

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Cameron Rose
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Richard Grounds

FILE No.: 2023/091

DATE OF DECISION: November 15, 2023

DECISION

SUBMISSIONS

Cameron Rose on his own behalf

OVERVIEW

1. This is an appeal by Cameron Rose (“Appellant”) of a determination issued by Michael Thompson, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), dated March 23, 2023 (“Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Delegate concluded that Cameron Rose was owed wages by Key-West Asphalt (333) Ltd. and Summit Traffic Services Ltd (the “Employer”). The Determination was sent to the Appellant by registered mail and by email, and the Determination stated that the deadline to appeal the Determination was 4:30 pm on May 1, 2023.
3. The Appellant submitted an incomplete appeal submission by fax on May 1, 2023, at 7:07 pm. The appeal submission was received by the Tribunal on May 2, 2023. The Appellant submitted that evidence had become available that was not available at the time the Determination was made and included two pages of handwritten numerical notations and a delivery receipt dated November 29, 2021.
4. The Appellant requested an extension of time to May 10, 2023, to submit documents and reasons for his appeal, including the Determination itself, which was later received on June 20, 2023.
5. Submissions were not requested from the parties.
6. I have considered the Determination, the reasons for the Determination, the appeal submissions and the ESA section 115 record (“Director’s Record”). For the following reasons, the Appellant’s request for an extension of time to file the appeal is denied.

ISSUES

7. The issue to be decided in this appeal is whether to grant an extension of time to file the appeal.

FACTUAL BACKGROUND

8. The Employer operates two companies in British Columbia, Key West Asphalt (333) Ltd. (“Key West”) which is an asphalt and paving company and Summit Traffic Services Ltd. (“Summit”) which is a flagging and traffic control company. The Appellant was hired by Summit to work at a lane-widening site on the Trans-Canada Highway in Langley, BC starting in November 2021. The Appellant lived on site in a travel trailer and would open the gate for persons who needed access to the site after hours. The Appellant’s hours were recorded under both companies depending on the duties performed. The Appellant’s employment ended on December 10, 2021.

9. On December 10, 2021, the Appellant made complaints to the Employment Standards Branch against both Summit and Key West. The Appellant claimed he was owed wages because the Employer did not pay him the agreed upon hourly wage, the Employer did not pay him a living out allowance, the Employer did not pay him as a night watchman when he lived on site, and the Employer did not pay him for work he did on December 8 to 10, 2021.
10. The Complainant's complaint proceeded to an investigation which was conducted by Lauren Thompson, a delegate of the Director ("Investigating Delegate"). The Investigating Delegate spoke with the Appellant, a witness who was employed as a general superintendent for the Employer and representatives for the Employer. The Investigating Delegate informed the Appellant that the complaint for a living out allowance was an allowance and not related to work.
11. On February 14, 2023, the Investigating Delegate sent an Investigation Report to the Appellant and to the Employer. The Investigation Report contained a summary of the information obtained for the investigation including the information from the Appellant, the witness and the Employer. The Investigation Report noted that the Appellant and the Employer disputed the Appellant's rate of pay, whether the Appellant was hired as a nightwatchman and whether the Appellant worked on December 8-10, 2021. The Investigation Report included various references to timesheets and the Foreman's Daily Reports and a list of documents obtained for the investigation.
12. The Appellant provided a response to the Investigation Report and additional information including photographs of pay stubs, a travel trailer and a traffic control trailer.

THE DETERMINATION

13. The Delegate completed the Determination based on "a review of all information on the file, which includes the investigation report (the IR) issued on February 14, 2023, summarizing the information collected from the investigation." The Delegate considered a preliminary matter and concluded that Summit and Key West were associated employers pursuant to section 95 of the *ESA* and were jointly the Employer.
14. The Delegate identified the three issues as: what was the Appellant's rate of pay, what hours did he work and had the employer paid for all of those hours. The Delegate accepted that the Investigation Report accurately reflected the evidence and position of the parties and only referenced in the Determination the evidence necessary to reach the required findings.
15. The Delegate found that the Appellant's rate of pay was \$25 per hour and \$27 per hour for night work. The Delegate found that the Appellant had worked on December 8-10, 2021, and was owed wages for those hours worked.
16. The Delegate found that the Appellant provided services to the Employer by providing site access after hours but that he was only entitled to wages when he actually performed services by opening the gate to allow physical access and at all other times he would not have been working because he was in his "residence." Accordingly, the Delegate found that the Appellant was not entitled to wages for eight hours per night that he spent on the work site.

17. Regarding opening the gate, the Delegate accepted the Appellant's evidence that he opened the gate 8 or 9 times and, in the absence of evidence from the Appellant or the Employer, estimated that this would have taken an additional 10 minutes per occasion for a total of an additional 1.5 hours of work.
18. The Delegate concluded that the Appellant was owed additional wages in the amount of \$1,026.06 including wages, annual vacation pay and accrued interest. The Delegate imposed a mandatory administrative penalty against the Employer for failing to pay the Appellant all of his outstanding wages within 48 hours of the end of his employment.

ARGUMENTS

19. The Appellant submitted in his appeal form (received May 2, 2023) that evidence had become available that was not available at the time the Determination was made and included two pages of handwritten numerical notations and a delivery receipt for a company that dropped off jersey barriers on November 29, 2021. The handwritten notations are not explained but appear to repeat the Appellant's position that he is entitled to wages based on \$30 per hour, for time that he worked as a nightwatchman and for a living out allowance.
20. The delivery receipt for November 29, 2021, appears to be for a company that dropped off some jersey barriers at the work site in Langley, BC. The receipt has the "Time In" as "5:00" and the "Time Out" as "5:36" and it appears that the Appellant may have signed for the delivery with the title "Security".
21. The Appellant's May 2, 2023, appeal submissions did not include any reasons for why he needed an extension of time. The Appellant subsequently provided the Determination on June 20, 2023, when he sent the Tribunal the following email (verbatim):

sorry for the delay sending determination letter and reasons for appeal review. Discussions with Rickie/Karen on paper was being negotiated and Cameron miss placed drafted wages figures and was not submitted in the employment standards complaint application against Keywest Asphalt/Summit Traffic. Cameron was fired /terminated unfairly while doing 2 jobs in a 24 hour period. Investigation over looked wage rate for scorpion truck driver! and weekend/dayshift watchmen doing on site security. The law of gathering all evidence for employee wasn't submitted. Employer tried lying about vehicles stolen. ICBC investigator contacted Mr. Cameron Rose to clarify conditions of company trucks used to tow scorpion trailer for night shift work from 7pm-7am and sometimes Saturdays 8am. I'm complaining about lack of contract hours signed with Ministry of Highways and Summit Traffic/Keywest Asphalt wasn't investigated properly. Cameron always started work opening gated turning on generator light plants between 630-7pm 6 days a week.

22. The Appellant provided additional comments and submissions for his appeal as follows:
 - Three emails on August 23, 2023, in response to an August 2, 2023, email from the Tribunal providing the Appellant with various appeal documents as part of the appeal process.
 - Three emails sent on September 8, 2023 (received on September 11, 2023), in response to September 6, 2023, emails from the Tribunal providing the Appellant with various appeal documents as part of the appeal process.

- Two emails sent on September 25, 2023 (received on September 26, 2023), in response to a September 25, 2023, email from the Tribunal confirming a Panel had been assigned to decide the appeal.

23. The Appellant's email submissions on June 20, 2023, August 23, 2023, September 6, 2023, and September 25, 2023, did not include any reasons for why he needed an extension of time to file his appeal.

ANALYSIS

24. The deadline for the Appellant to file his appeal was May 1, 2023, at 4:30 pm. The Appellant submitted an incomplete appeal by fax in the evening of May 1, 2023, which, according to the Tribunal's *Rules of Practice and Procedure*, was not received until May 2, 2023. In his appeal form, the Appellant requested an extension of time to May 10, 2023, to provide additional reasons and arguments for his appeal and more documents for his appeal. The appeal form confirmed that the Appellant's appeal submission was not complete and that he required additional time to provide the Determination, reasons and argument and supporting documents.

25. The Appellant did not provide the Determination, reasons and argument or supporting documents by May 10, 2023. The Appellant provided the Determination on June 20, 2023, and made various other submissions on subsequent dates in August and September 2023. The Appellant did not provide any reasons why he needed an extension of time.

26. The Appellant has appealed the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. Given the Appellant did not file his appeal form before the deadline on May 1, 2023, and did not provide the other required documents for his appeal until well after this date, it must first be decided whether to grant the Appellant an extension of time to file his appeal.

Extension of statutory appeal period

27. The Appellant has requested an extension of time to the statutory appeal period to file his appeal.

28. Section 114(1)(b) of the *Employment Standards Act* provides that the Tribunal may dismiss all or part of an appeal if the appeal was not filed within the applicable time limit. There is no automatic right to an extension of the time limit to appeal. In *Niemisto* (BC EST # D099/96) the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:

- 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 as the Director, has 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 Appellant has not provided any reasons why he could not file his complete appeal before the deadline of May 1, 2023, at 4:30 pm. Given this lack of information, it is difficult to assess whether there has been a genuine, and on-going *bona fide* intention to appeal the Determination or that the Employer and Director were made aware of this intention. Aside from not being able to rely on the certainty of process, it does not appear that the Employer would be unduly prejudiced by the granting of an extension.
30. The final and determining factor in relation to the Appellant's request for an extension of time relates to whether there is a strong *prima facie* case in favour of the Appellant.
31. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.* BC EST # D171/03 where it stated (at page 3):
- We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
- (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.
32. The first stage of the test for admitting new evidence on appeal requires that 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. As part of his appeal, the Appellant has submitted two pages of handwritten numerical notations and a delivery receipt for a company that dropped off jersey barriers on November 29, 2021, possibly containing the Appellant's signature and handwritten title of "security".
33. The Appellant has not provided any reasons for why these documents could not have been discovered and presented prior to the Determination being made. It is reasonable to infer that the handwritten notations could have been drafted before the Determination was made because they do not appear to contain any new information but instead appear to be a repetition of the Appellant's position about what he was owed. The delivery receipt, purporting to show that the Appellant signed for some jersey barriers

that were dropped off at the work site on November 29, 2021, appears to have been in existence since that date and, therefore, could have been discovered with due diligence.

34. Given the handwritten notations and November 29, 2021, delivery receipt could have been discovered and presented with due diligence before the Determination was made, the first condition of the test to admit new evidence has not been met.
35. It is unclear exactly how this information is relevant but the November 29, 2021, delivery receipt could possibly be relevant to show that the Appellant worked at the work site opening a gate on November 29, 2021, where the visitor was present for 36 minutes (from 5:00 to 5:36). There is no indication, however, whether this delivery was at 5:00 am or 5:00 pm or exactly what the Appellant did during this time and if he did even open the gate.
36. The Appellant's timesheet for November 22, 2021, to December 5, 2021, recorded that he worked 4 hours on nightshift on Monday, November 29, 2021.¹ The corresponding time slip No 222 for November 29, 2021, recorded that the Appellant worked 4 hours from 7:30 pm to 5:30 am including "gates".² It is unclear whether the Appellant was in fact working when the delivery was made on November 29, 2021.
37. The Appellant's primary position was that he was employed as a nightwatchman (and deserved to be paid 8 hours per night that he lived on site), but the investigation and the Determination considered this in detail and concluded that the Appellant was residing on site and, therefore, only entitled to wages for the occasions he actually worked. The Delegate estimated that the Appellant would have spent 10 minutes on each occasion when he opened the gate after hours. Although the November 29, 2021, delivery receipt may be reasonably capable of belief, it does not clearly contradict the Delegate's finding about the Appellant opening gates.
38. Given the evidence and the factors noted, I am not satisfied that there is a strong *prima facie* case in favour of the Appellant.
39. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

ORDER

40. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1)(a) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal

¹ Page 120 of the Director's Record.

² Page 84 of the Director's Record.