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-

Mega Tire Inc. operating as Discovery Tire Service

("Mega Tire")

- of a Determination issued by -

The Director of Employment Standards

(the "Director")

ADJUDICATOR:	Kenneth Wm. Thornicroft
FILE No.:	97/487
DATE OF DECISION:	September 30, 1997

DECISION

OVERVIEW

This is an appeal brought by Mega Tire Inc., operating as Discovery Tire Service ("Mega Tire" or the "employer"), pursuant to section 112 of the *Employment Standards Act* (the *"Act"*) from a Determination issued by the Director of Employment Standards (the "Director") on April 30th, 1997 under file number 079869 (the "Determination").

The Director determined that Mega Tire owed its former employee, Sean K. MacDonald ("MacDonald"), the sum of $759.13 on account of unpaid wages earned during the period January 28th to February 17th, 1997, inclusive, and interest. Mega Tire's appeal is based on the assertion that MacDonald was only employed by Mega Tire for one day, January 28th, 1997, and that thereafter MacDonald was employed by, or had entered into some sort of partnership arrangement with another Mega Tire employee, one George Makow (himself a Mega Tire employee) whereby they would do work for Mega Tire, on Mega Tire's premises, using (at least in part) Mega Tire's tools and equipment.

ISSUE TO BE DECIDED

Mega Tire's appeal was filed with the Tribunal on June 23rd, 1997 at 3:14 P.M. As noted above, the Determination was issued on April 30th, 1997 and, given that it was served by certified (registered) mail, the time for filing an appeal expired 15 days after the date of receipt [see section 112(2)(a) of the *Act*]. Thus, Mega Tire's appeal is now apparently statute-barred and, accordingly, Mega Tire seeks an extension of the appeal period pursuant to section 109(1)(b) of the *Act*.

FACTS AND ANALYSIS

The Determination was issued and delivered to Mega Tire by certified mail on April 30th, 1997. On June 5th, 1997, the Director sent another letter to Mega Tire, again by certified mail, advising that the Determination had been filed in the Victoria Registry of the B.C. Supreme Court (see section 91 of the *Act*) on May 30th, 1997. It is my understanding that the Director's June 5th letter was received by Mega Tire on June 6th, 1997. The Director's June 5th letter states that if the full amount due under the Determination was not received within five days of the date of the letter, the Director would take "affirmative action directed towards the recovery [of the monies due under the Determination]...without further notice."

On June 23rd, 1997, the instant appeal was filed.

In previous cases (*cf. e.g. Niemisto* [1996] B.C.E.S.T.D. 320.03.20-02), the Tribunal has suggested that the following criteria are relevant when considering an application under section 109(1)(b):

> i) there is a reasonable and credible explanation for the the failure to request an appeal within the statutory time limit;
>
> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
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> iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;
>
> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
>
> v) there is a strong *prima facie* case in favour of the appellant.

In light of the foregoing criteria, I am not satisfied that the appellant ought to be granted a time extension in this case. In my view, the evidence suggests that Mega Tire was only motivated to file an appeal when the Director indicated to Mega Tire that she intended to take all steps necessary to collect the monies owed under the Determination.

The appellant's assertion that it understood its earlier appeal filed with the Tribunal on May 7th, 1997--not May 2nd, 1997 as alleged by Mega Tire--with respect to an April 8th, 1997 determination (issued in the amount of $500 for failure to produce payroll records) somehow constituted a proper appeal of the instant Determination (*i.e.,* an appeal of a Determination issued in response to MacDonald's unpaid wage claim) cannot be given much credence.

First, the May 7th appeal documents in no way relate or refer to MacDonald's claim for unpaid wages. Second, the May 7th appeal was itself untimely. Finally, having considered the substantive grounds of Mega Tire's appeal, I am not satisfied that there is any *prima facie* merit to the appeal. Taken at face value, the allegations raised by Mega Tire in its June 20th, 1997 letter to the Tribunal, appended to its notice of appeal, strongly suggest that Mega Tire was *de facto* as well as *de jure,* MacDonald's employer.

ORDER

Mega Tire's request for an extension of the time for filing an appeal is refused and, accordingly, pursuant to section 115 of the *Act,* I order that the Determination issued by the Director in this matter, dated April 30th, 1997 and filed under file number 079869, be confirmed in the amount of $759.13 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act,* since the date of issuance.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal