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 -

Hemwat Logging Ltd. ("Hemwat" or the "Employer")

- of a Determination issued by -

The Director Of Employment Standards (the "Director")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/678

DATE OF DECISION: February 10, 1999

DECISION

SUBMISSIONS

Mr. G.E. Greene on behalf of the Employer

Mr. John Dafoe 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 January 13, 1998 which determined that three employees were owed \$7,182.73 on account of regular and overtime wages.

FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated October 27, 1998. The directors of the Employer say that they moved to Alberta and did not know of the Determination until October 20, 1998. The Determination was served by registered mail at their address but was returned "unclaimed" to the Employment Standards Branch. The Determination were served on the Employer as well as the owners. The Determination was also sent by regular mail to the registered and records office of the Employer. The registered and records office, a law firm, confirm receipt of the Determination but states that it was never forwarded to the owners of the Employer. They agree that the address where service was effected is the correct address. They explain that they may have been away from the address due to work or travel.

The letter from the Employer's counsel suggests that the appeal is timely under Section 122(3) of the *Act*. In my view that provision is not applicable. However, Section 109 provides, *inter alia*:

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;

It is clear that the appeal is untimely. Section 112 provides that an appeal must be delivered to the tribunal within 15 days after the date of service if the person was served by registered mail and within 8 days after the date of service if the person was served personally or transmitted via fax or electronically (see also Section 122(3)).

In *Blue World It Consulting Inc*. (BCEST #D516/98), the Adjudicator 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."

I note at the outset that the appeal is approximately eight months late. In any event, in my view, for the reasons set out below, the application fails to satisfy these criteria.

First, the *Act* specifically provides that a determination is deemed to have been served if it is "sent by registered mail to the person's last known address" (Section 122(1)(a)). In this case, the Determination was served at the correct address of the Employer and its directors. In addition, the Determination was served on the registered and records office. Moreover, as argued by the Director, Canada Post left cards on January 21, 26 and February 5, 1998. In my view, the Employer has not provided a reasonable and credible explanation for the delay, particularly as it appears from the material submitted that it was aware of the complaints and had made submissions in that regard. There is no explanation of what the Employer did to inform itself of the status of the complaints.

Second, I understand from the Employer's affidavit that the amount of the Determination was garnished and held in trust by the Director. If those funds have been paid out--and I understand from the Director's submission--that the file was closed, there is prejudice to the respondents and other parties. Moreover, I understand from the Employer's affidavit--though that point is somewhat unclear--that the Employer or its counsel were aware of the garnishing order in September 1998. It would thus seem that the Employer could have taken steps to inform itself earlier.

Third, with respect to one of the employees, the Employer's appeal suggests that there was an agreement with the employee not to pay overtime wages at the Employer provided certain other benefits, for example truck rental. With respect to another employee, the Employer acknowledges that it owes him money. Finally, with respect to the third employee the Employer acknowledges

that he was being evaluated on his ability to operate the Employer's equipment for a short period. In my view, there is not a strong *prima facie* case in favour of the Employer.

In the result, I dismiss the application for extension of time to file the appeal.

ORDER

The application to extend time to file an appeal of a Determination dated January 13, 1998 is dismissed.

Ib Skov Petersen Adjudicator Employment Standards Tribunal

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