

An appeal

- by -

Tracks and Treads Contracting Inc.
(“TTC”)

- 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: Shafik Bhalloo

FILE No.: 2014A/65

DATE OF DECISION: July 2, 2014

DECISION

SUBMISSIONS

Marion Mitchell

on behalf of Tracks and Treads Contracting Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Tracks and Treads Contracting Inc. (“TTC”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 16, 2014 (the “Determination”).
2. The Determination found that TTC had contravened sections 18 (wages) and 58 (annual vacation pay) of the *Act* and section 37.7 (overtime) of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Mitchell Fuoco (“Mr. Fuoco”), Ashley Oiom (“Mr. Oiom”), and Marc Provencher (“Mr. Provencher”) (collectively, the “Complainants”). Further, with respect to Mr. Oiom, the Determination also found that TTC contravened section 45 (statutory holiday pay) and section 63 (compensation for length of service) of the *Act*. The total amount the Determination ordered TTC to pay the Complainants, including accrued interest pursuant to section 88 of the *Act*, is \$10,853.92. The Determination also levied four (4) administrative penalties of \$500.00 each against TTC for contraventions of sections 17, 18 and 45 of the *Act* and section 37.7 of the *Regulation*.
3. The Determination was sent by registered mail on April 16, 2014, to TTC’s registered and records office in Maple Ridge, British Columbia, and to both of its Directors, Judith Danielson (“Ms. Danielson”) and Kenneth Danielson (“Mr. Danielson”), at the same address provided for them in the BC Online Corporate Search for TTC.
4. TTC has filed an appeal of the Determination on the ground that evidence has become available that was not available at the time the Determination was being made.
5. I note that TTC’s Appeal Form was received by the Employment Standards Tribunal (the “Tribunal”) on May 16, 2014, within the period allowed for filing an appeal. The appeal is incomplete. It was delivered to the Tribunal by Marion Mitchell (“Ms. Mitchell”), accountant or bookkeeper for TTC. Attached to the Appeal Form are two (2) pieces of correspondence, dated May 9, 2014, addressed to the Employment Standards Branch (the “Branch”). It would appear that the appeal was sent to the Branch first but later forwarded to the Tribunal. The first piece of correspondence from Ms. Mitchell indicates that Ms. Danielson is out of the country until June 10, 2014, and will be unable to appeal the Determination until after that date and, therefore, Ms. Danielson needs an extension of the appeal deadline until after that date. Ms. Mitchell also indicates that she will be out of the country starting May 26, 2014, and will not return until July 6, 2014. She indicates that Ms. Danielson may be contacted at the email provided on the Appeal Form. She additionally provides the name and phone number of a family member of Ms. Danielson who may be contacted prior to June 10th. The second piece of correspondence of same date from Ms. Mitchell includes Ms. Danielson’s email address. It is the same address provided in TTC’s Appeal Form.
6. After receiving TTC’s appeal form, on May 20, 2014, the Tribunal sent TTC an email and Ms. Mitchell a fax notifying both that under section 112 of the *Act* and Rule 18(3) of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”), the appeal was incomplete. The correspondence informed Ms. Mitchell what was required in order to meet the requirements in the *Act* and the *Rules* for completing the filing of the appeal, and what was

required in order for TTC to obtain an extension from the Tribunal of the statutory time period to file an appeal. Ms. Mitchell and TTC were given until 4:30 p.m. on May 23, 2014, to satisfy the requirements for an appeal and to submit the reasons for the request for an extension of the deadline to file an appeal.

7. On May 21, 2014, Ms. Mitchell provided submissions in support of TTC's request for an extension of the deadline to file an appeal. On May 23, 2014, the Tribunal acknowledged to the parties that an appeal had been received from TTC, requested production of the section 112(5) "record" from the Director and 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. The correspondence also indicated that if the Tribunal did not dismiss all of the appeal or did not confirm all of the Determination, the Tribunal would invite the Complainants and the Director to file a reply to the question of whether to extend the deadline to file the appeal. Ms. Mitchell responded to this correspondence by way of an email to the Tribunal on May 24, 2014. In her email, she acknowledged receiving the correspondence from the Tribunal and advised that Ms. Danielson, as the owner of TTC, cannot do anything about the appeal until after June 10th, and requested that the latter have until "June 30th to reply to the determination".
8. The section 112(5) "record" was provided by the Director to the Tribunal on June 3, 2014, and, thereafter, sent to TTC. TTC was provided an opportunity to object to the completeness of the "record" by 4:00 p.m. on June 17, 2014.
9. On June 20, 2014, the Tribunal sent a letter to all parties stating that no objection to the completeness of the "record" was received by the Tribunal, forwarded Ms. Mitchell's correspondence of May 26, 2014, to the rest of the parties, and advised that the Tribunal would now review the appeal. The Tribunal's letter also informed the parties that the Tribunal may, without seeking submissions from the parties, dismiss all or part of the appeal, and/or confirm all or part of the Determination. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite the Complainants and the Director to file a reply to the question of whether to extend the deadline to file the appeal, and TTC will be given an opportunity to make a final reply to these submissions, if any.
10. Having reviewed the appeal materials, including the reasons for the appeal submitted by TTC, and the section 112(5) "record", I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess this appeal based solely on the Reasons for the Determination (the "Reasons"), the appeal and my review of the section 112(5) "record" that was before the Director when the Determination was being made. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Complainants and the Director may be invited to file a reply to the question of whether to extend the deadline to file the appeal. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

11. The issue at this stage of the appeal is whether there is any reasonable prospect the appeal will succeed.

THE FACTS

12. TTC operates a logging business in British Columbia, and was incorporated, pursuant to the laws of British Columbia, on June 11, 2008, with Mr. Danielson and Ms. Danielson listed as its Directors.

13. Mr. Fuoco and Mr. Oiom filed their complaints against TTC on April 4, 2013, and Mr. Provencher filed his complaint against TTC on April 30, 2013 (collectively, the “Complaints”). The Complainants claimed that they performed work for TTC and were not paid for all hours worked, including some overtime. In the case of Mr. Oiom, he also advanced a claim for statutory holiday pay and compensation for length of service.
14. A delegate of the Director conducted an investigation into the Complaints, and in the Reasons reviews the parties’ evidence with separate summary sheets provided in respect of the evidence of each complainant. I have reviewed the Reasons carefully and do not propose to reiterate all of the evidence here except to the extent necessary.
15. In the Reasons, the delegate notes that the Complainants all stated that Marc Gauvin (“Mr. Gauvin”) was their employer but it became clear during the investigation that, at all material times, Mr. Gauvin, like the Complainants, was employed by TTC.
16. Having said this, I note that in the Reasons, the delegate states that Ms. Danielson, during the investigation, provided wage statements, camp records and equipment logs as TTC’s documentary evidence and confirmed that Mr. Gauvin was TTC’s foreman at work sites in the Prince George area during the Complainants’ employment. The evidence submitted by TTC also indicates that Mr. Gauvin was responsible for supervising the employees, approving their timesheets and submitting their hours for payment.
17. The delegate notes that, early in the investigation, Mr. Gauvin was contacted and that he provided limited information, but since May 31, 2013, he has had no contact with the Branch. Ms. Danielson advised the delegate that Mr. Gauvin no longer works for TTC, and she has not been able to contact him either.
18. I also note that after the Complaints were filed and during the investigation, the delegate sent a Demand for Employer Records to TTC’s registered and records office on May 6, 2013, requiring TTC to disclose, produce and deliver any and all payroll records relating to wages, hours of work and conditions of employment of the Complainants, as well as any and all documents relating to the termination of the Complainants’ employment. However, TTC did not comply with the request.
19. Subsequently, on June 28, 2013, the delegate summarized the evidence of the Complainants in a letter to TTC sent to the attention of Mr. Danielson and Ms. Danielson. In the letter, the delegate afforded TTC an opportunity to provide any evidence to disprove or to dispute the evidence of the Complainants by July 19, 2013. However, TTC appears not to have responded to the letter by the said deadline.
20. I note in the “record” that there is an email of the delegate to Ms. Mitchell dated August 20, 2013, which is also copied to Ms. Danielson. The email confirms a telephone call on the previous day, presumably with Ms. Mitchell, wherein the latter appears to have asked for an update on the investigation of the Complaints. The delegate responds in her email to Ms. Mitchell that there has been no response from TTC and the Complaints remain unresolved. The delegate also notes that the Demand for Employer Records was not complied with by TTC, and therefore an administrative penalty was issued by the Director on June 27, 2013, against TTC for the said failure.
21. The delegate also notes that in her email of June 28, 2013, to Ms. Danielson of TTC, she included her preliminary findings which were based only on the information she had received from the Complainants because TTC had not provided any information to her. She states in the same email that “[t]here is still an opportunity for the employer to participate in this investigation, and/or to resolve these complaints on a voluntary basis”. She also requests Ms. Danielson to contact her to discuss the matter by August 23, 2013,

and repeats her request for production of employer records and any other information relevant to the Complaints by August 30, 2013.

22. I also note in the “record” a further email from the delegate to Ms. Danielson dated August 26, 2013, attaching Mr. Oiom’s information in the investigation and his complaint, which appears to have been requested by Ms. Danielson previously. Following this email, there is a further email from the delegate to Ms. Danielson on August 27, 2013, wherein the delegate indicates to Ms. Danielson that she had provided the information requested by Ms. Danielson, but did not receive a confirmation of receipt by Ms. Danielson. The delegate again requests Ms. Danielson to provide confirmation of receipt. The delegate also notes in the same email that she tried to telephone Ms. Danielson but there was no answer and no way to leave a message. Further, I note on the same email document, there is a handwritten notation, purportedly the delegate’s, and it is dated August 28 at “8:30” indicating that Ms. Danielson received the email in question and was finally able to open the attachment. It further states that Ms. Danielson was “having all kinds of computer problems, [but] will be speaking with Marion [Mitchell] today to start going over [the] info”.
23. I also note a further email, dated September 13, 2013, from the delegate to Ms. Danielson indicating that the latter had spoken to her on August 28, 2013, and told her that she was able to open the information sent to her by email on August 26, 2013, and that she would be speaking with her bookkeeper on the same day to go over the information, but it has been over two weeks without any further contact from Ms. Danielson. The delegate requests, in the email, that Ms. Danielson contact her “today”.
24. Based on my review of the Reasons and the “record”, there appears to have been no contact from Ms. Danielson thereafter. Subsequently, the delegate issued her letter of preliminary findings, dated January 16, 2014, addressed to Ms. Danielson at the registered and records office of TTC, which address is also the same address provided for Ms. Danielson as a Director of TTC on the BC Online Corporate Search for TTC. In the preliminary findings, the delegate sets out, based on the evidence she primarily received from the Complainants during the investigation, what she believes TTC owes each of the Complainants. She also makes it clear that the findings in her preliminary report are not final, and invites Ms. Danielson to tender any further evidence by 4:00 p.m. on January 31, 2014, failing which, she would issue a determination in the matter.
25. It appears that Ms. Danielson and TTC did not respond to the said preliminary findings letter and, as a result, a different delegate of the Director (not the delegate who investigated the matter) ultimately issued the Determination on April 16, 2014, against TTC, along the terms previously set out. The Determination was sent by registered mail to TTC’s registered and records office address and to both Mr. and Ms. Danielson at that same address provided for them in the BC Online Corporate Records search. The Determination states that TTC has until 4:30 p.m. on May 26, 2014, to appeal the Determination.

SUBMISSIONS OF TTC FOR EXTENSION OF THE APPEAL DATE

26. Ms. Mitchell, on behalf of TTC, appears to have submitted the appeal to the Director (not the Tribunal) on May 9, 2014. The appeal was subsequently received by the Tribunal on May 16, 2014, within the time limit for filing an appeal.
27. I note the initial written submissions of Ms. Mitchell do not quite address the merits of the appeal but they ask for an extension of time to appeal the Determination because Ms. Danielson is out of the country until June 10th. In her subsequent email submission of May 21, 2014, Ms. Mitchell indicates what may be the basis of TTC’s appeal when Ms. Danielson returns to Canada from her trip to Belize. Ms. Mitchell states:

Ms. Danielson has seen the Determination and is confident that the adjudicator erred in his determination by not requiring the claimants to produce verifiable documents regarding their employment terms, hours, etc. One of the claimants was never on the Tracks & Treads payroll and yet the adjudicator awarded this claimant. Since Ms. Danielson has no access to the payroll records while out of the country she is unable to respond to various aspects of the determination with documents. Additionally, she will be speaking to the former foreman/supervisor of Tracks & Treads in the Prince George area to confirm the payroll information and other issues raised in the determination.

28. In the balance of the email, Ms. Mitchell explains that she will be out of the country from May 26th and reiterates that Ms. Danielson is returning to Canada on June 10th and, therefore, TTC needs an extension of the appeal date to June 30th.

ANALYSIS

29. Section 112(3) of the *Act* delineates appeal deadlines to ensure that appeals are dealt with promptly. In this case, the Determination was sent by registered mail to TTC's registered and records office and to its Directors, Mr. Danielson and Ms. Danielson, at the same address. TTC had until May 26, 2014, to file its appeal. Ms. Mitchell, TTC's accountant, filed an incomplete appeal, seeking an extension of time to file an appeal once Ms. Danielson returned to Canada from Belize after June 10, 2014.

30. Section 109(1)(b) of the *Act* permits the Tribunal to extend the time limit for an appeal. In *Re: Tang* (BC EST # D211/96), the Tribunal explained the principles governing the exercise of its discretion under this section as follows:

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 extension 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.

31. In *Blue World IT Consulting Inc.* (BC EST # D516/98), the Tribunal delineated the following non-exhaustive factors it may consider in deciding whether to grant an extension of the appeal:

- 1) there is a reasonable and credible explanation for the failure to request an appeal with[in] [*sic*] the statutory time limit;
- 2) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
- 3) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
- 4) the respondent party will not unduly prejudiced by the granting of the extension; and
- 5) there is a strong *prima facie* case in favour of the appellant.

32. Having said this, the onus is on the appellant to demonstrate with compelling reasons the criteria set out above are met (see *Re: Wright*, BC EST # D132/97).

33. In this case, while TTC has filed its appeal before the expiry of the deadline for filing the appeal, the appeal is incomplete. TTC is seeking an extension of time to file its submissions after Ms. Danielson returns to Canada. For the reasons below, I am not persuaded that there is a compelling reason to grant an extension in this case. While I appreciate that Ms. Danielson was out of the country and not scheduled to return until after the expiry of the deadline for appealing, there is correspondence in the "record" that indicates she was indeed aware of the investigation and the impending determination. She also appears to have participated in

the investigation of the Complaints albeit to a very limited extent, although given ample opportunity to do so by the delegate. She was also aware, particularly after the preliminary report of January 16, 2014, that failing any further evidence from TTC by January 31, 2014, the delegate would issue a determination along the lines set out in the preliminary report. TTC and Ms. Danielson chose not to respond to the preliminary report and cannot have been surprised when subsequently, on April 16, 2014, the Determination was issued against TTC.

34. Having said this, I also note that the Determination was sent to TTC, Ms. Danielson and Mr. Danielson at the registered and records office address of TTC, and there is no dispute that it was received by all. In my view, Ms. Danielson's decision to travel out of the country, knowing full well that the Determination would be made any time after January 31, 2014, and her further decision to only participate in a very limited way during the investigation of the Complaints, although provided ample opportunity to do so by the delegate, were risks that Ms. Danielson or TTC took at their own peril. Based on the submissions of Ms. Mitchell, it would appear that some of what Ms. Danielson wishes to now submit in support of TTC's appeal, when she returns to Canada, is evidence that could have been adduced during the investigation. An appeal is not the venue in which to adduce evidence that should have been adduced by TTC and Ms. Danielson during the investigation. I will address this latter point in greater detail in context of TTC's new evidence ground of appeal below.

35. I note that although there are other considerations set out in *Blue World IT Consulting Inc.*, *supra*, that the Tribunal may consider in deciding to grant an extension of time to appeal and while I have already concluded that there is not a persuasive reason to extend the time to appeal in this case, it is noteworthy that one of the significant factors is that there is a strong *prima facie* case in favour of the appellant. This consideration also stands as a consideration on which an appeal may be dismissed under section 114(1)(f) 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:

...

(f) there is no reasonable prospect that the appeal will succeed;

36. Having said this, in this case, I have previously noted that TTC's appeal is based on the "new evidence" ground of appeal.

37. The governing test for allowing new evidence on appeals is delineated in *Re: Merilus Technologies Inc.* (BC EST # D171/03). In this case, the Tribunal delineated four (4) conjunctive requirements the appellant must satisfy before the purported "new evidence" would be considered, namely:

- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- (b) The evidence must be relevant to a material issue arising from the complaint;
- (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence have led the Director to a different conclusion on the material issue.

38. According to Ms. Mitchell's email of May 21, 2014, the purported new evidence is that evidence which Ms. Danielson hopes to secure when and if she "will be speaking to the former foreman/supervisor of Tracks & Treads in the Prince George area to confirm the payroll information and other issues raised in the determination". In my view, this hardly qualifies as "new evidence" under the test for admitting new evidence in *Re: Merilus Technologies Inc., supra*. It is purely speculative what, if anything, in the form of evidence Ms. Danielson may obtain from Mr. Gauvin. Further, it is highly doubtful, even if Ms. Danielson secures the evidence she hopes to secure from Mr. Gauvin, the evidence would qualify as new evidence in the sense that it was not previously available, with the exercise of due diligence, during the investigation or before the Determination was made.
39. I also note that Ms. Mitchell's May 21, 2014, email states that Ms. Danielson "is confident that the adjudicator erred in his determination by not requiring the claimants to produce verifiable documents regarding their employment terms, hours, etc." She goes on to state "[o]ne of the claimants was never on the Tracks & Treads payroll and yet the adjudicator awarded this claimant". Based on my review of the Reasons, the delegate appears to have preferred the evidence of the Complainants over that of TTC, although the Complainants' evidence, in most cases, was not substantiated with documentary evidence, but rather oral evidence. I note in particular, in the Reasons, the following passage which illustrates the delegate's weighing of evidence of the parties:
- It appears that Mr. Gauvin did not forward all payroll records to Tracks and Treads for payment, as I have found that all of the Complainants are owed wages for hours of which Tracks and Treads has no record. The records of hours worked that were supplied to Tracks and Treads by Mr. Gauvin are inconsistent, sometimes being time logs for equipment, and at other times emailed breakdowns of hours worked. In the absence of detailed evidence from Mr. Gauvin, and no other firsthand evidence available from the Employer, I find that the Complainants' statements and documents provide the best evidence available of their hours worked.
40. In the circumstances, I am not persuaded that TTC has any basis to argue that the adjudicator erred in his Determination, as it was open for the adjudicator to prefer the evidence of the Complainants which he considered to be the best evidence in the circumstances.
41. With respect to Ms. Mitchell's submission that one of the Claimants was not on TTC's payroll and the adjudicator awarded this Claimant in the Determination, Ms. Mitchell is speaking of Mr. Fuoco. With respect to Mr. Fuoco, in a separate summary of Mr. Fuoco's evidence in the Reasons, the delegate makes it abundantly clear that Ms. Danielson did advance an argument on the lines that Mr. Fuoco was not an employee of TTC, but the delegate was not persuaded by Ms. Danielson's argument and reasoned as follows:

Ms. Danielson provided a statement advising that Mr. Fuoco does not appear in any of Tracks and Treads' payroll records. Ms. Danielson stated that her understanding was that Mr. Fuoco travelled to the worksite in a Tracks and Treads vehicle because he wanted an opportunity to learn how to operate a processor. He reportedly attended the work site [*sic*] without the required safety gear and never operated any equipment. Ms. Danielson stated that Mr. Fuoco did on one occasion assist in greasing a machine. Ms. Danielson stated that Mr. Fuoco asked Mr. Gauvin for some money for a truck payment and was told not to return to the worksite.

Ms. Danielson was not at the worksite in question, and did not identify the source of her information....

I am unable to give much weight to the Employer's evidence with respect to Mr. Fuoco's employment. The only source of first hand information [*sic*], Mr. Gauvin, initially acknowledged Mr Fuoco's entitlement to wages and then reversed his position, stating that Mr. Fuoco performed no work. Mr. Gauvin is no longer available to clarify his statements, and given their conflicting nature I find the statements to have very little credibility.

42. Based on Ms. Mitchell's submissions, it appears that Ms. Danielson now wants an opportunity to re-argue this point in the appeal because she is dissatisfied with the delegate's findings and conclusions of fact. I note that the Tribunal has indicated, time and time again, that it does not have jurisdiction over questions of fact unless, of course, the matter involves errors on findings of fact which may amount to an error of law (see *Re: Pro-Serv Investigations Ltd.*, BC EST # D059/05). The Tribunal, in *Re: Funk* (BC EST # D195/04), expounded on the latter point, stating that the appellant would have to show that the fact finder made a "palpable and overriding error" or that the finding of fact was "clearly wrong" to establish error of law. Further, I note that the Tribunal is generally reluctant to substitute the delegate's findings of fact, even if it is inclined to reach a different conclusion on the evidence. In this case, having reviewed the Reasons, the section 112(5) "record" and Ms. Mitchell's submissions, I do not find that there is any basis to challenge the delegate's findings of fact. I do not see any evidence of the delegate making a "palpable and overriding error" or reaching a clearly wrong conclusion of fact or acting without any evidence or on a view of evidence that could not reasonably be entertained.
43. In these circumstances, I find, pursuant to section 114(1)(f) of the *Act*, that this appeal has no reasonable prospect of succeeding, and I dismiss it.

ORDER

44. Pursuant to section 115 of the *Act*, I order that the Determination, dated April 16, 2014, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal