

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Western Wheelcraft Ltd.
("Western Wheelcraft")

- 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.: 2020/055

DATE OF DECISION: August 12, 2020

DECISION

SUBMISSIONS

Baldeep Gidda and Michael Prasad on behalf of Western Wheelcraft Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Western Wheelcraft Ltd. (“Western Wheelcraft”) has filed an appeal of a determination issued by Sukh Kaila, a delegate of the Director of Employment Standards (the “Director”), on July 3, 2019 (the “Determination”).
2. The Determination found Western Wheelcraft had contravened Part 3, section 18 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “Regulation”) in respect of the employment of Harpreet Singh (“Mr. Singh”). The Determination ordered Western Wheelcraft to pay Mr. Singh wages in the total amount of \$535.29, an amount that included interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$1,535.29.
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 April 20, 2020. The statutory time period for filing an appeal of the Determination expired on August 12, 2019. In other words, the appeal was late by more than eight months. Western Wheelcraft has requested an extension of the appeal period.
5. The appeal does not contain a copy of the reasons for the Determination, as none were provided with the Determination and Western Wheelcraft did not request them, as it was entitled to do under section 81(1.1) of the *ESA*.
6. In correspondence dated April 27, 2020, 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.
7. The record has been provided to the Tribunal by the Director and a copy has been delivered to Western Wheelcraft and Mr. Singh. 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.
8. 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 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 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.

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Singh 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

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

THE FACTS

11. Western Wheelcraft operates a mobile automotive wheel painting business in Burnaby, BC.
12. Mr. Singh filed a complaint with the Employment Standards Branch (the “Branch”) alleging he was employed by Western Wheelcraft from December 11 to December 18, 2018, and had not received all wages owed to him.
13. The record shows a copy of the complaint was sent to Western Wheelcraft by e-mail on March 25, 2019.
14. On April 4, 2019, a Demand for Employer Records and a Notice of Complaint Hearing was sent to Western Wheelcraft and its officers/directors by registered mail.
15. The record does not show there was any response from or discussion with any representative of Western Wheelcraft or any its officers/directors concerning the complaint.

16. Some of the registered mail was claimed and for that which was not claimed, I am satisfied from the record that Western Wheelcraft was aware of it and chose not to claim it. Section 122 of the *ESA* would operate to deem service.
17. It appears from the record that Western Wheelcraft failed or refused to respond to the communications, notices and the demand issued by the delegate.
18. At the conclusion of the complaint process, the Director found Mr. Singh was owed wages in the amounts set out in the Determination, that Western Wheelcraft had contravened section 18 of the *ESA*, and that Western Wheelcraft had contravened section 46 of the *Regulation*.

ARGUMENT

19. Western Wheelcraft has grounded this appeal in evidence becoming available that was not available when the Determination was being made. However, no supporting documents or any supporting material that might be presented as “evidence that has become available” are attached to the appeal.
20. Western Wheelcraft submits the Director did not have sufficient information to decide the complaint, asserting, falsely, that Western Wheelcraft was never notified of the complaint and no person in authority was ever contacted in respect of Mr. Singh’s claim.
21. Western Wheelcraft says there was never a proper investigation by the Director into the claim.
22. Western Wheelcraft also submits Mr. Singh was never an employee and alleges his claim is false
23. I will note at this stage, that none of the assertions made in the appeal submission are “evidence” and, in any event, they all could have been made to the Director in the complaint process had Western Wheelcraft participated.
24. In support of its request for an extension of the statutory appeal period, Western Wheelcraft says it was their intention to file appeals on “all matters on all files to the tribunal”.

ANALYSIS

25. The Tribunal may dismiss an appeal without a hearing if the appeal is not filed within the statutory appeal period: see section 114(1)(b).
26. 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.

27. 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:
- 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.
28. 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.
29. I am singularly unimpressed by the request for an extension of the appeal period provided by Western Wheelcraft. I find it neither reasonable nor credible.
30. The Determination clearly and obviously sets out the relevant dates for meeting the statutory time period for an appeal.
31. The requested extension is for nearly eight months; there is no explanation for that delay. While Western Wheelcraft says it was always their intention to appeal the Determination, their silence on this “intention” for an inordinately long period of time and the length of the delay itself speak against this excuse.
32. The criteria listed at points iii. and iv., above, do not factor significantly into whether an extension ought to be given to Western Wheelcraft.
33. My finding on the final factor is important.
34. When considering the *prima facie* strength of the case presented by Western Wheelcraft in a 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.
35. When examining the merits of this appeal, the appropriate starting point is the grounds of appeal in the *ESA* and a consideration of the principles developed and applied to appeals generally as they relate to the appeal under consideration. 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.

36. 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.

37. Western Wheelcraft has grounded this appeal in evidence becoming available that was not available when the Determination was being made. This ground of appeal is commonly described as the “new evidence” ground of appeal.

38. The Tribunal has discretion to accept or refuse new evidence.

39. 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. Stating the above principles or performing an analysis of their applicability to this case is unnecessary as Western Wheelcraft has provided no additional evidence – new or otherwise – in support of its appeal. The assertions made by Western Wheelcraft in its appeal submission are nothing that could not have been advanced during the complaint process.

41. Western Wheelcraft has utterly failed to establish any merit to this ground of appeal and cannot possibly succeed in persuading the Tribunal there is an error in the Determination.

42. In addition to there being absolutely no merit to the chosen ground of appeal, 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, which says 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.

43. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. The Director cannot be said to have “erred” in a fact-finding process that Western Wheelcraft failed or refused to participate in.

44. The facts of this case are similar to those in *Kaiser Stables Ltd., 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, although the difference here is that no new evidence at all is presented with this appeal. Nevertheless, the Tribunal's statement that it "will not to allow an employer to completely ignore the Director's investigation and then appeal its conclusions" is apt and applicable to this case.
45. The lack of a response of Western Wheelcraft to the complaint process and their refusal to comply with the Demand for Employer Records while contending the Determination is wrong on matters concerning the employment of Mr. Singh persuades me that Western Wheelcraft should not be allowed to challenge the Determination in this appeal.
46. 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

47. Pursuant to section 115 of the *ESA*, I order the Determination dated July 3, 2019, be confirmed in the amount of \$1,535.29 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal