

An appeal

- by -

Mark Yim
(“Mr. Yim”)

- 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: David B. Stevenson

FILE No.: 2014A/147

DATE OF DECISION: January 7, 2015

DECISION

SUBMISSIONS

Didi Dufresne

on behalf of Mark Yim

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Mark Yim (“Mr. Yim”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 3, 2014.
2. The Determination was made in respect of a complaint filed by Mr. Yim who alleged David Wang (“Mr. Wang”) was an employer who had contravened the *Act* by failing to pay wages that were owed to Mr. Yim.
3. The Determination found Mr. Yim was not an employee of Mr. Wang, the *Act* had not been contravened, no wages were outstanding and no further action would be taken.
4. Mr. Yim has filed an appeal of the Determination, relying on all of the grounds of appeal listed in section 112(1) of the *Act*.
5. The appeal was delivered to the Tribunal on October 27, 2014. The statutory appeal period expired on October 10, 2014. Mr. Yim has requested an extension of time.
6. In correspondence dated November 7, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
7. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Yim who has been given the opportunity to object to its completeness. There has been no objection and, accordingly, the Tribunal accepts the “record” provided by the Director as complete.
8. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, the appeal is being assessed based solely on the Determination, the appeal and written submissions made on behalf of Mr. Yim and my review of the “record” that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

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 the 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;*
- (b) *one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Wang will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

10. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under any of the provisions in section 114(1) of the *Act*. The timeliness of the filing of the appeal and its prospects of succeeding are being considered.

THE FACTS

11. Mr. Wang operates a landscaping business. Mr. Yim claimed he was employed by Mr. Wang from April 29, 2013, to May 24, 2013, at a rate of \$14.00, increasing to \$15.00, an hour and had not been paid all the wages he was owed. Mr. Wang claimed Mr. Yim was not his employee but operated his own landscaping business; that he and Mr. Yim had struck an agreement to help each other's business by trading work on each other's client contracts. The agreement commenced April 29, 2013, and ended when Mr. Wang found Mr. Yim was attempting to solicit some of his clients.
12. The Director conducted a complaint hearing by teleconference at which he heard testimony from Mr. Yim, Mr. Wang and several witnesses who appeared on behalf of Mr. Wang. Mr. Wang and Mr. Yim gave their evidence through an interpreter.
13. The Director was confronted with conflicting evidence from the respective parties, assessed the credibility of the evidence presented by and on behalf of each party and decided the issue of credibility in favour of Mr. Wang. The reasons for that decision are set out in the Determination.
14. The Director accepted the position of Mr. Wang – that he and Mr. Yim were in a business, not an employment, relationship – found the *Act* did not apply to that relationship and dismissed Mr. Yim's wage claim.
15. The facts relating to the issue of the timeliness of the appeal are as follows:
- 1. The Determination was issued on September 3, 2014;
 - 2. The time limited for filing an appeal expired on October 10, 2014;
 - 3. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
 - 4. The appeal was not delivered to the Tribunal until October 27, 2014.

ARGUMENT

16. Notwithstanding the Appeal Form lists all of the grounds of appeal available under section 112(1) of the *Act*, the submission filed on behalf of Mr. Yim argues only that the Director breached a principle of natural justice

by not affording Mr. Yim the right to be heard. This position is based on the assertion that Mr. Yim was “not able to understand or be understood via a teleconference hearing”. The appeal submission states Mr. Yim had asked the Director for an in-person hearing, which was denied, and although he had an interpreter for the complaint hearing, that person could “not adequately interpret for him”. Mr. Yim submits the Director found he was not credible “because of how he answered questions”, but the fact that English is not his first language led to confusion in how he understood and answered the questions.

17. On the request for an extension of time, the advocate for Mr. Yim submits he needs assistance in filing an appeal as English is not his first language and he cannot adequately represent himself without help. It is asserted Mr. Yim “had some difficulty” in finding an advocate to assist him with an appeal.

ANALYSIS

18. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, 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.*

19. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

20. I will first consider Mr. Yim’s request to extend the appeal period, applying the circumstances of this case to the principles and factors used by the Tribunal in considering such requests.

21. The *Act* imposes an appeal deadline, and the other deadlines relating to the efficient handling of appeals, to ensure appeals are dealt with promptly: see section 2(d). The *Act* allows the 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 time limits 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.

22. 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 should 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 ongoing bona fide intention to appeal the Determination;
- iii) the respondent party (i.e. the employer and 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.

23. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
24. A delay in filing an appeal is not on its own determinative of the outcome of an extension request. I should consider all of the criteria identified above, as well as any unique criteria that have been identified in the request.
25. In this case Mr. Yim relies on a professed language barrier, a resulting need for assistance with his appeal and a difficulty in finding that assistance as reasons for the request that the Tribunal extend the appeal period in this case.
26. Considering the listed criteria, it does not appear that Mr. Yim expressed to the Director an intention to appeal the Determination or convey to any other party an intention to do so prior to the expiry of the appeal period. While there is a letter dated October 7, 2014, addressed to the Tribunal from Mr. Yim’s advocate, requesting an extension of time, it does not appear to have been delivered to the Tribunal until October 31, 2014.
27. A consideration of undue prejudice is, in this case, a neutral factor.
28. In the circumstances, I am less than satisfied that the explanation for the delay in this case is reasonable and credible. Based on an examination of the “record”, Mr. Yim’s professed “difficulty” understanding and expressing himself in English is not borne out. He filed a complaint with the Director, expressing the elements of his claim in English, he received, reviewed and replied to a substantial response to his claim filed on behalf of Mr. Wang, he received and responded to communications from the Employment Standards Branch concerning disclosure of material relevant to the complaint hearing, he filed a four page submission with the Director, in English, arguing the merits of his claim and responding to the position of Mr. Wang and he filed exhibits for the complaint hearing, written in English, that were relevant to and supporting his claim. While Mr. Yim claims he requested an in-person hearing rather than a teleconference hearing, there is no material in the “record” indicating such a request was made and there is nothing presented in the appeal supporting this assertion. There is, in fact, no objective evidence of any sort that support the reasons given by Mr. Yim for either the delay or the request. I also note that throughout the entire complaint process there is no indication or suggestion that Mr. Yim had any language difficulty with any aspect of it.
29. An application of this factor militates strongly against any extension of the appeal period.
30. Finally, one of the criteria considered in deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I also note that the presumptive merits of an appeal stand as a distinct consideration on which an appeal may be dismissed under section 114(1) (f) of the *Act*, which is set out above.
31. When considering the relative merits of an appeal, or the *prima facie* strength of the case on appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the issues raised by the appeal. On that basis, I will now consider the relative merits of this appeal and its prospects for succeeding.

32. Mr. Yim relies on an alleged failure by the Director to observe principles of natural justice. As with all of the grounds of appeal, the burden is on Mr. Yim to, “provide, demonstrate or establish a cogent evidentiary basis for the appeal”. In particular, an appellant alleging breach of natural justice must provide objective evidence of the breach of natural justice that has been alleged. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWT Business World Incorporated*, BC EST #D050/96.

33. It is clear from the “record” that Mr. Yim was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*.

34. Nothing has been provided with this appeal other than bald assertions – assertions that are not supported on any evidence and which are, on a reasonable analysis, inconsistent with the weight of material in the “record”. Mr. Yim has provided no detail on what part or parts of the process he was “not able to understand” or where it was, in the context of the findings made in the Determination, that he was not understood during the teleconference hearing. On this point, considering the burden on him, Mr. Yim ought to have identified and clarified those areas where the Director found he was not credible “because of how he answered questions”, but he has not. Similarly, Mr. Yim ought to have indicated where his unfamiliarity with English led to confusion in how he understood and answered the questions.

35. He has not done so. This appeal falls well short of meeting the required burden for demonstrating an error in the Determination and, consequently, of showing it has any merit or any possibility of succeeding.

36. For the above reasons, I find no reason to consider extending the time period for filing an appeal; I find the reason provided for the delay is not reasonable and credible and on its face the appeal does not demonstrate a strong case. As well, for the reasons stated above, I find there is no reasonable prospect this appeal can succeed.

37. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

38. I therefore, dismiss the appeal under section 114(1)(b) and (f) of the *Act* and confirm the Determination.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated September 3, 2014, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal