



Citation: AWC Developments Ltd. (Re)
2019 BCEST 11

An appeal

- by -

AWC Developments Ltd.
("AWC")

- 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)

PANEL: David B. Stevenson

FILE NO.: 2018A/119

DATE OF DECISION: January 23, 2019

DECISION

SUBMISSIONS

Henry Amayo

on behalf of AWC Developments Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), AWC Developments Ltd. (“*AWC*”) has filed an appeal of a Determination issued by Dawn Rowan, a delegate of the Director of Employment Standards (the “*Director*”), on July 4, 2018 (the “*Determination*”).
2. The Determination found AWC had contravened Part 3, sections 17, 18, and 21 and Part 5, section 45 of the *ESA* in respect of the employment of Anthony Cunningham, David Gilmore, Lucas Hewko, Kevin Jarvis, Andrew Ostrowski, and Gabriela Petkova (“the *Complainants*”) and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Determination ordered AWC to pay the *Complainants* wages in the total amount of \$19,926.45 and to pay administrative penalties in the amount of \$2,500.00. The total amount of the Determination is \$22,426.45.
3. This appeal is grounded in evidence becoming available that was not available when the Determination was being made.
4. The appeal was delivered to the Tribunal on November 14, 2018, more than three months after the statutory time period for filing an appeal had expired. The Appeal Form was accompanied by a request to extend the time period for filing the appeal. Although requested on the appeal form, AWC has provided no reason for the failure to meet the statutory time period; there is a vague reference to Henry Amayo (“*Mr. Amayo*”), who is representing AWC in this appeal and is identified on the Appeal Form and the section 112(5) record (the “*Record*”) as the president of AWC, as being depressed, seeing doctors, and visiting the hospital ER on several occasions. Nothing has been provided to support those assertions.
5. In correspondence dated November 21, 2018, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “*Record*”) from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
6. The Record has been provided to the Tribunal by the Director and a copy has been delivered to AWC and the *Complainants*. All of the parties have been provided with the opportunity to object to its completeness. No objection to the completeness of the Record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any other evidence allowed to be added to the appeal. Under

section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:

- (a) the appeal is not within the jurisdiction of the tribunal;*
- (b) the appeal was not filed within the applicable time limit;*
- (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) there is no reasonable prospect that the appeal will succeed;*
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) one or more of the requirements of section 112 (2) have not been met.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Complainants will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the request for an extension of the appeal period should be granted and whether there is any reasonable prospect the appeal will succeed.

ISSUE

9. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

10. AWC operates a construction company.
11. Each of the Complainants filed a complaint with the Employment Standards Branch (the “Branch”) alleging each was employed by AWC for varying periods of time in 2017 and had not received all wages owed to them. Most of the claims covered periods of work in September and October 2017; Mr. Hewko’s claim covered a period from January to October 2017 and Mr. Ostrowski claimed wages to November 10, 2017.
12. The Determination outlines the largely unsuccessful efforts of the Director to obtain from either AWC or Mr. Amayo a meaningful response to the complaints and their participation in the complaint process.
13. Copies of some of the complaints, along with supporting documents submitted by the applicable Complainants, and a Demand for Employer Records were sent to AWC by registered mail on March 2,

2018. Canada Post records confirm the delivery of the registered mail. The same material was sent to Mr. Amayo by e-mail on March 12, 2018.
14. The material set a deadline for responding to the Demand for Employer Records and explained the consequences of failing to comply.
15. No response was received to either the registered mail or the e-mail.
16. On March 21, 2018, the Director sent a letter by e-mail to Mr. Amayo containing additional complaints, the supporting documents for those complaints, and another Demand for Employer Records. On March 22, 2018, that material was sent to AWC by registered mail. On the same day Mr. Amayo contacted the Director and acknowledged receipt of the e-mail.
17. On March 29, 2018, the Director notified Mr. Amayo by e-mail that another complaint had been received. The complaint was attached to the e-mail. On April 12, 2018, another complaint was delivered to Mr. Amayo. In response to the complaint delivered on April 12, 2018, Mr. Amayo sent an e-mail to the Director, stating:
- Ok thank you.
I will be contacting the police to get involved as well on Dave Gilmore for indirectly harassing. Claiming and asking people that i have never employed to file claims.
18. An April 16, 2018, voicemail was not returned by Mr. Amayo.
19. Apart from two brief communications to the Director from Mr. Amayo, neither of which were responsive to the claims made or the Demands for Employer Records, AWC has not participated in the complaint process.
20. On June 5, 2018, the Director sent a preliminary findings letter to Mr. Amayo and on June 6, 2018, sent the same document by registered mail to AWC. The letter provided Mr. Amayo and AWC until June 20, 2018, to dispute any of the findings. Canada Post records show the registered mail was unclaimed and returned to sender. No response to the preliminary findings letter was received from either Mr. Amayo or AWC.
21. The Determination, without reasons, was issued on July 4, 2018. On July 19, 2018, Mr. Amayo requested written reasons for the Determination and these were provided by the Director on July 26, 2018.
22. The Director found the Complainants were employed by AWC during the periods claimed, were owed wages in the amounts set out in the Determination, that AWC had contravened several provisions of the *ESA*, and had contravened section 46 of the *Regulation*.

ARGUMENT

23. AWC has grounded this appeal in evidence becoming available that was not available when the Determination was being made. Included with the appeal is a copy of an incomplete civil statement of claim – undated, unsigned, and unfiled.

24. On January 7, 2019, the Tribunal received a communication from Mr. Amayo inquiring whether he could submit “more information” related to the appeal that he had “recovered”. In correspondence dated January 7, 2019, the Tribunal requested Mr. Amayo provide a brief description of the “recovered” information and some explanation of why he could not have provided it within the appeal deadline. He was given until the end of the work day on January 11, 2019, to respond to this request.
25. On January 9, 2019, Mr. Amayo responded. He described the additional information he wished to submit as “text messages that I have recently have [sic] been able to upload”. Mr. Amayo says these are text messages from Mr. Gilmore showing “we [AWC] worked for him, . . . not him working for us [AWC]”. He says there is also a text from another Complainant “asking us [AWC] for advances”. Mr. Amayo says these texts were only recently recovered off a chip from an old cell phone which had been borrowed by his in-laws approximately nine months ago.
26. AWC says four of the Complainants were not employees of AWC, but were employees of a sub-contractor used by AWC on one of its jobs. In any event, AWC disputes aspects of the claims made by these Complainants. AWC says the other two Complainants, while conceding they were employees of AWC, seldom came to work and did not work all of the hours claimed. AWC says it did not agree to pay one of the Complainants – Mr. Ostrowski – the wage rate he claimed.

ANALYSIS

27. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:
- Section 109 (1) (b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
28. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
1. There is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
 2. There has been a genuine and on-going *bona fide* intention to appeal the Determination;
 3. The responding party and the Director have been made aware of the intention;
 4. The respondent party will not be unduly prejudiced by the granting of an extension; and
 5. There is a strong *prima facie* case in favour of the appellant.
29. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been

advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.

30. In this case the length of delay is excessive and what little explanation for the delay that has been provided is neither reasonable nor credible. This appeal was filed more than three months after the expiry of the statutory appeal period. The request to provide further information was delivered to the Tribunal more than five months after expiry of the statutory appeal period.
31. There is no indication during the appeal period that AWC had formed any intention to appeal the Determination.
32. When considering the *prima facie* strength of the case presented by AWC in this appeal, and in its request for an extension of the time period for filing an appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.
33. I shall consider the merits of the appeal before reaching any final decision on the request for an extension of the appeal period.
34. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*
35. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
36. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
37. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
38. AWC has grounded this appeal in evidence becoming available that was not available when the Determination was made. This ground of appeal is commonly described as the “new evidence” ground of appeal.

39. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.
40. I find the evidence provided by AWC with the appeal, and the information sought to be added, as described in its January 9, 2019, reply to the request from the Tribunal, do not meet the considerations for accepting and considering new evidence.
41. The proposed evidence is not “new”; it was available and could, applying a reasonable degree of diligence, have been provided to the Director during the complaint process had AWC opted to participate in that process. Neither is the proposed evidence credible or probative in the sense required when considering an application to submit new evidence on appeal.
42. Further, the material sought to be included or added to the Record directly challenges the Director’s finding that the Complainants were all employees of AWC. That finding, which was substantially a finding of fact firmly grounded in the evidence provided by the Complainants and another person (and contained in the Record), is not one which can be challenged on appeal unless such finding is shown to be an error of law. Mr. Amayo has not grounded this appeal in error of law and, in any event, nothing provided or asserted by Mr. Amayo in this appeal comes remotely close to showing the Director was wrong in finding AWC employed the Complainants and was therefore responsible for the unpaid wages claimed.
43. Nothing provided in this appeal persuades me it has any merit or any reasonable prospect of succeeding.
44. Adopting my earlier comments on the criteria considered in deciding whether to grant an extension of the statutory appeal period, an extension of time will not be granted.
45. In my view this appeal also fails on the principle expressed in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
46. A party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a Determination being issued, seek to advance a case to the Tribunal on appeal, when the facts should have been advanced to the Director during the complaint process. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Director cannot be said to have “erred” in a fact-finding process that AWC failed to participate in.
47. The facts of this case are similar to those in *Kaiser Stables, supra*, where the concerted efforts of a delegate to have an employer participate in the investigation of a complaint were ignored by the employer.

Following a determination with which the employer did not agree, an appeal was filed that sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Tribunal stated it “will not to allow an employer to completely ignore the [Director’s] investigation and then appeal its conclusions”.

48. The very limited response of AWC to the efforts of the Director seek their participation in the complaint process and the refusal to comply with the Demand for Employer Records (while contending the Determination is wrong on matters concerning the employment of most of the Complainants with AWC, hours of work and wage rate) persuades me that AWC should not be allowed to challenge the Determination in this appeal.
49. Based on all of the above, the purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under sections 114(1) (b) and (f) of the *ESA*.

ORDER

50. Pursuant to section 115 of the *ESA*, I order the Determination dated July 4, 2018, be confirmed in the amount of \$22,426.45, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal