

**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

(“Dumonceaux”)

- of a Determination issued by -

The Director of Employment Standards

(the “Director”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE Nos.:** 97/829 & 97/830

**DATE OF DECISION:** April 27, 1999

**DECISION**

**FACTUAL BACKGROUND**

On October 23rd, 1997, delegates of the Director of Employment Standards (the "Director") issued two determinations both of which were subsequently appealed to this Tribunal. In the first determination, Miles Dumonceaux operating as M & R Renovations ("Dumonceaux") was held liable for unpaid wages owed to two former employees, Brian Lewis ("Lewis") and Mary-Anne Sturley ("Sturley")--I shall refer to this as the "Wage Determination". In the second determination, Dumonceaux was ordered to pay a \$500 monetary penalty for failing to produce employment records pursuant to a demand issued by the Director--I shall refer to this as the "Penalty Determination".

Dumonceaux appealed on three grounds: first, that neither Lewis nor Sturley were "employees" as defined by the *Act*; second, if they were employees, they were employed by another person, a Ms. Watson; and third, that he was not an "employer" as defined in the *Act*.

In a written decision issued on April 15th, 1998 (B.C.E.S.T. Decision No. D149/98) a Tribunal adjudicator observed that the Wage Determination contained little, if any, factual information that would support the delegate's finding that Dumonceaux was the employer of the two complainants. The adjudicator's decision continued:

"...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...

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...

The Tribunal is an appeal body and it is not appropriate for this Tribunal to be an investigative body of first instance...

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."

It should be noted that the adjudicator did not cancel the determinations, although he had the jurisdiction under section 115(1)(a) of the *Act* to do so; rather, pursuant to section 115(1)(b) the matters set out in the determinations were simply referred back to the Director so that, after appropriate further investigations, the Tribunal would have a more fully particularized record so that it could properly assess the merits of Dumonceaux's two appeals.

On February 26th, 1999 the Director's delegate issued a document entitled "Submission" which was addressed to the Tribunal. Although said to be a "Submission", for all practical purposes, this document is an amended determination (other than the heading, it takes the form of a typical determination) that sets out the particulars that were requested by the adjudicator in his April 15th, 1998 decision.

The Submission records Dumonceaux's position that he was employed by Mrs. Watson and that the two complainants were independent contractors. The Submission also records Mrs. Watson's position that she retained Dumonceaux as a general contractor to carry out renovations at her house situated on Fraser Street in Vancouver. To that end, Mrs. Watson set up a bank account--and apparently over time deposited some \$100,000 into this account--to be accessed by Dumonceaux for payment of labour and materials. As recorded in the Submission, the two complainants, Lewis and Sturley, allege that they were both hired by Dumonceaux (Lewis by Dumonceaux directly; Sturley by the site foreman who, in turn, reported to Dumonceaux). Neither Lewis nor Sturley were paid all of their wages for their labour. Various other facts, corroborating the delegate's finding that Dumonceaux was a general contractor and that the two complainants were his employees, are set out in the Submission.

In a one-page letter dated March 22nd, 1999 and filed with the Tribunal on March 23rd, 1999, Dumonceaux made a number of assertions and comments, most of which have little if anything to do with the substantive question relating to his status as an employer and the complainants' status as employees. In this latter regard, the only relevant comment made is that the two complainants were "independent contractors" who "were responsible for paying their own taxes". This latter assertion is wholly unsupported by *any* evidence. In conclusion, Dumonceaux says that "the Delegate has left large gaps in the sequence of logic required to come to this determination" and that "there is no sound basis for her conclusions and they are not at all obvious".

## **ANALYSIS**

Upon receipt of the delegate's Submission, the Tribunal Registrar wrote (on March 3rd, 1999) to the parties advising that Dumonceaux's appeals would now be addressed in light of the additional information provided by the delegate as directed by the April 15th, 1998 adjudicator's order. The Registrar's letter specifically advised the parties that an oral hearing would not necessarily be held and that the matter could be adjudicated based solely on the written submissions filed by the parties. The parties were requested to deliver any further written submissions to the Tribunal by March 17th, 1999. The Registrar's letter also stated that upon review of the further submissions, an adjudicator would decide whether or not the original determinations (*i.e.*, the Wage Determination and the Penalty Determination) would be confirmed, varied or cancelled. Dumonceaux's March 22nd letter was delivered in response to the Registrar's March 3rd request for submissions.

Having reviewed the further particulars contained in the Submission and given the complete dearth of any contrary evidence from the appellant, I find that the delegate now has provided more than sufficient particulars to support the conclusion that Dumonceaux is liable for the unpaid wages owed to Lewis and Sturley. The material before me shows that Dumonceaux was retained as a

general contractor by Mrs. Watson, that he was an “employer” under the *Act* and in that capacity retained the services of the complainants neither of whom was fully paid.

Inasmuch as Dumonceaux was an “employer” as defined in section 1 of the *Act*, he was obliged to maintain and produce employment records and, having failed to do so, was properly penalized--in the prescribed amount of \$500--pursuant to sections 28(b) and 46 of the *Employment Standards Regulation*.

**ORDER**

Pursuant to section 115 of the *Act*, I order that the Wage Determination and the Penalty Determination, both dated October 23rd, 1997 as amended by the delegate’s Submission dated February 26th, 1999, be confirmed in the amounts of **\$2,369.23** and **\$500**, respectively, together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, as and from February 24th, 1999.

**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**