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 -

Kelvin Swidrovich
operating Mission (Architectural) Millwork
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib S. Petersen

FILE No.: 1999/644

DATE OF DECISION: February 4, 2000

DECISION

SUBMISSIONS

Mr. Kelvin Swidrovich ("Swidrovich") — on behalf of the Employer

Ms. Chris Miller ("Miller" or the "Employee") — on behalf of himself

Mr. Rod Bianchini — on behalf of the Director

OVERVIEW

This is an application for extension of time under Section 109(1)(b) of the *Employment Standards Act* (the "*Act*") in respect of an appeal by the Employer pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued on May 27, 1997 which determined that Chris Miller ("Miller") was owed $990.06 on account of wages. The Employer appeals the award and says that Miller was a "sub-contractor", i.e., not an "employee" under the *Act*.

THE FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated October 26, after the deadline for filing an appeal. The Determination, dated May 27, 1997, stated that an appeal had to be filed within 23 days of that date. The appellant writes:

> "According to the Employment Standards Branch in Abbotsford, we had 23 days from mailing date to appeal their decision. The documents were mailed to a group mailbox at our shop location and for unknown reasons returned to sender ... not giving us a chance to defend ourselves.
>
> Chris Miller was a sub-contractor who invoiced us for work performed. As a sub-contractor, according to 'Ron' at Employment Standards in Vancouver, Chris Miller should not be entitled to overtime or vacation pay, nor in his opinion should this have been an employment standards issue."

In *Blue World It Consulting Inc*. (BCEST #D516/98), the Tribunal summarized the considerations applicable to a request for an extension of the appeal period:

> "1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
>
> 2) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;

3) the respondent party (*i.e.*, the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;

4) the respondent party will not be unduly prejudiced by the granting of the extension; and

5) there is a strong *prima facie* case in favour of the appellant."

The delegate and the respondent Employee oppose the request for an extension of time.

The delegate details his efforts to contact the appellant Employer prior to issuing his Determination. Among others he contacted the Employer by mail and left telephone messages. He also attended the Employer's business address on two occasions and was told by Swidrovich that "there was no money to pay the complainant". In other words, the Employer was aware of the allegations made against him. The Employer does not respond to these assertions.

In the circumstances, I am not prepared to grant the extension. In my view, the Employer's application does meet the criteria discussed in *Blue World*. I do not accept that there is a reasonable and credible explanation for the failure to appeal in time. Section 122 of the *Act* provides that a "determination is deemed to have been served if ... sent by registered mail to the person's last known address". The delay in this case is substantial, more than two years. The delegate argues that the address to which the Determination was sent is the "one used for day to day business of the company". The Employer does not deny this. In other words, there is no dispute that the Determination was sent to the correct address.

Moreover, I am of the view, that there is a not strong *prima facie* case in favour of the appellant Employer. In fact, I am of the view that there is no *prima facie* case. Other than the allegation that Miller "invoiced" the Employer, there are no particulars, or allegations of fact, to support a conclusion that he was an independent contractor. I note that the respondent Employee denies submitting invoices. Nevertheless, even if I accept that Miler "invoiced" the Employer that is not, in itself, sufficient to establish independent contractor status such that the *Act* does not apply. Finally, and in any event, even if I accepted that there were sufficient particulars to support an argument Miller was an independent contractor, I am not convinced--on the basis of the material submitted in support of the appeal--that the Employer should be permitted to make that argument on appeal. The delegate appears to have gone to great length to ensure that the Employer had an opportunity to respond to complaint. It does not appear from the Determination that Swidrovich took the position before the delegate that Miller was not an employee; rather it appears that he took the position that he was not able to pay the wages owing. The Employer is not entitled to "sit in the weeds", failing or refusing to participate in the delegate's investigation, and then later file an appeal when the Employer disagrees with the delegate's conclusions.

In the circumstances, I am not prepared to exercise my discretion to extend the time for filing the appeal.

ORDER

The application to extend time to file an appeal of the Determination dated May 27, 1997 is dismissed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal