

An appeal

- by -

0752871 B.C. Ltd
(“0752871”)

- 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.: 2014A/27

DATE OF DECISION: May 9, 2014

DECISION

SUBMISSIONS

Sarjinder K. Dhaliwal

on behalf of 0752871 B.C. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), 0752871 B.C. Ltd. (“0752871”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 15, 2013.
2. The Determination found that 0752871 had contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered 0752871 to pay an administrative penalty in the amount of \$500.00, which represents the total amount of the Determination.
3. 0752871 has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. The appeal has been filed considerably outside of the time limited for filing an appeal under section 112 of the *Act*.
4. In correspondence dated March 7, 2014, the Tribunal 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.
5. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to 0752871, who has been given the opportunity to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
6. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of 0752871 and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), 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 that subsection, which states:

114 (1) *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 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.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director will be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at the timeliness of the appeal and the prospect of its success if an extension of time is warranted.

ISSUE

8. There are two issues to be considered at this stage of the proceedings: first, whether the Tribunal should extend the appeal period; and second, whether, in any event, there is any reasonable prospect the appeal can succeed.

THE FACTS

9. 0572871 was a Farm Labour Contractor operating under a licence issued by the Director under section 7 of the *Regulation* for a period from December 28, 2011, to December 27, 2014. Based on the information in the file, 0572871 stopped operating as a Farm Labour Contractor in June of 2013.
10. The facts relating to the issue of the timeliness of the appeal are as follows:
 1. The Determination was issued on November 15, 2013;
 2. The time limited for filing an appeal expired on December 23, 2013;
 3. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
 4. The web site address and the telephone number of the Tribunal are also clearly expressed in the Determination;
 5. The section 112(5) “record” indicates the Determination was sent by registered mail to the address listed on 0572871’s Farm Labour Contract Licence and to its registered and records office, an address which is also listed in the corporate records as the mailing and delivery address for Sarjinder K. Dhaliwal (“Ms. Dhaliwal”) who is listed in the corporate records as the sole director and officer of 0572871;
 6. The tracking information for the Determination provided by Canada Post indicates delivery of the Determination was attempted on November 18, 2013, at both addresses, was refused at the address listed on the Farm Labour Contractor Licence and went unclaimed at the other address.
 7. Notice of attempted delivery was left at the registered and records office address on November 18, 2013, and a final notice for pickup was left at that address on November 25, 2013;
 8. The appeal was not delivered to the Tribunal until March 4, 2014.
11. The facts relating to the merits of the appeal are as follows:
 1. On October 22, 2013, the Director issued 0752871 a Demand for Payroll Records (the “Demand”) by registered mail to the address listed on 0572871’s Farm Labour Contract Licence and to its registered and records office;
 2. The Canada Post tracking system shows the Demand was successfully delivered to both locations on October 24, 2013;

3. As of the date of the Determination, the Director had not received any payroll records from 0752871; and
4. On the day fixed for complying with the Demand, the Director received a fax communication from Ms. Dhaliwal saying the company could not meet the Demand for two reasons: first, she had only just returned to her office and saw the Demand; and second, the business was no longer in operation; she had no access to the records as and the person holding the records was away until the “end of the month”.

ARGUMENT

12. In respect of the late filing of the appeal, 0752871 submits the Determination was never delivered to or received by 0752871 in November 2013. 0752871 submits the material showing the Determination was returned to the Employment Standards Branch in January 2014 without being claimed by the company supports this submission and overrules the deeming provision in section 122 of the *Act*. 0752871 says the effect of these facts is that the Determination was never served in November 2013, was required to be reissued and service subsequently proven, before being effective. 0752871 acknowledges delivery of the Determination on February 26, 2014, and argues the time for appeal commences from that date.
13. In respect of the administrative penalty imposed, 0752871 says the decision of the Director was unfair and inequitable. 0752871 submits there was a valid explanation given for not being able to meet the deadline set out in the Demand and the Director did not act reasonably in rejecting that explanation and issuing the administrative penalty.

ANALYSIS

14. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: see 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.
15. 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 the failure to request an appeal within the statutory time limit;
 2. there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 3. the respondent party (*i.e.*, the employer or employee), as well the Director, must have 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.
16. 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.

17. The argument made by 0752871 on the timeliness of this appeal depends on the effect of the attempted delivery of the Determination by registered mail in November 2013 to the address listed on 0752871’s Farm Labour Contract Licence and to its registered and records office, which is the mailing and delivery address for Ms. Dhaliwal. 0752871 says the Determination must be considered as having never been served. This argument has been considered and rejected by the Tribunal in *The Director of Employment Standards (Re Charles Neil)*, BC EST # D330/00 (Reconsideration of BC EST # D122/00). In that case, Mr. Neil had successfully argued in his appeal that because the Determination had been sent to his last known address – from which he had moved without providing a forwarding address – and returned to the Director unclaimed, the Determination had never been “served”. The original panel agreed, but on reconsideration, the Tribunal disagreed, stating:

In my view, given the above findings of fact, the adjudicator erred in finding that the Determination was never served – see *e.g. Patry*, BC EST #D120/96; *Tang*, BC EST #D211/96; *Fort Optical*, BC EST #D205/97; *Aujla*, BC EST #D012/99; see also *Laguna Woodcraft (Canada) Ltd. v. B.C. Employment Standards Tribunal* [1999] B.C.J. No. 3135 (B.C.S.C.). Although the Determination may not have been physically in Neil’s hand in late July 1999, the Determination was nonetheless deemed, by reason of subsection 122(2), to have been lawfully served as of July 22nd, 1999 (8 days after July 14th) at which point the 15-day appeal period set out in section 112(2)(a) commenced running.

18. That is the case here: even though the Determination may never have physically been in 0752871’s hands, subsection 122(2) deems it to have been lawfully served. The argument that the deemed service is “overruled” because the Determination was not “received by” 0752871 has no merit. I also note that, unlike the *Neil* case, where Mr. Neil (in all probability) was unaware the Director was attempting to serve the Determination, there were four notices left with 0752871, two at the Farm Labour Contractor Licence address and two at its registered and records office, which was also Ms. Dhaliwal’s home address, indicating there was registered mail to be picked up. All of these were ignored.
19. The date from which the appeal period is to be calculated is, consequently, eight days from November 18, 2013.
20. The delay in filing this appeal is more than three months and such delay is unreasonable. I find nothing in the appeal that explains such an unreasonable delay. 0752871 knew in early November 2013 the Director intended to impose an administrative penalty for failure to comply with the Demand but ignored all processes potentially relating to it until the end of January when, it appears, the Director demanded payment and, quite probably, threatened collections action.
21. The explanation provided does not justify an extension of the appeal period. Nor do any of the other criteria listed in deciding whether to extend the appeal period warrant granting an extension of the statutory appeal period.
22. Even if I accepted the explanation for the delay was reasonable, or had some other reason for extending the appeal period, I do not find 0752871 has a strong *prima facie* case on the merits. The obligation on a farm labour contractor to maintain records is clear and includes the obligation that such records be produced “as and when required”. The expressed statutory obligation is to maintain the records at the principal place of business. The objective of the statutory provisions is to ensure timely and complete production of the required records. That objective was not met by Ms. Dhaliwal advising the Director that the records required to be produced were inaccessible for at least four weeks.

23. On November 4, 2013, 0752871 never expressly asked for an extension of time to provide the records covered by the Demand, but simply notified the Director the records could not be provided. In the circumstances, I see nothing unreasonable or unfair in the Director imposing the administrative penalty.
24. I do not find the purposes and objects of the *Act* would be served by requiring the other party to respond to this appeal.
25. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated November 15, 2013, confirmed in the amount of \$500.00.

David B. Stevenson
Member
Employment Standards Tribunal