

**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 -

Charles Neil  
operating as  
Chuck's Window Cleaning

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

**ADJUDICATOR:** John M. Orr

**FILE No.:** 2000/038

**DATE OF DECISION:** March 24, 2000

## DECISION

### TIMELINESS

This is a review of the timeliness of an appeal by Charles Neil ("Neil") pursuant to Section 112 of the Employment Standards Act (the "Act") from a Determination numbered ER# 064999 dated July 14, 1999 by the Director of Employment Standards (the "Director").

The main issue addressed in the Determination was whether a certain worker, Stephen Peers ("Peers") was an employee or an independent contractor. A review of the Determination and the submissions confirms that the Director's delegate dealt with the bookkeeper for the business during the investigation of Peers' complaint. The Director determined that Peers was an employee and issued the Determination July 14, 1999.

The appeal herein is dated, and was received by the Tribunal, January 24, 2000.

The time limits for appeals are set-out in Section 112 of the Act as follows:

#### *Right to appeal director's determination*

- 112.** (1) *Any person served with a determination may appeal the determination to the tribunal by delivering to its office a written request that includes the reasons for the appeal.*
- (2) *The request must be delivered within*
- (a) *15 days after the date of service, if the person was served by registered mail, and*
- (b) *8 days after the date of service, if the person was personally served or served under section 122(3).*

The Tribunal has authority under Section 109(b) to extend the time period for requesting an appeal even though the period has expired. The Tribunal has developed certain basic principles to exercising the discretion granted in this section which include (1) that there must be a reasonable and credible explanation for the delay; (2) there must have been a genuine and ongoing intention to appeal; (3) the respondent and the director must have been aware of the intention to appeal; (4) the prejudice to the respondent should be considered; and (5) there must be a strong *prima facie* case set-out in the appeal.

However, 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.

Peers objects to the timeliness of the appeal because he states that it was Neil's own fault as he had moved and not informed the Branch of his change of address. He says that it took six months to track him down. The Director's delegate confirms the information about lack of service but does not make any allegations about difficulties in finding Neil. There is no reason given for not contacting the bookkeeper. The delegate does not object to the appeal based on its timeliness.

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.

**ORDER**

I find that the appeal is timely.

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**