

An appeal

- by -

Ray Miller a Director and Officer of B.C. Wood Recycling Ltd.

- 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:** Carol L. Roberts

**FILE No.:** 2010A/179

**DATE OF DECISION:** February 10, 2011

## DECISION

### SUBMISSIONS

|              |   |
|--------------|---|
| Ray Miller   | on his own behalf                                 |
| Lance Letain | on his own behalf                                 |
| Marc Hale    | on behalf of the Director of Employment Standards |

### OVERVIEW

1. This is an appeal by Ray Miller a Director and Officer of B.C. Wood Recycling Ltd. pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued November 4, 2010.
2. Tony Moody and Lance Letain (the employees) filed complaints with the Director alleging that B.C. Wood Recycling Ltd. (“B.C. Wood”) failed to pay them compensation for length of service. In a Determination issued August 4, 2010, the Director’s delegate found that B.C. Wood had contravened the *Act* in failing to pay the employees compensation for length of service. The delegate determined wages and interest owing in the amount of \$7,643.96 and imposed an administrative penalty in the amount of \$500.00. Included with the Determination was a notice to B.C. Wood’s directors and officers explaining their personal liability under the *Act*. The appeal period for that Determination expired September 13, 2010, without an appeal being filed.
3. In the Determination under appeal, the Director’s delegate found that B.C. Wood had not filed an appeal of the August Determination and that no money had been paid. The delegate further determined that Mr. Miller was a director and officer of B.C. Wood at the time the complainants’ wages were earned and payable. The delegate therefore determined that Mr. Miller was personally liable to pay \$7,695.41 (representing the outstanding wages and accrued interest), which represented not more than two months’ unpaid wages for each of the employees. This Determination contained the following statement in an accompanying “Notice to Directors/Officers”:

If a Determination is issued against a director/officer of a company, the director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination. There are only three grounds on which a Determination made against a director/officer may be appealed:

  - That the person appealing was not a director/officer of the company at the time wages were earned or should have been paid;
  - That the calculation of the director/officer’s personal liability is incorrect; and/or
  - That the director/officer should not be liable for the penalty, where a penalty has been assessed, on the grounds that he or she did not authorize, permit or acquiesce in the company’s contravention.
4. Mr. Miller alleges that the Director failed to observe the principles of natural justice in making the Determination and seeks to have it cancelled.
5. Mr. Miller’s appeal was filed with the Tribunal on December 20, 2010. This decision addresses the timeliness of Mr. Miller’s appeal and is based on the written submissions of the parties.

## ISSUE

6. Whether or not the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## FACTS

7. B. C. Wood had a contract with BC Hydro and Telus to recycle power poles. The employees were employed with B.C. Wood until April 8, 2010. Mr. Miller did not dispute their wage rates, dates of employment and provided the delegate with their payroll information. On October 21, 2009, he told the employees that BC Hydro and Telus were terminating their contract effective January 31, 2010. The employees worked until April 8, 2010 finishing B.C. Wood orders, at which time he told them their employment was terminated. Although Mr. Miller conceded that he had not provided the employees with written notice of termination, he said that he had told them to start looking for other employment as early as 2009.
8. The delegate found that the employees were entitled to compensation for length of service. He determined that although B.C. Wood had told them about the end of the contract, they continued to work past the end of the contract period and did not receive written notice of the end of their employment at any time. As noted above, the Determination finding the employees entitled to wages was not appealed. When that Determination was not satisfied, the Director issued the Determination now under appeal, the 'Director Determination' finding Mr. Miller personally responsible for the outstanding wages.
9. The documentation filed by Mr. Miller shows that he filed his appeal documents with the Langley office of the Employment Standards Branch on December 13, 2010, which was the appeal deadline. He was advised by the Branch staff, both by telephone and in writing that he was to file his appeal immediately with the Tribunal.
10. In his appeal submission, Mr. Miller contends that B.C. Wood is "disputing the claim" as the employees were aware that the project they were employed on was to be terminated. He says that he kept the two employees past the termination date so they could actively pursue work. He submitted that "as a trade-off for the 2 weeks notice I kept the employees on for an extra 9 weeks and was very flexible surrounding the ability of the employees to seek suitable employment".
11. Mr. Miller further says that Canada Revenue Agency has filed what I understand to be a lien against his home for amounts owing and that B.C. Wood has no assets or receivables and no ability to pay.
12. Mr. Miller suggests that, given his personal circumstances, an exemption may be recognized given that the employees were specifically told about the end of the work and were kept abreast of the circumstances of the company.
13. The Director agreed that Mr. Miller attempted to file the appeal by the deadline and says that the one week delay is reasonable in the circumstances. The delegate submits that although Mr. Miller does not have a strong case on appeal, there is no reason not to extend the appeal deadline.
14. Mr. Letain objects to Mr. Miller's application for an extension of time in which to file the application. He says that B.C. Wood, not BC Hydro or Telus, was responsible for shutting down operations and that he and Mr. Moody were led to believe that they would still be employed by B.C. Wood after the contract ended.

## ANALYSIS

15. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
16. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
17. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
18. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
  - there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - the respondent party as well as the Director has been made aware of this intention;
  - the respondent party will not be unduly prejudiced by the granting of an extension; and
  - there is a strong *prima facie* case in favour of the appellant.
19. These criteria are not exhaustive.
20. I find that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
21. The record indicates that Mr. Miller attempted to file his appeal in time. Indeed, the date stamp on the documents confirms that he submitted his appeal to the Employment Standards Branch on December 13, 2010. The delegate was aware of Mr. Miller's intention as he wrote to Mr. Miller to advise him that the Branch would commence collection action on December 21, 2010, if Mr. Miller had not filed his appeal by that date. The delegate's letter seems to suggest that the appeal deadline was being extended, which the Director has no jurisdiction to do and may have misled Mr. Miller into believing that he had an additional week in which to file his appeal.
22. I accept that Mr. Miller had a genuine *bona fide* intention to appeal the Determination and that the Director was aware of that intention.
23. There is no evidence that the respondents will be unduly prejudiced by an extension of time.
24. However, I am unable to find that there is a strong *prima facie* case in Mr. Miller's favour. The submissions address the "correctness" or "fairness" of the August Determination finding the employees entitled to wages. The appeal submissions address the merits of the Determination against B.C. Wood rather than the Determination against Mr. Miller as an officer/director of B.C. Wood. As noted in the notice accompanying the initial Determination, a director/officer may not argue the merits of the Determination against the company by appealing the director/officer Determination. That is precisely what Mr. Miller has done.

25. There is nothing in the appeal submissions that address any of the three grounds on which a Determination made against a director/officer may be appealed. That is, Mr. Miller does not deny that he was a director/officer of the company at the time wages were earned or should have been paid or that the calculation of the director/officer's personal liability is incorrect. Similarly, Mr. Miller also does not suggest that he should not be liable for the penalty on the grounds that he did not authorize, permit or acquiesce in the company's contravention.
26. Finally, although Mr. Miller indicates that the grounds for appeal are that the Director failed to observe the principles of natural justice, nothing in the appeal submissions address that alleged failure.
27. Considering all of the factors, I deny Mr. Miller's application.

### **ORDER**

28. Pursuant to section 109(1)(a) of the *Act*, I deny Mr. Miller's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**