

An appeal

- by -

Craftsman Collision (1981) Ltd.  
("Craftsman")

- 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.:** 2010A/06 & 2010A/07

**DATE OF DECISION:** March 22, 2010

## DECISION

### SUBMISSIONS

Nicole M. Byres	Counsel for Craftsman Collision Ltd.
Darcy Howe	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

### OVERVIEW

1. This decision relates to an appeal brought under to Section 112 of the *Employment Standards Act* (the “*Act*”) by Craftsman Collision (1981) Ltd. (“Craftsman”) of a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on November 26, 2009.
2. The Determination found that Craftsman had contravened Part 3, Section 18 and Part 7, Section 58 of the *Act* in respect of the employment of Darcy Howe (“Howe”) and ordered Craftsman to pay wages to Howe in the amount of \$19,859.42 and to pay an administrative penalty in the amount of \$500.00.
3. Craftsman has filed an appeal of the Determination, alleging the Director erred in law.
4. The appeal was filed late, and Craftsman has made an application to extend the time period for filing an appeal. Craftsman has also made an application under section 113 of the *Act* to suspend the effect of the Determination pending the appeal. On January 18, 2010, the Tribunal notified the parties that the timeliness issue would be decided before the parties were asked to respond on the merits of the appeal. This decision addresses this application to extend the time period and the suspension request.

### ISSUE

5. The issue is whether the Tribunal should extend the appeal period and suspend the effect of the Determination.

### THE FACTS

6. The facts relating to the issue of timeliness are as follows:
  1. The Determination was issued on November 26, 2009;
  2. Craftsman received the Determination and the reasons for the Determination sometime before December 1, 2009;
  3. The lawyer representing Craftsman in the complaint process (the “first lawyer”) was provided with a copy of the Determination and reasons by Craftsman and reviewed those documents on December 1, 2009;
  4. The lawyer representing Craftsman in this appeal (the “current lawyer”) says Mr. David Cant, Executive Vice President and CFO for Craftsman, believes he gave instructions to the first lawyer to appeal the Determination;

5. The current lawyer says the first lawyer does not recall receiving instructions from Craftsman to file an appeal of the Determination;
6. On December 18, 2009, the first lawyer gave notice of her intention to leave the law firm representing Craftsman and left that firm on, or about, January 5, 2010;
7. The time limit for delivering an appeal to the Tribunal expired on January 4, 2010;
8. The appeal was delivered to the Tribunal on January 15, 2010.

## ARGUMENT

7. Craftsman argues there was always an intention on their part to appeal the Determination and, believing instructions had been given to the first lawyer to file an appeal, left that task to her.
8. Craftsman says there has been no undue delay and the appeal was filed expeditiously once it was discovered no appeal had been filed by the first lawyer.
9. Craftsman submits Howe will not be unduly prejudiced by extending the appeal period, whereas they would be significantly prejudiced if the appeal was not allowed. Craftsman cites the effect of the decision on their bonus program(s) and on the potential for the increasing administrative penalties in the future if the Determination is confirmed.
10. Craftsman contends there is a good arguable case on appeal.
11. The Director has filed a response on this issue. The Director says there is no good reason for the failure to file the appeal within the period allowed, the delay in filing is unreasonably long, there is no objective indication that Craftsman ever intended to file an appeal before the appeal period had expired, there was no indication to the Director during the appeal period that Craftsman ever intended to appeal the Determination, an appeal will delay the payment of wages owing and Craftsman does not have a strong case on appeal.
12. The Director says it is Craftsman's responsibility to ensure an appeal is filed within the time period allowed and suggests that responsibility includes – if instructions were given – checking to ensure those instructions were being carried out before the time period expired, not some four days after.
13. Howe has also filed a response to the application, saying Craftsman has failed to establish there are “compelling reasons” for extending the appeal period. Howe says no direct evidence has been provided regarding the cause of the delay, only assertions of fact made by the current lawyer in this application about what Mr. Cant and the first lawyer told her. He says even those assertions do not show there are “compelling reasons” to grant an extension. He also says there is no direct evidence that any person from Craftsman instructed the first lawyer, or anyone else, to file an appeal within the time allowed.
14. Howe says the prejudice Craftsman says it will incur is “insincere”, as they can correct the effect of the Determination simply by putting the terms of the bonus plan in writing and providing those terms to their employees.
15. Finally, Howe questions the strength of Craftsman's appeal case.

16. In their final reply, Craftsman submits they were reasonably entitled to rely on the first lawyer to alert them to any limitation period and any failing by her in that regard should not negate what is otherwise a credible explanation for not filing within the statutory time period.
17. Craftsman challenges the Director's suggestion that the time delay was "unreasonably long", indicating the Director has provided no authority for that suggestion.
18. Craftsman says there is no obligation to notify either the Director or Howe of an appeal and in fact the Tribunal did so once the appeal was delivered.

## ANALYSIS

19. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: 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.

20. 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 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;
  5. There is a strong *prima facie* case in favour of the appellant.
21. 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.
22. There is a suggestion of a unique criterion involved in this case, relating to the assertion by Craftsman's current lawyer that Mr. Cant believes instructions were given to their first lawyer to appeal, but those instructions were either misunderstood or ignored by the first lawyer, who also apparently failed to advise Craftsman of the limitation period.
23. In respect of the first criterion, I do not find the explanation provided by the current lawyer for Craftsman to be a reasonable and credible explanation for the delay. For several reasons, I do not find any relevance to whether or not Mr. Cant instructed the first lawyer to appeal, although the available objective evidence would suggest he did not.

24. Craftsman has provided no direct evidence from either Mr. Cant or the first lawyer and the uncorroborated assertions made by the current lawyer of the recollections of Mr. Cant and the first lawyer on this point are in conflict. For the purpose of considering this criterion, I do not accede to the notion that the first lawyer was solely responsible for advising Craftsman of the appeal period. Representatives of Craftsman received the Determination. It clearly and expressly provides the reader with appeal information. That information includes notice of the date – January 4, 2010 – by which an appeal must be delivered to the Tribunal. If Craftsman did not read the Determination or take notice of the appeal information, that is their failing, not the first lawyer’s. There is nothing which demonstrates Craftsman exercised a reasonably expected level of diligence and that operates against them in this matter.
25. I do not accept the circumstances of the first lawyer’s ending her employment with the law firm representing Craftsman affects my view of this factor at all or provides a unique criterion. If Mr. Cant failed to instruct the first lawyer, then the failure to ensure a timely appeal falls predominantly at the feet of Craftsman. Even if Mr. Cant did instruct the first lawyer to appeal and the entire responsibility for ensuring a timely filing, and the failure to do so, can somehow be attributed to her, that still does not assist Craftsman here. The first lawyer was Craftsman’s representative. As the Tribunal stated in *Tri-West Tractor Ltd.*, BC EST #D268/96:
- It rings hollow to cast the blame for the failure of Tri-West to respond to the inquiries of the delegate onto its legal counsel. Legal counsel is the agent for Tri-West. Its failure is Tri-West’s failure.
26. The circumstances here are comparable. If there is an issue between Craftsman and its law firm about possible professional liability, that is a matter that arises independently of this appeal or any matter in the *Act*. Particularly, it has no affect on a consideration of the application to extend. If instructions to appeal were given, the first lawyer had more than a month to comply with those instructions. There is no suggestion in the application that her decision to leave the firm adversely affected her ability to continue to do her job for the clients of the firm.
27. In regard to the requirement to demonstrate a genuine and on-going intention to file an appeal, there is simply no objective evidence that Craftsman had such an intention. In fact, what objective evidence there is does not support the existence of such intention. While the objective evidence confirms the first lawyer received and reviewed the Determination and the reasons, there is no evidence of a telephone call from, or to, Mr. Cant, an e-mail or letter of instruction enclosed with the copy of the Determination and reasons that suggest the first lawyer should review the reasons with a view to an appeal.
28. Turning to the third criteria, the Employer did not make Howe or the Director aware of any intention to appeal within the relevant time period. Dealing with the fourth criteria of prejudice in granting an extension, while I do not find any evidence of undue prejudice to Howe, to grant the extension would cause further delay to him in receiving his award and be contrary to one of the purposes of the *Act* as set out in Section 2(d): to provide fair and efficient procedures for resolving disputes.
29. Finally, I do not find there is a strong *prima facie* case in favour of Craftsman. To establish a strong *prima facie* case, the appeal must have some merit on its face. Except to the extent necessary to determine if there is a “strong *prima facie* case that might succeed”, the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period: see, for example, *Re Owolabi (c.o.b. Just Beauty)*, BC EST RD#193/04.
30. Craftsman has alleged the Director committed five errors of law in the Determination.

31. Craftsman submits the Director's interpretation of the facts are not reasonably supported by the evidence on whether the bonus claimed by Howe "related to hours of work, production or efficiency" and on whether the bonus was "payable". At their core, both of these alleged errors challenge findings of fact that are, on the face of the Determination, grounded in and supported by the evidence. Both ask the Tribunal to review and reassess the evidence provided by the parties and reach different conclusions than the Director on that evidence. There is no support from a reading of the Determination that the Director "ignored" uncontradicted evidence, rather than (as the Directors says) simply not putting much weight on this evidence. No new evidence is sought to be introduced. A consideration of the first error alleged also requires the Tribunal to ignore evidence provided by Craftsman's witnesses and accept an argument that was not made by Craftsman in the complaint process and which to some extent runs against the evidence and argument that was given by them during the complaint process. All of these matters ask the Tribunal to do what we have consistently said we cannot or will not do.
32. Craftsman says the Director erred in law by adopting an incorrect analysis on whether the bonus was wages. I agree the Director incorrectly organized the analysis of whether the bonus met the definition of wages – see *Taiga Building Products Ltd.*, BC EST # D059/07 – but as with the result in the *Taiga Building Products Ltd.* case, there is nothing in the appeal that shows the Director reached the wrong conclusion as a result of the fragmented approach taken. The Director did address each component of the definition of wages as it applied to the bonus and found each supported the conclusion reached: that the bonus met the definition of "wages" in section 1 of the *Act*. Succeeding on this argument will not change the result or the Determination.
33. Craftsman argues the Director erred in law in finding the bonus was not "discretionary". On a fair reading of the Determination, the Director did not find there was no discretionary aspect to the bonus; the Director rejected the argument that the bonus was "discretionary" on the basis that Mr. Hatswell had the final say on whether or not it was paid since he was the president and signed the cheques. In fact, there is a suggestion in the Determination that the Director found some elements of discretion in the awarding of the bonus, but found Craftsman's "discretion" whether to award a bonus did not remove it from the definition of wages because both elements of the exclusion found in section 1(g) – that the bonus discretionary *and* unrelated to hours of work, production or efficiency – were not established. This argument is simply another challenge to the conclusion of the Director that the bonus was related to hours of work, production and efficiency, a conclusion I have already indicated was solidly grounded in the evidence and findings of fact made by the Director on that evidence.
34. Finally, Craftsman argues the Director erred in law by applying an incorrect test to determine the terms of the employment contract relating to the bonus. There was no dispute between the parties that there was an employment contract and that contract included the payment of a bonus. The issue between the parties was whether there was a term in the employment contract making the agreement to pay the bonus conditional on continued employment on the payout date. The Director found there was no such term. This conclusion was based on an analysis of the evidence, the facts and the absence of facts relating to the assertion by Craftsman that this was a term of the employment contract.
35. Craftsman says the Director ought to have implied such a contractual term from the conduct of the parties and the evidence provided. Craftsman relies on a decision of the BC Supreme Court, *Rose v. Shell*, [1985] CanLii 675, as expressing the law on this argument. The decision, however, expressly states that: ". . . the question of what terms, if any, should be implied in any contract is a question of fact not law and thus it can only be answered by reference to the history of the relationship between the parties." This argument challenges findings of fact about what terms were included in the employment contract. No error of law is apparent in this argument. The Tribunal has no authority to consider appeal based on errors of fact, this argument is bound to fail on that basis.

36. The application to extend the appeal period is denied. The appeal is dismissed.
37. In light of my decision on this application, the request under section 113 of the *Act* for a suspension of the effect of the Determination is moot and need not be decided.

**ORDER**

38. Pursuant to Section 115 of the *Act*, I order the Determination dated November 26, 2009, be confirmed in the amount of \$20,359.42, together with any interest that has accrued under Section 88.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**