

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 -

Rolf Kipferling
operating as All Cargo Express Inc.
(the "Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR:	Ib S. Petersen
FILE NO.:	98/717 & 98/718
DATE OF DECISION:	February 10, 1999

DECISION

SUBMISSIONS

Mr. Rolf Kipferling on behalf of the Employer
("Kipferling")

Ms. Adele Adamic counsel for 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 two Determinations of the Director of Employment Standards (the "Director") issued on October 6, 1998. One Determination found the Employer owed a former employee, Mr. Newman ("Newman") \$5,454.48 on account of overtime wages (Section 40). The other Determination issued a \$500 penalty against the Employer for failing to produce records (Section 46, *Regulation*).

STYLE OF CAUSE

The Employer says that the Determinations are not issued in the "legal name of Mr. Kaufman's (sic) employer".

Both Determinations explain as follows:

"The complainant produced a business card from the company showing that the name was "All Cargo Express Inc." No information was provided by the employer, identified by the complainant and telephone response to the Demand for Employer Records as Rolf Kipferling, regarding the legal name of the company. A company search was done which showed "no company name satisfies search request", or, that there was no company with the name "All Cargo Express Inc." registered. The Active and Historical Corporation listings as well as the Active and Historical Firm listing were checked. All the pay stubs provided by the complainant shows the company name as "All Cargo Express Inc."

Based on the above, the Style of Cause used for this Determination is: Rolf Kipferling operating as All Cargo Express Inc."

The Employer now produces a certificate of incorporation which states that there is a company named "Ace Allcargo Express Inc." I assume that the Employer's position is that this company is the proper employer.

I do not accept that proposition. The Demand for Employer Records indicates that the delegate requested information about "the complete legal name of your company". This Demand was served on the Employer by registered mail at the Employer's place of business. Moreover, if the Employer carries on business under an incorrect corporate name, "All Cargo Express Inc.", as would appear to be the case from the Employer's letterhead, and from the undisputed findings in the Determination, I am not prepared to allow the Employer to now advance the argument that he is not the proper Employer. I am not prepared to disturb the delegate findings with respect to style of cause or the identity of the Employer.

FACTS AND ANALYSIS

The Employer's appeal was filed by letter dated November 16, 1998, with a further submission filed by letter dated November 17 and December 9, 1998. The letters suggests that the reasons for not filing the appeal in time were: 1) Kipferling had been away from the business prior to receiving the Determination and had to attend to operational priorities; 2) The registered mailing with the Determination was received by a junior employee who failed to bring the matter to Kipferling's attention; and 3) this is the first complaint in 20 years. The Employer argues that he should be allowed an extension of time to file an appeal.

The Director argues that the Employer should not be granted an extension as requested:

"The Tribunal has decided on several occasions that an employer who does not participate in the investigation process may not use the section 112 appeal to present evidence which was available and should have been delivered to the delegate during the investigation In this matter the employer has sat in the weeds until long after the appeal period. He now seeks the double indulgence of providing materials to the delegate and to be allowed to file a significantly late appeal."

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;

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.”

In my view, the application fails to satisfy these criteria.

Moreover, it is not clear from the Employer’s submissions when the Determination came to his attention and what he did with respect to an appeal of the Determination. In my view, the Employer’s explanation is neither reasonable nor credible.

Finally, the penalty Determination states:

“On September 26, 1997, Rolf Kipferling called M. Elaine Bellamore to tell her that the complainant “pleaded with (him) not to cut his hours and that he would accept straight time pay”. Ms. Bellamore explained Section 4 of the Act to Mr. Kipferling. Mr. Kipferling said that he may require more time to produce the information requested and he’s call if he require more time. On October 21, 1997 there was a telephone conversation between Ms. Bellamore and Mr. Kipferling. Mr. Kipferling said he was involved with his corporate year end and that he needed until November 10th to provide the information requested. He said that he might be able to have the information before that date. Ms. Bellamore said that November 10th was alright but no later than that would be acceptable. As of the date of the Determination, no information has been received from the employer. M. Elaine Bellamore could not review the records because the records were not produced.”

The Employer denies that it was “sitting in the weeds” and did in fact, cooperate with the delegate’s investigation. While the Employer in the second and third submission disputes the content of the conversations between himself and the delegate, there is, however, no doubt that he

did not produce the records requested. In fact, that is expressly admitted in the Employer's submission by virtue of the "request to submit the requested records by Nov 30/98". As mentioned above, the delegate served a Demand for Employer Records by registered mail. The information was to be produced by October 8, 1997. While I have some sympathy for the Employer's argument that the delegate took considerable time to render her Determination, in circumstances such as these, I would not extend the time to file an appeal.

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 two Determinations dated October 6, 1998 is dismissed.

**Ib Skov Petersen
Adjudicator
Employment Standards Tribunal**