

An appeal

- by -

Brian Link
(the “Appellant”)

- 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 (as amended)

TRIBUNAL MEMBER: Philip J. MacAulay

FILE No.: 2006A/68

DATE OF DECISION: January 4, 2007

DECISION

SUBMISSIONS

Brian Link	on his behalf
Deborah Sures	on behalf of Deborah Sures operating as Qi Design
Amanda Clark Weber	on behalf of the Director of Employment Standards

OVERVIEW

1. This is the appeal of Brian Link (the “Appellant”) pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against determination No. ER139-765 (the “Determination”) issued by the Delegate of the Director of Employment Standards (the “Delegate”) on April 13, 2006.
2. The Delegate found that the Respondent Deborah Sures (operating as Qi Design) had secured a contract from a private college for development of the curriculum for a program at the college. It was determined that some assistance would be required to fulfil the contract. The Appellant was subsequently engaged to provide some of the curriculum required for the course. There was never a written contract or employment agreement between either the college or the Respondent Sures and the Appellant. The Appellant was not paid for his efforts and filed a claim under the *Act* seeking wages. In her Determination, the Delegate decided that the *Act* did not apply to the complaint and that no further action would be taken. The Delegate had concluded that the Appellant was an independent contractor.
3. The Delegate sent a copy of the Determination to the Appellant by registered mail on April 13, 2006. Canada Post records indicate that the Appellant acknowledged delivery on that date.
4. The Appellant delivered a request for an appeal of the Determination on May 26, 2006.
5. Section 112 of the *Act* provides that an appeal of a Determination must be based on one or more of three 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.”
6. On his Appeal Form the Appellant ticked all three grounds and added words to each of (a) - (c) respectively as follows:
 - a) “, common sense”
 - b) “No statement of truth from College and Ms. Sures!”
 - c) “Writer [of Determination] did not state ‘all facts’ only selected some!”

7. The Appellant did not at that time include his “explanation on a separate sheet of paper” of his grounds of Appeal as requested in the appeal form.
8. As well, the Appellant did not attach a copy of the “director’s written reasons for the Determination” to his Appeal Form as required by section 112(2)(a)(i.1) nor any detailed appeal submission on why his appeal should be allowed.

PRELIMINARY ISSUE

9. The preliminary issue now before the Tribunal is whether or not an extension of time within which an appeal may be requested, as provided in section 112 of the *Act*, will be granted to the Appellant pursuant to section 109(1(b)).
10. Section 112(2) and 112 (3) of the *Act* provide as follows:
 - “112(2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
 - (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
 - (i.1) a copy of the director’s written reasons for the determination, and
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (b) deliver a copy of the request under paragraph (a)(1) to the director.”
 - “112(3) The appeal period referred to in subsection (2) is
 - (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).”
11. With respect to the computation of the 30 day appeal period, section 122(1) and 122(2) provide:
 - “122(1) A determination or demand that is required to be served on a person under this *Act* is deemed to have been served if,
 - (a) served on the person, or
 - (b) sent by registered mail to the person’s last known address.
 - (2) If service is by registered mail, the determination or demand is deemed to be served 8 days after the determination or demand is deposited in a Canada Post Office.”
12. This Tribunal has earlier determined that the last day by which the Appellant could deliver his request for an appeal was May 23, 2006.
13. Accordingly, the Appellant’s delivery on May 26, 2006 of his request for an appeal was a few days past the end of the appeal period.

FACTS AND ARGUMENT

14. By letter of June 1, 2006 the Tribunal “as requested” by the Appellant, provided a copy of the Tribunal’s Rules of Practice and Procedure to the Appellant.
15. Rule 8 of the Employment Standards Tribunal Rules of Practice and Procedure provides that:
- “8 (3) If you file an appeal after the appeal period, the Tribunal will ask you to submit a request in writing to extend the appeal period.
- (4) Your request for an extension of the appeal period must include reasons why you did not file on time. It must also include any other information the Tribunal asks for. You must deliver the request for an extension of the appeal period by the time and date given to you by the Tribunal.
- (5) If you do not deliver your request for extension within the time allowed, or if you fail to comply with the directions given, the Tribunal may dismiss the appeal without a hearing of any kind and without notifying any other party.”
16. By letter dated May 29, 2006 the Vice-Chair of the Tribunal wrote to the Appellant noting the late filing of the Request and advised him of the provisions of section 109(1)(b) of the *Act* whereby he might seek an extension of time. The Vice-Chair advised that, in making a decision to extend or not, “the Tribunal looks at the following main factors”:
- “1. Is there a good reason why you could not submit an appeal before the deadline?
2. Is there an unreasonably long delay in filing the appeal?
3. Did you always intend to appeal the Determination?
4. Were other parties – such as the Respondent (Deborah Sures operating as Qi Design) and the Officer who wrote the Determination – aware that you intended to appeal?
5. Would extending the appeal deadline harm the Respondent’s case?
6. If the Tribunal grants an extension, do you have a strong case that might succeed?
- We cannot make a fair assessment unless you provide the reasons why your appeal was late and why the Tribunal should extend the appeal deadline. Please submit your reasons in writing. The Tribunal will share this information with the other parties and ask them to submit a response on the delay. The Tribunal will then consider whether to extend the deadline and accept the late appeal.
- Please ensure that your submission is received by the Tribunal no later than 4:30 p.m. on June 13, 2006.** If you do not respond by then, the Tribunal will be unable to proceed with your appeal.”
17. The Appellant responded to the Tribunal’s May 29, 2006 letter by letter dated June 1, 2006 which was received by the Tribunal on June 2, 2006. In this letter the Appellant stated that (and I paraphrase):
- the Appeal had not been sent in on time because he did not have the necessary money to send the document by registered mail. As well, he did not allow time for delivery by regular mail because the Appeal Form did not draw that contingency to his attention. He says he would have been able to deliver the document on time if a stamped envelope had been provided to him.
18. It is to be noted that the appellant did not sign the Appeal Form until May 23, 2006.

- he also stated that he did not have copies of the applicable sections of the *Act* or of the Rules and attached a copy of his registered letter to the director of May 23, 2006 requesting that a copy of the Determination be sent to the Tribunal.
- he stated that he had not made any other parties aware of his intention to appeal and did not respond on the issue as to whether he had always intended to appeal the Determination.
- he did not directly address the question as to whether extending the appeal period would harm the Respondent's case.
- in response to the issue of whether or not he had "a strong case that might succeed" he briefly took issue with the findings of the Director and alleged that the Respondent had told him he was to be paid \$20.00 per hour and would "be the instructor during the month of February". He also said that the Respondent was to have prepared a contract "and prepared a form for my hours" which he alleged she did not do. He stated that he never heard of the Respondent Qi Design until 6 months after he had completed his work.

19. He closed his letter with the statement:

"I will forward the requested explanation on a separate sheet of paper, in addition a response to the original Determination for again your perusal." [sic]

20. The Vice-Chair of the Tribunal then sent a letter of June 5, 2006 to the Delegate enclosing a copy of the Appellant's letter of June 1, 2006 and requested that the Delegate provide a copy of the Record as required by section 112(5) of the *Act* by June 26, 2006.

21. By letter of June 6, 2006 the Delegate supplied a copy of the Record together with her submission on the timeliness of the Appellant's appeal. In her submission the Delegate noted that:

1. the Appellant had received the Determination on April 13. The Delegate stated that the appeal deadline date of May 23, 2006 was noted in the Determination and that the Appellant "had ample opportunity to file an appeal within the time limit".
2. The Appellant never, prior to making a request to forward a copy of the Determination to the Tribunal, indicated to the Delegate that he intended to appeal.
3. the Appellant had "not provided any argument to suggest that his case might succeed on appeal". She stated that since the Appellant had "not identified a prima facie case relating to any of the specified grounds for appeal, and that, therefore, she was unable to comment on any specific merits of the case.
4. Finally, the Delegate argued that Section 109 of the *Act* required the Tribunal be provided with compelling reasons to exercise its discretion to extend the time for appeal and that the Appellant had not done so.

22. The Respondent Deborah Sures (operating as Qi Design) also opposed the extension of the time to appeal by her letter of June 20, 2006. In her letter, Ms. Sures noted:

1. the Determination documentation specifically advised the Appellant that an "appeal must be delivered to the Tribunal on May 23, 2006".

2. no intent to appeal had been conveyed to her by the Appellant during the appeal period
 3. no new issues that had not already been dealt with in the Determination are raised in the Appellant's submission.
23. By letter dated June 27, 2006 the Tribunal forwarded to the Appellant copies of the Delegate's Record and submission together with the Respondent Sures' submission. This letter stated that if the Appellant wished to respond to the submissions he must do so no later than July 14, 2006. No such reply was received by that date from the Appellant.
24. In a letter to the Appellant dated July 25, 2006 the Tribunal advised the Appellant that it had received two notes (dated June 28, 2006 and July 18, 2006) from the Appellant's doctor. The earlier note stated that the Appellant was "unable to complete required paperwork by June 28 because of medical reasons". The second requested that the time to file the Appellant's submissions be extended to September 1, 2006 "for medical reasons". The Vice-Chair of the Tribunal then granted the Appellant additional time to prepare his submission to "no later than" September 1, 2006.
25. On August 25, 2006 the Appellant apparently made another request to the Tribunal for a second extension of the time to file his reply submission. The Vice-Chair wrote to the Appellant in that regard on August 29, 2006, and copied the Respondents.
26. In her letter the Vice-Chair notes that the Tribunal had received another note from the Appellant's doctor regarding a specific medical condition requesting an extension until December, 2006. While noting her concern in granting another "very lengthy" extension for filing this reply, the Vice-Chair, nonetheless, extended the time limit to December 1, 2006.
27. On December 1, 2006 the Appellant filed with the Tribunal a letter dated November 27, 2006 together with a number of enclosures. The November 27, 2006 letter is quite brief and notes that the Appellant has "many concerns". He then refers to a 2-page list of ten concerns.
28. It is accurate to find that none of the ten "concerns" relate to the limited matter now at issue as to whether or not an extension beyond the 30-day time limit for appealing a Determination should be granted. As well, these "concerns" are not responsive to the submission on this point made by the Director or Ms. Sures.
29. The ten concerns could best be described as a point-form listing of areas of evidence regarding the substance of the complaint about which the Appellant raises questions. Without reviewing each "concern" in detail, I cannot see how any of them relate to evidence which was not available at the time of the original director's hearing. Nor is any question of law about which the Director might have erred raised or argued as to why the Determination should be cancelled, varied or referred back to the Director. Likewise, no failure to observe principles of natural justice is noted or argued.
30. As one of his attachments, the Appellant includes a copy of the Determination upon which he has written a large number of comments on each page and on their reverse. Once again, none of these comments go to the question of the extension of the time to appeal.
31. The comments are a disjointed and unorganized critique on most of the findings of the Director. Much of it simply gainsays those finding without any attempt made to deal with the specific criteria which must be present to allow an appeal to succeed. I therefore cannot conclude, even if the time within which an

appeal may be filed were otherwise extended, that the appellant has raised any ground of appeal that would constitute a strong case that might succeed.

ANALYSIS

32. The *Act* has explicit time limits within which an appeal of a Determination must be delivered to the Tribunal.
33. The Appellant was aware of this time limit but failed to file any document whatever within the 30 days allowed.
34. While the Appellant did file an Appeal Form mere days after the expiry of the time period, the document filed was deficient in providing any meaningful submissions or explanations to support his alleged grounds for appeal.
35. The Tribunal then advised the Appellant that he had two weeks to submit specific reasons as to why any extension should be granted.
36. As noted earlier, the Appellant's submissions on these issues were largely off-point and concerned more with the substantive aspects of the merits of his appeal and not reasons for delay. To the extent that the Appellant excused his late filing by the fact he had no money for delivery purposes, I do not find his explanation to be at all compelling. He did not sign the request until May 23, 2006.
37. After the Respondents had filed submissions as to why no extension should be granted, the Appellant sought, and was granted, lengthy multiple extensions of time to provide a reply to the Respondents. As noted earlier, when the Appellant finally provided a reply, it did not meaningfully deal with the question of why an extension of the appeal time should be granted.
38. Section 2 of the *Act* states that one of the *Act's* purposes is to provide fair and efficient procedures for resolving disputes concerning the application and interpretation of the *Act*. Section 112 provides that appeals from Determinations must be made within 30 days of receipt of the Determination. Section 109 does allow this Tribunal to extend that time period, even though it has expired.
39. Section 109(1)(b) provides authority to the Tribunal to extend the time within which an appeal may be brought. The *Act* does not set out any particular criteria to govern the Tribunal's discretionary authority to extend the statutory time limit. Therefore, the Tribunal has established such criteria.
40. The decision of the Tribunal in *Niemisto v. The Director of Employment Standards*, BC EST #D099/96 correctly, in my opinion, sets out these criteria:

“In my view, extensions should not be granted as a matter of course. The Legislature has established very tight time frames for filing an appeal from a Determination issued under the *Act*. Although relatively short, the appeal periods established in section 112(2) are not that unusual. For example, parties who wish to challenge decisions made by arbitrators under the *Residential Tenancy Act* have as little as 2 days and, at most, only 15 days to file an application for review with the Arbitration Review Panel (cf. *Residential Tenancy Act*, section 45.3). An application for reconsideration of a decision issued by the B.C. Labour Relations Board must be made within 15 days [cf. *Labour Relations Code*, section 141(5)]. As a final example, an appeal to the B.C. Court of Appeal must be brought within 30 days (cf. *Court of Appeal Act*, section 14).

Certain common principles have been established by various courts and tribunal 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:

- 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.

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.”

41. And in *Tang v. The Director of Employment Standards*, BC EST #D211/96:

“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.”

42. For the reasons noted earlier in this Decision, in my opinion,

- the Appellant in this case has not provided a reasonable or credible explanation for his failure to request an appeal within the time prescribed.
- There is no compelling evidence the Appellant had an intention to appeal the Determination until May 23, 2006 or had conveyed this intention to the Respondents during the appeal period, and
- Very importantly, there is no strong prima facie case made by the appellant that his appeal would succeed. The request, as filed on May 26, 2006, is deficient in providing any sufficient information, explanation or argument in support of any of the three potential grounds for appeal. Subsequent submissions from the Appellant which were, among other things, to answer the question as to whether or not the Appellant had a “strong case” for his appeal, did not cure this deficiency.

43. Given the foregoing I am not satisfied that an extension of time should be granted.

ORDER

44. The Appellant's request to extend the time period for requesting an appeal is denied and, pursuant to Section 114 of the *Act*, the appeal is dismissed.

Philip J. MacAulay
Member
Employment Standards Tribunal