

Citation: Keithley Creek Ventures Inc. and
Robert Allan Wayne Kaartinen (Re)
2018 BCEST 95

Appeals

- by -

Keithley Creek Ventures Inc.
("Keithley Creek")

– and –

Robert Allan Wayne Kaartinen
("Kaartinen")

- of Determinations 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)

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2018A/80 and 2018A/82

DATE OF DECISION: September 25, 2018

DECISION

SUBMISSIONS

Wayne Kaartinen	on behalf of Keithley Creek Ventures Inc.
Wayne Kaartinen	on his own behalf as a Director of Keithley Creek Ventures Inc.

OVERVIEW

1. Procedurally, this is a somewhat unusual matter. There are two appeals before me – one filed by a corporate appellant (File No. 2018A/80) and the other by this corporation’s sole director, relating to a determination issued against him under section 96 of the *Employment Standards Act* (the “ESA”) (File No. 2018A/82). Both determinations were issued following an investigation by an officer employed with the Employment Standards Branch. The appeal of the determination issued against the corporation was filed after the applicable appeal period expired, and the appeal of the determination issued against the corporation’s director is arguably legally defective.
2. In my view, this is not an appropriate case to extend the appeal period applicable to the determination issued against the corporation under subsection 109(1)(b) of the *ESA* and, in any event, there is no reasonable prospect that either appeal will succeed. That being the case such, both appeals must be dismissed under subsection 114(1)(f) of the *ESA*. My reasons for reaching this conclusion now follow.

THE DETERMINATIONS

The Corporate Determination

3. On July 9, 2018, Wayne Kaartinen (“Kaartinen”), who is the sole director of Keithley Creek Ventures Inc. (“Keithley Creek”), filed an Appeal Form under section 112 of the *ESA* on behalf of that firm. This appeal concerns a determination issued on April 26, 2018, against Keithley Creek in the total amount of \$45,580.05 representing unpaid wages owed to Deane Goss and Carrie Goss (\$44,080.05) and \$1,500.00 on account of three separate \$500 monetary penalties (see section 98). I shall refer to this determination as the “Corporate Determination” and to Mr. and Ms. Goss as the “complainants”.
4. By way of the Corporate Determination, Deane Goss was awarded \$26,092.91 in unpaid wages and section 88 interest, and Carrie Goss was awarded \$17,987.14 in unpaid wages and interest. The three monetary penalties were issued against Keithley Creek because it failed to pay all earned and payable wages for each pay period as required by section 17, failed to pay wages due on termination of employment (see section 18), and failed to produce employment records pursuant to a lawful demand (see section 46 of the *Employment Standards Regulation*).
5. Keithley Creek appealed the Corporate Determination relying on all three statutory grounds of appeal (see subsections 112(1)(a), (b), and (c) of the *ESA*), namely, that the delegate of the Director of

Employment Standards (the “delegate”) who issued the Corporate Determination erred in law, failed to observe the principles of natural justice, and on the basis that it had new and relevant evidence.

6. The deadline for appealing the Corporate Determination, calculated in accordance with section 122 of the *ESA*, was 4:30 pm on June 4, 2018 (this deadline is set out in a text box at the bottom of the second page of the 4-page Corporate Determination). Accordingly, the appeal of the Corporate Determination was filed more than one month after the appeal period expired. Part 6 of the prescribed Appeal Form is the section where an appellant is directed to first, apply for an extension of the appeal period and, second, to “provide a reasonable and credible explanation” regarding why the appeal was not filed within the statutory appeal period. This section of Keithley Creek’s Appeal Form was not completed.
7. Although Keithley Creek did not complete Part 6 of the Appeal Form, I understand that Mr. Kaartinen contacted the Tribunal by telephone on July 25, 2018, and made an oral request to have the appeal period extended. Keithley Creek was asked to provide a written submission regarding the application to extend the appeal period, and on August 1, 2018, Mr. Kaartinen submitted a very brief statement to the Tribunal. As noted above, in my view, it would not be appropriate to make an order extending the appeal period relating to the Corporate Determination. I will address this matter more fully, below.

The Section 96 Determination

8. As noted at the outset of these reasons, there is also a second appeal before me relating to a determination issued against Mr. Kaartinen under section 96 of the *ESA*: “A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.”
9. On June 18, 2018, a delegate of the Director of Employment Standards issued a determination against Mr. Kaartinen in the amount of \$44,301.42 comprised of unpaid wages and interest owed to Deane Goss (\$25,672.00 plus interest) and Carrie Goss (\$17,696.98 plus interest). I shall refer to this determination as the “Section 96 Determination”. The delegate noted in her “Reasons for the Determination” appended to the Section 96 Determination that as of June 18, 2018, no appeal had been filed regarding the Corporate Determination. The appeal of the Corporate Determination was subsequently filed on July 9, 2018.
10. In appealing the Section 96 Determination, Mr. Kaartinen appears to have simply resubmitted to the Tribunal the Appeal Form relating to Keithley Creek’s appeal of the Corporate Determination – this document was filed on July 18, 2018. Although the appellant is identified on the Appeal Form as Keithley Creek (since this is the same document filed relating the Corporate Determination), the Section 96 Determination was appended to the Appeal Form. By letter dated July 25, 2018, the Tribunal directed Mr. Kaartinen to file an amended Appeal Form – identifying Mr. Kaartinen as the appellant – by no later than August 9, 2018, but no amended Appeal Form was ever filed.
11. Although the Appeal Form relating to the appeal of the Section 96 Determination is defective – and arguably Mr. Kaartinen never perfected his purported appeal of the Section 96 Determination – I will proceed as if this latter appeal is properly before the Tribunal, as it appears Mr. Kaartinen’s clear intention was to appeal the Section 96 Determination.

REASONS FOR APPEAL

12. The stated reasons for appeal for both appeals (since identical appeal documents were filed in each appeal) are as follows (reproduced in full):

Dean and Carrie Goss were hired as contractors not employees for Keithley Creek Ventures. At the time of hiring they were told that the job was 10 hour days and 7 days a week. With time off if needed. Also at this same time they said that they would look after their own insurance and taxes. They would be paid as follows: Dean Goss \$35/hr and Carrie Goss \$25/hr. All agreements were verbal and not in writing. Employees and contractors are 2 separate categories. I will be paying them their wages that they have coming according to the time sheets that were kept. Plus 5% of the gold that the company got. Nothing more and nothing less. If this is not satisfactory let me know and I will proceed with legal counsel Wayne Kaartinen for Keithley Creek Ventures Inc [sic]

FINDINGS AND ANALYSIS

The Corporate Determination

13. Keithley Creek has not submitted any evidence that was not available at the time the Determination was issued, nor has Keithley Creek provided any evidence or argument relating to the “natural justice” ground of appeal. Accordingly, these two grounds of appeal must be summarily dismissed as absolutely no justification has been given in relation to either of these two grounds of appeal. As for the “employee versus contractor” issue, that assertion does arguably raise an alleged error of law and I will now briefly address that issue.
14. Keithley Creek quite rightly asserts that there are important factual and legal distinctions between “employees” and “independent contractors”. *But Keithley Creek has not provided any evidence to support its bald assertion that the two complainants were independent contractors.* Regardless of what Keithley Creek may have told the complainants, or otherwise believed the relationship to be, there are various factual matters that must be considered before an individual worker can be characterized as an independent contractor. For example: Who is providing the tools and equipment to do the job?; Does the worker have the right to subcontract their duties to a third party?; Who holds the ultimate control over, and otherwise directs, the work to be done?; and, more fundamentally, is the worker operating an independent business or is the worker an integral part of, and economically dependent on, the business operated by the person hiring the worker? (see *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001] 2 SCR 983 at paras. 33 – 48). There is no evidence before me regarding any of these matters and the evidence that is in the record strongly supports the notion that the parties were in an *employment* relationship.
15. I have reviewed the subsection 112(5) record in this matter and, at no time did Keithley Creek ever argue that the *ESA* did not apply because the complainants were independent contractors rather than employees. Further, as noted above, Keithley Creek has not provided *any* evidence to support its assertion that the complainants were independent contractors. This “status” issue, having been raised for the very first time on appeal, is not properly before the Tribunal (see *Tri-West Tractor Ltd.*, BC EST #

D268/96; *Kaiser Stables Ltd.*, BC EST # D058/97; *Lasota Fishing Ltd.*, 2018 BCEST 33; and *Vice Pacific Holdings Inc.*, 2018 BCEST 54).

16. Keithley Creek's communications with the Employment Standards Branch were largely concerned with its financial inability to pay the complainants, and its continuing search for new investors. Keithley Creek also stated that it might have to file for bankruptcy if new investors could not be secured. While Keithley Creek did not necessarily accept the complainants' position regarding the total amount of unpaid wages owed, Keithley Creek did concede, in its various communications with the Employment Standards Branch, that wages were owed. Keithley Creek also suggested that the complainants had agreed to forgo their statutory entitlement to overtime and statutory holiday pay but, even if there were such an agreement (and, other than Mr. Kaartinen's assertion of such an agreement, there was no evidence in that regard), such an agreement would be void under section 4 of the *ESA*.
17. Keithley Creek concedes that it did not pay the complainants' wages in full either during the currency of the parties' working relationship, or within the time period set out in section 18 following the end of the parties' working relationship. Thus, the two monetary penalties issued in relation to sections 17 and 18 of the *ESA* must be confirmed. Keithley Creek did not properly comply with a valid demand for production of certain payroll records – and Keithley Creek does not argue otherwise – and thus the third monetary penalty issued for failing to produce records must also be confirmed.
18. Since the “employee versus contractor” assertion was the basis for Keithley Creek's appeal, it follows that its appeal cannot succeed as there is no evidence before me that would suggest, even on a *prima facie* basis, that the delegate erred in law or fact with respect to this issue (and, of course, it was not even raised as an issue during the course of the delegate's investigation). As there is no merit to the Keithley Creek appeal, the question of the timeliness of the appeal is moot. Nevertheless, I will briefly address this matter.
19. Mr. Kaartinen asserts that he had “various medical problems” and that he “did not realize that I had missed time frame to send in information to Employment Standards”. This assertion stands wholly uncorroborated by medical evidence of any sort, let alone evidence demonstrating Mr. Kaartinen was sufficiently disabled by health issues such that he was unable to file a timely appeal. Indeed, it seems to me that Keithley Creek was only motivated to file an appeal of the Corporate Determination after Mr. Kaartinen was served with the Section 96 Determination, at which point his own potential personal liability came into sharp focus. I am not satisfied that Keithley Creek has provided a reasonable and credible explanation for its failure to file a timely appeal and, of course, the appeal grounds are wholly without merit. Based on the *Niemisto* (BC EST # D099/96) criteria, there is no proper basis for extending the time to appeal the Corporate Determination.

The Section 96 Determination

20. Mr. Kaartinen concedes that he is the sole Keithley Creek director – he identified himself as a Keithley Creek “director” on the Appeal Form. The record shows that he was a director when the complainants' unpaid wage claims crystallized. Mr. Kaartinen does not challenge the delegate's calculations regarding the 2-month unpaid wage liability ceiling, or the calculations concerning his personal liability to each

complainant. None of the subsection 96(2) defences is applicable here. There is no basis – either in fact or law – to set aside the Section 96 Determination, and thus it must be confirmed.

ORDERS

21. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, Keithley Creek’s appeal of the Corporate Determination is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Corporate Determination is confirmed as issued in the amount \$45,580.05 together with whatever further interest that may have accrued under section 88 since the date of issuance.
22. Pursuant to subsections 114(1)(f) of the *ESA*, Mr. Kaartinen’s appeal of the Section 96 Determination is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Section 96 Determination is confirmed as issued in the amount \$44,301.42 together with whatever further interest that may have accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal