

An appeal

- by -

Glenn A. Good
("Glenn Good")

- 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/20

DATE OF DECISION: April 1, 2014

DECISION

SUBMISSIONS

Glenn A. Good

on his own behalf

OVERVIEW

1. This decision addresses an appeal by Glenn A. Good (“Glenn Good”) made under section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 29, 2013.
2. The Determination was made in respect of a complaint filed by Glenn Good who alleged Grizzly Holdings Inc. (“Grizzly”), had contravened the *Act* by failing to pay him wages for his labour and services.
3. The Determination found Grizzly had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. Glenn Good has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal was received by the Tribunal on February 4, 2014, almost two months after the end of the statutory appeal period.
5. In correspondence dated February 5, 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.
6. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to Glenn Good. The Appellant has been given the opportunity to object to the completeness of the section 112(5) “record”. Glenn Good has filed a submission addressing some of the documents in the “record”. If necessary I shall consider this submission later in this decision.
7. The Tribunal has 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 written submission filed by Glenn Good and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), 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;*
- (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), Grizzly 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

9. There are two issues to be considered at this stage of the proceedings: first, whether the Tribunal should extend the appeal period; and second, whether, in any event, there is any reasonable prospect the appeal can succeed.

THE FACTS

10. On January 17, 2012, Glenn Good filed a complaint with the Director alleging Grizzly had employed him from May 7, 2011, until November 25, 2011, as Project Manager on a mining venture on the Hyland River, Liard Mining District of British Columbia (the “Hyland Project”), and had not paid him wages for his labour and services.
11. Grizzly disputed the claim, arguing Glenn Good was a shareholder, business partner, director and president of Grizzly in the Hyland Project and the *Act* did not apply to him. At pages 8-9 of the Determination, the Director analyzed the relationship among the principle parties involved in the Hyland Project in the context of the *Act* and particularly the definitions of “employee”, “employer” and “work” found in section 1, concluding Glenn Good was a business partner in the Hyland Project and, while not a registered director or officer of Grizzly, held himself out as the company’s president, made key decisions for the company and had authority to bind the company to important contracts. He contributed financially to the company and incurred a financial loss on the Hyland Project. Based on the evidence, the Director found Glenn Good to be a controlling mind and *de facto* director and officer of Grizzly. The Director determined Glenn Good was not a person the *Act* intended to include as an employee and dismissed his complaint, citing and relying on the Tribunal decision *Barry McPhee*, BC EST # D183/97.
12. The Determination was sent by registered mail to the affected parties. It was sent to Glenn Good at the last known address for him in the file, a post office box in Watson Lake. The “record” indicates the Determination was received in Watson Lake, delivery was attempted, a notice card was left; the Determination remained unclaimed and was, after a period of time, returned to the Director’s office.
13. On December 16, 2013, Glenn Good asked the Director to deliver a copy of the Determination electronically and a copy was delivered to him the same day.

ARGUMENT

14. The appeal contains an explanation for the delay in filing. Glenn Good says the registered mail was not picked up because he was not in Watson Lake at the time. He says the first notification he had that a decision on his claim had been issued was December 16, 2013. He also says he was told by the Director at that time there was “nothing I could do as far as an appeal, since I had passed the date”. He says he later found out, when dealing with the appeals of his son, Sean Good, and Robert Kehler, that he could appeal the Determination against his claim.
15. At the root of the arguments on the merits of the appeal, Glenn Good simply disagrees with the Director finding he was not an employee for the purposes of the *Act*. He does not strongly contest the facts of his relationship and role as one of the parties who formed Grizzly and, with Grizzly, engaged in the Hyland

Project. He submits, however, that whatever Grizzly was initially intended to be, and his role in it, he was, as it turned out, cut out of Grizzly and denied any position as director of officer. He says his role (or intended role) with Grizzly must be separated from his job as Project Manager. He alleges much of what transpired in Grizzly was a “muddle of deceit, lying, fraud and breach [sic] of trust by the Capsticks” that, it appears, must be ignored or divorced from his work as Project Manager.

16. Glenn Good does not even strongly contest the finding of the Director that, on the facts, he was “a controlling mind” of Grizzly, but says (without any evidentiary support whatsoever), “there are vast amounts of salaried employees, that are controlling minds in the companies they work for”.
17. He submits “there is no such thing as a pseudo director” and wants that conclusion taken out of the Determination.

ANALYSIS

18. The *Act* imposes an appeal deadline 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.

19. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST # D099/96. The following criteria should be satisfied to grant an extension:
 1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
 2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. The respondent party (i.e. the employer or employee) and the Director have been made aware of the 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.
20. 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.
21. The first point I make is that section 122(2) deems service was made to Glenn Good eight days after it was deposited with Canada Post for delivery by registered mail. It is Glenn Good’s responsibility to ensure the Director has a valid and current mailing address.
22. Even putting that aside, other than to provide an explanation for the delay, Glenn Good has not attempted to demonstrate the existence of other relevant criteria. The delay in this case is lengthy. Even if I accepted Glenn Good’s explanation provides a reasonable explanation for failing to file within the appeal period, that

does not explain why it then took more than a month and a half to deliver the appeal to the Tribunal. I do not accept it is a good or sufficient reason for filing late for Glenn Good to acknowledge, in effect, that he failed to read the very clear and distinct instructions in the Determination for filing an appeal or, at least contact the Tribunal for his options once he was aware the appeal date had come and gone. His inaction after receiving the Determination, together with the prolonged period before any appeal was filed militates against any conclusion he had “a genuine and ongoing *bona fide* intent to appeal” and I find he did not. He certainly never communicated to any other party his disagreement with the Determination or made any other party aware of an intention to appeal. Even a most basic understanding of human nature would indicate a person in Glenn Good’s position, having received a decision he found unacceptable, would not simply accept a statement from the Director – and I make no finding such a statement was made – that the appeal date had passed, but would try to do more to find an appeal route.

23. I do not find the explanation for the length of delay in this case to be reasonable or credible. In the circumstances I would not extend the appeal period.

24. In any event, one of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. The presumptive merits of an appeal also stand as a consideration on which an appeal may be dismissed under section 114(1) of the *Act*, which is set out above.

25. When considering the relative merits of an 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 particular issues raised by the appeal.

26. 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.*

27. 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. dba Honda North*, BC EST # D043/99.

28. 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.

29. 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. The appeal submission on the merits does not even remotely allude to circumstances where

Glenn Good was denied the procedural protections of the principles of natural justice. He does nothing more in his submission than posit a different perspective of the findings of fact made by the Director on the issue of his status under the *Act*, disagreeing with the view of the Director when that is available and creating his own version of the facts when it is not. In respect of this last point, I refer to the assertion by Glenn Good that “vast amounts of salaried employees” are controlling minds in the companies they work for. That assertion stands starkly against the statement in *Lorna Lee Burns*, BC EST # D139/04, at page 4, that:

The Tribunal has never accepted that the “controlling mind” of a corporation can be an employee for the purposes of the *Act*.

30. The facts relied on by the Director in finding Glenn Good was a controlling mind of Grizzly strongly support that finding. There was no error of law in the finding made, nor is there any other error of law apparent in the Determination. The result is perfectly consistent with the approach taken by the Tribunal to the status of the “controlling mind” of a corporation under the *Act*, which was first enunciated in the *Barry McPhee* decision and has been applied in several decisions since.
31. In sum, Glenn Good cannot avoid the consequences of his being found to be a “controlling mind” on his status under the *Act*. An assessment of the merits of this appeal shows it has no prospect of succeeding and stands as another reason for denying the extension of time or for dismissing the appeal under 114(1)(f) of the *Act*. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
32. I dismiss the appeal and confirm the Determination. It is unnecessary to consider the matters raised by Glenn Good concerning the section 112(5) “record”.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination dated October 29, 2013, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal