

An appeal

- by -

Character Builders Inc.
("CBI")

- 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: Shafik Bhalloo

FILE No.: 2020/046

DATE OF DECISION: July 8, 2020

DECISION

SUBMISSIONS

David C. Patriquin

on behalf of Character Builders Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Character Builders Inc. (“CBI”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 4, 2020 (the “Determination”).
2. The Determination found that CBI contravened Part 3, sections 17 and 18 (wages); Part 4, section 40 (overtime wages); Part 5, sections 45 and 46 (statutory holiday pay), and Part 7, section 58 (vacation pay) of the *ESA* in respect of the employment of Douglas Docherty (“Mr. Docherty”).
3. The Determination ordered CBI to pay Mr. Docherty wages in the total amount of \$3,044.60 including accrued interest.
4. The Determination also levied five administrative penalties against CBI of \$500 each under the *Employment Standards Regulation* (the “*Regulation*”) for breach of sections 18, 27, 40, 45, and 46 of the *ESA*.
5. The total amount of the Determination is \$5,544.60.
6. CBI appeals the Determination on the “natural justice” and “new evidence” grounds of appeal under section 112(1)(b) and (c) of the *ESA*.
7. The deadline to file the appeal of the Determination was 4:30 p.m. on March 13, 2020. On March 13, 2020, the Tribunal received CBI’s incomplete appeal submission via fax from David C. Patriquin (“Mr. Patriquin”), the sole director and officer of CBI. The appeal submission consisted of CBI’s Appeal Form and written reasons for requesting an extension of the statutory appeal period to April 13, 2020.
8. On the same date, March 13, 2020, the Tribunal contacted Mr. Patriquin via e-mail and requested CBI to provide the Tribunal with a complete copy of the Determination and the written Reasons for the Determination (the “Reasons”) by 4:30 p.m. Subsequently, the Tribunal received an incomplete copy of the Determination via fax and an updated letter containing the reasons for requesting an extension to the statutory appeal period by e-mail.
9. On March 16, 2020, the Tribunal received a complete copy of the Determination and the Reasons, a revised Appeal Form noting the grounds of appeal, and a duplicate copy of the reasons for requesting an extension.
10. On March 18, 2020, the Tribunal contacted Mr. Patriquin via e-mail requesting confirmation as to “whether the appeal is being filed by [Mr. Patriquin] or by Character Builders Inc.”

11. On March 20, 2020, Mr. Patriquin confirmed, by e-mail, that he was filing the appeal on behalf of CBI.
12. On April 15, 2020, the Tribunal corresponded with the parties advising them that it had received CBI's appeal of the Determination and application to extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*. The Tribunal also informed Mr. Docherty and the Director that, at this time, no submissions were being sought from them on CBI's request to extend the appeal period and on the merits of the appeal.
13. In the same correspondence, the Tribunal requested CBI to provide the written reasons and argument for the appeal and any supporting documents by no later than 4:30 p.m. on May 13, 2020. The Tribunal clarified that this date is not an extension to the statutory appeal period but is a deadline to provide the requested documents to the Tribunal. It also noted that the Panel assigned to decide the appeal will also decide CBI's request for an extension of the appeal period.
14. The Tribunal also requested the Director, pursuant to section 112(5) of the *ESA*, to provide the Record that was before the Director at the time the Determination was made.
15. On May 6, 2020, the Tribunal received the Record from the Director. A copy of the same was sent to CBI and Mr. Docherty and both parties were provided an opportunity to object to its completeness by June 12, 2020. CBI did not object to the completeness of the Record. However, Mr. Docherty made two submissions in response. In his first submission, an e-mail received on May 25, 2020, Mr. Docherty requested that page 78 of the Record, which contained a financial record from CBI, should be resubmitted to clearly show the dates of the transactions that were missing in the document.
16. The second submission of Mr. Docherty, in his e-mail of June 12, 2020, requested the Tribunal to incorporate in the record several documents he supplied.
17. The Tribunal shared Mr. Docherty's submissions with the Director and CBI and asked the Director to respond.
18. On June 16, 2020, the Director responded stating that page 78 of the Record was as received from CBI. As for the additional documents Mr. Docherty wanted to include in the Record, the Director pointed out that the documents fell into the following categories: (i) some documents were not submitted by either party before the hearing and before the Determination was made; (ii) some documents were already in the Record and identified the page numbers in the Record where they could be found; and (iii) some documents were not in existence at the time of the hearing and therefore should not form part of the record. In the circumstances, the Director contended that the Record delivered to the Tribunal, on May 6, 2020, was complete.
19. On June 18, 2020, the Tribunal sent the Director's submission to Mr. Docherty and afforded him an opportunity to reply. On the same date, Mr. Docherty responded stating "I do not refute [the Director's] findings, nor do I contest them."
20. On June 22, 2020, the Tribunal informed the parties that the appeal is assigned to a Panel, that it would be reviewed, and that following the review, all or part of the appeal may be dismissed. If all or part of the

appeal is not dismissed, the Tribunal would seek submissions from Mr. Docherty and the Director on the merits of the appeal.

21. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I will assess the appeal based solely on CBI's appeal submissions, the Record, and the Reasons for the Determination (the "Reasons"). Under section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any reasons listed in the subsection. If satisfied the appeal or part of it should not be dismissed, the Director and Mr. Docherty will be invited to file submissions. On the other hand, if the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I will consider whether there is any reasonable prospect that the appeal will succeed.

ISSUE

22. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

Background

23. Based on the B.C. Online Corporate Registry search conducted by the delegate of the Director on April 24, 2019, with a currency date of February 19, 2019, CBI was incorporated in British Columbia on November 24, 1995, and Mr. Patriquin was its sole director and officer.
24. CBI operates a construction and renovation business in North Vancouver, British Columbia, and employed Mr. Docherty as an office assistant at \$25 per hour from May 21, 2019, to August 20, 2019.
25. Mr. Docherty filed a complaint under section 74 of the *ESA* on August 30, 2019, alleging that CBI contravened the *ESA* by failing to pay him regular wages and annual vacation pay (the "Complaint").
26. The delegate of the Director conducted a hearing into the Complaint on November 26, 2019. The hearing was attended by Mr. Patriquin on CBI's behalf and by Mr. Docherty on his own behalf.
27. On February 4, 2020, the delegate issued his Determination and the Reasons.

The Reasons

28. The delegate notes that he considered the following two issues at the hearing:
- a. Was Mr. Docherty an employee of CBI or a subcontractor?
 - b. If Mr. Docherty was an employee, does CBI owe him wages?
29. The delegate succinctly summarizes the evidence of both parties in the Reasons. In the case of Mr. Docherty, the delegate notes that the latter testified that after meeting with Mr. Patriquin, the owner of CBI, he agreed to work for CBI four hours each day, five days a week, at an hourly rate of \$25.00.

30. Mr. Docherty also said that there was a possibility that CBI might receive an employment wage subsidy for his work through the Neil Squire Society (the “Society”). The Society assists employees with disabilities to obtain employment through its wage subsidy program. Under this program, CBI would receive a partial wage subsidy for any payments it made to him, provided CBI submitted documents to the Society showing proof of payment. However, CBI failed to complete the arrangement for the wage subsidy program.
31. When he commenced working for CBI, Mr. Docherty states that Mr. Patriquin directed his work either personally or by text. Mr. Docherty stated that over 1900 texts were exchanged with Mr. Patriquin during his period of employment with CBI. Mr. Docherty also always used CBI’s e-mail or letterhead in his work and referred to himself as CBI’s office assistant.
32. Mr. Docherty tracked his time on time sheets which he either gave to Mr. Patriquin directly or left them in the office every week. His timesheets showed the days and hours he worked each day.
33. CBI paid Mr. Docherty by cheque, cash, or by E-transfer without making statutory deductions.
34. On August 3, 2019, Mr. Docherty provided CBI notice of his intention to end his employment on August 20, 2019.
35. On August 12, 2019, CBI paid Mr. Docherty wages for work performed to the end of July 2019 but not for any work he performed in August. CBI also did not pay him any vacation or statutory holiday pay during his period with CBI. Based on his \$25.00 hourly wage, Mr. Docherty claimed that CBI owed him wages totaling \$2,225.00 and vacation pay.
36. On the part of CBI, the delegate notes that Mr. Patriquin testified that CBI needed Mr. Docherty’s help because it had a large project and CBI’s previous office assistant did not properly track and send out invoices. Therefore, it had issues with the Canada Revenue Agency and needed Mr. Docherty to work with its accountant to resolve these issues.
37. Mr. Patriquin testified that he directed Mr. Docherty’s work and expected the latter to supply his services personally. However, Mr. Docherty chose his own hours of work.
38. Mr. Patriquin also testified that he never heard of the possibility of a wage subsidy for Mr. Docherty’s wages until late July. He thought a wage subsidy was a good thing, but he never completed arrangements for it, and CBI did not receive any wage reimbursement for any wages it paid to Mr. Docherty.
39. Mr. Patriquin contended that Mr. Docherty was not an employee and did not charge GST. He said that CBI only uses contractors and they sign a paper acknowledging that they are contractors and responsible for their own deductions. In the case of Mr. Docherty, however, CBI did not have him sign a paper saying he was a contractor. Nevertheless, CBI never took statutory deductions from Mr. Docherty’s wages and it did not provide him WorkSafe BC coverage.
40. The delegate notes that, at the hearing, Mr. Patriquin did not have any reason to dispute the dates and hours Mr. Docherty claimed he worked for CBI. Mr. Patriquin also claimed that he never told Mr. Docherty that CBI would not pay his final wages but rather wanted to negotiate his hours worked because he felt CBI was not getting value from him.

41. Having delineated the evidence of both parties, the delegate then went on to consider the *ESA* definitions of “employee” and “employer” and noted that while the *ESA* overrides the common law tests, the factors considered in the latter are helpful in examining the nature of the relationship between Mr. Docherty and CBI. In concluding that Mr. Docherty was an employee and not a contractor of CBI, the delegate reasoned as follows:

Character Builders selected the Complainant to work for it and, I find, intended that he supply his services personally. If he were a contractor, it would have been irrelevant to Character Builders who did the work it needed done. It directed him in his work, in person and in text messages. I find that it controlled his work as an employer does. I find that its interest in a wage subsidy supports a conclusion that he was an employee.

The Complainant supplied no tools. Character Builders paid him a fixed, hourly wage. I find that the Complainant had no ability to increase his income, or profit, by performing his work more efficiently and had no opportunity for profit from applying his own skills to his work. I find that the Complainant faced no financial risk from his work.

Character Builders hired the Complainant to work in a relationship without a defined end. Unlike contractors, engaged to perform a fixed amount of work, Character Builders hired the Complainant without any suggestion that his work was time-limited. I find that the Complainant's work for Character Builders was integral to its business.

In conclusion, I find that the Complainant was an employee of Character Builders and that the Act applies to his work for it.

42. Since Mr. Patriquin took no issue with Mr. Docherty’s record of days and hours worked for CBI, the delegate accepted Mr. Docherty’s records as the best evidence of his hours worked and went on to determine that CBI owed Mr. Docherty regular wages of \$2,225.00; overtime wages of \$168.75; statutory holiday pay of \$252.81; and annual vacation pay of \$343.36. The delegate also added interest of \$54.68, on the total amount, pursuant to section 88 of the *ESA*.

43. The delegate also levied mandatory administrative penalties against CBI of \$500.00, under section 29 of the *Regulation*, for each contravention of the *ESA* in respect of the employment of Mr. Docherty. More particularly, the delegate found that CBI contravened sections 18, 27, 40, 45, and 46 of the *ESA* and issued mandatory penalties totaling \$2,500 against CBI.

SUBMISSIONS OF CBI

44. In its Appeal Form, CBI has checked-off the “natural justice” and “new evidence” grounds of appeal in section 112(1)(b) and (c) of the *ESA*. However, CBI did not submit any written reasons and argument with its appeal. It did, however, submit a request to the Tribunal for an extension of the statutory appeal period to April 13, 2020. The Tribunal subsequently asked CBI to submit its written reasons and argument no later than 4:30 p.m. on May 13, 2020. However, CBI failed to do so. As at the time of writing this decision, CBI has not submitted its written reasons and argument for the appeal.

45. In the reasons in support of CBI's application for the extension of the statutory appeal period, Mr. Patriquin states:

I am hereby requesting an extension to the statutory appeal period. The reasons for this are:

1. I am currently undergoing an audit by the CRA
2. I am currently undergoing inspections by the District of North Vancouver of my workshop
3. I am currently awaiting hip replacement surgery, and am in constant pain, which makes dealing with official business difficult
4. We are still digging out evidence relating to this case, so we need more time.

The person in question made his own hours, I was trying to meet with him and work but he was busy doing something else. He worked 80% of the time at his home office. He made his own appointment times and was to only follow my list, which he did not. He did what and when he decided most of the time. He did not get back to me when I had questions of (sic) needed answers. He said not to take any deductions off his paycheque because he was going to do his own separate from CBI and that's how it went. When I asked him to meet me to see his progress and look at his charges he did not, he only went to the labour relations and refused to see me.

I am requesting an extension of the statutory appeal period of one month, to April 13, 2020. The CRA audit and shop inspections should be completed by then and I will be able to focus on this appeal at that time.

ANALYSIS

46. The grounds of appeal under the *ESA* are set out in section 112(1):

Appeal of director's determination

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.

47. The Tribunal has consistently held that 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, and the burden is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

48. Section 112(1) does 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.

49. It is also important to note that a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
50. Having delineated some of the relevant principles applicable to appeals, as previously noted, CBI has based its appeal on the “natural justice” and “new evidence” grounds. I have reviewed the Reasons, the Record, and the submissions from Mr. Patriquin, and I am not persuaded with the merits of CBI’s appeal. I dismiss CBI’s appeal for the reasons set out below.

Natural Justice

51. With respect to the natural justice ground of appeal, the often-quoted decision of the Tribunal in *Re: 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05, explains that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.
52. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.

53. There is nothing in the Record nor in Mr. Patriquin’s submissions that give the slightest hint of an infringement of CBI’s natural justice rights at any stage in the proceedings leading to the Determination. As indicated above, the onus is on the party alleging a failure to comply with principles of natural justice to provide some evidence in support of that allegation and, in this case, CBI has clearly failed to do so as it failed to deliver its written reasons and argument for the appeal by the deadline set by the Tribunal, namely, May 13, 2019. In the circumstances, I do not find any merit in CBI’s natural justice ground of appeal.

New Evidence

54. With respect to the “new evidence” ground of appeal, the Tribunal has consistently stated that the appellant relying upon this ground, at a minimum, must demonstrate that the evidence sought to be admitted as “new evidence” in the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal furthermore requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination. All of the foregoing

requirements are conjunctive requirements that the appellant must satisfy before "new evidence" will be admitted into an appeal (see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03).

55. While CBI has checked-off the "new evidence" ground of appeal in its Appeal Form, as with the natural justice ground of appeal, it has failed to adduce any evidence on appeal that would remotely qualify as "new evidence" under the four prongs of the "new evidence" test in *Re Merilus Technologies, supra*. Therefore, I find there is no merit whatsoever in the "new evidence" ground of appeal propounded by CBI.

Application for an extension of the statutory appeal period

56. As indicated in the Overview section of this decision, the deadline for CBI to file its appeal of the Determination was on March 13, 2020. On the same date, CBI filed an incomplete appeal application seeking an extension of the statutory appeal period to April 13, 2020. In its correspondence of April 15, 2020, the Tribunal asked CBI to provide its written reasons and argument for the appeal and any supporting documents by no later than 4:30 p.m. on May 13, 2020. However, CBI failed to comply with this direction. It is now over a month past the deadline the Tribunal set for CBI to provide its written reasons and argument for the appeal and no written submissions have been received.

57. While the question of the extension of the statutory period for filing CBI's appeal is likely moot at this stage, I note that I would not have granted CBI's extension application based on Mr. Patriquin's submissions in support of the extension application on March 13, 2020. My reasons follow.

58. Section 109(1)(b) of the *ESA* provides that the Tribunal may exercise a discretion to extend the deadline to file an appeal notwithstanding that the statutory time period has expired.

59. 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.

60. In *Re Niemisto*, BC EST #D099/96, the Tribunal defined the criteria that must be satisfied by an appellant for that discretion to be exercised. These criteria include:

1. there is a reasonable and credible explanation for the failure 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 respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this 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.

61. While I find criteria listed at points 2,3, and 4 in *Re Niemisto* above do not factor significantly into whether an extension ought to be given to CBI, I find criteria 1 and 5 particularly important and determinative in this case.
62. With respect to criteria 1, I am not persuaded with nor do I find Mr. Patriquin’s reasons for seeking an extension credible or reasonable. More particularly, I do not find CRA auditing CBI, or the District of North Vancouver inspecting CBI’s workshop or CBI needing more time because it is “still digging out evidence relating to this case” are good reasons to extend the statutory appeal period. To the contrary, I find that an extension of the appeal period for any of these reasons would only subvert the purposes and objectives of fairness, finality and efficiency set out in subsections 2(d) and (e) of the *ESA*.
63. As for Mr. Patriquin’s request for an extension of the statutory appeal period because he is “awaiting [a] hip replacement surgery” and “in constant pain” and unable to deal with “official business”, he has not supplied any corroborative medical evidence that suggests that he is unable to prosecute or participate in CBI’s appeal of the Determination because of his hip ailment. It is rather curious and telling that he is able to participate in the CRA audit of CBI and District of North Vancouver inspection of his workshop but not CBI’s appeal of the Determination. He says “[t]he CRA audit and shop inspections should be completed by then [April 13, 2020] and I will be able to focus on this appeal at that time.”
64. With respect to criteria 5, in *Re: C.G. Motorsports Inc.*, BC EST # RD110/12, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal in order to determine whether there is a strong prima facie case in favour of an Appellant:
- ... to the extent necessary to determine whether there is a “strong prima facie case” the Tribunal will examine the merits of the appeal. ... An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.
65. In this case, as indicated previously, the Tribunal provided CBI until May 13, 2020, to submit its written reasons and argument for its appeal and any supporting documents but CBI failed to do so. In the circumstances, and based on my review of the Reasons and the Record, I can unreservedly say that there is *not* a strong prima facie case in favour of CBI. Therefore, I would not have granted CBI any extension of the statutory appeal period.
66. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA* and alternatively, under section 114(1)(b).

ORDER

- ^{67.} Pursuant to section 115 of the *ESA*, I order the Determination dated February 4, 2020, be confirmed together with any interest that has accrued under section 88 of the *ESA*.

Shafik Bhalloo
Member
Employment Standards Tribunal