

An appeal

- by -

0955958 B.C. Ltd. carrying on business as RB Contracting
(“RB Contracting”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/2

DATE OF DECISION: March 8, 2016

DECISION

SUBMISSIONS

Ryan Bray on behalf of 0955958 B.C. Ltd. carrying on business as
RB Contracting

OVERVIEW

1. This is an application filed by 0955958 B.C. Ltd. carrying on business as RB Contracting (“RB Contracting”), pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the “*Act*”), to extend the time for filing an appeal of a determination.
2. In my view, this application is entirely without merit and, accordingly, it is refused. Further, even if I were persuaded that the appeal period should be extended, this appeal has no reasonable prospect of succeeding and thus I would, in any event, summarily dismiss this appeal under subsection 114(1)(f) of the *Act*.
3. In adjudicating this application, I have reviewed the Determination issued against RB Contracting on October 2, 2015, the subsection 112(5) “record” that was before the delegate when the Determination was issued and RB Contracting’s various submissions (all filed by Mr. Ryan Bray, one of the firm’s two directors; the other being Ms. Breeanna Bray).

FACTUAL BACKGROUND

4. Dominic Vendittelli (“Mr. Vendittelli”) filed an unpaid wage complaint against RB Contracting claiming nearly \$20,000 in unpaid wages. In his complaint, Mr. Vendittelli stated he worked for RB Contracting as a “labourer” in RB Contracting’s construction business from June 16 to September 25, 2014, and that his agreed wage rate was \$38 per hour. Mr. Vendittelli stated he worked 8 hours each day and 40 hours each week during this tenure with RB Contracting.
5. On May 7, 2015, the Employment Standards Branch issued a “Notice of Complaint Hearing” advising the parties that a complaint hearing would be conducted, by teleconference, on June 17, 2015. This notice was sent, by registered mail, to RB Contracting’s offices as recorded on Mr. Vendittelli’s T-4 “Statement of Remuneration Paid” for 2014 (it was also sent by electronic mail). This same address was recorded in the B.C. Corporate Registry as being Ms. Breeanna Bray’s delivery address. Canada Post records indicate that this hearing notice was “successfully delivered” on June 14, 2015 (but only after a “final notice – item will be returned to sender if not collected within 10 days” was sent) with delivery being acknowledged by “B. Bray”.
6. The record includes an internal Employment Standards Branch “File Tracker & Workflow Sheet” maintained by an Employment Standards Branch staff member. There is a handwritten note dated April 17, 2015, that reads as follows: “ER – Ryan – refuses to participate on the process. Has no records, and will just bankrupt the company. Explained ESB can do what we want but he won’t be there.” However, this document also contains a later note, on April 20, indicating “Ryan would like to participate”. On May 6, 2015, and Employment Standards Officer (not the individual who issued the Determination) sent an e-mail to Ryan Bray advising about the upcoming complaint hearing and providing some other relevant information about the hearing process. The Employment Standards Branch staff member sent another e-mail to Mr. Bray on May 7, 2015, confirming the hearing date and location and providing still more information about the hearing process (including dial-in information). The Employment Standards Branch’s e-mail system records this

latter e-mail as having been successfully delivered. On June 9, 2015, the Employment Standards Branch staff member sent another e-mail to Mr. Bray enclosing copies of documents that Mr. Vendittelli proposed to tender at the hearing and the next day sent another e-mail to Mr. Bray enclosing “the complete package that Dominic will be relying on for the hearing”. The Employment Standards Branch’s e-mail system similarly records the June 9 e-mail as having been successfully delivered.

7. The hearing proceeded on June 17, 2015, with Mr. Vendittelli in attendance but RB Contracting did not appear in person or by telephone at the hearing. Mr. Vendittelli gave oral testimony and filed nine separate documentary exhibits.
8. On October 2, 2015, Keven J. Mead, a delegate of the Director of Employment Standards (the “delegate”), issued the Determination pursuant to which he ordered RB Contracting to pay Mr. Vendittelli the total sum of \$10,133.92 on account of unpaid wages and section 88 interest. The unpaid wage award consisted of \$3,496.00 for regular wages, \$4,873.50 for overtime pay, \$539.39 for statutory holiday pay, \$930.92 for vacation pay and \$294.11 on account of section 88 interest. Further, and also by way of the Determination, the delegate levied five separate \$500 monetary penalties against RB Contracting (see section 98) based on its contraventions of sections 18 (failure to pay earned wages on termination), 40 (failure to pay overtime pay), 46 (failure to pay statutory holiday pay), 58 (failure to pay vacation pay) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce employment records on demand). Thus, the total amount payable by RB Contracting under the Determination is \$12,633.92.

THE APPEAL & APPLICATION TO EXTEND THE APPEAL PERIOD

9. There is a text box at the bottom of the third page of the Determination headed in boldface type “**Appeal Information**”. This box contains information regarding how the Determination may be appealed to the Tribunal and also contains the following notice: “Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on November 9, 2015. **Your appeal must include a copy of the Director’s written reasons for the Determination.**” [boldface in original text]. A number of excerpts from the *Act* were also appended to the Determination including section 81 which is the provision setting out the procedure a person must follow to obtain written reasons for the determination.
10. I presume the deadline for appealing the Determination was calculated in accordance with the “deemed service” provisions set out in 122 of the *Act*.
11. The Determination was sent, by registered mail, to the address noted in the B.C. Corporate Registry as the delivery address for Breeanna Bray and was also sent, again by registered mail, to Ms. Bray personally at three separate addresses, to Mr. Ryan Bray personally at the same three separate addresses, and to RB Contracting’s registered and records office and address for delivery as recorded in the B.C. Corporate Registry.
12. The record includes Canada Post tracking records for each of the nine separate envelopes that were sent to RB Contracting, Ms. Bray and Mr. Bray. One of the three envelopes sent to each of RB Contracting, Ms. Bray and Mr. Bray was successfully delivered to the addressee but only after, in each case, a prior “10-day final notice” was sent. The three “10-day final notices” were all delivered on October 10, 2015, and the envelopes were all successfully delivered on October 27, 2015. Three of the remaining six envelopes were returned by Canada Post to the Employment Standards Branch with a stamp indicating that delivery was “refused” by the addressee and the other three envelopes were similarly returned to the Employment Standards Branch with a notation “moved/unknown”.

13. RB Contracting never applied, under subsections 81(1.1) and (1.2) of the *Act*, for written reasons and, accordingly, the delegate never issued written reasons for the Determination.
14. On January 4, 2016, RB Contracting filed an Appeal Form (Form 1) with the Tribunal together with: i) a 1-page memorandum – prepared by Mr. Bray – setting out its reasons for appeal (on the Appeal Form, RB Contracting indicated that it was appealing the Determination on the “new evidence” ground of appeal, subsection 112(1)(c) of the *Act*); ii) a separate page containing a single sentence purporting to explain why the appeal was filed after the appeal deadline expired; and iii) a copy of the Determination and accompanying attachments.
15. Subsection 112(2)(a)(i.1) of the *Act* requires an appellant to deliver to the Tribunal a copy of the written reasons for the Determination within the appeal period. Clearly, since RB Contracting did not make a timely application for written reasons (it would appear that a late application was made on January 4, 2016), and no reasons were ever prepared, RB Contracting’s appeal is incomplete and therefore deficient.
16. On December 2, 2015, a “Writ of Seizure and Sale” was issued by the B.C. Supreme Court against RB Contracting in favour of the Director of Employment Standards (see sections 91 and 92 of the *Act*). It appears from the record that Mr. Bray was made aware of this Writ by no later than December 16, 2015. There is also a note in the record from Mr. Bray to the effect that he was advised the Writ was executed on January 4, 2016 (the same day that this appeal was filed).
17. As noted above, Mr. Bray provided only the most cursory explanation for failing to file the appeal within the statutory appeal period. His explanation is as follows: “I am asking for an extension to the appeal timeline for the reason i tried to email my information in and was unsuccessfull and i am trying again after the holiday by fax” [sic]. Mr. Bray does not say when he first tried to email his appeal materials and his assertion to the effect that he made some prior effort to file an appeal is not corroborated in any way (say, by a transmission record). I might also note that, in general, electronic mail systems automatically send a note to the sender when a transmission is not delivered.
18. As for RB Contracting’s reasons for appeal, it says that Mr. Vendittelli “has a lot of false accusations [sic] and false information” and that he committed “fradulent acts” [sic]. Mr. Bray says that he did not participate in the complaint hearing teleconference “due to uninformed reasons out of my controll” [sic]. Mr. Bray appears to be saying that he expected the delegate to contact him by telephone on the day of, and at the time set for, the hearing and that when he did not receive a call, he contacted the Employment Standards Branch a few days later to determine if he had the wrong day and time. This latter assertion appears to raise a “natural justice” issue (see subsection 112(1)(b) of the *Act*).
19. In subsequent submissions filed with the Tribunal, Mr. Bray seemingly asserts, on RB Contracting’s behalf, that Mr. Vendittelli was an independent contractor rather than an employee (this would constitute an alleged error of law) and that, in any event, his time records regarding his working hours were inaccurate. Mr. Bray also submitted various documents including copies of cheques, invoices, and documents relating to the Writ of Seizure and the Director’s enforcement actions.

FINDINGS AND ANALYSIS

20. I shall first address RB Contracting’s application to extend the appeal period. The appeal, deficient though it is, was filed on January 4, 2016, when it should have been filed by no later than the close of business on November 9, 2015. Canada Post records clearly prove that the Determination was actually delivered to RB Contracting (and to its two directors) on October 27, 2015. The present appeal was not filed until about

2 ¼ months' later. RB Contracting has not provided any explanation for why there was such a significant delay from time of delivery of the Determination to the date of the filing of the appeal. As noted above, Mr. Bray has not provided any detail regarding when he first attempted to file the appeal and, on balance, I find the explanation about why the appeal was late to be implausible and wholly unacceptable. It appears that Mr. Bray was only motivated to file the appeal when the Director took concrete steps to enforce the Determination. In his memorandum attached to the Appeal Form, Mr. Bray states: "...i had no idea what was taking place behind my back up until the day came and all my bankaccounts were seized" [*sic*]. When he learned about the Director's enforcement actions Mr. Bray says "I have showed them that there is a false accusation happening here and that i was sending off the appeal asap" [*sic*].

21. Applications to extend an appeal period are evaluated in light of several criteria first set out by the Tribunal in *Niemisto* (BC EST # D099/96) including: i) whether there is a reasonable and credible explanation for the late filing; ii) whether there has been a genuine and on-going *bona fide* intention to appeal the Determination that has been communicated to the respondent parties; iii) whether parties would be unfairly prejudiced if the appeal period were to be extended; iv) whether the appeal has some presumptive merit.
22. As noted above, I am not satisfied that the RB Contracting has adequately explained why it failed to file a timely appeal. Overall, I am left with the distinct impression that RB Contracting was only pressed into action when it was faced with imminent enforcement proceedings. I will comment further on the merits of the appeal in greater detail, below. At this juncture, I will simply say that I consider this appeal to be wholly without merit.
23. Taking a very liberal view of RB Contracting's appeal submissions (see *Triple S Transmission Inc.*, BC EST # D141/03), it appears that it is raising all three statutory grounds although only the "new evidence" ground was indicated on its Appeal Form.
24. RB Contracting appended a number of documents to its various appeal submissions. None of these documents post-dates the Determination save for those relating to the Director's enforcement proceedings and, with respect to the latter, they are entirely irrelevant to the issues that could be properly before the Tribunal in this appeal. In order for new evidence to be admissible on appeal, the appellant must demonstrate that the evidence: i) could not, with the exercise of due diligence, have been discovered and presented at the complaint hearing or otherwise provided to the delegate prior to the Determination being made; ii) is relevant to a material issue arising from the complaint; iii) is credible in the sense that it is reasonably capable of belief; and iv) has high potential probative value regarding a material issue (see *Davies et al.*, BC EST # D171/03). All of these documents, save for the irrelevant documents relating to the Director's enforcement proceedings, could have been presented to the delegate at the complaint hearing had RB Contracting bothered to attend. I presume that these documents have been tendered on appeal to support, in some fashion, RB Contracting's position that Mr. Vendittelli was an independent contractor, but they are very far from being cogent and probative in that regard.
25. RB Contracting's bald suggestion that Mr. Vendittelli was an independent contractor rather than an employee is not supported by any cogent argument or evidence. The fact that a person may have issued invoices for their work is not, standing alone, proof that the individual was an independent contractor rather than an employee. This latter question must be examined by taking into account all of the circumstances relating to the relationship between the parties including, among other considerations, such things as who provided direction and control regarding the work to be done, who provided the necessary tools and equipment to get the job done, and whether the worker was, in fact, operating an independent business that had various clients.

26. As noted above, RB Contracting's position is that it failed to attend the complaint hearing because it was under the impression that the delegate would be telephoning Mr. Bray at the appointed time on the day of the hearing. Even if that were a reasonable apprehension (and, as will be seen, it is not), I have to question why Mr. Bray would not have *immediately* called the Employment Standards Branch directly when someone from that office had not yet called him rather than waiting, by his own admission, for "a few days" before contacting the Branch. However, Mr. Bray seemingly conveniently ignores the hearing notice which clearly states that he must "dial-in" to the hearing (with full instructions about how to connect) as well as an e-mail that was sent to him on May 7, 2015, that also clearly states the hearing will be conducted by teleconference and that he must "dial-in" on June 17, 2015, at 9 AM (full instructions also provided). While there is no doubt that RB Contracting did not participate in the complaint hearing, that failing was entirely attributable to Mr. Bray's own neglect or perhaps even purposeful behaviour. Certainly, in my view, there is no credible "natural justice" argument in this case.
27. In my view, none of the grounds raised directly, or implicitly, by RB Contracting in support of its appeal has any reasonable prospect of succeeding.

ORDER

28. RB Contracting's application to extend the appeal period is refused. Pursuant to subsection 114(1)(b), (f) and (h) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of \$12,633.92 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal