

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Target Secure Tech Inc.
(the “Appellant”)

- 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: Ryan Goldvine

FILE No.: 2021/033

DATE OF DECISION: July 13, 2021

DECISION

SUBMISSIONS

Avtar Singh Khurana

on behalf of the Appellant

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Target Secure Tech Inc. (the “Appellant”) of a determination made by Dan Armstrong, a delegate of the Director of Employment Standards (the “Director”), on March 6, 2020 (the “Determination”).
2. The Determination concluded that wages and interest were owing to Manpreet Singh Dhall (the “Complainant”) in the amount of \$4,890.18, and that administrative penalties were owing in the amount of \$1,500.00 for contraventions of section 17 and 18 of the *ESA*, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”).
3. The Tribunal received the appeal on April 13, 2021 (the “April submission”). The Appellant sought an extension of the statutory appeal period to May 7, 2021 and sought to overturn the Determination on the basis that evidence has become available that was not available at the time the Determination was being made.
4. On April 30, 2021, the Tribunal acknowledged receipt of the Appeal and confirmed that written reasons for the Determination (the “Reasons”) had been requested of the Appellant but had not been received by that date.
5. On May 21, 2021, the Appellant’s representative filed a further submission with the Tribunal (the “May submission”).
6. I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made (the “Record”).

ISSUE(S)

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

ARGUMENT(S)

8. The Appellant requested an extension to the statutory appeal time limit to May 7, 2021 and cites section 112(1)(c) as the ground for appeal that “evidence has become available that was not available at the time the determination was being made.”
9. The Appellant has not provided reasons for the delay in filing the appeal.

10. The evidence provided by the Appellant's representative as "new evidence" under section 112(1)(c) is presented as an invoice provided by the Complainant to the Appellant for his services (the "Invoice"), as evidence that the Complainant was not an employee, but instead an independent contractor. The Appellant's representative's May submission included an acknowledgement that some money was owing to the complainant, but not the amount claimed.
11. The Appellant's April submission included a copy of an email dated September 10, 2020, in which the Appellant's representative wrote to a subsequent delegate of the Director, who was engaged in collection actions against the Appellant. The Appellant's representative indicated that "Sandeep is apologizing for not responding to your letter earlier, He was not aware that this is an urgent matter until I call him for this urgency" and attached a copy of the Invoice to the email.
12. The Appellant's representative's May submission to the Tribunal, indicates that the Appellant's principal was "so much in depression; he did not even open the employment standard letter otherwise this should have been resolved in a first meeting". He also asserts that the Appellant's principal's depression was the result of the Complainant's efforts to be compensated by the Appellant.
13. The Appellant asks for the Determination to be overturned, indicating that "we would like to settle this, Target Secure owes him \$2000, please ask him to fix his invoice and we will pay him all at once".

ANALYSIS

14. Section 112(2) of the *ESA* provides that an appeal is not perfected unless an appellant files a completed appeal form and a copy of the Reasons with the Tribunal.
15. Subsections 81(1.1) - (1.3) of the *ESA* provide as follows:
 - (1.1) A person named in a determination under subsection (1) may request from the director written reasons for the determination.
 - (1.2) A request under subsection (1.1) must be in writing and delivered to the director within 7 days of the person being served with the copy of the determination under subsection (1).
 - (1.3) On receipt of a request under and in accordance with subsections (1.1) and (1.2), the director must provide the person named in the determination with written reasons for that determination.
16. I note that the Determination contains a notice regarding this procedural matter.
17. The Appellant indicated on the Appeal Form, included in its April submission to the Tribunal, that the Reasons were being submitted to the Tribunal; however, although requested to do so, the Appellant has not provided the Tribunal with a copy of the Reasons.
18. There is no indication in the materials before me that the Appellant requested the Reasons from the Director.
19. The Appellant was advised by the Tribunal of the opportunity to request written reasons for the Determination but does not appear to have made such a request.

20. 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.

21. As noted above, the Appellant has not provided the Tribunal with the Reasons. On the face of the Record, the issue before the Director was whether the complainant, Manpreet Singh Dhall, (the “Complainant”) was entitled to compensation for unpaid wages and interest flowing from his employment with Target Secure Tech Inc.

22. The Record shows that the initial delegate of the Director appeared to have made several attempts to engage with the Appellant by phone and email, scheduled a mediation session in October 2019, and set the matter down for a complaint hearing in January 2020. It is not clear on the face of the Record whether the Appellant attended the mediation or provided any meaningful reply to the allegations disclosed.

23. The Record also contains registered mail tracing indicating all but one of the pieces of registered mail correspondence to the Appellant were signed for.

24. Further, the email address being used by the initial delegate, and subsequent delegates, to contact the Appellant is the same email address indicated by the Appellant’s representative as the Appellant’s correct email address.

25. The Appellant provides no reasons for the over one-year delay in requesting the appeal.

26. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt with promptly: see section 2(d).

27. 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 the 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:
- 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.
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 the present appeal, the Appellant’s bald assertion that the Complainant’s actions caused the depression of Mr. Haror, the Appellant’s principal, and led to the delay in filing the appeal, is not supported by any evidence.
31. Accordingly, I find that no reasonable or credible explanation has been given for the failure to request an appeal within the statutory time limit.
32. This notwithstanding, even if I had accepted that there was a reasonable and credible explanation for the delay, I am not able to find that there is a strong *prima facie* case in favour of the Appellant.
33. When considering the *prima facie* strength of the case presented by the Appellant in this appeal, 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.
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 Appellant seeks to overturn the Determination under subsection 112(1)(c).
38. The Tribunal set out guidance on how this ground of appeal is to be assessed in *Re Davies et al.*, BC EST # D171/03. The Tribunal established a four-part test as follows:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
 - (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
39. In the present case, the Appellant has provided the Invoice as their evidence that the Determination should be overturned.
40. Although it is not determinative of precisely when the Invoice was provided to the Appellant, the Invoice is dated March 8, 2019, more than a year before the Determination was issued, and prior to the Complaint being filed in June 2019.
41. No assertions have been made by the Appellant to suggest that the Invoice was “new” or otherwise not in the Appellant’s possession on or about March 8, 2019. In fact, the Appellant’s May submission to the Tribunal indicates that the Appellant and Complainant argued about the contents of the Invoice prior to the Complainant filing their complaint with the Employment Standards Branch. Correspondingly, the Appellant does not appear to have taken the position before the Director at any time prior to the Determination that the Complainant was not an employee.
42. Further, although the Invoice was provided by the Appellant’s representative to a delegate of the Director in September 2020, the Appeal was not filed until April 2021. Not only are reasons for not providing the Invoice between the date of the Determination and September 2020 absent, there is no explanation for the further delay from September 2020 to April 2021, when this appeal was filed.
43. Accordingly, I am unable to find that the first criterion of the test has been met, that the evidence could not have been discovered and presented to the Director during the investigation or adjudication of the Complaint. It appears, instead, that the Appellant simply failed or refused to participate, although there were several opportunities to do so, when the delegate reached out by telephone and email, or when either mediation or the complaint hearing were scheduled.

44. For all the foregoing reasons, the Appeal is dismissed.

ORDER

45. The Appellant's request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b).

46. Further to this, the appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period and under section 114(1)(h) for not meeting the requirements of section 112(2).

47. In the alternative, even if the Appellant had been granted an extension to the statutory appeal period, the appeal is nevertheless dismissed under section 114(1)(f) as disclosing no reasonable prospect of success.

48. Pursuant to section 115 of the *ESA*, the Determination dated March 6, 2020, is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal