

An appeal

- by -

0695955 B.C. LTD (a dissolved corporation) and 0761597 B.C. LTD carrying on
business as Freedom Bionics
("Freedom Bionics")

- 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/110

DATE OF DECISION: January 22, 2015

DECISION

SUBMISSIONS

Douglas Kind

on behalf of 0695955 B.C. LTD and 0761597 B.C. LTD
carrying on business as Freedom Bionics

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) 0695955 B.C. LTD and 0761597 B.C. LTD carrying on business as Freedom Bionics (“Freedom Bionics”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 14, 2014.
2. The Determination found that Freedom Bionics had contravened Part 3, sections 17, 18 and 26, Part 7, section 58 and Part 8, section 63 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Dennis Ho, Todd Pettit, Brett R. Spratt and Dan P. Wiens (“the complainants”) and ordered Freedom Bionics to pay wages to the complainants in the amount of \$99,577.48 and to pay administrative penalties in the amount of \$3,000.00. The total amount of the Determination is \$102,577.48.
3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available at the time the Determination was being made.
4. A form of appeal was delivered to the Tribunal on August 21, 2014, the last day of the appeal period set out in the Determination and in subsection 112(3) of the *Act*. The appeal did not, as required by subsection 112(2), include a completed, signed and dated copy of page 2 of the Appeal Form or a copy of the Director’s written reasons for the Determination.
5. On August 26, 2014, the Tribunal informed Freedom Bionics the appeal was incomplete and advised the *Act* and the Tribunal’s *Rules of Practice and Procedure* (“the *Rules*”) required a completed Appeal Form and the written reasons for the Determination to be delivered to the Tribunal within the appeal period. Freedom Bionics was given a deadline of September 8, 2014, to provide that material. It was clear that there was no extension of the appeal period. On September 3, 2014, Freedom Bionics provided the Tribunal with a completed page 2 of the Appeal Form and advised the Tribunal the reasons for the Determination could not be completed until after September 15, 2014, as the delegate responsible for providing the reasons was on vacation until that date. The Tribunal received the reasons for the Determination on October 14, 2014.
6. On October 17, 2014, the Tribunal notified the parties that an appeal and a request for an extension of the appeal deadline had been received from Freedom Bionics, requested production of the section 112(5) “record” (the “record”) from the Director and 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 “record” was provided by the Director to the Tribunal and a copy was sent to Freedom Bionics, who was advised of their right to object to the completeness of the “record”. Freedom Bionics has objected to the completeness of the “record”, submitting the “record” contained no reference to a mediation session that was to be scheduled and no reference to moneys that had been paid to the complainants. There are several elements of the submission about the completeness of the “record” that are in substance submissions on the

merits of the Determination. I am not persuaded reference to a possible mediation session is a matter that should properly have been included in the “record” and its omission does not affect its completeness. The matter of information relating to moneys paid to the complainants in partial satisfaction of their claims is a matter which, if provided to the Director while the Determination was being made, should be included in the “record” and I will consider this aspect of Freedom Bionics’ submission in the context of assessing the merits of the ground of appeal based on evidence becoming available: section 112(1) (c) of the *Act*.

8. Consistent with the October 17, 2014, notice, I have reviewed the appeal, the appeal submissions, including the attachments submitted by Freedom Bionics, and the “record”.
9. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the “record” that was before the Director when the Determination was being made. Under section 114 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 subsection 114(1), 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;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

10. I am deciding whether Freedom Bionics should be granted an extension of the appeal period and, if so, whether there is any reasonable prospect the appeal will succeed. If I decide all or part of the appeal should not be dismissed under section 114(1) of the *Act*, the complainants will, and the Director may, be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

11. The issue to be considered at this stage of the proceeding is whether all or part of the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

12. The facts set out below are a summary of the facts found in the reasons for the Determination.
13. 0695955 B.C. Ltd. is a dissolved company that was incorporated in the province on May 26, 2004. A search of the BC Online: Registrar of Companies indicated the company was dissolved on December 24, 2012. Douglas Alan Kind (“Mr. Kind”) was listed as sole director and an officer of the company.

14. 0761597 B.C. Ltd. is a company that was incorporated in the province on June 23, 2006. Until October 1, 2013, when Mr. Kind was added as a director and officer of this company, Wyrom Morton Walker was the sole director and officer.
15. The Director associated the above companies under section 95 of the *Act*.
16. A factor in the decision to associate the companies is found in the following paragraph from the reasons for Determination:

. . . I did a web search for public information. The search found the consolidated financial statements for the three months ending September 30, 2010, for Yaletown Capital Corp and its wholly owned subsidiary 0695955 B.C. Ltd. carrying on business as Freedom Bionics. The notes to the financial statement include note 18 for 0695955 BC Ltd. dba Freedom Bionics, which reads in part “Freedom will acquire from 0761597 BC Ltd. (dba Cognitive Research Group)” certain assets and additionally 0695955 B.C. Ltd. and additionally [sic] “entered into a Research Partner Licence Agreement, with 0761597 B.C. Ltd.”. On various websites Douglas Kind is shown to be CEO, President and CEO and chairman of the Board of Yaletown Capital Corp.
17. The Director found the two companies were both active and carrying on business during the period in which the wages of the complainants were earned, but not paid. The records of employment and payroll information showed some of the complainants had been employed and paid for work at various times by both companies. During the relevant period, both companies were involved in software and applications development of health services products. The Director found the complainants, “contemporaneously and interchangeably” performed work for both companies under the direction of Mr. Kind.
18. The Director considered other evidence, which is found at pages R5 – R6 of the Determination and applied that evidence to the requirements of section 95 in associating the companies.
19. The complainants were employed by Freedom Bionics as programmers, mechanical or software designers and developers.
20. During the complaint investigation, Freedom Bionics provided some evidence but did not provide hours of work or payroll records for the complainants. The reasons for Determination indicate that Freedom Bionics acknowledged the amounts claimed by the complainants “were relatively close” to what was owed. There were some disputes on individual complainants’ claims, which were noted by Freedom Bionics on the complainants’ summary sheets.
21. The reasons for Determination outline the information concerning the claims that was provided to Freedom Bionics and the opportunity to respond that was given to Freedom Bionics. It also records the dates of some of the discussions with Mr. Kind relating to the amounts claimed and the subject matter of those discussions.
22. The Director found each of the complainants was owed wages and that it was reasonable, absent payroll records or a detailed dispute from Freedom Bionics of the amounts claimed, that the evidence provided by each complainant of the amount owed could be relied on as accurate. This evidence was used to calculate the wages for each of the complainants.
23. The Director found Freedom Bionics had contravened several provisions and requirements of the *Act* and imposed administrative penalties for those matters.

ARGUMENT

24. The arguments made by Freedom Bionics in this appeal are spread over several submissions, most of them made after expiry of the appeal period.
25. I shall attempt to capture the essence of all of these arguments, but will not necessarily consider them all. I will consider those arguments that reflect the grounds of appeal and the stated reasons for filing the appeal: see *D. Hall & Associates Ltd.*, BC EST # D354/99.
26. In its initial appeal submission Freedom Bionics identifies the following disagreements with the Determination:
- (a) there are errors in the source facts provided by the complainants and used in the Determination;
 - (b) in associating the numbered companies under section 95, the Director did not consider that 0761597 BC Ltd. did not commence operations until November 2009 and discontinued operations for a brief period of time in October 2012; that Mr. Kind was not a director and officer of that company until November 2013 and that Wyrom Morton Walker was never a director or officer of 0695955 BC Ltd.; and
 - (c) Freedom Bionics, and its directors, did not get an opportunity to present their case; they were expecting a one on one meeting that never materialized.
27. The appeal submissions attaches what Freedom Bionics contends are “true numbers and more accurate facts”. Freedom Bionics submits it had “reasonable data” for Todd Pettit and Dan Wiens and accepts the correctness of the information provided by Brett Spratt; it submits Dennis Ho has misrepresented the facts. Freedom Bionics has provided information with the appeal that was not provided to the Director during the complaint process.
28. The appeal describes efforts by Freedom Bionics to pay some of the outstanding wage obligations and make arrangements to additional amounts.
29. On November 3, 2014, the Tribunal received a submission addressing the reasons for the Determination, which is dated September 26, 2014, and was delivered to the Tribunal on October 14, 2014. The submission indicates that Freedom Bionics disputes some of the reasons for the Determination and includes a “marked up” copy of the Determination showing areas of disagreement. It also indicates Freedom Bionics intended to provide the Tribunal with “a set of reconciled amounts for each employee” by November 7th as well as payment plans”. The “marked up” copy of the reasons for Determination contained comments in the area of the Determination marked “Opportunity to Respond”, “there must be common control or direction”, “there must be some statutory purpose for treating the entities as one employer”, “Are the complainants owed wages”, the administrative penalty for failing to pay medical and health benefits, and the administrative penalty for compensation for length of service.
30. No material was received from Freedom Bionics on November 7th, as promised.
31. On November 18, 2014, the Tribunal received a response to the November 3, 2014, correspondence seeking submissions on the completeness of the “record”. Only one of the comments contained in the document address the completeness of the “record”. The remainder speaks to either how Freedom Bionics intends to satisfy the complainants’ claims or refers to errors in the Determination.

32. A last submission was received by the Tribunal from Freedom Bionics on December 16, 2014, containing comments about the completeness of the “record” and reiterating previous submissions.
33. Freedom Bionics has requested an extension of time for filing the appeal. Mr. Kind says he was away when the Determination arrived, that no one working for the company was in attendance at the office and that the deadline for requesting the reasons had passed by the time he read the Determination.

ANALYSIS

34. I shall first address the Freedom Bionics submission concerning the exclusion from the “record” of reference to moneys paid to the complainants in partial satisfaction of their claims. I am not persuaded the matter was required to be included in the “record”. As indicated in the Determination, Freedom Bionics provided no hours of work or payroll records during the complaint process. The “record” indicates Mr. Kind indicated on several occasions he had satisfied some of the complainants’ claims but never supported those assertions with any kind of objective evidence. I find the “record” provided by the Director is complete and inclusive of the material that is statutorily required under section 112(5).
35. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: 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.

36. 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 limit;
 - ii. there has been a genuine and ongoing *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 the 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.
37. 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.
38. For the following reasons, the request to extend the appeal period is denied.
39. First, although the initial attempt at filing an appeal of the Determination was made on August 21, 2014, which was the last day of the appeal period, Freedom Bionics failed to comply with the statutory requirements for filing an appeal set out in section 112(2) of the *Act*. The explanation for failing to comply

with the appeal requirements is weak and unsupported by the details necessary to make a proper assessment of the delay. That part of the appeal which was filed on August 21 indicates Mr. Kind understood there was a requirement to request reasons. The handwritten request for an extension says, in part, “I will be contact [sic] employment standards requesting reasons”, suggesting Mr. Kind was aware of the requirement, but there is no explanation why that had not already been done. On analysis and on balance, I find the absence of a full explanation weighs against an extension of the appeal period, although not heavily.

40. The appeal deadline was August 21, 2014. The statutory requirements for an appeal were completed on October 14, 2014, when the reasons for Determination were delivered to the Tribunal. While some of that delay can be attributed to the inability of the Director to immediately attend to providing the reasons, I find the efforts made by Freedom Bionics to obtain the reasons for the Determination to have been less than diligent. While this failing is not a significant factor in my view it speaks to the *bona fides* of Freedom Bionics’ intention to appeal the Determination.

41. Freedom Bionics did not notify any party of an intention to file an appeal before expiry of the appeal period. The matter of prejudice weighs in favour of providing a resolution of the claims and against an extension of the appeal period.

42. One of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I am satisfied there is no *prima facie* case raised in this appeal. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds for appeal chosen against long standing principles that apply in the context of those grounds. As noted by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11:

. . . [this] inquiry [into whether there is a *prima facie* case] flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.

43. I also note that the presumptive merits of an appeal, listed in section 114(1)(f) of the *Act* as whether there is a reasonable prospect of the appeal succeeding, stands as a distinct consideration on which an appeal may be dismissed under that provision, which is set out above in its entirety.

44. 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.*

45. 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 grounds of appeal relied

upon. More particularly, a party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

46. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. I point this principle out as Freedom Bionics first argument in its appeal submission is that the Determination has “errors in the source facts supplied by the employees”.
47. In this context, I observe that the Director’s deciding the complainants were entitled to wages was based on the facts available to the Director at the time the Determination was being made. The appeal takes issue with some of the findings but, as indicated above, there is a limited basis on which such challenges can be made.
48. The appeal does not raise “error of law” as a ground of appeal. I shall address the ramifications of this later in this decision.
49. I will first address the natural justice ground of appeal. Simply put, there is absolutely no evidence from which it could be found the Director failed to observe principles of natural justice in making the Determination. 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 *BWI Business World Incorporated*, BC EST # D050/96).
50. The appeal submission on the merits does not even remotely allude to circumstances where Freedom Bionics was denied the procedural protections of the principles of natural justice that arise in this case. There is nothing in the section 112(5) “record” that would in any way suggest Freedom Bionics was not provided with the opportunity to know the case against them and given the right to present their case to the Director. What the section 112(5) “record” clearly shows is that Freedom Bionics provided no documents to the Director and failed or refused to comply with a Demand for Employer Records. The “record” also displays a pattern of unfulfilled promises to provide material. There were discussions in late January and February, 2014, in which Mr. Kind indicated records on the complainants were being assembled and would be delivered. For reasons unexplained no such records were ever provided. The Determination was made in July, 2014.
51. It is clear from the “record” that Freedom Bionics took issue with parts of the claims made by three of the complainants and with the Director associating other companies with 0695955 B.C. Ltd. but provided no evidence in respect of these matters.
52. It is not a denial of natural justice for the Director to not conduct a mediation session, even if one party demands it. The Director has a discretion to decide the process by which a complaint will be determined. That is the effect of section 76 of the *Act*.

53. This ground of appeal has no merit and no reasonable prospect of succeeding.
54. The “new evidence” ground of appeal is similarly without merit. All of the facts to which Mr. Kind alludes in the appeal were known, or reasonably ought to have been known, to Freedom Bionics before the Determination was made. That information could have been provided during the complaint investigation and before the Determination was made. The appeal submission substantially confirms this view, stating Freedom Bionics “had reasonable data” on Mr. Pettit and Mr. Wiens and had the data on Mr. Ho on an old server hard drive. The information contained on the old hard drive appears to have been represented by Mr. Kind to be available in his February 18, 2014, telephone discussion with the Director where he indicated he was “getting the [employee] records together and would provide them first to the trustee and then to [the Director]”. In any event, Mr. Kind made no effort to provide the payroll information at any time during the five months between that discussion and the issuance of the Determination.
55. The Tribunal has firmly established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal.
56. The evidence sought to be admitted into this appeal does not resemble the kind of evidence that would be considered as acceptable. It is not “new” or probative. Looked at objectively, this additional evidence does little more than provide a springboard for Freedom Bionics to re-argue their position on three of the complainants without establishing, on cogent evidence, the Director made any error in the Determination
57. As well, at its core, this ground of appeal smacks of the kind of approach consistently rejected by the Tribunal, where there has been a failure or refusal by a party to participate fully in an investigation and a subsequent appeal by that party based on evidence and arguments that could, and should, have been presented to the Director during the investigation: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97. I note here again that Freedom Bionics failed or refused to respond to the Demand for Employer Records, but now appears to seek to have material admitted into the file that should have been provided.
58. The arguments relating to the section 95 decision raise arguments that are substantially grounded in error of law, with some elements challenging findings of fact without showing such findings are reviewable under section 112(1) of the *Act*. Error of law is a ground of appeal that was not relied upon by Freedom Bionics in their appeal, the time period for raising this ground has expired and, accordingly, I will not consider arguments relating to the decision of the Director to associate. Even if I did, however, I find nothing in the appeal that would convince me the Director’s findings, conclusions and analysis on the section 95 issue were wrong in fact or law and should be set aside under the appeal provisions in the *Act*.
59. In sum, Freedom Bionics has not demonstrated there is any merit at all to the appeal, let alone a *prima facie* case. It would be inconsistent with the purposes and objectives of the *Act* to require the other parties to the Determination to respond to an appeal that has no likelihood of succeeding.
60. The appeal is dismissed.

ORDER

- ^{61.} Pursuant to section 115 of the *Act*, I order the Determination dated July 14, 2014, be confirmed in the amount of \$102,577.48, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal