



An appeal

- by -

A1 Fencing & Contracting Services Inc.  
("A1")

- 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:** R. Hoops Harrison

**FILE No.:** 2016A/154

**DATE OF DECISION:** February 28, 2017

## DECISION

### SUBMISSIONS

Sandra Collins

on behalf of A1 Fencing & Contracting Services Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), A1 Fencing and Contracting Services Inc. (“A1”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on September 26, 2016. In its appeal, A1 has requested an extension of time for appeal so as to produce new evidence.

#### *Determination*

2. The Determination found that A1 Fencing & Contracting Services Inc. was:
  - a. an employer of the Complainant, Bryan Wrightson (“Mr. Wrightson”),
  - b. pursuant to section 79 of the *Act*, ordered to pay \$16,077.71 in wages, overtime pay, statutory holiday pay, compensation for length of service, annual vacation pay along with accrued interest, and
  - c. pursuant to sections 18, 28 and 63 of the *Act*, ordered to pay administrative penalties in the amount of \$1,500.00.
3. The total amount of the Determination is \$17,577.71.

#### *Appeal*

4. An Appeal Form, dated October 17, 2016, was received by the Tribunal on November 2, 2016. The Form states that new evidence has become available that was not available when the Determination was rendered, and also contends the Director failed to follow the principles of natural justice.
5. Furthermore the Appeal Form requests an extension so as to produce the new evidence. The primary basis relied upon for both the extension and reliance on new evidence was that A1 was in the process of moving offices and had “packed things away.”
6. The Tribunal:
  - a. acknowledged to the parties that an appeal had been received from A1,
  - b. requested production of the section 112(5) record (the “Record”) from the Director and 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,
  - c. established a deadline of December 2, 2016, for A1 to provide additional supporting documentation respecting its appeal extension request,

- d. provided A1 with the Director's Record with a deadline of December 20, 2016, for A1 to object to the completeness of the Director's Record.
7. There has been no objection and, accordingly, the Tribunal accepts the Director's Record as complete.
8. I am considering only the Determination, the reasons for Determination, the Appeal Form, the written submissions and materials filed by A1 with the appeal and my review of the Director's Record.

## ISSUE

9. Under section 114 of the *Act*, 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 subsection 114(1), which states:

*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 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.*
10. If I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it may be dismissed under section 114(1) of the *Act*.
  11. If I decide all or part of the appeal should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Wrightson may be invited to file further submissions regarding the appeal extension.

## FACTS

12. A1 operates a fencing and snow removal business in and around Kamloops, British Columbia.
13. Mr. Wrightson worked for A1 from October 8, 2015, to January 21, 2016; he in fact lived in a trailer that A1 provided. Following his termination, Mr. Wrightson complained to the Director alleging that A1 contravened the *Act* in failing to pay wages, including for length of service, and for making impermissible deductions from his wages.
14. A1 responded by asserting that Mr. Wrightson was not an employee, but rather an independent contractor operating under another business, J & B Fence and Deck ("J&B"), and alternatively, his claims for hours of work were exaggerated and unsubstantiated.

15. The Director conducted a complaint investigation and a hearing was held on May 20, 2016. A1 called five (5) witnesses. Mr. Wrightson gave evidence on his own behalf.
16. The Director identified the following issues:
  - a. Was Mr. Wrightson an employee?
  - b. If an employee, what hours did he work and what was he paid?
  - c. Was A1 liable for compensation for length of services? and
  - d. Did A1 require Mr. Wrightson to pay costs of its business?
17. In analyzing the evidence of the parties, the Director found some of Mr. Wrightson's evidence suspect (namely a produced set of timesheets) and his credibility low. The Director however also found that Mr. Wrightson's evidence went uncontested - the five A1 witnesses having not provided any other specific evidence of hours worked, for instance.
18. Without evidence to the contrary, the Director ultimately found in favour of Mr. Wrightson concerning issues a, b and c but not issue d.

## **ARGUMENT**

19. A1 provided some written argument in its Appeal Form and also in its supplementary documentation, which was indexed into 25 parts. A1's position remains unchanged from the one advanced during the Determination, namely that:
  - a. Mr. Wrightson was a 'con artist' (or otherwise an untruthful individual) and his evidence of work is not corroborated, and
  - b. Mr. Wrightson was at all times an independent contractor.

## **DISCUSSION**

20. A review of the *Act* and the decisions of the Tribunal reveal certain principles applicable to appeals that have consistently been applied. The following bear on the analysis and result of this appeal and its extension request.
21. One of the purposes of the *Act*, section 2 (d), is "to provide fair and efficient procedures for resolving disputes". "Fair and efficient procedures" includes the element of ensuring that disputes are resolved in a timely fashion.
22. Similarly, an appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is 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: *Jasmine Transport Ltd.*, BC EST # D100/16. ("*Jasmine*")

23. The grounds of appeal are those found in subsection 112(1) of the *Act*, which states:
- 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.

24. The main foundation of A1's appeal and its extension request is pursuant to section 112(1)(c) in that new evidence is available that was not available when the Determination was being made. A1 also cites section 112(1)(b), and a failure to follow the principles of natural justice.

### Extension of time

25. The Tribunal has developed a principled approach to the exercise of its discretion to grant an extension as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be established:
- a. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - b. there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - c. the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
  - d. the respondent party will not be unduly prejudiced by the granting of an extension; and
  - e. there is a strong *prima facie* case in favour of the appellant.
26. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.
27. A1 has founded its request for an extension in an attachment to its Appeal Form stating that it:
- a. 'had to move offices and packed things away, this is why it's taken so long. We still have many boxes to go through looking for further documentations relevant to this case',
  - b. was awaiting evidence from Ontario, and
  - c. wants Mr. Wrightson's bank statements to be produced so that A1 can prove that Mr. Wrightson took A1s money unlawfully.
28. No further specifics about the office move or evidence from Ontario or relevance of the bank statements are submitted.
29. I do not find the above justifications compelling and also, seeing as A1 was found in contravention of section 28 of the *Act* with respect to record keeping, in the circumstances of this case, they amount to "the dog ate my homework" excuse and I do not find the justifications reasonable or credible.
30. Similarly, considering the principles referred to above, including in section 2(d) of the *Act*, I find that in the circumstances an extension would unduly prejudice Mr. Wrightson.

31. That being said, in assessing the remaining criteria in *Re Niemisto*, the Appeal Form, though deficient, was filed within the statutory time period and so I do find that there was an intention to appeal and I also find that the Director, through Tribunal communications, was made aware of this intention.
32. What remains is a consideration to the *prima facie* case of A1 pursuant to its statutory grounds of appeal. This analysis will also inform my considerations under section 114 of the *Act*.

### **New Evidence [s. 112(1)(c)]**

33. Principally, the opportunity to provide new or additional evidence 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.
34. Specifically, in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 (“*Davies?*”), the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- a. 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;
  - b. the evidence must be relevant to a material issue arising from the complaint;
  - c. the evidence must be credible in the sense that it is reasonably capable of belief; and
  - d. 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.
35. The additional supporting documentation supplied by A1 includes:
- a. other A1 employee paystubs and deductions, including A1 invoices,
  - b. various GPS tracking information,
  - c. a confidentiality agreement dated proximate to the time of hiring of Mr. Wrightson,
  - d. invoices and quotes from J&B, to third parties,
  - e. various documents relating to Mr. Wrightson’s licensing and an automobile violation ticket, and
  - f. unsigned and unsworn statements of opinion.
36. The additional supporting documentation provided by A1 relate to arguments and positions taken by A1 at the Determination hearing. For example, the Director noted that while the A1 trucks use GPS tracking, the GPS records were not made available at the hearing (page R5).
37. That being said, the additional documents, including the GPS records, while material to arguments raised by A1, are not persuasively relevant to the resolution of the issues properly identified by the Director. For example, evidence of some employees work schedules and their need to work no overtime is what is known as ‘similar fact evidence’ and do not mean that Mr. Wrightson may or may not have had to work overtime himself. Furthermore, evidence of a signed confidentiality agreement by Mr. Wrightson on behalf of J&B is not determinative of an independent contractor relationship. with A1, as the law considers the intentions of the parties only one factor in the analysis (page R8). Proverbially, A1 is ‘beating a dead horse’.

38. Most importantly however, is that all of the additional documentary evidence could have been produced and relied upon at the investigative hearing stage, with the advantage of such evidence being verified and authenticated by one or more of A1's five witnesses and then considered contextually by the Director in its overall analysis. The production of them now, without reasonable justification, is to simply reargue the merits of the claim in front of a different decision maker and is not a valid ground of appeal (*Jasmine, supra*).
39. So in applying the test from *Davies*, while the materials *may* be arguably be relevant to a material issue, none of these materials are "new" as they could have been produced at the hearing given reasonable diligence, they are unauthenticated and therefore of low credibility and I do not find the materials highly probative in that they would have resulted in a different Determination had they been produced. Consequently, I am not persuaded to exercise my discretion to accept or consider any of the supporting documentation included by A1.

### **Principles of natural justice [s. 112(1)(b)]**

40. My conclusion on the additional supporting documentation filed with the appeal leaves only the unproven allegations that the Director failed to observe principles of natural justice in making the Determination.
41. Principles of natural justice require the Director to provide A1 with the particulars of the case against them, the opportunity to respond to it in a meaningful way and the right to have the case decided by an independent and unbiased decision maker: *BWI Business World Incorporated*, BC EST # D050/96.
42. In this case, the Director gave each witness ample opportunity to present their evidence and also transparently dealt with threshold witness problems including relevance of testimony. These were all noted in the Determination (for example, page R4).
43. Moreover the Director faced an unenviable set of factors in having a complainant with low credibility faced with no relevant and reliable evidence to the contrary. The Director aptly summarized the fairness of the procedure (page R9), including evaluating the evidence on its internal and external consistency.
44. In all, the Director outlined the issues and provided a fair and unbiased forum for resolution. A1 has not shown there is any breach of principles of natural justice in this case.
45. A1 has also challenged the imposition by the Director of administrative penalties. This argument has no merit. The contraventions in this case are discrete, relating to separate and distinct obligations under the *Act*. It was open to the Director to impose a penalty in respect of each of the contraventions found to have occurred: see *537370 B.C. Ltd. operating as Ponderosa Motor Inn*, BC EST # D011/06.

### **CONCLUSION**

46. A1 has not provided a reasonable and credible explanation for their extension request nor do they have a strong *prima facie* ground for appeal. I am not inclined to exercise my discretion to grant an extension of the appeal period nor to accept any new evidence, all of which could have been relied upon and submitted to the Director at the investigative stage.
47. For the reasons stated previously, there is no possibility that this appeal can succeed. The purposes and objects of the *Act*, included as stated in section 2, would not be served by requiring other parties to participate and respond. They would be unduly prejudiced.

48. Accordingly, I would dismiss the appeal pursuant to section 114 of the *Act*.

**ORDER**

49. Pursuant to section 115 of the *Act*, I order the Determination dated September 26, 2016, be confirmed in the amount of \$17,577.71, together with any interest that has accrued under section 88 of the *Act*.

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**R. Hoops Harrison**  
**Member**  
**Employment Standards Tribunal**