written reasons for decision.

3. In my view, this application is not meritorious and, accordingly, is dismissed. My reasons for so finding now follow.

## PREVIOUS PROCEEDINGS

### *The Determination*

4. On August 23rd, 2004 Richelle M. Onyschtschuk ("Onyschtschuk") filed a complaint with the Employment Standards Branch alleging that her former employer, Mr. Kerr, failed to pay her regular wages, overtime pay and statutory holiday pay for July 1st, 2004. Ms. Onyschtschuk alleged that she had been employed at one of Mr. Kerr's tanning studios (in North Vancouver) as an assistant from June 9th to July 11th, 2004 and was to be paid $8 per hour.

5. An evidentiary hearing regarding the complaint was held on February 1st, 2005 before a delegate of the Director of Employment Standards (the "delegate"). Mr. Kerr, although given both written (received on December 16th, 2004) and telephone notice (on the day of the hearing) of the hearing date, failed to attend claiming he was "too busy" to attend the hearing. The delegate delayed the hearing by some 30 minutes to afford Mr. Kerr an opportunity to attend the hearing but he nonetheless failed to attend. I also note that the record before me indicates that Mr. Kerr had previously failed to respond to a Demand for Production of Payroll Records.

6. The hearing proceeded in Mr. Kerr's absence; Ms. Onyschtschuk testified on her own behalf and also provided some documentary evidence. On February 24th, 2005 the delegate issued a Determination and accompanying "Reasons for the Determination". The delegate dismissed Ms. Onyschtschuk's claim for statutory holiday pay, however, she upheld Ms. Onyschtschuk's claims for regular wages, overtime pay and vacation pay. The delegate ordered Mr. Kerr to pay Ms. Onyschtschuk the total sum of $441.03

including section 88 interest. This latter sum was calculated after accounting for two separate wage payments that had been made by Mr. Kerr.

7. In addition, the delegate levied four separate $500 administrative penalties based on Mr. Kerr's contravention of sections 18 (payment of wages upon termination), 27 (failure to provide wage statements), 40 (failure to pay overtime pay) and 58 (failure to pay vacation pay) of the *Act.* These latter administrative penalties were levied pursuant to section 29(1) of the *Employment Standards Regulation*. As noted above, it would appear that Mr. Kerr failed to provide payroll records pursuant to a valid Demand, however, the delegate did not issue a further penalty on that account. The Determination thus required Mr. Kerr to pay a total sum of $2,441.03.

***The Appeal and Member Stevenson's Decision***

8. On April 5th, 2005 Mr. Kerr appealed the Determination to the Tribunal. Mr. Kerr alleged that he never received any written notice of the hearing and that, accordingly, there was a denial of natural justice [see section 112(1)(b) of the *Act*]. Mr. Kerr did not seek an oral hearing before the Tribunal and none was held. The appeal was adjudicated based on the parties' written submissions (see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act;* see also *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

9. Member Stevenson issued written reasons for decision on June 20th, 2005 confirming the Determination. Member Stevenson concluded that although the statutory presumption of service contained in section 122 of the *Act* did not apply where the document being served was a notice of an evidentiary hearing, he was satisfied that the hearing notice had been delivered to a proper business address and that Mr. Kerr simply "chose not to participate in the complaint [adjudication] process".

10. I have reproduced the relevant portions of Member Stevenson's reasons for decision (at pages 4-6), below:

> 18. In the appeal submission, he says. "I am certain that you will find no verification of the February 1st hearing notice being sent to myself, Kelly Kerr, and ask you to grant my appeal."
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> 19. Kerr has also challenged the conclusion that Onyschtschuk was owed wages and has included with his appeal all of the reasons why he disagrees with it, together with supporting documents. He has asked the Tribunal to reject the complaint. I do not intend to consider the merits of the complaint. If I agree with Kerr on the natural justice ground, the appropriate course in the circumstances is to refer the matter back to the Director. If I do not agree with Kerr on the natural justice issue, the appeal will be dismissed applying the principle enunciated in *Tri-West Tractor Ltd.,* BC EST #D268/96 and *Kaiser Stables Ltd.,* BC EST #D058/97 - that a party to a complaint process may not "lie in the weeds", failing to cooperate or participate in the complaint process, and later seek to appeal the resulting Determination with evidence that should have, and could have, been provided during the complaint process.
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> 20. In replying to the appeal, the Director submits that Kerr was served with the Notice and Demand, was aware of the hearing and chose not to attend. In support of that submission, the Director has included evidence, which I accept, confirming the successful delivery of the Notice of Complaint Hearing by registered mail addressed to Kelly Kerr operating as SunScape Tanning Studios at the Mountain Highway location. The Notice was delivered with the Demand for Employer Records.

21. The Director also refers to subsections 122(1) and (2) of the *Act*. That provision reads:

> ***122.****(1) A determination or demand that is required to be served on a person under this Act is deemed to nave been served if*
> *(a) served on a 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.*

22. The above provisions are determinative of service of the Demand for Employer Documents. I accept the Mountain Highway address qualifies as Kerr's "last known address". The Director had made delivery of the notice of mediation in November 2004 to the same address. That delivery was acknowledged by Kerr. His subsequent communication to the Director to indicate the mediation notice was received too late for him to attend is on letterhead listing that address and contains no indication that such correspondence should have been sent, or in the future should be sent, to the address identified by Kerr as the "head office" for SunScape. While the term "last known address" is not defined in the *Act*, common sense would dictate it would include the address to which the last successful delivery or service of a communication was made. Kerr has not provided any reason why the address on Mountain Highway should not in the circumstances be considered the "last known address" for him. It is worth noting that when the Tribunal has been called upon to interpret and apply Section 122 of the *Act*, it has adopted a strict approach to ensure that these deeming provisions prevail and that the purposes of the *Act* are achieved. For example, see *A-Mil Financial Corp*., BC EST # D193/98; *ScottLynn Contracting Ltd*., BC EST # D012/97; and *Zed*i, BC EST # D308/ 96.

23. The Notice, however, stands on a somewhat different footing. As noted by the Tribunal *in CDL Disposal Ltd.*, BC EST # D190/04, a complaint hearing by the Director is not a process that is addressed in either the *Act* of the *Regulation*. There is no specific legislative direction as to how a "complaint hearing" is to be conducted or how and when (relative to the hearing) a notice of complaint hearing must be delivered or served. The Notice of Complaint Hearing is not *"determination or demand"* under the *Act* and is therefore not a document that is accorded the statutory presumption that is described in subsections 122(1) and (2).

24. The question then becomes, absent a statutory presumption of service, what rules should apply to the delivery of the Notice. There is no reason why the Tribunal should not approach a question concerning delivery of the Notice of Hearing with the same perspective it applies to the interpretation of Section 122 of the *Act*. The objectives and statutory purposes of the *Act* justify a strict approach.

25. Accordingly, while a statutory deeming of service does not apply, the circumstances of the delivery of the Notice can give rise to a factual presumption of service. In this case, a strong presumption of effective service arises. The presumption may be rebutted but the evidence necessary to rebut the presumption must be convincing.

26. Kerr has not rebutted the presumption of service.

27. In the appeal submission, Kerr challenged the Director to verify that the hearing notice was sent to him. The Director provided that verification. The evidence clearly shows the Notice was successfully delivered by registered mail to a location where a registered mail delivery had been made less than three weeks before and had been received and acknowledged by Kerr.

> 28. Kerr refers to the location on Mountain Highway as "one of our store locations" and says he does not visit each store location on a regular basis to check the mail. He says the Director has provided no proof, by way of a signature, that the Demand and Notice were received by him or one of his employees. It is a simple enough thing for a person to refuse to sign for registered mail. That does not affect the evidence of confirmation of delivery by Canada Post. As well, even if I accepted the Mountain Highway location was just a store location, having no particular importance relative to the business, Kerr's assertion that he did not receive the registered mail because he "does not check the mail [at the store locations] on a regular basis" strains credulity. Accepting that assertion would require me to believe that Kerr did not visit that location to check for mail for a period of more than six weeks—from December 16, 2004 to February 1, 2005—and that the person who received the registered mail (if it was someone other than Kerr) did not notify him of its delivery.
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> 29. I am not prepared to accept that Kerr was unaware of the complaint hearing. I accept the submission of the Director that Kerr was given an opportunity to be heard and chose not to participate in the complaint process. In the circumstances there was no failure by the Director to observe principles of natural justice.
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> 30. As indicated above, the Tribunal will not allow Kerr to challenge the conclusions made by the Director on the merits of the complaint with evidence that should have been provided to the Director during the complaint process.
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> 31. For the above reasons, the appeal is dismissed.

## THE APPLICATION FOR RECONSIDERATION

11. Mr. Kerr's application for reconsideration was filed on July 28th, 2005. Mr. Kerr says that Member Stevenson's decision contains a "mistake of law or fact" and that Member Stevenson either "misunderstood" or "fail[ed] to deal with a serious issue." Mr. Kerr appended an 8-page memorandum (including an attachment) to his reconsideration request form; this latter document more fully sets out his position. I also have before me an additional 1 1/2 page letter from Mr. Kerr dated September 7th, 2005.

12. The Director's delegate, in a submission dated August 3rd, 2005, submits that the application should be summarily dismissed. Ms. Onyschtschuk, despite being invited to do so, did not file any submission with respect to the instant application (I note that she did not file any submission in the appeal proceedings).

## FINDINGS AND ANALYSIS

13. Although I consider this application to be timely, it is not, in my view, a meritorious application.

14. Mr. Kerr acknowledges that he received the initial notice regarding a November 25th, 2004 mediation session but only two or three days *after* the scheduled date for the mediation session. Mr. Kerr says that he was prejudiced by his failure to attend the mediation session, however, I cannot accept that submission. The mediation session, had it proceeded, merely provided an opportunity for a "without prejudice" exploration of the issues surrounding Ms. Onyschtschuk's unpaid wage complaint. Mr. Kerr's assertion that the matter would have been "settled in my favour" at that session completely ignores the fact that the mediation session was not an adjudicative hearing and that no settlement could have been effected without Ms. Onyschtschuk's concurrence.

15. Mr. Kerr says that he was did not receive notice of the evidentiary hearing scheduled for February 1st, 2005. Mr. Kerr asserts that delivering the hearing notice to his "Mountain Highway" studio was "not an appropriate method of delivery". I completely disagree with this latter submission for the reasons given by my colleague, Member Stevenson (see above). This latter address was a location where Mr. Kerr conducted regular business operations and Mr. Kerr never demanded that the Director forward notices or correspondence to any other address.

16. Mr. Kerr acknowledges being telephoned on the day of the hearing and says that he was "not able to attend the hearing on such short notice". However, he has not provided a credible explanation as to why he could not have taken advantage of the dispensation that was offered to him by the Employment Standards Branch. He says that he might have been able to attend the hearing but would have had to close his business while he was attending the hearing; that may be so, however, had he been somewhat more proactive, he might have scheduled another employee to work in his stead for the morning in question. I note that Mr. Kerr never requested that the hearing be adjourned and rescheduled; he simply states that it was "impossible" for him to attend the February 1st hearing (clearly, a bit of hyperbole on his part).

17. Mr. Kerr submits "neither I nor any of my employees have any recollection of the delivery of these documents [i.e., the hearing notice and Demand for Payroll Records], nor did neither I nor any of my employees sign to acknowledge receipt of the delivery of these documents". However, and notwithstanding this latter assertion, the record clearly indicates that the hearing notice was mailed on December 14th and actually delivered to Mr. Kerr's place of business on December 16th, 2004. Mr. Kerr makes the point that this notice was not forwarded by registered mail, contrary to section 122 of the *Act* (see above), however, as noted by Member Stevenson, hearing notices are not subject to this latter statutory requirement.

18. Quite apart from the issue of delivery of the hearing notice, I am somewhat surprised that Mr. Kerr would not have taken some affirmative steps to inform himself about if and when an evidentiary hearing would be held once he had notice of the complaint (as he admits he had) in hand (sometime in late November 2004). His attitude toward this entire matter can only be characterized as one of deliberate (and rather cavalier) indifference.

*19.* Finally, Mr. Kerr makes the point that Ms. Onyschtschuk's complaint was tainted by "fraud", however, I agree with Member Stevenson that the merits of the complaint were not properly before him nor are they now properly before me. In any event, this latter "fraud" allegation is based, in part, on the fact that Ms. Onyschtschuk did receive a "pay stub", however, there is no evidence in the record to indicate that this so-called "pay stub" met the statutory requirements of a "wage statement" as defined in section 27 of the *Act.*

20. If Mr. Kerr wished to make a detailed submission regarding the merits of Ms. Onyschtschuk's claim, he should have appeared before the Director's delegate and placed his evidence before her. The Tribunal hears *appeals* in order to determine if the Determination being appealed is legally correct; the Tribunal does not conduct entirely new hearings regarding complaints that have previously been determined at the Branch level.

21. It follows that the application for reconsideration must be refused.

## ORDER

22. The application to vary or cancel the decision of Member Stevenson in this matter is **refused.**

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**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**