

An appeal

- by -

Victoria's Five Star Cleaning Ltd.  
(“Five Star Cleaning”)

- 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:** Marnee Pearce

**FILE No.:** 2016A/161

**DATE OF DECISION:** February 1, 2017

## DECISION

### SUBMISSIONS

Bekim Ademi

on behalf of Victoria's Five Star Cleaning Ltd.

### OVERVIEW

1. This is an appeal by Victoria's Five Star Cleaning Ltd. ("Five Star Cleaning") pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 12, 2016.
2. Five Star Cleaning was incorporated on May 21, 2013, and Bekim Ademi ("Mr. Ademi") is listed as the sole director. On October 19, 2015, Wael Fawzi (Mr. Fawzi) filed a complaint alleging that Five Star Cleaning had contravened the *Act* in failing to pay wages and vacation pay.
3. The Director held a hearing into Mr. Fawzi's complaint on December 14, 2015, and addressed the following issues; was Mr. Fawzi an "employee", was he owed regular wages, was he owed reimbursement for monies deducted from his wages, was he owed statutory holiday pay, and was he owed vacation pay. Five Star Cleaning was not represented at this hearing.
4. The Determination found that Five Star Cleaning had contravened Part 3, sections 16, 17, and 21, Part 4, section 34, Part 5, section 45, Part 7, section 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulation*") with respect to the employment of Mr. Fawzi and ordered Five Star Cleaning to pay Mr. Fawzi wages in the amount of \$2,004.07 and to pay administrative penalties in the amount of \$7,500.00. The total amount of the Determination is \$9,504.07.
5. The grounds of the appeal are that the Director erred in law when making the Determination and that evidence has become available that was not available at the time the Determination was being made. Five Star Cleaning seeks to have the Determination canceled, or referred back to the Director.
6. The time period for filing this appeal of the Determination expired on September 19, 2016. This appeal was received by the Tribunal on November 15, 2016, eight weeks after the statutory time period had expired. Five Star Cleaning seeks an extension of the statutory appeal period.
7. In correspondence dated November 18, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any party pending a review of the appeal by the Tribunal and, following this review, all or part of the appeal might be dismissed.
8. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and on December 6, 2016, a copy has been mailed to Five Star Cleaning, allowing the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
9. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for Determination (provided to the Tribunal as part of the record), the appeal, the written submissions filed with the appeal, my review of the

material that was before the Director when the Determination was being made, and any other material allowed by the Tribunal to be added to the record. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of the appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 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 any 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 that the appeal will succeed;*
  - (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
  - (h) *one or more the requirements of section 112(2) have not been met.*

10. 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*, the Director and Mr. Fawzi will be invited to file 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 is liable to be dismissed. In this case, I am looking at whether the time limit for filing an appeal should be extended, if there is any reasonable prospect the appeal can succeed and if Five Star Cleaning has failed to meet the requirements of section 112(2) of the *Act*.

## ISSUE

11. The issue is whether this appeal should be allowed to proceed or dismissed under section 114(1) of the *Act*.

## ARGUMENT

12. Five Star Cleaning has made submissions on the request for an extension of time for filing the appeal and on the substance of Mr. Fawzi's complaint.
13. Regarding an extension of time for filing, Five Star Cleaning argued that English is a second language of Mr. Ademi, the sole director of Five Star Cleaning, and he was unable to understand the process, as he was receiving information at the same time from both Revenue Canada and the Director. Five Star Cleaning was undergoing a lengthy audit of its payroll accounts by Revenue Canada, and Mr. Ademi believed that Revenue Canada's decision would be the deciding factor concerning whether there was an employee or a subcontractor relationship between Mr. Fawzi and Five Star Cleaning. Revenue Canada is in the process of issuing a decision concerning Mr. Fawzi and others. Five Star Cleaning did file a Notice of Objection to Revenue Canada and Mr. Ademi believed this would cover both processes (the complaint process of the Director and the Revenue Canada payroll audit), as in his opinion, they deal with essentially the same issue.
14. On the substance of Mr. Fawzi's complaint, Five Star Cleaning argued that he was not an employee but rather a subcontractor, and that Mr. Fawzi lied about matters addressed by the Determination. Five Star Cleaning also argued that there was new evidence that was not available at the time of the Determination, in particular, "Revenue Canada is in the process of making a decision".

## THE FACTS AND FINDINGS OF THE DIRECTOR

15. Five Star Cleaning operates a cleaning business. Mr. Fawzi worked as a cleaner from on or about September 1, 2013, to April 20, 2015.
16. Mr. Fawzi filed a complaint alleging Five Star Cleaning contravened the *Act* by failing to pay to him regular wages, statutory holiday pay and vacation pay.
17. The Director reviewed the complaint and decided to investigate. During the course of the investigation the Director also considered whether Mr. Fawzi was an “employee” as defined by the *Act* and if he was owed reimbursement for monies deducted from his wages.
18. On November 3, 2015, a delegate of the Director spoke with Mr. Ademi by telephone and apprised him of the complaint. Mr. Ademi confirmed that he was available for a complaint hearing by teleconference on December 14, 2015.
19. On November 9, 2015, by way of registered mail and email the Director successfully provided Five Star Cleaning with correspondence confirming that the complaint hearing was formally scheduled for December 14, 2015. The correspondence also included the demand for production of records and information on the hearing process.
20. On November 25, 2015, an email was sent to Five Star Cleaning with electronic copies of documents submitted by Mr. Fawzi in support of his complaint.
21. On December 9, 2015, an email was sent to Five Star Cleaning with a reminder that its records were due November 30, 2015, and that no documents had been received by the Director. The date and time of the hearing was reiterated; the hearing was to commence at 9:00 am.
22. On December 14, 2015, Five Star Cleaning failed to call in to the complaint hearing teleconference, and an email was sent to the Five Star Cleaning indicating that the Director would wait until 9:30 for Five Star Cleaning to join the hearing or it would proceed in its absence. A voice message was also left with Five Star Cleaning at the last known phone number providing the same information. There was no response and the complaint hearing proceeded.
23. The Reasons for Determination indicate that the issues before the Director were whether Mr. Fawzi was an employee of Five Star Cleaning, and, if so, whether he was entitled to wages, reimbursement for monies deducted from his wages, statutory holiday pay, and vacation pay.
24. No evidence or argument was presented by Five Star Cleaning.
25. The Director addressed the employment status of Mr. Fawzi, and found that he met the definition of employee under the *Act* and was not an independent contractor.
26. The Director found that Mr. Fawzi, an employee of Five Star Cleaning, was entitled to outstanding wages, vacation pay, statutory holiday pay, and reimbursement for monies deducted from his wages, in the amount set out in the Determination.

27. The Director applied mandatory administrative penalties associated with the contravention of the requirements of the *Act*, two of the seven penalties were based on second contraventions by Five Star Cleaning of specific sections of the *Act*. The amounts were set out in the Determination.
28. The Determination was issued August 12, 2016, and sent by registered mail to Five Star Cleaning.
29. The time limit for filing an appeal was clearly marked in the Determination as September 19, 2016.

## ANALYSIS

30. Section 112 of the *Act* provides that a person served with a Determination may appeal the Determination by delivering a request to do so, with reasons for the appeal, to the Tribunal within fifteen days of service, if served by registered mail, or eight days of service, if served personally.
31. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
32. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired. In *Metty M. Tang*, BC EST # D211/96, the Tribunal outlined the approach it has consistently followed in considering the time limit 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 Five Star Cleaning to show that the time period for an appeal should be extended.

33. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. These include that the party seeking the extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;
  - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - (5) there is a strong *prima facie* case in favour of the appellant.
34. 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 such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.
35. The appeal has been filed eight weeks after the expiry of the statutory appeal period. This delay is lengthy, and no clear reason has been provided for the extent of the delay. Five Star Cleaning argues that English is a second language, and that Mr. Ademi, sole shareholder, was unable to understand the process. Five Star Cleaning argues that as Revenue Canada was auditing the payroll accounts, and as the issue was whether the payees were employees or subcontractors, and as this was also the key issue before the Director, it mistakenly believed that by filing a Notice of Objection with Revenue Canada both processes were covered.

36. I do not accept that the reasons provided by Five Star Cleaning for the delay in filing the appeal are reasonable or credible. The Director has levied prior administrative penalties against Five Star Cleaning for violations under section 17 of the *Act* and section 46 of the *Regulation*, which resulted in higher administrative penalties for second contraventions in the current Determination; it is not reasonable to conclude that Mr. Ademi would be unfamiliar with the process resulting in these penalties, even if English is a second language. Mr. Ademi spoke with a delegate of the Director by telephone on November 3, 2015, in order to establish a complaint hearing date, and received emails and written correspondence from the Director regarding the December 14, 2015, hearing and the current Determination. If he did not fully understand the process due to language barriers, he could have sought additional clarification given his established and ongoing line of communication with the Director. It is unreasonable to accept that Five Star Cleaning, with issues under investigation with Revenue Canada and the Director, would believe that by filing a Notice of Objection with Revenue Canada this would “cover both processes”. It is unclear, if this was a genuinely held belief, why Mr. Ademi would file an appeal with the Tribunal two months after the legislated deadline.
37. Five Star Cleaning made virtually no effort to participate in the complaint process prior to the Determination being made, although Mr. Ademi was aware of the hearing date and received telephone calls, emails, and written demands and notices leading up to the December 14, 2015, hearing date. Five Star Cleaning did not comply with efforts by the Director to obtain production of the employer’s records for Mr. Fawzi’s employment. Five Star Cleaning did not participate in the investigation, or attend the hearing resulting in the Determination. In the context of the request to extend the appeal period, this leads to the likely conclusion that there was no intention on the part of Five Star Cleaning to appeal the Determination. There is no indication to any other party or to the Tribunal that there would be an appeal until the appeal documents were delivered to the Tribunal in November 2016.
38. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
  - the director failed to observe the principles of natural justice in making the determination;
  - evidence has become available that was not available at the time the determination was being made.
39. Another of the considerations for deciding whether an appeal period should be extended is the *prima facie* strength of the case on appeal. When considering this criterion, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. Five Star Cleaning has grounded its appeal in error of law. The burden is on Five Star Cleaning to show such an error.
40. On its face, this appeal asserts that Mr. Fawzi was not an employee, but a subcontractor of Five Star Cleaning. However, it is noted above that Five Star Cleaning did not participate in the investigation or hearing process, neither complying with record production demands nor attending the scheduled hearing. To give effect to this argument in these circumstances would require the Tribunal to ignore the long-established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, which states that barring special circumstances parties may not fail or refuse to cooperate or participate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Five Star Cleaning failed to participate in the complaint process. This failure compels a finding that they may not now seek to challenge the Determination by seeking to make a case they should have attempted to make in the complaint

process. Simply put, if Five Star Cleaning believed Mr. Fawzi was not an employee, it should have submitted this argument, along with any supporting evidence, to the Director during the complaint process.

41. Second, and in any event, the burden of showing error of law is on Five Star Cleaning, and it has fallen far short of meeting this burden. On an assessment of the Determination, I find that Five Star Cleaning has not shown the Director made an error of law. In respect of the applicable provisions of the *Act* and the legal principles flowing from those provisions, the Director considered the relevant provisions in the *Act* relating to the issue of whether Mr. Fawzi was an employee. The Director applied findings of fact to these provisions. There is no error of law shown in the findings of fact.
42. The Tribunal noted in *Britco Structures Ltd.*, BC EST # D260/03, that the test for establishing findings of fact constitute an error of law is stringent, requiring Five Star Cleaning to show the finds 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director. The findings of fact in this case were reasonably and logically grounded in the evidence, and the appeal does not show there is any merit to the ground of appeal chosen and the appeal has no reasonable prospect of succeeding.
43. Five Star Cleaning also asserts that evidence has become available that was not available at the time the Determination was made – in this regard, it submits that “Revenue Canada is in the process of making a decision”.
44. In respect of this ground of appeal, the Tribunal has discretion to accept or refuse new or additional evidence. When considering this ground of appeal, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of the Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency; see section 2(b) and (d) of the *Act*.
45. Although Five Star Cleaning submits that “Revenue Canada is in the process of making a decision” as new evidence, no decision from Revenue Canada is presented with the appeal, but rather, Five Star Cleaning appears to be assuming that the payroll audit of Revenue Canada will ultimately support the position that Mr. Fawzi is a subcontractor, not an employee. As speculation is not new evidence, there is nothing to consider on this issue.
46. The additional documents that were included with the appeal by Five Star Cleaning have been reviewed, and it is noted that they are not “new”. All of it existed at the time the Determination was being made, and if Five Star Cleaning had participated in the complaint process, would have reasonably been available for consideration. As such, I will not exercise my discretion to allow the additional evidence.
47. In sum, for the reasons stated above, this appeal is dismissed under section 114(1) of the *Act*. The request for an extension of the time limited for appeal is denied; an assessment of this appeal shows it has no prospect of succeeding and the requirements of section 112(2) of the *Act* have not been met.

48. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

**ORDER**

49. Pursuant to section 115 of the *Act*, I order the Determination dated August 12, 2016, be confirmed in the amount of \$9,504.07, together with any interest that has accrued under section 88 of the *Act*.

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**Marnee Pearce**  
**Member**  
**Employment Standards Tribunal**