Employment Standards TRIBUNAL

An appeal

- by -

Curtyn Construction Ltd.
("Curtyn")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/785 and 2001/873

DATE OF DECISION: January 3, 2001

DECISION

OVERVIEW

This decision arises from an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Curtyn Construction Ltd. ("Curtyn") of a Determination that was issued on October 15, 2001 by a delegate of the Director of Employment Standards (the "Director"). The Determination concluded that Curtyn had contravened Part 3, Sections 16 and 17, Part 4, Sections 34 and 40 and Part 11, Section 90 of the *Act* and Section 5 of the *Skill Development & Fair Wage Act* (the *"SD&FWA")* in respect of the employment of several employees, Jason Bell, Ryan Brown, James N. Kelly, Terrance K. Mark, Dave Martin and Perry Twyman and ordered Curtyn to cease contravening and to comply with the *Act*, its *Regulations* and the *SD&FWA* and to pay an amount of $39,401.42.

Curtyn says the Determination is in error in its calculation of the amounts owed to Brown, Kelly, Mark, Martin and Twyman and denies there was any indebtedness to the person in respect of whom the Third Party Demand was made at the time such demand was served. Curtyn has also filed an application under Section 113 of the *Act* to suspend the effect of the Determination.

The appeal was filed late. This decision will address whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time for requesting the appeal and, if the extension of time is granted, whether the Tribunal will suspend the effect of the Determination pending a decision on the merits of the appeal and, if so, on what terms.

FACTS

The facts warrant some analysis.

Curtyn is a construction company. A delegate of the Director visited construction sites on which Curtyn was performing work. The sites visited included a work site identified as the Coast Meridian Elementary School site. The work on this project was governed by the provisions of the *SD&FWA*. The delegate found that some of the requirements of the *SD&FWA* were being contravened. Some employees indicated they were not being paid the fair wage rate. On October 25, 2000, the Director received a complaint from James N. Kelly ("Kelly"). Kelly alleged he had not received fair wage or overtime from Curtyn in over a year. The Director issued a Demand for Records in respect of this complaint. The employer failed to comply with the Demand and a Penalty Determination was issued for that failure. There was no appeal of that Determination. On May 2, 2001, the Director received a complaint from Terrance K. Mark ("Mark"). Mark alleged he had not been paid the fair wage rate. The Director issued another Demand for Records on May 25, 2001 and that Demand was followed up with a reminder, sent by facsimile on June 12, 2001. No records were received. A penalty Determination was issued and not appealed. Two other penalty Determinations were issued elating to the failure to

produce records. Neither was appealed. The Determination notes that on October 2, 2001, Curtyn was sent a 'preliminary findings letter' by the Director. That letter included the following comments:

> The employer's records provided to date are incomplete. The employer has been advised of the shortcomings of the records and further demands have been made to encourage the production of complete records. Credible records have not been produced. The employer has been served with penalty Determinations and has not appealed those Determinations.
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> . . .
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> I visited Coast Meridian Elementary School site when other employees than those present on September 26, 2000 were on site. I clarified in cover sheets of Demand for Records to the employer that the Demand was for a longer pay period and was for all employees that were on site. The employer did not respond. Based on this failure to respond to provide complete records, failure to clarify or withdraw apparently false statements made as part of the employer's record and failure to provide records for when employees were established to have been on site by my physical presence, I have no confidence in the credibility of the employer's records. I draw a negative inference from the employer's failure to provide records. I find the employer's records not reliable and not credible.

There was no attempt to respond to that letter until after the Determination was issued.

The Determination contains the following comment:

> The employer's response has been providing incomplete records followed by failure to respond.

Under the findings of fact, the Determination states:

> Assessing the details of Curtyn's records I have asked for complete records and they have not been provided. The incomplete records provided do not include employees hours of work, including daily start and finish times. Rates of pay and benefits are not shown in a believable manner. Inconsistencies and falsehoods were pointed out to the employer. When invited or demanded to provide more or better information, Curtyn chose not to participate. . . . The only portion of the employer's records that appear reliable are the negotiated cheques.

In the appeal, Curtyn says:

> With respect to Jim Ross's allegation that I failed to provide adequate and/or incomplete records, I say that I did my best meet [sic] his every demand, but

> found the process very frustrating and time consuming, as each time I thought I had provided him with what he wanted, he either said he didn't accept it, or requested more records, which I didn't have.

That is the only reference in the appeal, or in the documents supporting the appeal for the failure of Curtyn to provide the records requested and demanded by the Director.

The appeal attaches a letter dated October 24, 2001, from counsel for Curtyn to the Director, which asks the Director to vacate the Determination and allow Curtyn to respond to the October 2, 2001 letter. In that letter, counsel states:

> We would like the opportunity to present to you our client's position and in effect provide you with the responses our client should have made earlier. If, after receiving and reviewing our submission, you remain of the same opinion as set out in the Determination of October 15, 2001, then you would be free to confirm that Determination. However, in the meantime, this would allow our client to provide a proper response to you and to put before you the written and other materials that it has in support of its position, so that it would not be prejudiced by its absence in pursuing an appeal . . .

Counsel also referred to an attachment order that had been served on Curtyn's bank account.

In the appeal, Curtyn says that all the employees included in the Determination were properly paid, except Mark, and has attached letters from Kelly and Perry Twyman to that effect. In respect of Mark, the appeal states that, while accepting Mark was not paid the proper wage rate, Curtyn says "the hours may be incorrect", but that cannot be confirmed without reviewing the records given to the Director. This is an odd statement since the Determination says no record of hours of work were ever provided by Curtyn.

In early 2001, a delegate of the Director visited the Coast Meridian Elementary School site and found a person on site working for Richard A. McKie operating as A Step Above Construction ("McKie"), against whom the Director had an outstanding Determination in the amount of $6,705.69. Subsequent investigation uncovered that the sub-contractor supplying the employee was Curtyn. Believing that Curtyn might be indebted to McKie, a Third Party Demand, pursuant to Section 89 of the *Act* was served on Curtyn. Follow up faxes to the Third Party Demand were sent on April 18, 2001 and June 12, 2001. Curtyn neither denied indebtedness to McKie nor did he send any funds in response to the Third Party Demand.

In the appeal, Curtyn has denied any indebtedness to McKie as of the date the Third Party Demand was served and has provided a letter from McKie, but no other documents or records, to that effect.

ARGUMENT AND ANALYSIS

Curtyn says the Tribunal should extend the time for the following reasons:

1. Curtyn formed an immediate intention to appeal the Determination;

2. One of the reasons for the delay was the difficulty in obtaining evidence necessary for the appeal;

3. As well, Curtyn was waiting for a response to the October 24, 2001 letter to the Director;

4. The delay was only two days, and was caused by the inadvertence of Curtyn and counsel for Curtyn to realize the appeal date had passed;

5. There would be no prejudice to the respondents; and

6. Curtyn has a strong case that would likely succeed on appeal.

The Director opposes the extension, submitting that no good reason has been provided by Curtyn. The Director says that a response to the letter of October 24, 2001 was provided on October 25, 2001, indicating the Tribunal was the proper place to file an appeal. The Director submits there is no evidence of an intention by Curtyn to appeal the Determination. The Director notes there was no response from Curtyn until collection action was commenced. Curtyn had not appealed any of the four penalty Determinations issued by the Director for failure to produce proper records. The Director says Curtyn has no good case on appeal.

None of the persons affected by the Determination have responded.

The Tribunal has consistently held that it will not grant extensions under Section 109(1)(b) of the *Act* as a matter of course and will exercise its discretionary powers only where there were compelling reasons to do so (see, for example, *Re Metty M. Tang*, BC EST #D211/96). In deciding whether "compelling" reasons exist in a particular request for an extension, the Tribunal's decision in *Re Niemisto*, BC EST #D99/96, stated the following:

> Certain common principles have been established by various courts and tribunals governing when, and under what circumstances, appeal periods should be extended. Taking into account the various decisions from both courts and tribunals with respect to this question, 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:
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> 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[1].

The above criteria are not intended to constitute an exhaustive list. Adjudicators may find that in particular cases, certain other, perhaps unique factors ought to be considered.

I am not convinced this is an appropriate case to exercise my discretion in favour of extending the time for requesting an appeal, notwithstanding the delay is only two days.

I accept there is a reasonable and credible explanation for the delay in requesting the appeal. However, against that supporting factor, I do not accept Curtyn has demonstrated an ongoing and bona fide intention to file an appeal. Nor do I accept that the granting of an extension of the time limits in this case will not unduly prejudice the respondent parties. Finally, and most significantly, Curtyn has not demonstrated a prime facie case in their favour.

Curtyn believes the Determination "resulted largely" from a failure to respond to the letter of October 2, 2001. That assumption would be incorrect. It is, however, apparent that many of the findings made in the Determination were the result of a continuing pattern of failure and/or refusal by Curtyn to participate and cooperate in the investigation generated by the complaints of Kelly and Mark. This failure resulted in the issuance of four penalty Determinations for not providing proper records, none of which have been appealed. Even in the appeal itself, Curtyn has neither provided nor offered to provide records to support its 'evidence' that the persons affected by the Determination have been properly paid. Curtyn even has the temerity to suggest, in respect of Mark, that its appeal depends on reviewing records in the possession of the Director that were never, on the face of the Determination, provided to the Director.

The Tribunal has decided in many appeals, commencing with its decisions in *Tri-West Tractor Ltd.*, BC EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97, that a prospective appellant will not be allowed to 'sit in the weeds', failing or refusing to cooperate with the delegate in the investigation of a complaint, and later seek an appeal of the Determination when they disagree with the result. Nor will the Tribunal re-hear the merits of an appeal based on information that could have and should have been provided to the delegate. There were many ways in which Curtyn could have responded to the demands of the Director between February, 2001 and

[1] See also the comments in *Re Berg*, BC EST #D212/97 in respect of this factor.

October, 2001, including having the employees communicate directly with the Director, but they did not. I do not accept, on the face of the information in the Determination, that Mr. Harriot, the principal of Curtyn, did his best to meet the demands of the Director. To suggest there is any merit to this appeal at all would countenance plain and obvious defiance Curtyn has demonstrated for the requirements and processes of the *Act* and the authority of the Director.

As a result of my refusal to extend the time for requesting an appeal, the appeal is dismissed.

There is no need to address the application under Section 113 of the *Act* in any detail, but I would add that even if I were to have allowed this appeal to proceed, there would be no suspension of the effect of the Determination under Section 113 of the *Act* without payment of the full amount of the Determination.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 15, 2001 be confirmed in the amount of $39,401.42, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal