

An appeal

- by -

Sobil Media Enterprises Inc.
("Sobil Media")

- 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.: 2015A/159

DATE OF DECISION: January 18, 2016

DECISION

SUBMISSIONS

Greg Charanduk

on behalf of Sobil Media Enterprises Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sobil Media Enterprises Inc. (“Sobil Media”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 25, 2014.
2. The Determination found Sobil Media had contravened Part 3, sections 17, 18 and 28, and Part 7 section 58 of the *Act* in respect of the employment of Tisha Creed (“Ms. Creed”) and ordered Sobil Media to pay Ms. Creed wages in the amount of \$1,594.56 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$3,094.56.
3. This appeal is grounded in evidence becoming available that was not available when the Determination was being made. Sobil Media seeks to have the Determination cancelled.
4. This appeal was received by the Tribunal on November 26, 2015 – fifteen months after the statutory time limit for filing an appeal expired. Sobil Media seeks an extension of the appeal period.
5. In correspondence dated December 1, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Sobil Media. They have been provided with 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 complete.
7. 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, the appeal, the written submission 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), the Tribunal has discretion to dismiss all or part of an 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 of the requirements of section 112(2) have not been met.*

8. 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 Ms. Creed 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), it is liable to be dismissed. In this case, I am looking at whether the time limit for filing an appeal should be extended and if there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

10. Sobil Media operates an advertising business. Ms. Creed was employed by Sobil Media as a sales representative from May 25, 2013, to June 21, 2013. She filed a complaint alleging Sobil Media had failed to pay all wages owing to her.
11. The Director conducted an investigation, which included a fact finding meeting held on March 27, 2014. Greg Charanduk (“Mr. Charanduk”), who was at the time of the complaint and investigation the sole listed director of Sobil Media, and Henry Rempel (“Mr. Rempel”), who appears to have had some kind of managing or supervising role within Sobil Media, represented the company during the investigation. The record suggests most of the Director’s interaction on the complaint was with Mr. Rempel.
12. The response of Sobil Media to the claim of Ms. Creed was to assert she was not an employee, but an independent contractor. Apparently Ms. Creed had signed some form of an “independent contractor” agreement, but that document was never provided to the Director during the investigation, even though the Director had requested it several times and Sobil Media had promised to provide it.
13. The Director found Ms. Creed was an employee under the *Act* and was not paid all wages owed to her. The Director awarded wages to Ms. Creed in the amount set out in the Determination.
14. The Determination was issued July 25, 2014, and sent by registered mail to Sobil Media at their business address, which was also the address for the company in their corporate records and the address to which all mailed correspondence from the Director had been sent. A copy of the Determination was sent to Mr. Charanduk at the same address.
15. The time limit for filing an appeal was clearly marked in the Determination as August 25, 2014.

ARGUMENT

16. Sobil Media has provided two arguments: one relating to the request for an extension of time; the other relating to the basis for the appeal.
17. In respect of the first, Sobil Media says it never received the Determination and was unaware it had been issued until the bank notified Mr. Charanduk that a demand had been delivered to the bank (presumably by

the Director) to hold his account. Sobil Media says its lack of knowledge of the Determination has given it no chance to appeal.

18. In respect of the latter, Sobil Media has submitted several documents with the appeal: a sales invoice for another sales representative working for Sobil Media; a copy of the sales commission structure for sales representatives; and a copy of the Independent Contractor Agreement, which has apparently been signed by some of the sales representatives who have worked for Sobil Media. Sobil Media also requests the opportunity to call another witness, although the nature of the evidence that would be sought from that witness is not described in the appeal.
19. Sobil Media says that if the delegate conducting the investigation had a chance to review the attached documents, the result would have been different.
20. I will note here that copies of the Independent Contractor Agreement, signed by persons other than Ms. Creed, were provided by Sobil Media during the investigation; those are included in the record and were considered and addressed in the Determination.

ANALYSIS

21. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with 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 must be satisfied to grant an extension:
 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 and on-going *bona fide* intention to appeal the Determination;
 3. the respondent party (*i.e.*, the employer or employee), as well the Director, must have 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.
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 be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.
24. This appeal has been filed fifteen months after the expiry of the statutory appeal period. That is completely unacceptable and, absent an extremely strong and compelling explanation for such a delay, is sufficient on its own as a basis for denying the requested extension.

25. The explanation given by Sobil Media is that the Determination was never received by Mr. Charanduk and he was unaware it had been issued until the Director started collection proceedings, although no date is given for when this occurred.
26. I find this assertion, generally, to be neither credible nor reasonable, and particularly as it relates to Sobil Media. My review of the record reveals notes of a telephone discussion on November 20, 2014, between the Director and Mr. Rempel, discussing the complaints of Ms. Creed and another former employee, in which Mr. Rempel is told the “appeal date expired”. In addition, the same discussion suggests Sobil Media was still at the business address to which the Determination was delivered by registered mail some three months earlier.
27. It is insufficient proof, and does not satisfy the burden on Sobil Media when requesting an extension of time based on non-delivery of the Determination, for Mr. Charanduk to simply assert the Determination was never received by him. The record indicates the Determination was properly and lawfully served on Sobil Media. Section 122 of the *Act* deals with service of determinations, demands and notices under the *Act*. Subsection 122(1) deems a determination to be served if it is sent by registered mail to the “*person’s last known address*”. Subsection 122(2) deems service by registered mail “*to be served 8 days after the determination ... is deposited in a Canada Post Office*”.
28. Accordingly, I find the Determination to have been served on Sobil Media, the appeal period to have commenced approximately 8 days after the date of the Determination and the appeal period to have expired on or about August 25, 2014. I repeat my finding that the delay in this case is unacceptably long and inadequately explained.
29. One of the other 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.
30. Sobil Media has grounded the appeal in evidence becoming available that was not available when the Determination was being made. The material sought to be included with the appeal is described above.
31. 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 a 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*.
32. There are two reasons why I refuse to exercise my discretion to allow the “new” evidence submitted by Sobil Media with its appeal. First, the evidence is not “new”. All of it existed at the time the Determination was being made and, with some diligence could have been provide to the Director during the complaint process.

33. Second, there is nothing on the face of the material that indicates it is relevant to Ms. Creed, since none of this proposed evidence relates directly to her employment, that it is credible or that it is probative.
34. There is no basis for accepting the material submitted as “new” evidence. The chosen ground of appeal has no merit, and no chance of succeeding.
35. Based on the above, the request for an extension of the time limited for appeal is denied. The delay is unacceptable long, without valid explanation and the appeal on its face is devoid of merit. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

36. Pursuant to section 115 of the *Act*, I order the Determination dated July 25, 2014, be confirmed in the amount of \$3,094.56 together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal