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 -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/392

DATE OF DECISION: August 14, 2000

DECISION

OVERVIEW

This is an application filed by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on March 24th, 2000 (BC EST #D122/00).

FACTUAL BACKGROUND

On July 14th, 1999 a Director's delegate issued a Determination ordering Charles Neil operating as Chuck's Window Cleaning ("Neil") to pay $5,169.84 to his former employee, Stephen Peers ("Peers"), on account of unpaid wages and interest (the "Determination").

On January 24th, 2000, apparently after the appeal period had already expired, Neil purported to appeal the Determination to the Tribunal. A notice set out in the Determination stated that the deadline for filing an appeal was August 6th, 1999 [this deadline was presumably calculated pursuant to subsections 112(2)(a) and 122(2) of the *Act*—see *Stohlstrom*, BC EST #D453/98]. Accordingly, a Tribunal adjudicator had to decide whether, pursuant to section 109(1)(b) of the *Act*, the appeal period ought to be extended.

It should be noted that the Tribunal had previously decided that the appeal was *not* filed within the statutory appeal period—see the Tribunal Acting Chair's letter to all interested parties dated January 24th, 2000. However, the adjudicator, rather than addressing the application for an extension of the appeal period, concluded that the appeal was not, in fact, untimely. Thus, the adjudicator did not formally address the issue that was remitted to him for decision, namely, the section 109(1)(b) application for an extension of the appeal period. The relevant portions of the adjudicator's decision are reproduced below:

> "...the facts of this case are distinguishable from most of those previous decisions dealing with extensions of time because the Determination was not in fact served upon Neil. The Determination was sent by registered mail to Neil's last known address but was returned to the Director stamped 'return to sender'. No other steps were taken to serve Neil despite the fact that the delegate had dealt with Neil's bookkeeper throughout the investigation.
>
> On January 07, 2000 another delegate contacted Neil about payment of the determination amount and apparently this was the first time that Neil became aware of the Determination. He asked the delegate to speak to his bookkeeper, which she did. The bookkeeper confirmed that this was the first time they were aware of the Determination. The appeal was filed within 15 days of receipt of a copy of the Determination.

> The file information would indicate that the Determination has never actually been 'served' upon Neil and therefore in accordance with Section 112 the time period for filing an appeal had not started to run prior to the filing of an appeal...
>
> In circumstances where the appellant has not been served he is entitled to file an appeal as of right and the issues around extensions of time do not arise...
>
> I find that the appeal is timely."

ANALYSIS

The Director's application for reconsideration is contained in a written submission from the Director's legal counsel to the Tribunal dated June 6th, 2000 and filed on June 7th, 2000. Applications for reconsideration must be filed within a "reasonable time" in light of the particular complexities of the case at hand; a party who fails to requests a reconsideration within a "reasonable time" is ordinarily expected to provide a cogent explanation for their tardiness (see *MacMillan Bloedel,* BC EST #D279/00).

In this case, the Director's reconsideration request was filed over 10 weeks after the adjudicator's decision was issued. The issue raised by the present request for reconsideration, namely, the scope of the "deemed service" provisions of the *Act*, is not, in my view, particularly complex. In addition, it should be noted that the adjudicator's decision addressed what might be characterized as a "preliminary" issue rather than the substantive merits of Neil's appeal. Finally, it should be further noted that the instant reconsideration request was not filed by one of the two principal parties (Neil and Peers)–who may or may not be knowledgeable regarding the provisions of the *Act* and the Tribunal's procedures and jurisprudence—but, rather, by the Director, a party that may be presumed to be well-versed in such matters.

In my view, this reconsideration request was filed very near the end (if not at the very endpoint) of the "reasonable time" spectrum. I also note that the Director has not provided *any* information to the Tribunal explaining the 10-week delay in seeking reconsideration. Although in this instance (and particularly given the relative paucity of Tribunal decisions regarding what constitutes an "unreasonable" delay), I am not prepared to find a 10-week delay to be unreasonable, I rather doubt that I would take the same view in a future case involving a reconsideration request filed by the Director where there is an unexplained delay of a similar magnitude.

Even if a reconsideration request is timely, it does not follow that the Tribunal will address the application on its merits. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*) if: i) the issue(s) raised in the reconsideration request are sufficiently significant to warrant further inquiry and ii) assuming the first threshold has been satisfied, it is appropriate that the adjudicator's decision be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice)–see *Milan Holdings Ltd.,* BC EST #D313/98.

In order to meet the first branch of the *Milan* test, the applicant must raise a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (*Milan Holdings,* supra.). The present application clearly satisfies the first *Milan* criterion in that the application raises a fundamental question of statutory application and raises a strong *prima facie* case that the adjudicator erred in law.

I shall now turn to the merits of the Director's reconsideration request.

Section 112(2)(a) of the *Act* states that a person appealing a determination must file the appeal with the Tribunal "within 15 days after the date of service, if the person was served by registered mail". This latter subsection is specifically mentioned in the adjudicator's decision. However, the adjudicator did not, in his reasons for decision, refer to subsections 122(1) and (2) of the *Act* which provide as follows:

> *122. Service of Determinations and Demands*
>
> *(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.*

As noted above, the adjudicator noted that the Determination was "sent by registered mail to [the appellant's] last known address". The material before me indicates that the delegate forwarded the Determination to Neil, by certified (registered) mail, on July 14th, 1999, however, the envelope was returned to the Ministry of Labour on July 22nd, 1999–the envelope was stamped with a Canada Post notice "return to sender" and with an explanation that the addressee had moved without providing a forwarding address. On January 7th, 2000 another delegate contacted Neil by telephone in order to discuss payment of the Determination and was, in turn, referred to Neil's bookkeeper. As noted above, this appeal was filed on January 24th, 2000.

In my view, given the above findings of fact, the adjudicator erred in finding that the Determination was never served—see *e.g. Patry,* BC EST #D120/96; *Tang,* BC EST #D211/96; *Fort Optical,* BC EST #D205/97; *Aujla,* BC EST #D012/99; see also *Laguna Woodcraft (Canada) Ltd. v. B.C. Employment Standards Tribunal* [1999] B.C.J. No. 3135 (B.C.S.C.). Although the Determination may not have been physically in Neil's hand in late July 1999, the Determination was nonetheless deemed, by reason of subsection 122(2), to have been lawfully served as of July 22nd, 1999 (8 days after July 14th) at which point the 15-day appeal period set out in section 112(2)(a) commenced running.

It is apparent that this appeal was not filed within the statutory time limit and, in any event, the untimeliness of this appeal was previously determined by the Tribunal's Acting Chair on January 24th, 2000. In the end result, the adjudicator did not address the very issue he was called upon to adjudicate, namely, whether or not the appeal period should be extended.

ORDER

Inasmuch as the adjudicator did not address the question of whether the appeal period should be extended [*i.e.,* the appellant's application under section 109(1)(b)] I am of the view that the most appropriate order is to refer that latter application back to the adjudicator for disposition. Accordingly, and pursuant to section 116(1)(b) of the *Act*, I so order.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal