

An appeal

- by -

James Reynolds

- 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: Allison Tremblay

FILE NO.: 2019A/149

DATE OF DECISION: November 14, 2019

DECISION

SUBMISSIONS

James Reynolds

on his own behalf

OVERVIEW

1. James Reynolds (“Reynolds”) seeks to appeal, under section 112 of the *Employment Standards Act* (the “ESA”), the June 19, 2019 determination (the “Determination”) of the Director of Employment Standards (the “Director”).
2. On February 1, 2019, Reynolds filed a complaint with the Director alleging that Fleck Contracting (2012) Ltd. (“Fleck”) employed him as a watch person at a demolition site from December 23, 2018, to January 2, 2019, and failed to pay him wages in contravention of the ESA. Fleck disputed that Reynolds was its employee.
3. A delegate of the Director (the “Delegate”) held a hearing on June 12, 2019. Based on the evidence presented, the Delegate concluded that Reynolds was not hired to provide security at the demolition site and was not entitled to be compensated for work he unilaterally chose to perform. The Delegate dismissed the complaint.
4. Reynolds now appeals, alleging an error of law and a breach of natural justice, and seeks to have the matter remitted to the Director for redetermination. Reynolds admits he filed his appeal late and so also seeks to extend the time to appeal under section 109(1)(b) of the ESA.
5. In this decision I address only the application to extend the time to appeal. My reasons are based on Reynolds’ written submission, the written Reasons for Determination, and the section 112(5) record (the “Record”) provided by the delegate.

ISSUE

6. Should the Tribunal extend the time to appeal under section 109(1)(b) of the ESA?

THE FACTS AND ANALYSIS

7. In December 2018, Fleck, a construction company, was performing demolition on a site in Powell River, British Columbia.
8. Reynolds alleged that he was hired by a representative of Fleck as a watch person to provide security to the demolition site over the holiday period when there were no workers on the site. He alleged he worked 104 hours between December 23, 2018, and January 2, 2019. He testified before the Delegate that he was paid no wages, but that Fleck’s representative gave him a bottle of vodka and a package of cigarettes on January 2, 2019.

9. Fleck's Project Manager, Alex Medway ("Medway") gave evidence for Fleck. He testified before the Delegate that he did not offer Reynolds work, but told Reynolds if he noticed anything suspicious at the site while driving by that he could take a picture and report the occurrence to the authorities. In further support of his contention that he did not hire Reynolds, he testified that Reynolds would not have been allowed on the site, which was contaminated with asbestos, without having first completed training. He also explained that the property owner's General Manager, Clint Loan ("Loan"), had agreed to provide site surveillance over the holiday period. Medway explained that he bought Reynolds vodka and cigarettes as a good will gesture for the holidays.
10. Loan also testified before the Delegate. He explained that he agreed to perform, and did perform, site surveillance between December 23, 2018, and January 4, 2019.
11. Three other witnesses testified. Two were Reynolds' friends who said that Reynolds told them he was hired for site security and saw him at or near the demolition site wearing a high visibility vest. A director and officer of Fleck testified about Fleck's site orientation requirements, which Reynolds had not completed. He said that Reynolds was not authorized to do security at the site.
12. The Delegate considered the *ESA's* definitions of "employee" and "employer" and concluded that Fleck's representative had hired Reynolds to perform drive by checks of the site. The Delegate considered this to be work that would normally be performed by an employee. She also considered the vodka and cigarettes to be a token of appreciation for Reynolds having agreed to perform drive-by surveillance. However, the Delegate found that Fleck had not hired Reynolds to perform surveillance on the site itself, given the lack of evidence supporting Reynolds' contention. The Delegate observed that Reynolds was not authorized to be present on the contaminated site and that Loan performed surveillance at the site. The Delegate concluded that Reynolds was not entitled to be compensated for time he unilaterally decided to spend at the site.
13. Finally, the Delegate held that there was no evidence that Reynolds performed the work Fleck hired him to do: the drive-by checks. Consequently, she dismissed the complaint.
14. Reynolds had until July 29, 2019, to file a timely appeal. The Tribunal received his appeal and request for extension for time to appeal on August 13, 2019.
15. The test for extending the time to appeal is set out in *Niemisto*, BC EST #D099/96:

I am of the view that appellants seeking time extensions for requesting an appeal from a Determination issued under the *Act* should satisfy the Tribunal that:

 - 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 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.

16. In support of his application to extend time, Reynolds contends that he was ill and travelling back and forth between Powell River and Vancouver for tests and treatment. He provided no supporting documentation or details about the timing of his travels or how the travels and illness prevented him from filing a timely appeal.
17. Reynolds also submitted a letter from the Tribunal registry referring to a telephone conversation Reynolds had with the Registry on June 27, 2019. This call is evidence in support of an ongoing intention to appeal. There is, however, no evidence that Reynolds informed Fleck or the Director of his intention.
18. Of primary importance to my decision is the question of whether Reynolds makes out a strong *prima facie* case. I conclude he does not. Although Reynolds alleges an error of law and a breach of natural justice, none of his submissions address these issues. Reynolds simply reargues the merits of the case he made before the Delegate and alleges Fleck's witnesses were not credible.
19. An appeal is not an opportunity for an appellant to take a "second kick at the can." Reynolds has failed to allege that any of the factual conclusions reached by the Delegate were based on wrong information, were manifestly unfair, or lacked rational basis (see *Mykonos Taverna Operating as the Achillion Restaurant*, BC EST # D576/98). Absent one of these errors, a delegate's determination of facts will stand.
20. Accordingly, I find that Reynolds has failed to make out a strong *prima facie* case as required to extend the time to appeal. It follows that I dismiss the appeal under section 114(1)(b) of the *ESA*.

ORDER

21. The appeal is dismissed under section 114(1)(b) of the *ESA*. Pursuant to section 115(1)(a), I confirm the Determination.

Allison Tremblay
Member
Employment Standards Tribunal