

**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 -

Koutsantonis Enterprises Ltd. operating as Olympia Pizza & Steak House  
("Olympia")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Norma Edelman

**FILE NO.:** 98/669

**DATE OF DECISION:** December 8, 1998

## DECISION

### OVERVIEW

This is an appeal by Koutsantonis Enterprises Ltd. operating as Olympia Pizza & Steak House (“Olympia”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) against a Determination issued by a delegate of the Director of Employment Standards on September 21, 1998. The Director’s delegate found that Olympia owed Jeremy Dahl (“Dahl”) wages in the amount of \$1,444.24 (including interest). The Determination stated that an appeal of it had to be received by the Tribunal by October 14, 1998. The Tribunal received an appeal on October 26, 1998. Olympia requested that the Tribunal extend the deadline to file an appeal. The other parties to the appeal were invited to make submissions on a possible extension of the deadline under Section 109(1)(b) of the *Act*. The Director’s delegate and Dahl opposed the granting of an extension. This appeal was decided based on the written submissions of the parties.

### ISSUES TO BE DECIDED

Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* to extend the deadline for filing an appeal?

### FACTS

The Determination which was issued on September 21, 1998 found that Olympia owed wages to Dahl in the amount of \$1,444.21 (including interest). The Director’s delegate found that Olympia did not keep records of Dahl’s hours of work, nor did it provide pay statements to Dahl. Further, Olympia provided no evidence that Dahl was a sub-contractor. The Director’s delegate concluded that Dahl, a pizza delivery driver and kitchen helper, was an employee of Olympia and, based on the records provided by Dahl, he was owed minimum wages, overtime wages and vacation pay for the period July 8, 1997 to August 27, 1997.

The Determination, at page 9, indicated that an appeal of it had to be received by the Tribunal no later than October 14, 1998. The Determination was sent by registered mail and it was received by Olympia on September 29, 1998 as evidenced by Canada Post Corporation’s “Acknowledgment of Receipt” document.

The Tribunal received an appeal from Olympia on Monday, October 26, 1998. The appeal was dated October 23, 1998 and it was sent by fax to the Tribunal at 4:20 p.m. on Friday, October 23, 1998. Michael Koutsantonis (“Koutsantonis”), on behalf of Olympia, requested that the Tribunal extend the deadline to file an appeal. Koutsantonis provided the following explanation why his appeal was late: “When I received the Determination, I leafed through it, examining all the information contained within. I came to the section at

the bottom of page 9 about the appeal information but did not see the page on the process. The page was stuck to the previous page”. Koutsantonis said he tried to reach the Director’s delegate by telephone over the next several weeks but he never received a call back and so he “...put the file away hoping to get a call back and forgot about it”. He further said “I operate two restaurants and they require a great deal of time and effort in order to keep them operating efficiently. On October 22, 1998 I received a call from the bank stating that the bailiff had my accounts frozen and that I owe \$1819.19. At that point I realized that I forgot about the Determination...” He then called the Employment Standards Branch office in Kelowna and was faxed a copy of the appeal form and information sheet.

Koutsantonis stated that Dahl was employed primarily as a driver. He washed dishes on two days, and although not required to do so, he also did prep work and cleaning. Koutsantonis stated that Dahl did not work overtime and he received free drinks and food and did not commence work until July 15. He stated “I have enclosed documentation as to an approximation of what Mr. Dahl worked. Because he was a delivery driver and his hours were not recorded it is difficult to give exact figures. The figures which I have come up with are based on which days he worked and how many drivers were working. He would never have worked full shifts every night if there were other drivers involved. Also he was an independent contractor because he used his own vehicle and was responsible for all his own maintenance.”

The other parties on the appeal were invited to make submissions on a possible extension of the deadline for filing an appeal under Section 109(1)(b) of the *Act*.

The Tribunal received submissions dated November 16, 1998 and November 19, 1998 from the Director’s delegate stating that he opposed the granting of an extension. He said “The record clearly shows the matter could have been addressed in a timely manner. It is my view the only reason for the late submission is to deflect the attention from the issue of wages being owed. Additionally, there was no attempt to submit an appeal until the bailiff attempted to recover the determined wages and bailiff fees.” The Director’s delegate further said that Olympia did not provide records during the investigation stage and should not be permitted to do so on the appeal (see *Tri-west Tractors Ltd.* BC EST #265/96). Alternatively, if the Tribunal does consider the records, it should be noted that they are an “approximation” and certain records sent to the Tribunal are inconsistent with earlier information submitted to the Employment Standards Branch.

The Tribunal received submissions dated November 17, 1998 and November 19, 1998 from Dahl who also opposed the granting of an extension. Dahl said “(T)hey have had more than enough time. They didn’t care before so why now. This is not fair.”

He further said he was 16 years old at the time he worked for Olympia. He said he was required to do prep work and cleaning and he worked the hours as set out in the calculation sheets attached to the Determination.

## **ANALYSIS**

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal.

The Tribunal has held consistently that it should not grant extensions under Section 109(1)(b) as a matter of course and it should exercise its discretionary powers only where there are compelling reasons to do so. (See, for example, *Metty M. Tang* BC EST #D211/96). In deciding whether “compelling” reasons” exist in a particular request, the Tribunal has identified several material considerations including:

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

In my view, Olympia has failed to satisfy any of the above-mentioned criteria.

Koutsantonis was in receipt of the Determination well in advance of the appeal deadline but despite the clear direction contained in the Determination regarding when an appeal could be filed with the Tribunal, he did not file an appeal, nor did he make any contact with the Tribunal until after the expiration of the appeal period. Koutsantonis had an opportunity to file a timely appeal but he chose not to exercise his option of disputing the Determination until after the deadline to do so had expired. He filed an appeal only after the Director’s delegate, through the bailiff, commenced collection activity. Nothing in Koutsantonis’ submissions leads me to conclude that there was a *bona fide* intention to appeal the Determination during the statutory appeal period. Koutsantonis did not notify either the Director’s delegate or Dahl of his intention to make an appeal to the Tribunal. Notification was given to the other parties for the first time by the Tribunal on October 27, 1998. One of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly. Dahl stated that his claim is now 14 months old. It would not be in his interest to have this matter further delayed during the appeal process. However, even if I were satisfied that Dahl would not be unduly prejudiced by an extension of the appeal deadline, Koutsantonis has not established that there is a strong *prima facie* case that the Tribunal would find, if the merits of the appeal were to be heard, that the Determination should be cancelled. I make no decision about the merits, but the following three factors cause me to conclude there is not a strong *prima facie* case in favour of Olympia. First, there is insufficient evidence to show the Director’s delegate erred in concluding that Dahl was an employee and not an independent contractor. Second, the information provided by Koutsantonis concerning Dahl’s hours of

work is incomplete, unclear and often contradictory. For example, the schedule for July 13 - July 19 shows that Dahl worked 8 hours in total. Yet, on the calculation sheets attached to the Determination, Koutsantonis has written that Dahl worked 12 hours in total. Third, the Tribunal has consistently held that it will not allow a party to introduce evidence on the appeal that could have, and should have, been made available to the Director's delegate during the investigation stage (See, for example, *Kaiser Stables Ltd.* BC EST #D58/97 and *Triwest Tractor* BC EST #D268/96) In this case, Koutsantonis does not explain why the information he submitted on the appeal was not made available to the Director's delegate during the investigation.

The obligation is on the Appellant to exercise reasonable diligence in the pursuit of an appeal. In this case, Olympia has failed to persuade me that it has done so. I find no compelling reasons to allow this appeal.

For the above reasons, I have decided not to extend the time limit for requesting an appeal in this case.

**ORDER**

Olympia's application under Section 109(1)(b) of the *Act* to extend the time for requesting an appeal is refused. Pursuant to Section 114(1)(a) of the *Act* the appeal is dismissed and accordingly the Determination is confirmed as issued in the amount of \$1,444.24 together with whatever further interest may have accrued, pursuant to Section 88 of the *Act*, since the date of issuance.

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**Norma Edelman**  
**Registrar**  
**Employment Standards Tribunal**

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