

Citation: GC's Door Express 2007 Ltd. (Re)  
2018 BCEST 21

An appeal

- by -

GC's Door Express 2007 Ltd.  
(the "Applicant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE NO.:** 2018A/13

**DATE OF DECISION:** March 5, 2018

## DECISION

### SUBMISSIONS

Glen Creer

on behalf of GC's Door Express 2007 Ltd.

### OVERVIEW

1. This is an application filed by GC's Door Express 2007 Ltd. (the "Applicant") to extend the time for requesting an appeal of a determination. It is made pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the "ESA") which reads as follows: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following...(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired."
2. On December 4, 2017, Megan Roberts, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination against the Applicant ordering it to pay a former employee (the "complainant") the total sum of \$5,766.31 on account of unpaid wages (including regular wages, commissions, vacation pay, compensation for length of service and section 88 interest). The Determination was issued following an oral complaint hearing held on November 15, 2017, attended by both parties. The delegate also issued, concurrent with the Determination, her "Reasons for the Determination" (the "delegate's reasons").
3. Further, and also by way of the Determination, the delegate issued two separate \$500 monetary penalties (see section 98) against the Applicant based on its failure to comply with sections 17 and 18 of the *ESA* (payment of wages at least semimonthly and payment of earned wages on termination of employment). Thus, the total amount payable under the Determination is \$6,766.31.

### THE APPLICATION TO EXTEND THE APPEAL PERIOD

4. The Applicant has filed a late appeal arguing that the dispute between the parties should be referred back to the Director on the basis of "new evidence" it now has (see subsection 112(1)(c) of the *ESA*). This appeal, although dated January 5, 2018, was actually filed on January 19, 2018. The applicable appeal period (see subsection 112(3)(a) of the *ESA*) expired on January 11, 2018. Hence, the instant application to extend the appeal period.
5. The Determination, at the bottom of the second page, contains a text box providing information about the appeal process. I have reproduced the information in the text box in full:

#### Appeal Information

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on January 11, 2018.

The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at [www.bcest.bc.ca](http://www.bcest.bc.ca) or by phone at (604) 775-3512.

6. The Applicant manufactures, sells, and installs residential and commercial doors. The complainant was formerly employed as a sales representative and her compensation was based on an \$18 hourly wage and commissions – the Determination included \$3,821.20 on account of unpaid commissions (see delegate’s reasons, page R12). The Applicant’s appeal concerns the method of calculating the complainant’s commissions. With respect to the latter, the Applicant says that commissions “are payable upon completion and receipt of payment”. The Applicant says that four sales “are no longer eligible for commission payout” due to the fact that the sales never completed – according to the Applicant, these sales were only “in progress” as of the date of the hearing. The commission adjustment sought is \$390.41 – the Applicant does not seek any other adjustment to the Determination:

We ask that the amount above [i.e., \$390.41] be deducted from the amount found payable in the Determination (\$6,766.31).

We believe \$6,375.90 to be the precise amount owing [to the complainant]. In the interest of expediting this process, Door Express will not appeal the further adjustments to the amounts owed [the complainant], even if there are further cancelations or errors.

7. The Applicant’s explanation for having filed a late appeal is set out in a January 19, 2018, letter filed with the Tribunal on January 22, 2018. In this letter, the Applicant says that it prepared and faxed the relevant appeal documents “several weeks ago”, but later learned from its internet service provider (“ISP”) that the latter was having “intermittent service issues” (the Applicant uses a VOIP, or “voice over internet”, telephone/fax system), and “our best guess is that that was the cause”. The Applicant says that it re-sent its original appeal documents after it learned about its ISP’s service quality issues and its own related fax transmission problems.

8. In *Niemisto*, BC EST # D099/96, the Tribunal identified several factors that should be taken into account when assessing whether the appeal period should be extended in a particular case:

- Is there is a reasonable and credible explanation for failing to file the appeal within the statutory time limit?
- Has the applicant demonstrated a genuine ongoing intention to appeal the Determination?
- If so, has this intention been brought to the respondents’ (including the Director’s) attention?
- Would a respondent party suffer undue prejudice if the appeal period were to be extended? and
- Is the appeal presumptively meritorious?

9. The delay in question in this case is modest and the Applicant has provided a possible explanation for its tardy appeal (although, it must also be noted, that there is no corroborating evidence whatsoever before me regarding the ISP’s alleged “service issues”). However, this appeal cannot be characterized as having any presumptive merit.

10. The four disputed commissions concern three sales that were negotiated in July 2017, and a fourth in June 2017. In her testimony before the delegate, the complainant acknowledged “some July sales may have been cancelled and agrees she would not be owed commissions on those” (delegate’s reasons, page R4). At page R8 of her reasons, the delegate held that “commissions were payable on full payment and completion of the order”. The delegate then noted “I have included unpaid commissions from orders dated from December

2016 through September 2017 in my calculation for commissions owed” and “I also accept that the status of each order listed on Door Express’s Commission Trackers is accurate” (page R8).

11. As noted above, the Applicant says that four commissions should be deducted from the delegate’s unpaid commission order. However, three of the four commissions in question *were already deducted* by the delegate in her award, namely, the Lomax, Kiss and MacDougall commissions – see delegate’s reasons at page R9. *None* of these commissions is listed in the table of commissions payable set out at page R12 of the delegate’s reasons.
12. This leaves only one remaining disputed commission, namely, the June 9, 2017 “Dirk, Flote” commission for \$80.83. The subsection 112(5) Record indicates (at page 104) that the Applicant’s evidence before the delegate regarding this sale was that it was “IN PROGRESS”, not “DONE”. However, at page 113 of the Record, the Applicant’s record regarding this latter sale was changed to indicated that it was “DONE” (and thus it would be payable). I cannot find any other reference in the Record to this particular sale. This commission *is* included in the page R12 table listing all commissions that were payable to the complainant.
13. Thus, the Applicant’s argument appears to be that its own document submitted to the delegate should be ignored and some sort of adjustment made. The delegate, of course, can hardly be faulted for relying on the Applicant’s own commission records that it had assured her were accurate. Further, while the Applicant now says that the “Dirk” sale was “canceled”, that is merely an assertion, and it is wholly unsupported by any cogent corroborating evidence. There is no “new evidence” to support the Applicant’s ground of appeal in relation to this particular disputed commission and, in any event, I see no error insofar as the delegate’s commission calculations are concerned. Even if the Applicant did originally submit erroneous information to the delegate (and I am not persuaded, based on the evidence before me, that is the case), I do not see how this error now gives the Applicant a legitimate ground of appeal.
14. Accordingly, while I do not find the delay in this case to be particularly problematic and, in addition, the Applicant has provided at least a semblance of a credible explanation for its late appeal, there does not appear to be, in my view, any merit whatsoever to the underlying legal foundation for its appeal. As such, I find that it would not be appropriate to extend the appeal period in this case. Further, in my judgment, this appeal does not have any reasonable prospect of succeeding (subsection 114(1)(f) of the *ESA*).

## ORDERS

15. The Applicant's application to extend the time for requesting an appeal is refused.
16. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed.
17. In accordance with subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of \$6,766.31 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

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