

An appeal

- by -

Sundance Forest Management Ltd.

(“Sundance”)

- 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:** Carol L. Roberts

**FILE No.:** 2013A/1

**DATE OF DECISION:** May 16, 2013

## DECISION

### SUBMISSIONS

Patricia Frazier on behalf of Sundance Forest Management Ltd.  
Myles Frazier on behalf of Sundance Forest Management Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Sundance Forest Management Ltd. (“Sundance”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 3, 2012. In that Determination, the Director ordered Sundance to pay its former employee, Gregory Larsen, \$3,410.65 in wages, annual vacation pay, unauthorized deductions and interest. The Director also imposed six administrative penalties in the total amount of \$3,000 for Sundance’s contravention of Sections 17, 18, 21, 27, 28 and 58 of the *Act*, for a total amount payable of \$6,410.65.
2. The deadline for filing an appeal of the Determination was 4:30 pm on January 10, 2013. On January 16, 2013, Sundance submitted a number of documents to the Tribunal. Those consisted of a completed and signed Appeal Form, a completed and signed Reconsideration Application Form, a facsimile “Activity Report” including written reasons for filing a late appeal, written reasons for the appeal and a copy of the Determination. Sundance’s grounds of appeal of the Determination are that the delegate both erred in law and failed to comply with principles of natural justice in making the Determination. Although Sundance also submitted an Application for Reconsideration, given that this document is for a reconsideration of a Tribunal decision, I infer that Ms. Frazier was unsure what form to use to appeal the Determination. In any event, the reasons set out in both documents are similar. In essence, Ms. Frazier believes the delegate was biased against her and failed to consider her evidence.
3. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
4. I find that this appeal can be decided based on Sundance’s written submissions, the Section 112(5) “record” that was before the delegate at the time the decision was made, the Determination and the Reasons for the Determination.

### FACTS AND ARGUMENT

5. Mr. Larsen worked for Sundance, a silviculture business from May 7, 2012, until June 14, 2012. On September 12, 2012, Mr. Larsen filed a complaint with the Employment Standards Branch alleging that Sundance had contravened the *Act* by failing to pay all regular wages earned, failing to pay vacation pay and by making unauthorized deductions from his wages.
6. Mr. Larsen alleged that he was not paid in full for the work he performed and that Sundance had deducted rent and hydro costs from his wages. Mr. Larsen said that he was not paid vacation pay, that his employer did not provide him with proper wage statements and that he was not always paid on time.

7. Ms. Frazier, the sole director and officer of Sundance, delivered employer records relating to Mr. Larsen's employment in response to a Demand for Employer Records. She contended that Mr. Larsen had been paid in full for all work performed and that he was paid appropriately. She said that Mr. Larsen's vacation pay was included in his daily rate and had therefore been paid on each paycheque. She contended that Mr. Larsen verbally agreed to pay rent on a house he stayed in along with other crew, but confirmed that she did not have written authorization to make this deduction from his wages. She agreed that she deducted \$650 (two month's rent) from his second paycheque. She also agreed that she had deducted \$184.98, representing hydro costs for the house, from his final paycheque without having discussed that with Mr. Larsen.
8. Ms. Frazier agreed that she had missed paying Mr. Larsen for some days that he worked and confirmed that she did not have any form of written agreement or contract confirming his rate of pay. She also confirmed that she did not have any record of hours worked by any employee, including Mr. Larsen.
9. The delegate found that, while the parties agreed Mr. Larsen was to be paid a daily rate, they did not agree on what that rate was. The delegate noted that there was no written employment contract or agreement, and that Sundance did not issue wage statements showing an employee's rate of pay. Based on all of the information before her, the delegate determined Mr. Larsen's daily rate to be \$250 for each day worked.
10. The delegate found Mr. Larsen's own records to be consistent with the Employer's records and concluded that he was entitled to wages for three additional days. She determined that Mr. Larsen had not been paid within eight days of the end of the pay period, contrary to Section 17 of the *Act*. The delegate also found Sundance in contravention of Section 18 of the *Act* in failing to pay Mr. Larsen within six days of the end of his employment as well as in contravention of Section 58 of the *Act*, as she found no evidence Sundance had paid Mr. Larsen vacation pay.
11. The delegate determined that Sundance had made deductions from Mr. Larsen's pay for rent and hydro costs without written authorization, in contravention of Section 21 of the *Act*.
12. The delegate also found Sundance in contravention of Section 27 in failing to provide Mr. Larsen with written wage statements, noting that the employer's use of Canada Revenue Agency's payroll deductions online calculator did not meet the specific requirements of a wage statement.
13. Finally, the delegate found Sundance in contravention of Section 28 of the *Act* in failing to maintain accurate records of Mr. Larsen's dates of work or the hours he worked on those dates.
14. Ms. Frazier contends that because Mr. Larsen quit and left town without providing her with a forwarding address, she was unable to pay him until he returned to town to collect his pay. While acknowledging that her pay stubs are "not the most modern," they "give all necessary information." She asserts that she had a verbal agreement with Mr. Larson to deduct his rent from his pay.
15. Ms. Frasier also acknowledged that she relied on the records Mr. Larsen provided to her, believed they were accurate. She now argues that Mr. Larsen was "deceitful on hours and misrepresenting himself at all times." She asserts that she was victimized by Mr. Larsen and that he took advantage of her when she tried to work out his complaint with him.
16. After receiving a copy of the Director's record, Ms. Frazier advanced additional arguments and made further submissions. She alleged that she never received copies of correspondence between the delegate and Mr. Larsen and his spouse and believes that she was not treated fairly.

17. Finally, Ms. Frazier contends that she has been suffering from acute depression which has been “paralyzing.” She says that she did not pick up her mail in weeks and that she has not worked for two years. She says that she is confused by all the paper and would like to “start over fresh.”

## ANALYSIS

18. Section 114 of the *Act* provides that 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, 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.
19. Having reviewed the Section 112(5) record and Sundance’s submissions, I find no reasonable prospect that the appeal will succeed.
20. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law;
  - (b) the director failed to observe the principles of natural justice in making the determination;
  - (c) evidence has become available that was not available at the time the determination was made.
21. Section 112(2) provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
22. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
23. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
24. The appeal, dated January 10, 2013, was received by the Tribunal on January 16, 2013, six days after the deadline for filing an appeal. Ms. Frazier wrote that she was not at home for most of December and that, because she had a flood in her basement, she required additional time to get the information. The Tribunal asked that those documents be provided no later than 4:00 pm on January 21, 2013.
25. Ms. Frazier included a facsimile transmission report that she asserts was proof she attempted to file the appeal on time but that it was sent to an incorrect facsimile number. That report indicates that on 01/01/2012, a total of 25 pages were sent to a facsimile number with a 250 area code. Ms. Frazier does not

indicate where the documents were sent, but the number does not remotely resemble the Tribunal's facsimile number. Even if I were to infer that the documents were faxed on January 1, 2013, it is not clear to me why it took Ms. Frazier 16 days to discover the error. Furthermore, as the appeal documents are dated January 10, 2013, it is not clear to me what documents were faxed, whether the date was January 1, 2012, or January 1, 2013.

26. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (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, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has 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.
27. These criteria are not exhaustive.
28. I accept that Ms. Frazier suffers from acute depression and that she sustained a flooded basement in December. Both of these factors likely affected her ability to complete an appeal. However, I note that Sundance has been an incorporated company for many years and has many employees. While it is admirable that Ms. Frazier has apparently managed the business herself for many years, when it was clear she required assistance to meet the company's obligations, she ought to have engaged staff to assist her in carrying out those duties. Her failure to collect mail for several weeks does not constitute a reasonable explanation for Sundance's failure to request an appeal within the statutory time limit.
29. As noted above, while I accept that Ms. Frazier might have faxed some documents somewhere on January 1, 2013, I am not persuaded that there has been a genuine, ongoing intention to appeal the Determination. I also find that neither Mr. Larsen nor the Director was made aware of Sundance's intention to appeal the Determination.
30. Finally, I am not persuaded that Sundance has a strong *prima facie* case on appeal.
31. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
32. Sundance alleges the delegate was biased and failed to consider relevant documents. In my view, Sundance has not demonstrated either of these grounds.
33. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.
34. I accept that Ms. Frazier is not happy with the Determination. However, the fact that the delegate found in favour of Mr. Larsen is not a ground of appeal.
35. Moreover, an assertion of bias, without any foundation, is an insufficient basis for me to conclude that the delegate was biased. After receiving the record, Ms. Frazier contended that the delegate had not provided

Sundance with all of the delegate's correspondence with Mr. Larsen. The Director is not obliged to provide all information to both sides during an investigation, although all relevant and material information must be presented to the other side for response. After reviewing that record, I find no evidence the delegate was biased against Sundance or failed to disclose relevant information to Sundance for its response. Throughout the investigation, the delegate sought information from each side and presented the relevant responses to the other party. Ms. Frazier suggests that the delegate did not give her Mr. Larsen's diary to "try to figure out what days she might have missed." Having reviewed the record, I find no basis for Sundance's assertions. I find the delegate was both thorough and accurate when summarizing Mr. Larsen's responses to Sundance and Sundance's position to Mr. Larsen.

36. I am not persuaded that an allegation of bias has been substantiated.

#### Error of Law

37. Although not expressed as such, Sundance's submission is almost entirely a reiteration of the submission it provided to the delegate during the investigation. Although Sundance also submitted additional "evidence" including a letter from Ms. Frazier's son, I have not considered that information. That information was all available at the time of the investigation and could have been provided to the delegate. It will not be considered on appeal.
38. As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence that ought to have been provided to the delegate during the investigation. An appeal is also not an opportunity to re-argue a dispute that has already been argued before the delegate.
39. The delegate analyzed the information before her in light of the *Act* and the *Employment Standards Regulation* (the "*Regulation*"). I find nothing in Sundance's submission to suggest that the conclusions were wrong in law. Indeed, Ms. Frazier conceded much of what was confirmed by the delegate. She acknowledged that she did not have Mr. Larsen's written authorization to make any deductions from his pay. In one of her responses to the delegate, Ms. Frazier stated "because hydro was not included but added I took it off I think final cheque (sic). We did not discuss it so I am willing to pay for it." Her contention that Mr. Larsen had a verbal agreement with her son to pay rent does not meet the requirements of the *Act*.
40. Sundance agreed that Mr. Larsen had not been paid for his work on two days in May and later suggested Mr. Larsen was to blame for its failure to maintain proper records. Ms. Frazier contended that it was Mr. Larsen's responsibility to record time sheets daily and that, although she never saw his field books, she paid him nevertheless. None of this constitutes an error of law on the part of the delegate.
41. With respect to the delegate's finding that Mr. Larsen was entitled to vacation pay, I note Ms. Frazier's statement that vacation pay was "included in piece rate, explained at orientation – I usually separate it but this year didn't have energy to do so." There is simply no evidence that the delegate's conclusion that Sundance had contravened the *Act's* provisions respecting vacation pay constitutes an error of law.
42. I dismiss the appeal. I find that the appeal was not filed within the statutory time limit. I also find that there is no reasonable prospect that Sundance's appeal will succeed.

**ORDER**

43. Pursuant to Section 115(1)(a) of the *Act*, I Order that the Determination, dated December 3, 2012, be confirmed in the amount of \$6,410.65 together with whatever further interest that has accrued under Section 88 of the *Act* since the date of issuance.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**