

**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.:** 2000/555

**DATE OF DECISION:** August 28, 2000

DECISION

TIMELINESS

This is a second 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”).

This second review is necessary because some 10 weeks after the initial review the Director sought a “reconsideration”, pursuant to Section 116 of the *Act*, of my previous adjudication on this issue. The Board member reviewing my initial decision found that I had not properly considered Section 122(2) of the *Act* and has referred the matter back to me.

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 setout 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 setout in the appeal.

I found in the initial adjudication that the facts of this case were 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.

I found that the file information indicated that the Determination had 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.

The Director's delegate confirmed the information about lack of service and did not make any allegations about difficulties in finding Neil. There was no reason given for not contacting the bookkeeper. At the time of the initial adjudication, the delegate did not object to the appeal based on its timeliness.

It is somewhat shocking that the Director waited 10 weeks to seek reconsideration because the employer had missed a 15-day time limit and after her delegate had not objected to the appeal based on its timeliness. Nevertheless, the adjudicator reconsidering my initial decision has correctly pointed out that I did not specifically address Section 122 (2) of the *Act*. That section provides as follows:

*122 (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.*

The adjudicator on the reconsideration correctly pointed out that under the circumstance of this case the section provides that the determination was deemed to have been served as of July 22<sup>nd</sup>, 1999 (8 days after July 14<sup>th</sup>) at which point the 15-day appeal period commenced running.

I find it unconscionable that the Director seeks to rely on the deemed service provision of the *Act* when the delegate knew that the determination was not, in fact, delivered and when he had, at all times, dealt with employer's bookkeeper and could very simply have delivered a copy of the determination to the bookkeeper. The delegate had no difficulties contacting the employer or the bookkeeper. Under these circumstances I have no difficulty in exercising my adjudicative discretion under section 109(1)(b) of the *Act* to extend the time period for requesting an appeal in this matter to January 31, 2000.

To put this decision in the framework of previous decisions of the Tribunal on extensions of time to appeal I find as follows:

1. there is a reasonable and credible explanation for the delay;
2. the employer has had a genuine intention to appeal as soon as he had actual knowledge of the determination;
3. the intention to appeal was indicated to the Director as soon as the employer had actual knowledge of the determination;
4. I have considered the prejudice to the employee and consider that it is outweighed by the prejudice to the employer in not granting an extension of time;
5. there is a strong *prima facie* case.

One of the key purposes of the *Act* is to provide a fair and efficient procedure for resolving disputes. It is, therefore, important that the Tribunal endeavour to deal with the real matter in dispute between the parties. To accede to the Director's position herein would be to disenfranchise the employer from an adjudication on the merits because of the Director's reliance upon a technical service of documents when the Director knew that the documents were not actually delivered, and the delegate had no difficulty contacting the employer. This cannot be in accordance with the purpose of the *Act* to promote fair treatment of employees and employers.

**ORDER**

Accordingly, pursuant to section 109(1)(b), I extend the time for filing of the appeal herein to January 31, 2000.

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