

An appeal

- by -

Jesse Crandell

- 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.:** 2008A/150

**DATE OF DECISION:** February 25, 2009

## DECISION

### SUBMISSIONS

Jesse Crandell	on his own behalf
Joe Leblanc	on behalf of the Director of Employment Standards
Wanda and Jeff Crandell	on behalf of 0771346 BC Ltd. carrying on business as Tim Horton's Orchard Park

### OVERVIEW

1. This is an appeal by Jesse Crandell, pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued August 8, 2008.
2. Wanda and Jeff Crandell are the directors of 0771346 BC Ltd. carrying on business as Tim Horton's Orchard Park (“Tim Horton's”). Jesse Crandell, Wanda and Jeff's stepson and son respectively, operated Tim Horton's from November 2006 until November 2007. Mr. Crandell filed a complaint alleging that Tim Horton's contravened the *Act* in failing to pay him vacation pay, compensation for length of service and earned bonuses.
3. A delegate of the Director held a hearing into Mr. Crandell's complaint on June 18, 2008. The central issue before the delegate was whether Mr. Crandell was an employee or a partner in the business. Wanda and Jeff Crandell asserted the latter. If the delegate concluded he was an employee, he would be covered by the *Act*; if he was found to be a partner, the *Act* did not apply.
4. Following the hearing, the delegate issued a Determination finding that Mr. Crandell was a partner in the business and that the *Act* did not apply to his complaint.
5. Mr. Crandell argues that new evidence has become available that was not available at the time the Determination was being made and seeks to have the matter referred back to the Director of Employment Standards for a new hearing.
6. Pursuant to section 112 of the *Act*, Mr. Crandell's appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Mr. Crandell's appeal period expired September 8, 2008.
7. Mr. Crandell also seeks an extension of time in which to file his appeal.
8. These reasons address only the timeliness of Mr. Crandell's appeal and are based on the written submissions of the parties.

## ISSUE

9. Whether 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 AND ARGUMENT

10. In arriving at his decision that Mr. Crandell was a partner rather than an employee, the delegate considered a number of factors. The delegate noted that Mr. Crandell invoiced Tim Horton's for his services through a numbered company of which he was the sole director on a monthly basis. The invoice included 6% GST. The money was paid without any of the usual employee deductions and was recorded as an owner's expense in the financial records of the company rather than labour costs. Mr. Crandell attended monthly owners' meetings with Jeff and Wanda Crandell at which time staffing levels, profit and loss reports, strategic planning and best business practices were discussed. Tim Horton's accountant provided written evidence indicating that he understood Mr. Crandell was to manage the business as an independent contractor, either personally or through a corporation. Additional evidence in the form of a letter from a TD Canada Trust financial advisor indicated that Mr. Crandell was considered to be a co-owner of the business from the outset.
11. The evidence indicated that Mr. Crandell had responsibility for the day to day operation of the business, including hiring staff, ordering supplies, conducting training and staff evaluations. He had sole signing authority on the business account and paid suppliers as necessary.
12. The delegate concluded that the business was co-owned by Mr. Crandell's numbered company and 0771346 BC Ltd. owned by Jeff and Wanda Crandell. He rejected Mr. Crandell's argument that his stepmother and father's interference in the way the business was being operated reduced his role to an employee. The delegate noted that while there was no profit to split after one year of operation that did not convert the relationship to one of employer/employee, saying:
13. The events and circumstances above are things that are associated with partnership problems and business to business relationships. They are not the stuff of employer/employee relationships that fall into the jurisdiction of the *Act*.
14. As noted above, the time period for filing an appeal of the Determination expired September 8, 2008.
15. On October 29, 2008, Jesse Crandell's mother, Sherry Crandell, faxed a letter to the Tribunal explaining that her son had asked her to write on his behalf. She stated that her son had not received the Determination and that if he had, he would have appealed it. Mrs. Crandell inquired whether it was too late to appeal the Determination, stating that her son was confused when he went into the hearing, believing that it was simply to determine how much the company owed him, not whether he was a partner or not. She said that neither she nor her son had any idea what the procedures were to be at the hearing or what was going to happen. She said that her son had more to say at the hearing but that "“unfortunately he just fell apart”".
16. Mr. Crandell sent a letter to the Tribunal on November 5, 2008 expressing an intention to appeal the Determination. He said that he had not received the registered letter and found out about the Determination when he received a fax from the Branch responding to his inquiry about when a decision would be made. Mr. Crandell said that he had four tenants, all of whom had access to his mailbox and

suggested that the reason he had not received the Determination was that one of his tenants had misplaced his registered mail.

17. On November 17, 2008, the Tribunal notified Mr. Crandell that his appeal was late. The Tribunal advised Mr. Crandell that he was required to explain why he was appealing the Determination and why his appeal was late. The letter referred to section 109(1)(b) of the *Act* and set out some of the factors he was required to address in seeking an extension of the time to appeal. The Tribunal advised Mr. Crandell that his appeal form, submissions, late reasons and Determination were to be received by the Tribunal no later than 4:30 p.m. December 1, 2008 or the Tribunal would be unable to proceed with the appeal. Mr. Crandell did not respond. On December 10, 2008, the Tribunal's Vice Chair wrote to Mr. Crandell, advising him that she had closed the file because the Tribunal had not received the requested documents by the December 1, 2008 deadline.
18. On December 29, 2008, the Tribunal received another letter from Mr. Crandell dated December 27, 2008, setting out his reasons for appealing the Determination. While Mr. Crandell acknowledged that the Director did not err in law or treat him unfairly in making the Determination, he says that he has evidence that was not available at the time the Determination was being made. Mr. Crandell also adds that his reasons for appealing are more complicated than simply having new evidence. He contends that the directors of Tim Horton's misrepresented the case and that the delegate accepted the misrepresented evidence.
19. Mr. Crandell says he did not know what was going to happen at the original hearing or how to present his evidence. He also says that he was "terrified" and unable to "stand up" to Mr. and Mrs. Crandell. Although Mr. Crandell said that his mother attended the hearing for support, she was prevented from giving any evidence.
20. Mr. Crandell asserts that he believed he was an employee of Tim Horton's rather than a partner and that he was at the hearing to "fight for money". He acknowledged being "a little naïve" and ought to have researched the process more prior to going to the hearing. He says that he now understands how it works and wants an opportunity to try the process again to present new evidence.
21. The delegate submits that the Tribunal ought not exercise its discretion to extend the deadline for filing an appeal as Mr. Crandell had not shown good reason for not meeting the deadline. The delegate argues that Mr. Crandell provided no information from any of his tenants regarding the registered letter and his suggestion that one of them misplaced it is unsupported by any evidence.
22. The delegate further notes that although the Tribunal requested additional information from Mr. Crandell regarding his appeal and indicated that the information was to be provided by December 1, 2008, Mr. Crandell failed to send anything further to the Tribunal until December 29, 2008, almost three weeks past that deadline. The delegate suggests that Mr. Crandell's lack of attention to deadlines suggests that Mr. Crandell never intended to appeal the Determination.
23. The delegate further submits that although Mr. Crandell is of the view that Wanda and Jeff Crandell "misrepresented the evidence", he does not say what part of the evidence was allegedly misinterpreted. The delegate says that Mr. Crandell was given a copy of all the documents Mr. and Mrs. Crandell presented in advance of the hearing and that the issues were clarified at the start of the hearing. He notes that at no time during the proceedings did Mr. Crandell ask for an adjournment or postponement of the

hearing and at no time indicated that he was unaware of Mr. and Mrs. Crandell's position that he was a partner in the business.

24. The delegate says that although Mr. Crandell disagrees with the decision, he does not have an opportunity under the *Act* to try again.
25. Finally, the delegate submits that Mr. Crandell does not have a strong *prima facie* case.
26. Jeff and Wanda Crandell contend that Mr. Crandell waited too long to file an appeal once he found out about the Determination, suggesting that he did not intend to file an appeal. It also says that extending the appeal deadline would "harm our case". They also say that although Mr. Crandell indicates that there is new evidence, that evidence is not set out in the appeal documentation.

## ANALYSIS

27. 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.
28. 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*.
29. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
30. 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:
- (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.

These criteria are not exhaustive.

31. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
32. The record indicates that the Determination was sent by registered mail to Mr. Crandell at the address listed in the BC Corporate Registry director information for his numbered company on August 8, 2008. The mail was returned to the Employment Standards Branch as unclaimed. It is unclear why Mr. Crandell shares his company mailing address with unreliable individuals if his speculation that one of them failed

to notify him of registered mail is accurate. Mr. Crandell provides no other explanation why he did not receive the Determination.

33. On October 20, 2008, the delegate sent a letter to Mr. Crandell in response to a telephone message, enclosing a copy of the Determination. Although Mr. Crandell gives no plausible explanation why the registered mail was unclaimed, I find that he had actual knowledge of the Determination by late October, 2008.
34. Having received the Determination, Mr. Crandell and his mother made several inquiries about appealing it. Although the Tribunal advised Mr. Crandell what steps to take to perfect the appeal and the date by which he was required to take that step, Mr. Crandell failed to meet that deadline. In fact, he did nothing until December 27, 2008, almost two months after receiving the Determination and three weeks after the extended deadline given by the Tribunal. Mr. Crandell provided no explanation at all for his failure to file the appeal within the new deadline given by the Tribunal.
35. I am not persuaded that Mr. Crandell had a genuine, ongoing intention to file an appeal of the Determination.
36. I am not persuaded that there would be any prejudice to Tim Horton's or the Director if an extension were granted.
37. Finally, I am unable to find that there is a strong *prima facie* case in Mr. Crandell's favour. Although Mr. Crandell alleges that evidence has become available that was not available at the time the Determination was being made, he does not outline what that new evidence is or how it might have led the delegate to arrive at a different conclusion on the material issues.
38. Essentially, Mr. Crandell wishes to have another chance to appear at a hearing based on the fact he was unprepared for the first hearing. That is not a ground of appeal. Nor is there any basis for an appeal based on "naivety" or inexperience.
39. While the record suggests that Mr. Crandell's relationship with his father and stepmother is a complex and difficult one, I am also unable to find that these relationship difficulties form a basis for an appeal. If Mr. Crandell felt overwhelmed or unprepared for the hearing, he ought to have sought an adjournment or the assistance of a third party to represent him. He did not.
40. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - the evidence must be relevant to a material issue arising from the complaint;
  - the evidence must be credible in the sense that it is reasonably capable of belief; and

- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

41. The Tribunal has a well established principle that it will not consider new evidence that could have been provided at the investigation or hearing stage (see *Tri-west Tractor Ltd.* BC EST #D268/96 and *Kaiser Stables Ltd.* BC EST #D058/97).
42. Finally, having reviewed the record and the Determination, I find that the delegate's conclusions were supportable on the evidence before him and would thus find no *prima facie* case in support of any of the other grounds of appeal.
43. I deny Mr. Crandell's application.

### **ORDER**

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

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