

An appeal

- by -

Life Studios Inc.  
("Life Studios")

- 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)

and

An application for suspension

- by -

Life Studios Inc.  
("Life Studios")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

pursuant to Section 113 of the

*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE Nos.:** 2014A/36 and 2014A/37

**DATE OF DECISION:** May 29, 2014

## DECISION

### SUBMISSIONS

Christine Hanna

on behalf of Life Studios Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Life Studios Inc. (“Life Studios”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 30, 2013. Life Studios has also requested a suspension of the Determination under section 113 of the *Act*.
2. The Determination found that Life Studios had contravened Part 3, section 18 of the *Act* in respect of the employment of Juanyue Huang (“Huang”) and ordered Life Studios to pay wages to Huang in the amount of \$1,328.20, including interest under section 88 of the *Act*, and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$1,828.20
3. In the appeal of the Determination, Life Studios alleges 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 May 16, 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 Life Studios, 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 Life Studios, and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, 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;*

(b) *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*, Life Studios will, and the Director may, 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. Life Studios operates a cinematography and photography studio. Huang was engaged by Life Studios as a Video Editor from sometime in October 2012 until April 8, 2013. Huang did video editing on various projects and was to be paid a set amount for each completed project.
10. Huang complained that Life Studios had refused to pay him for three video editing projects he had completed and for which he had requested payment on April 8, 2013.
11. Life Studios argued Huang was not an employee for the purposes of the *Act*, but an independent contractor, and as such was not entitled to claim for wages under the *Act*.
12. The issues before the Director were whether Huang was an employee for the purposes of the *Act* and, if so, whether he was entitled to wages.
13. The Director conducted a complaint hearing during which he received evidence from Huang on his own behalf and Jacob Wasef on behalf of Life Studios. Both parties were provided the opportunity to present evidence and their respective position on the issues and to challenge the position of the other party.
14. On the first issue, the Director found the facts, which are analyzed in the Determination at pages R8 to R12 and need not be repeated here, supported a conclusion that Huang was an employee under the *Act*. On the second issue, the Director found Huang was entitled to wages in the amount he claimed and ordered those be paid.
15. The Determination was issued on December 30, 2013; the appeal was not delivered to the Tribunal until April 1, 2014 – more than three months after the issuance of the Determination and almost two months after the expiry of the statutory time period for filing an appeal of a Determination.

## ARGUMENT

16. Although Life Studios has alleged a failure by the Director to observe principles of natural justice as the only ground of appeal, the appeal submission commences: “. . . the determination is not consistent with the Law”. The appeal submission proceeds to raise nine points which, presumably, demonstrate the errors of law alleged to have been made by the Director. Of these, seven speak to alleged errors in findings of fact and the other

two points identify questions of law which were addressed in the Determination in the context of section 4 of the *Act*: see page R11.

17. The appeal form correctly recognizes the appeal has been filed late. The form requests an appellant filing after the appeal period has expired to “provide, on a separate sheet of paper, a reasonable and credible explanation for failing to request an appeal within the statutory limit.” While not providing a separate sheet as requested, Life Studios has provided the following explanation for the late filing:

We were travelling on a shoot during the time the appeal was due and furthermore upon our review in march [sic] 31 2014 we found out that the documents were not received.

## ANALYSIS

18. I shall first address the timeliness of the appeal and the request for an extension of the statutory appeal period. 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.

19. 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:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
  - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - v) 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. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97.

21. The delay in filing this appeal is unreasonably lengthy. I do not accept that the “reason” provided for the delay stated in the appeal is an acceptable explanation for the delay. I find it unlikely the persons responsible for running the company would have been “on a shoot” continuously from the date of the Determination to the expiry date for filing the appeal – February 6, 2014. If I am incorrect in that view, it is in my view incumbent on Life Studios to establish, on cogent evidence, that no person from the employer could possibly have attended to an appeal during the statutory appeal period. There has been no effort in this case to provide such evidence.

22. There is no indication Life Studios had any ongoing *bona fide* intention to file an appeal of the Determination. Rather, their appeal submission suggests there was no decision to attempt an appeal until the Director threatened to commence collect action, which did not occur until the appeal period had expired.
23. In my view, there will be prejudice to Huang occasioned by any further delay in concluding his complaint.
24. I do not find Life Studios has a strong *prima facie* case on the merits. It is well established that the grounds of appeal listed in section 112 of the *Act* do not provide for an appeal based on alleged errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than was made by the Director in the Determination unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
25. In this appeal, none of the challenges to the findings of fact made by the Director on the status of Huang as an employee under the *Act* have been shown to raise an error of law. Examining the Determination and the section 112(5) "record", I find the facts that are challenged in the appeal were based on evidence provided to the Director, were assessed in the context of other evidence and the law under the *Act*, were not inconsistent with or contradictory to other evidence, were not without rational foundation and were in no way perverse or inexplicable.
26. Accordingly, there is no basis for the Tribunal to consider reviewing the findings of fact made by the Director.
27. On the question of law raised in the appeal, I find the Director was entirely correct in considering the validity and enforceability of the contract signed by Huang in the context of the evidence and the prohibition found in section 4 of the *Act*. The summary in the Determination of the effect of section 4 on agreements that, against the flow of facts, attempt to characterize a person's relationship with an employer as something other than an employment relationship is well established. It was correct in these circumstances to give effect to that provision in the *Act*. Life Studios cannot succeed in this appeal on that challenge.
28. In sum, the circumstances do not justify an extension of the appeal period. None of the criteria listed in deciding whether to extend the appeal period support or warrant granting an extension of the statutory appeal period. The appeal has no reasonable chance of succeeding.
29. As there is no basis for extending the appeal period or addressing the merits of this appeal, I do not find the purposes and objects of the *Act* would be served by requiring the other parties to respond to this appeal.
30. Accordingly, I dismiss the appeal and confirm the Determination.
31. Life Studios has applied under section 113 of the *Act* to suspend the effect of the Determination pending consideration of the appeal. It follows from this decision that a consideration of that application is unnecessary and it is dismissed. I would add that even if considered, the application, as it is framed, would have been dismissed.

**ORDER**

32. Pursuant to section 115 of the *Act*, I order the Determination dated December 30, 2013, be confirmed in the amount of \$1,828.20, together with any interest that has accrued under section 88 of the *Act*.

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