

An appeal

- by -

Worldspan Marine Inc., Queenship Marine Industries Ltd. and Crescent Custom
Yachts Inc.

(the “Associated Employer”)

- 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.: 2011A/38

DATE OF DECISION: April 14, 2011

DECISION

SUBMISSIONS

Dean P. Davidson

on behalf of Worldspan Marine Inc, Queenship Marine Industries Ltd. and Crescent Custom Yachts Inc.

OVERVIEW

1. On March 18, 2011, the Director issued a Determination against Worldspan Marine Inc, Queenship Marine Industries Ltd. and Crescent Custom Yachts Inc.
2. The Determination was made on behalf of ninety-seven former employees of Queenship Marine Industries Ltd., some of whom had complained to the Director alleging they had been terminated from their employment and were not paid all wages owed.
3. The Director conducted an investigation under section 76(2) of the *Employment Standards Act* (the “*Act*”). The Director found the *Act* had been contravened and that the former employees were owed wages and interest in the amount of \$1,208,481.23.
4. The Director also imposed administrative penalties under Section 29(1) of the *Employment Standards Regulation* in the amount of \$1,000.00.
5. The Director found Queenship Marine Industries Ltd. and two other entities, Worldspan Marine Inc. and Crescent Custom Yachts Inc., met the statutory requirements for being associated under section 95 of the *Act* and did so. I will refer in this decision to the three entities as the “Associated Employer”.
6. The Determination indicated that if the Associated Employer wished to file an appeal of the Determination, the appeal had to be delivered to the Tribunal by 4:30 pm on April 25, 2011. On April 6, 2011, counsel for the Associated Employer filed a request (dated April 5, 2011) to the Tribunal for an extension of the time for filing an appeal from April 25, 2011 to June 27, 2011.

ISSUE

7. The issue is whether the Tribunal should grant the requested extension of the time for filing the appeal of the Determination.

ARGUMENT

8. Counsel for the Associated Employer says an extension of time is justified for several reasons.
9. First, counsel says two of the directors and/or officers of the Associated Employer were not in Canada and had not, as of the date of the request for an extension, seen the Determination.
10. Second, counsel says the evidence on which the section 95 decision was substantially based came from one person, Mr. Dan Pascoe (who is identified in the Determination as the Chief Financial Officer at Worldspan Marine Inc.), and Mr. Pascoe has given information that is outside of his scope of knowledge and authority, is incorrect and is otherwise unconfirmed by the directors and officers of the three entities which comprise the

Associated Employer. Counsel adds that many of the directors and officers of the three entities reside in the United States and are not readily available.

11. Third, counsel says the Determination is for a considerable amount of money, a correspondingly considerable liability on the Associated Employer, and involves a large number of claimants. He says these circumstances justify careful research by the Associated Employer to ensure the correctness of the conclusions reached by the Director on the amount of wages owed.
12. Fourth, counsel says there are questions of law and fact relating to the application of section 64 of the *Act* and whether the investigation conducted by the Director was “flawed and incomplete” and failed to meet the statutory obligation set out in section 77 of the *Act*.
13. Fifth, counsel indicates the Associated Employer plans to appeal both the section 95 decision, which he asserts was based on incorrect information, and the sections 63 and 64 decisions, which counsel says were made on incorrect information and without analysis of individual contracts of employment that might have affected the entitlement of some employees under section 64 of the *Act*. Counsel says there is a “forensic team on site” assembling information for the appeal.

ANALYSIS

14. The statutory requirements for filing an appeal are not onerous. Subsection 112(1) of the *Act* sets out three grounds on which a Determination may be appealed. In particular, an appeal can be grounded in evidence becoming available that was not available when the Determination was being made. A substantial body of law has been developed around this ground of appeal. The Tribunal takes a relatively strict approach to exercising its discretion about whether additional evidence will be accepted in an appeal, considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03, and *Senor Rana’s Cantina Ltd.*, BC EST # D017/05. The Tribunal also considers whether the evidence sought to be submitted with the appeal was available but not provided to the delegate during the investigation because of the failure or refusal of the appellant to participate in the complaint process: see *Tri-West Tractors Ltd.*, BC EST # D268/96; *Kaiser Stables Ltd.*, BC EST # D058/97.
15. Subsection 112(2) sets out what a person seeking to appeal must do in order to make an appeal:
 - (2) *A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),*
 - (a) *deliver to the office of the tribunal*
 - (i) *a written request specifying the grounds on which the appeal is based under subsection (1),*
 - (i.1) *a copy of the director’s written reasons for the determination, and*
 - (ii) *payment of the appeal fee, if any, prescribed by regulation, and*
 - (b) *deliver a copy of the request under paragraph (a) (i) to the director.*
16. Under the *Administrative Tribunals Act*, the Tribunal is vested with the authority to make rules respecting its practice and procedure: see section 11. The Tribunal has established rules relating to appeals. Among other

things, the rules require an appellant to provide an explanation for the grounds chosen. The objective of the rules is to meet the statutory purposes of speed, efficiency and finality in the appeal process. The rules are not, however, given an overly technical application. There is room within the application of the rules to ensure an appeal is fully and fairly heard: see *D. Hall & Associates Ltd.*, BC EST # D354/99.

17. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). More specifically, it is a primary objective of the *Act* that the appeals system should be relatively informal and, while ensuring compliance with principles of natural justice, that appeals should be decided quickly at the lowest possible cost to the parties. The foundation for this approach is firmly grounded in the language of the *Act*, the intention of the legislature and a recognition that the *Act* is basic social legislation governing employment, a matter described by Mr. Justice Iacobucci in *Machtiger v. HOJ Industries Ltd.*, [1992] 1 SCR 986, at page 1002, to be “of central importance to our society”. The entitlements contained in the *Act* have, by their inclusion in the legislation, been considered by the legislature to be basic social entitlements.
18. 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.
19. 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.
20. 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. In the circumstances of this request, the expression of the first criterion would be modified slightly to reflect this request is being made before the appeal period has expired; the Associated Employer must still demonstrate there is reasonable and credible explanation for the extension sought.

DECISION

21. I am not persuaded the circumstances in this case justify extending the time limits for appeal. This conclusion does not simply apply to the extension of more than two months requested by counsel for the Associated Employer, but to any extension of the appeal period.
22. First: that two of the directors/officers of the Associated Employer have not seen the Determination is neither particularly relevant nor is it compelling. The Determination has been served on the Associated Employer in accordance with the requirements of the *Act*. I do not accept that in this age of electronic

transference, mobile computing and widely accessible video conferencing that there should be any difficulty providing all the director/officers, even the non-resident director/officers, with a copy of the Determination and receiving instructions and information from them within the statutory period allowed for an appeal.

23. Second, if Mr. Pascoe has given information that is incorrect, it ought to be a simple enough task to identify what information that was, why the Director should not have relied on such information in making the Determination and provide the correct information within the appeal time period. If counsel is able to say much of the information provided by Mr. Pascoe was incorrect, it is reasonable to presume the errors have already been identified and can be conveyed in a timely appeal.
24. Third, and to some extent this relates to the second point, the calculations of wages owed were substantially based on payroll information provided by Mr. Pascoe, the Chief Financial Officer at Worldspan. If for some reason, the Director should not have relied on this information, the Associated Employer ought to be able to make this point without the need for an extension of the appeal period. In any event, the filing of an appeal does not preclude the Associated Employer from seeking to submit new evidence into the appeal process that comes available after the appeal has been filed, provided that evidence falls within the “new evidence” ground of appeal and otherwise passes muster on a consideration of the principles expressed in *Davies and others (Merilus Technologies Inc.)*, *supra*, *Senor Rana’s Cantina Ltd.*, *supra*.
25. Fourth, the fact that counsel identifies questions of law and fact relating to sections 64 and 77 suggests a legal and factual framework for an appeal on these two aspects of the Determination already exists and no compelling reason for extending the appeal period in order to deal with these matters is demonstrated. On this point, counsel has indicated the investigation of the Director was “flawed and incomplete”. To reiterate my earlier comment, that assertion presumes a presently existing factual foundation that counsel ought to be able to organize in an appeal within the statutory time period allowed.
26. Fifth, and in respect to the stated intention to appeal the section 95 decision, counsel says the information received and used by the Director to make this decision was incorrect, which once again suggests the “correct” information is presently known and available. As well, I note the Determination indicates that an e-mail was sent to all directors/officers of the Associated Employer on November 16, 2010, informing them of the Director’s intention to engage section 95 of the *Act* and providing details of the basis for that decision, including an e-mail from Mr. Pascoe, which is set out in the Determination, and asking for any responses. No submissions were provided. If the directors/officers of the Associated Employer felt the information provided by Mr. Pascoe was incorrect, there was a five month period (from November 16, 2010, to date of issuing the Determination – March 18, 2011) to provide the Director with “correct” information. The failure to use that five month period militates against a two month extension to attempt to do so now.
27. In respect of the stated intention to appeal that part of the Determination finding a contravention of section 64 of the *Act*, I make two points. First, to the extent the Associated Employer intends to raise a question of law respecting that provision, that intention provides no compelling reason to extend the appeal period. Many appeals raise complex questions regarding the interpretation and application of provisions of the *Act* without requiring an extension of time.
28. Second, to the extent the Associated Employer intends to challenge the section 64 calculations (or any other wage calculations) made by the Director for each former employee and some time to review the circumstances of each of those individuals, I do not accept that circumstance provides a compelling reason to extend the statutory appeal period. This conclusion is not intended to foreclose the Associated Employer from reviewing the former employees’ records or seeking to submit the results of that review if there is a belief they may impact the correctness of the Determination. As I indicated above, if evidence comes

available during the appeal process that bears on the grounds of appeal raised by the appellant, such evidence can be submitted. The Tribunal will then have to decide, applying the principles identified above, if such evidence will be received on the appeal. The possibility of new evidence arising during the appeal process, however, is not a compelling reason to extend the appeal period. The Tribunal expects the review contemplated by the Associated Employer would be expedited and would not delay a timely consideration of the appeal.

29. For the above reasons, the request to extend the appeal period is denied.

David B. Stevenson
Member
Employment Standards Tribunal