

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.: 97/488

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 29th, 1997 under file number 079869 (the “Determination”).

The Director determined that Mega Tire owed its former employee, Aaron L. Linder (“Linder”), the sum of \$388.57 on account of unpaid wages earned during the period November 25th to December 3rd, 1996, inclusive, and interest.

Mega Tire’s appeal is based on two grounds: first, that Linder has been paid all monies due to him and second, in any event, Linder only worked 38 hours, not the 52 1/3 hours claimed.

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 29th, 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 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 29th, 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 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, 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;
- 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. Indeed, in its letter dated June 20th, 1997, addressed to the Tribunal and appended to its appeal form, Mega Tire acknowledged that on June 19th, 1997 it received a call from one of its customers inquiring about what was, apparently, a third party demand issued by the Director (see section 89 of the *Act*). I would reiterate that Mega Tire's appeal of the Determination was filed on June 23rd, 1997.

Mega Tire also states, in support of its request for a time extension, 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 Linder's unpaid wage claim). This submission cannot be given much credence.

First, the May 7th appeal documents in no way relate or refer to Linder's claim for unpaid wages. Second, the May 7th appeal was itself untimely. Finally, having considered the substantive grounds for Mega Tire's appeal, I am not satisfied that there is any *prima facie* merit to the appeal.

On this latter point, I note, for example, Mega Tire states it had requested that the company that handles its payroll, Comcheq, to issue a payroll cheque to Linder for the monies that are now in dispute. However, tellingly, there is no independent evidence before me that such a cheque was cashed or even issued to Linder. If such a cheque was issued and cashed, surely, some corroborating evidence could be brought forward. Of course, if Mega Tire *has* made certain wage payments to Linder that have not been accounted for in the Determination, it is entitled to be credited for them as part of the collection process.

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 29th, 1997 and filed under file number 079869, be confirmed in the amount of \$388.57 together with whatever further interest that may have accrued, pursuant to section 88 of the *Act*, since the date of issuance.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal