

An appeal

- by -

Falcon West Contracting Ltd. and Falcon Leasing Ltd.  
(“Falcon”)

- 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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2011A/4

**DATE OF DECISION:** March 31, 2011

## DECISION

### SUBMISSIONS

Bob Dhillon	on behalf of Falcon West Contracting Ltd. and Falcon Leasing Ltd.
Ken White	on behalf of the Director
Kevin Mortimer	on his own behalf

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Falcon West Contracting Ltd. and Falcon Leasing Ltd. (“Falcon”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 1, 2010.
2. The Determination was made by the Director on complaints filed by Ray Cantin, Zoltan Cserhalmi and Kevin Mortimer (collectively, “the complainants”), who alleged Falcon had contravened the *Act* by failing to pay regular wages, overtime wages and annual vacation pay. The Determination found that Falcon had contravened Part 3, sections 17 and 18, Part 7, section 58 of the *Act* and Part 7, section 37.3 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered Falcon to pay the complainants \$18,108.76, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Falcon under Section 29(1) of the *Regulation* in the amount of \$1,500.00.
4. The total amount of the Determination is \$19,608.76.
5. Falcon has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination.
6. Some of the appeal documents were filed with the Tribunal on January 10, 2011, which was the last day for filing an appeal within the time period allowed in section 112(3) of the *Act*. The appeal was incomplete when it was filed and Falcon was notified of that on January 11, 2011 and granted until January 12, 2011 to comply with the filing requirements set out in section 112(2) of the *Act*. As a result, the appeal was filed late. Falcon has requested the time period for filing the appeal be extended.
7. The Tribunal has a discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

### ISSUE

8. There is an initial issue about whether the Tribunal should extend the appeal period. If the Tribunal decides to accept the appeal, the issue raised in the appeal is whether the Director failed to observe principles of natural justice in making the Determination.

## THE FACTS

9. The facts relating to the timeliness issue are as follows:
  1. The Determination was issued on December 1, 2010.
  2. The Determination provided appeal information and indicated any appeal was required to be delivered to the Tribunal “by 4:30 pm on January 10, 2011”
  3. Falcon filed what purported to be an appeal with the Tribunal on January 10, 2011.
  4. The filing did not comply with the requirements of section 112(2).
  5. The Tribunal allowed Falcon a period of time, until January 12, 2011 to comply with the filing requirements of the *Act* for an appeal.
  6. Falcon filed an appeal that complied with the requirements of section 112(2) of the *Act* on January 12, 2011 – two days outside of the appeal period set out in section 112(3).
10. Falcon has requested an extension of time, to January 12, 2011, for filing their appeal.

## ARGUMENT

11. Falcon says the appeal was late because the person with authority had been admitted to hospital for surgery. The office scanner was broken and no one other than that person could authorize the purchase of a new one.
12. The Director opposes any extension of time. He says there was ample time to prepare and file an appeal before the deadline date. The Determination was delivered to the office of Falcon on December 3, 2010, and was also sent to the home address of the sole director of Falcon. The Director says that although the filing was made only two days passed the deadline date, any delay is unreasonable. He says there is no indication Falcon ever made it known to the Director or the complainants that they intended to appeal the Determination. The Director submits that extending the appeal period has the potential to harm the complainants’ case as it will delay payment of outstanding wages. The Director also says Falcon has, in any event, provided no support in their appeal for the allegation that the Director failed to observe principles of natural justice in making the Determination and does not have a case that might succeed on appeal.
13. One of the complainants, Mr. Mortimer, has filed a response echoing the Director’s point that any continuing delay is prejudicial to him.
14. Falcon has filed a final reply. Their reply does not specifically address the timeliness issue, but rather makes a submission on the merits of their appeal.

## ANALYSIS

15. 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.

16. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, 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.
17. 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. No unique criteria are indicated in this case.
18. In respect of the first criterion, the deficiency in the appeal filing was the omission of six of twenty two pages in the documents sent to the Tribunal on January 10, 2011. This omission was corrected two days later. The reason given for the omission is a defective scanning machine. In the circumstances, I am prepared to accept that reason is truthful. In the sense of being reasonable, however, that excuse is very close to failing to pass muster. The problem only arose because Falcon left it to the last moment to file the appeal. On balance, I find this criterion to be neutral.
19. I also find the other criterion, except the last, to be neutral. The fact of filing within the time period is an expression of an intention to appeal, even though neither the Director nor the complainants were made aware of Falcon's intention before January 10. I find no additional prejudice would be imposed on the complainants by extending the time and considering the merits of the appeal.
20. In respect of the final criterion, I find there to be no possible merit to the appeal. I agree with the point made by the Director that the appeal provides no basis for finding the Director failed to comply with principles of natural justice, which in the context of the circumstances of the complaints being investigated required the Director to ensure Falcon knew the case being made against them, had the opportunity to reply, and was afforded the right to have their case heard by an impartial decision maker. Falcon does not say how it was denied the opportunity to present its case or to respond fully to the complaints. The Record shows that Falcon participated in the complaint process and was given ample opportunity to respond to the claims made.
21. The central position taken in the appeal, that the Director failed to give effect to the "no overtime" provision in Falcon's Driver Policy Manual, is fully and correctly addressed in the Determination by its reference to section 4 of the *Act*, which reads:
  4. The requirements of this *Act* and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) or (4), has no effect.
22. To put it succinctly, the "no overtime" provision of the Manual, because it purported to waive the requirements of section 37.3 of the *Regulation* was a nullity and could not operate to deny the complainants the benefits conferred by that section.

23. Similarly, the other aspect of the appeal, the section 95 finding, has no prospect of succeeding. The analysis of that question in the Determination is complete and firmly grounded in the material found in the Record and the Director's view of the law. Falcon was notified of the Director's intention to consider section 95 and given an opportunity to respond on that matter.
24. For the above reasons and considering a balancing of all the factors related to the timeliness issue, I am not prepared to extend the period for filing. Consequently, the appeal was filed out of time and is dismissed on that basis.
25. I would add that even if I were inclined to extend the period for filing the appeal, I would have found this appeal has no reasonable chance to succeed and exercised my authority under section 114 of the *Act* to dismiss the appeal.

### **ORDER**

26. Pursuant to section 115 of the *Act*, I confirm the Determination dated December 1, 2010 in the amount of \$19,608.76, together with any interest that has accrued under section 88 of the *Act*.

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