

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 -

Miles Dumonceaux
operating as M & R Renovations

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: John M. Orr

FILE NO.: 97/829 and 97/830

DATE OF DECISION: April 15, 1998

DECISION

OVERVIEW

This is an appeal by Miles Dumonceaux ("Dumonceaux") pursuant to Section 112 of the *Employment Standards Act* (the "Act") from two Determinations (File No. 077-397) both dated October 23, 1997 by the Director of Employment Standards (the "Director").

In both Determinations the Director's Delegate found that Dumonceaux was an employer. In one determination the Delegate found that Dumonceaux owed wages to two employees, Brian Lewis ("Lewis") and Mary-Anne Sturley ("Sturley") and in the other the delegate ordered Dumonceaux to pay a penalty of \$500.00 for contravention of section 46 of the *Regulations*.

Dumonceaux has appealed on the grounds that (1) the workers were contractors and not employees and (2) if they were employees they were employed by a Mrs. Watson and not by Dumonceaux and (3) he was not the employer at any time and was in fact an employee himself.

ISSUE TO BE DECIDED

The issues to be decided in this case are whether the workers were employees and if so by whom were they employed.

FACTS

The facts in this case are very difficult to determine because the Director's delegate has set out very little factual information upon which she based her decisions that Dumonceaux was the employer of the two workers. If there was a factual foundation for the Determination it is certainly not set out in the Determination itself. The bare statement by the Delegate that the workers were "employed" by Dumonceaux is not helpful. It appears that the workers were hired by Dumonceaux but there is no evidence upon which to decide the basis of their hiring. There is no evidence from the person referred to on appeal as "Mrs Watson" although it appears from some submissions that she in fact paid the pay-cheques for the workers. The Appeal documents raise many factual issues for the first time, both on behalf of the appellant and on behalf of the workers. There is some indication that Dumonceaux submitted the time sheets to Watson for payment and that Watson actually paid the wages (or invoices for services).

ANALYSIS

Although the Tribunal has taken the position in past decisions that the employer may not decline to participate in the investigation and then make submissions by way of an appeal, the Director's Delegate has not provided any analysis of the facts or the factors taken into account in deciding whether or not the workers were contractors or employees. If in fact the workers were employees there appears to be no investigation as to whether the workers were employed by

Dumonceaux or Mrs Watson. It is alleged on the Appeal that the Delegate had knowledge of Mrs Watson's involvement yet the Delegate makes no reference to her. There is no indication that Mrs Watson declined to participate.

There is no sound basis set out in either decision to find that Dumonceaux was liable to the workers as their employer or a person required to provide records under section 46. There is no sound factual basis that would have required him to submit evidence at the earlier time.

The Tribunal is an appeal body and it is not appropriate for this Tribunal to be an investigative body of first instance. The material filed on the Appeal should have been available to the Director's Delegate with some effort and, even if not at that time, the materials raise important issues of fact that need to be established to ensure fair treatment of the parties and to ensure that the correct parties are identified.

ORDER

I order, under Section 115 of the *Act*, that both matters be referred back to the Director for a full investigation and analysis surrounding the issues and to provide sufficient factual information upon which a Determination can be properly made.

**JOHN M. ORR
ADJUDICATOR,
EMPLOYMENT STANDARDS TRIBUNAL**