

An appeal

- by -

Thomas Hotson carrying on business as Hotson Flat Roofing  
(“Hotson”)

- 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.:** 2013A/28

**DATE OF DECISION:** June 25, 2013

## DECISION

### SUBMISSIONS

Thomas Hotson on his own behalf carrying on business as Hotson Flat Roofing

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Thomas Hotson carrying on business as Hotson Flat Roofing (“Hotson”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 26, 2013.
2. The Determination found that Hotson had contravened Part 3, section 18 of the *Act* in respect of the employment of Cody Gendron (“Gendron”) and ordered Hotson to pay wages to Gendron in the amount of \$161.79 and to pay administrative penalties in the amount of \$1,000.00. The total amount of the Determination is \$1,161.79.
3. Hotson has filed an appeal of the Determination on the ground that new evidence has come available that was not available when the Determination was being made.
4. The Tribunal has discretion, under section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*, to choose the type of hearing for deciding an appeal and has decided the matters raised in this appeal can be decided from the Determination, the written submission filed by Hotson and the section 112(5) “record” filed by the Director.
5. The appeal was filed late, and Hotson has requested the Tribunal extend the time period for filing an appeal. In correspondence dated May 22, 2013, 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.
6. Consistent with this notice, I have reviewed the appeal, the section 112(5) “record” and the submission filed by Hotson.

### ISSUE

7. 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

8. The facts relating to the issue of the timeliness of the appeal are as follows:
  1. The Determination was issued February 26, 2013;
  2. The time limit for filing an appeal expired on April 5, 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. An appeal form and submission was delivered to the Employment Standards Branch office (“the Branch”) in Kelowna, BC;
  6. Hotson was notified by e-mail that the Branch had received the appeal, but he was required to file it with the Tribunal and until it was, the appeal could not be considered to be filed;
  7. The e-mail advised Hotson to contact the Tribunal if he wished to file an appeal and provided the Tribunal’s web site address, fax number and general inquiry telephone number;
  8. Finally, the e-mail informed Hotson that if the Branch was not notified by April 22, 2013, that an appeal had been filed with the Tribunal, collection proceedings would be commenced; and
  9. The appeal was delivered to the Tribunal on May 16, 2013.
9. The facts relating to the merits of the appeal are as follows:
1. Gendron was employed by Hotson as a general labourer from September 30, 2012, to October 24, 2012, at a rate of \$14.00 an hour;
  2. He was paid on a cash basis and without incident until his last two days of employment, amounting to 11 hours work, for which he was not paid;
  3. Gendron provided evidence to the Director in the form of text messages between he and Hotson in which Hotson acknowledged the wages were owed and that they would be paid;
  4. The Director investigated Gendron’s claim, which included several unsuccessful attempts, by telephone and e-mail, to contact Hotson;
  5. On January 11, 2013, a Demand for Documents was sent by registered and regular mail to Hotson;
  6. The registered mail was returned unclaimed, the regular mail was not;
  7. As of the date of the Determination, Hotson had not responded to the Demand;
  8. The Director accepted Gendron’s claim and found he was owed wages in the amount of \$154.00, annual vacation pay on those wages of \$6.16 and interest under section 88 of the *Act* in the amount of \$1.63; and
  9. The Director also found Hotson had contravened Part 3, section 18 of the *Act* and section 46 of the *Employment Standards Regulation*, issuing administrative penalties for those contraventions.

## THE APPEAL

10. In respect of the late filing, Hotson says he filed the appeal before the expiry of the appeal period, but mistakenly delivered it to the wrong address. The section 112(5) “record” confirms he delivered an appeal form to the Branch office in Kelowna. The “record” also confirms he was told of his mistake within three days of making this mistake and that he needed to correctly file the appeal with the Tribunal.
11. In respect of the merits, Hotson says he did not receive the voice mail messages the Director left and has paid Gendron “in full for all monies owed”. The appeal contains nothing to support that assertion or to explain why the January 9, 2013, e-mail and the Demand for Records – neither of which he denies receiving – were ignored.

## ANALYSIS

12. 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.

13. 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 failing to request an appeal within the statutory limit;
  - (ii). There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
  - (iii). The respondent party and the Director have been made aware of the 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.
14. 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.
15. Other than to provide an explanation for the delay, Hotson has not attempted to demonstrate the existence of other relevant criteria. The delay in this case is fairly lengthy. Even if I accepted Hotson’s “mistake”, sending the appeal to a wrong location, provides a reasonable explanation for failing to file within the appeal period, that does not explain why it then took more than a month to deliver the appeal to the Tribunal. I do not, however, accept it is a good or sufficient reason for filing late for Hotson to say, in effect, he failed to read the very clear and distinct instructions in the Determination for filing an appeal and I certainly do not accept there is any reason for failing to immediately correct the “mistake” Hotson says he made by delivering the appeal to the wrong location. I do not consider the circumstances show a genuine and *bona fide* intention to appeal the Determination.

16. In any event, one of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. The presumptive merits of an appeal also stand as a consideration on which an appeal may be dismissed under section 114(1) of the *Act*, which reads:

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 period;*
- (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.*

17. When considering the relative merits of an appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the particular issues raised by the appeal.

18. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*

19. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the grounds of appeal relied upon. The ground of appeal chosen by Hotson is commonly referred to as the “new evidence” ground.

20. The Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that 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. In this appeal, Hotson has failed to provide any actual evidence. He asserts the wages owed to Gendron have been “paid in full” but that assertion is unsupported by any objective evidence or other important details, such as date and circumstances. Additionally, there is no indication the information he seeks to have accepted in this appeal was not reasonably available during the complaint process and could not have been provided to the Director.

21. As well, there can be no disputing that Hotson failed or refused to participate in the complaint investigation and failed to respond to the Demand issued by the Director for Gendron's employment records. In such circumstances, the Tribunal has firmly established that allowing Hotson to enter and argue "new" evidence at the appeal stage would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
22. Application of the above considerations to the "new evidence" ground of appeal chosen by Hotson is immediately apparent and fatal to the appeal. In result, the appeal does not show any merit whatsoever.
23. The absence of a basis for extending the appeal period and the absence of any presumptive merit to the appeal militates strongly against allowing an extension of the statutory time period. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
24. Accordingly, I dismiss the appeal and confirm the Determination.

### **ORDER**

25. Pursuant to section 115 of the *Act*, I order the Determination dated February 26, 2013, be confirmed in the amount of \$1,161.79, together with any interest that has accrued under Section 88 of the *Act*.

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