

An appeal

- by -

Worldstar Cashcard Network Inc.
(“WCN”)

- 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.: 2012A/7

DATE OF DECISION: March 14, 2012

DECISION

SUBMISSIONS

Roger Renaud	on behalf of Worldstar Cashcard Network Inc.
Ali Hassanian	on his own behalf
Theresa Robertson	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Worldstar Cashcard Network Inc. (“WCN”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued November 20, 2011.
2. Ali Hassanian (“Mr. Hassanian”) was employed by WCN for a period between November 2010 and March 2011. On March 22, 2011, he filed a complaint with the Director alleging that WCN had contravened the *Act* in failing to pay all wages owing.
3. Following a hearing, the Director concluded that WCN had contravened sections 18 and 58 of the *Act* in failing to pay all wages owing. The Director’s delegate determined that Mr. Hassanian was entitled to wages and accrued interest in the total amount of \$16,577.86. The Director also imposed three administrative penalties in the amount of \$500 each for contravening sections 17, 18 and 28 of the *Act*, for a total amount payable of \$18,077.86.
4. The deadline for filing an appeal of the Determination was 4:30 pm on January 9, 2012. On January 9, 2012, WCN submitted an appeal form, alleging that new evidence had become available that was not available at the time of the Determination. Included with the appeal was an email from Roger Renaud (“Mr. Renaud”) that stated “two witnesses have come forward to prove our case against Mr. Hassanian”. Mr. Renaud also wrote “affidavits of witnesses have not been received and cannot be obtained for at least two weeks”. The Tribunal contacted Mr. Renaud and requested that he provide written reasons for his appeal. Mr. Renaud indicated that he was unable to do so and that he would be filing a late appeal.
5. On January 16, 2012, the Tribunal advised Mr. Renaud that it had not received WCN’s written reasons for the appeal. The Tribunal also noted that Mr. Renaud had not set out the reason for the late filing of the appeal. The Tribunal set out a number of questions for Mr. Renaud to respond to in his submissions and asked that both his reasons for the appeal and his explanation as to why the appeal was filed late be provided no later than January 20, 2012.
6. On January 20, 2012, Mr. Renaud sent two documents to the Tribunal, the first being responses to the questions posed by the Tribunal in its January 16, 2012, letter, the second being an affidavit from Douglas Norman, a consultant who performed work on behalf of WCN between June 2009 and April 2011.
7. On February 14, 2012, the Tribunal provided Mr. Renaud with the submissions of the Director and of Mr. Hassanian replying to the timeliness of WCN’s appeal and asked for Mr. Renaud’s reply no later than February 28, 2012. On February 29, 2012, having received no response from Mr. Renaud, the Tribunal contacted WCN to determine whether or not the documents had been received and whether or not WCN

would be making a final reply. Mr Renaud indicated that he had only received the Tribunal's documents the previous day and that he would be submitting a final reply. The Tribunal requested that Mr. Renaud provide a written request for an extension to submit a final reply along with his written reasons for his delay. The Tribunal wrote that WCN's request for an extension was to be provided no later than March 1, 2012. The Tribunal had not received any further correspondence from Mr. Renaud by March 2, 2012. Through the Tribunal, I advised the parties that Mr. Renaud's final reply, along with his written reasons for the delay in submitting the reply, was to be received by the Tribunal by March 9, 2012. The Tribunal received no additional information on WCN's behalf.

8. This decision addresses only the timeliness of WCN's appeal and is based on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

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. On December 6, 2010, Mr. Hassanian entered into an "employment contract" with WCN which specified that he was to be employed as the Director of Internet Technology ("IT") commencing December 7, 2010, for an indefinite term. His duties included the creation and development of a website and directing the IT department. His salary was to be \$5,000 per month commencing January 15, 2011.
11. On March 15, 2011, WCN terminated Mr. Hassanian's employment. Mr. Hassanian repeatedly sought payment of his wages, which had not been paid to that point, both in person and by way of email correspondence. Although Mr. Renaud acknowledged receipt of the emails, he did not respond to Mr. Hassanian.
12. The Director held a hearing into Mr. Hassanian's complaint. The hearing, which was conducted by teleconference, was conducted over a period of three days: June 28, 2011, July 28, 2011, and August 23, 2011.
13. At the first day of the hearing on June 28, 2011, Mr. Renaud sought and was granted an adjournment on the grounds that, due to illness, he had been unable to properly prepare for the hearing. On that day, the delegate also discovered that Mr. Hassanian had information he sought to rely on to establish his case that he had not disclosed to either the delegate or WCN. Mr. Renaud also indicated that WCN might want to produce additional documentation to support its case and the delegate adjourned the hearing to July 28, 2011. The delegate set out deadlines for the disclosure of evidence. Although Mr. Hassanian submitted additional documentation, WCN did not.
14. On July 28, 2011, the delegate determined that as a result of some technical issues, additional documentation Mr. Hassanian had intended to rely upon had not been received by the Branch or by Mr. Renaud. The delegate instructed Mr. Hassanian to provide the information to her directly and adjourned the hearing until August 23, 2011.
15. Upon receiving the additional documentation, the delegate sent copies to both parties in advance of the August 23, 2011, hearing date. Mr. Hassanian electronically submitted additional evidence, a record of the days and hours he worked, on the morning of the hearing. Although WCN objected to the accuracy of the

information, it raised no other objections. WCN submitted no documentary evidence to the Branch. Mr. Renaud and Gary Fife appeared on WCN's behalf.

16. The issue before the delegate was the amount of wages to which Mr. Hassanian was entitled.
17. The delegate noted that the parties agreed that Mr. Hassanian performed some work for which he had not been paid and that the fact there was no exact record of the hours or days he worked did not prevent a finding that wages were owed to him. After hearing and considering the extensive evidence of the parties, she concluded that she had to arrive at a fair and reasonable conclusion about the work performed on the best evidence. The delegate concluded that it was reasonable for Mr. Hassanain to have worked 76 hours between November 21, 2010, and December 6, 2010. In the absence of an agreed rate of pay, she used the minimum wage of \$8.00 per hour to determine an amount owing of \$608.00 for that period.
18. The delegate considered the employment contract and preferred Mr. Hassanian's evidence regarding the nature of his employment and work performed to that of Mr. Renaud. She concluded that Mr. Hassanian was entitled to receive his agreed upon salary of \$5,000 for the period December 7, 2010, to March 8, 2011, the day Mr. Hassanian agreed he stopped working, plus vacation pay and interest.
19. Mr. Renaud says that on January 9, 2012, he notified the Director that he would accept the Determination and requested time to pay the amount owing due to a lack of funds. He says that the Branch informed him that they did not have jurisdiction to grant extensions and was told to file an appeal.
20. Mr. Renaud says that he discovered the "new information" at the "11th hour" and explained the delay in obtaining the "new evidence" to difficulties seeking legal advice and gathering affidavits during the holiday season. Mr. Renaud says that, at that time, "a couple of witnesses came forward with their intent to provide affidavits pertaining to their rendition of the events surrounding Mr. Hassanian's employment with [WCN]". Mr. Renaud also stated that he felt that he was not given sufficient time to present his case at the hearing.
21. On January 20, 2012, WCN submitted responses to six questions posed by the Tribunal regarding the late appeal as well as an affidavit from Douglas Norman, who described himself as a consultant to WCN from June 2009 until April 2011.
22. Finally, Mr. Renaud says that WCN has a strong case on appeal because "there was some coercion from the plaintiff to enter into an employment agreement although he knew the company was poorly funded" and that "Mr. Hassanian did very little work in his role".
23. The delegate took no position on the issue of whether or not the Tribunal should extend the time period for filing the appeal.
24. Mr. Hassanian submits that WCN has tried to delay the process at every step and that all of the issues raised by the "new evidence" have been addressed in the Determination.

ANALYSIS

25. 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.

26. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
27. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
28. 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.
29. These criteria are not exhaustive.
30. I do not find it appropriate to grant the application.
31. Although WCN's appeal form was filed within the statutory time period, the material in support of the grounds of appeal was not. Furthermore, although the Tribunal granted WCN an extension of time to provide its final reply along with reasons why the final reply was filed late, it has failed to do so.
32. While WCN contends that "new evidence" in the form of affidavit evidence from two parties was now available, only one affidavit has been submitted. No additional "new information" has been submitted despite extensions of time being granted to enable WCN to do so.
33. In my view, WCN has not demonstrated a genuine and ongoing and *bona fide* intention to file the appeal by the statutory deadline. Indeed, as Mr. Renaud conceded, he telephoned the Branch office on the last date for filing an appeal to communicate his acceptance of the Determination. Doing nothing until the last date of the statutory time period does not demonstrate an intention to file an appeal. Telephoning the Branch to communicate acceptance of the Determination belies Mr. Renaud's assertion that he intended to file an appeal.
34. While I accept that Mr. Hassanian may be inconvenienced and somewhat prejudiced by the granting of an extension, I am not persuaded that he will be unduly prejudiced. Mr. Hassanian did not identify any prejudice he might experience as a result of the granting of an extension in his own submission.
35. Finally, I find that WCN has not established a strong *prima facie* case on appeal. The sole ground of appeal is that evidence has become available that was not available at the time the determination was being made. Although WCN submitted some new evidence on appeal, this evidence does not meet the Tribunal's test for new evidence.
36. 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.

37. 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). The “new evidence” consists of an affidavit sworn by a retired businessman who was a consultant for WCN during the period of Mr. Hassanian’s employment. Given that this individual resides in the same community as Mr. Renaud, I am not persuaded that WCN could not have presented this evidence to the Director during the adjudication of Mr. Hassanian’s complaint. Accordingly, WCN cannot now rely on this evidence as a basis for its appeal.

38. Finally, having reviewed the record and the Determination, I find that the delegate’s conclusions were supportable on the evidence before her and would thus find no *prima facie* case in support of any of the other grounds of appeal.

ORDER

39. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal