

An appeal

- by -

A.M. Bruyneel Inc., carrying on business as Bruyneel & Co.  
(“Bruyneel”)

- of a Determination issued by -

The Director of Employment Standards  
(the “Director”)

pursuant to Section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2011A/121

**DATE OF DECISION:** October 28, 2011

## DECISION

### SUBMISSIONS

Kent Bruyneel	on behalf of A.M. Bruyneel Inc., carrying on business as Bruyneel & Co.
Shirley L. Wosk	on her own behalf
Robert Krell	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by A.M. Bruyneel Inc., carrying on business as Bruyneel & Co. (“Bruyneel”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued July 8, 2011.
2. Ms. Wosk was employed as a certified general accountant for Bruyneel from February 12, 2007, until May 31, 2010. On October 19, 2010, Ms. Wosk filed a complaint alleging that she was owed annual vacation pay, overtime wages, and compensation for length of service. Ms. Wosk contended that the conditions of her employment were so substantially altered that it amounted to a deemed termination under section 66 of the *Act*.
3. The Director’s delegate held a hearing into Ms. Wosk’s complaint on May 25, 2011. On July 8, 2011, the Director issued a Determination finding that Bruyneel had contravened Section 18 of the *Act* in failing to pay Ms. Wosk overtime and vacation wages. The Director determined that Ms. Wosk was entitled to wages and interest in the total amount of \$3,164.52. The delegate also imposed an administrative penalty in the amount of \$500, for a total amount payable of \$3,664.52.
4. The Director found insufficient evidence to conclude that Ms. Wosk’s employment was terminated by virtue of a substantial and unilateral alteration in the conditions of her employment.
5. The deadline for filing an appeal of the Determination was August 15, 2011. The Tribunal received Bruyneel’s appeal on September 7, 2011.
6. The basis of Bruyneel’s appeal is that the Director erred in law.
7. These reasons address only the timeliness of Bruyneel’s appeal and are based on the section 112(5) “record”, the written submissions of the parties, and the Reasons for the Determination

### ISSUE

8. Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## FACTS AND ARGUMENT

9. In the appeal submission, Mr. Bruyneel says that although Bruyneel initially disagreed with the amount awarded in the Determination, it was prepared to accept the decision in order to conclude the matter. He says that Bruyneel appealed the Determination only after learning of Ms. Wosk's appeal. Mr. Bruyneel submits that because Ms. Wosk waited until the last day to file her appeal, Bruyneel had no knowledge of her intention until the appeal deadline had passed. He now contends that the appeal ought to be "judged on its merits".
10. Bruyneel contends that the delegate erred in a number of his factual findings, including one that Ms. Wosk's last day of work was May 31, 2010, and that these factual errors affected his interpretation of the law.
11. The delegate took no position on the extension application.
12. Ms. Wosk contends that her last day of work was never under discussion throughout the adjudication hearing and that two records of employment prepared by Bruyneel state that May 31, 2010, was her last day of work. She also submits that Bruyneel has not demonstrated grounds to extend the time for filing an appeal.

## ANALYSIS

13. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
14. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
16. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
  - (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, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;
  - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - (5) there is a strong *prima facie* case in favour of the appellant.
17. These criteria are not exhaustive.
18. I do not find that Bruyneel has provided a reasonable and credible explanation for its failure to request an appeal within the statutory time limit. Had Bruyneel felt that the Director erred in his conclusions, it ought to have filed its appeal within the appeal deadline. While making a decision to accept a Determination it thinks incorrect may be a reasonable one in some circumstances, filing an appeal simply because the other party also

filed an appeal is not a reasonable explanation for a failure to file in a timely fashion. There is also no evidence Bruyneel had a genuine and ongoing intention to file an appeal before the statutory deadline.

19. As Ms. Wosk has also filed an appeal of the Determination, I find that she will not be unduly prejudiced by the granting of an extension.
  20. I am not persuaded that there is a strong *prima facie* case in Bruyneel's favor.
  21. Bruyneel alleges that the Director erred in fact, which led to a legal error. Because Bruyneel has alleged that the delegate made factual errors without enumerating what those errors are with the exception of a finding as to the date Ms. Wosk's employment ended, it is impossible to assess the strength of Bruyneel's appeal on this ground.
  22. Furthermore, the Tribunal has no authority to consider appeals based on alleged errors in findings of fact except where such findings raise an error of law. In *Britco Structures Ltd.*, BC EST # D260/03, the Tribunal adopted the following definition of "error of law" in *Gemex Development Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275:
    1. A misinterpretation or misapplication of a section of the *Act*;
    2. A misapplication of an applicable principle of general law;
    3. Acting without any evidence;
    4. Acting on a view of the facts which could not reasonably be entertained; and
    5. Adopting a method of assessment which is wrong in principle.
  23. In my review of the record and the Determination, I do not find any misinterpretation or misapplication of the *Act* or any applicable principles of general law on the part of the Delegate.
  24. Considering all of the factors, I am not persuaded that the Tribunal should exercise its discretion to extend the period in which to file an appeal.
- ORDER**
25. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**