



An appeal

- by -

Canada and USA Immigration Services Ltd. (“CUIS”) and
Surinder Trehan (“Mr. Trehan”) carrying on business as Savvy Pros (“Savvy Pros”) and Savvy Consultants Inc. (“Savvy Consultants”)

– 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 –

Canada and USA Immigration Services Ltd. (“CUIS”) and
Surinder Trehan (“Mr. Trehan”) carrying on business as Savvy Pros (“Savvy Pros”) and Savvy Consultants Inc. (“Savvy Consultants”)

– 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: Shafik Bhalloo
FILE No.: 2011A/52 and 2011A/53
DATE OF DECISION: June 21, 2011

DECISION

SUBMISSIONS

Surinder Singh Trehan	on behalf of Canada and USA Immigration Services Ltd. and Surinder Trehan carrying on business as Savvy Pros and Savvy Consultants Inc.
Harwinder Singh	on his own behalf
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Canada and USA Immigration Services Ltd. (“CUIS”) and Surinder Trehan (“Mr. Trehan”) carrying on business as Savvy Pros (“Savvy Pros”) and Savvy Consultants Inc. (“Savvy Consultants”), pursuant to section 112(1)(c) of the *Employment Standards Act* (the “*Act*”) of a Determination issued by the Director of Employment Standards (the “Director”) on December 7, 2010.
2. The main issues addressed in the Determination were threefold, namely:
 - 1) Was Harwinder Singh (“Mr. Singh”), the complainant, charged a fee contrary to section 10 of the *Act* (no charge for hiring or providing information) and, if so, what amount is Mr. Singh owed?
 - 2) Did CUIS and/or Mr. Trehan carrying on business as Savvy Pros operate as an employment agency without a valid employment agency license, contrary to section 12 of the *Act*?
 - 3) Are CUIS, Savvy Consultants and/or Mr. Trehan carrying on business as Savvy Pros associated employers pursuant to section 95 of the *Act*?
3. The Determination concluded in the affirmative on all three (3) issues, and ordered CUIS and Mr. Trehan carrying on business as Savvy Pros and Savvy Consultants (the “Appellants”) to pay Mr. Singh \$12,000 for contravention of section 18 of the *Act* and an additional \$430.77 in accrued interest pursuant to section 88 of the *Act*.
4. The Determination also imposed on the Appellants two (2) administrative penalties of \$500 each, pursuant to section 29 of the *Employment Standards Regulation* (the “*Regulation*”), for contraventions of sections 10 and 12 of the *Act*.
5. Mr. Trehan, on behalf of all of the Appellants, appeals the Determination on the new evidence ground of appeal in section 112(1)(c) of the *Act*, arguing that new evidence has become available that was not available at the time the Determination was made.
6. As a remedy, Mr. Trehan is seeking the cancellation of the Determination.
7. Mr. Trehan is also seeking a suspension of the Determination while the appeal is under consideration.
8. I note that the time limit for appeal is set out in section 112(2) and (3) of the *Act*:

Section (112)

- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
- (3) The appeal period referred to in subsection (2) is
 - (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).

9. In this case, the appeal is stamped received by the Tribunal on April 27, 2011. I also note that the Determination, dated December 7, 2010, which was sent by registered mail to all the Appellants, advises in small print on the last page, in a box entitled “Appeal Information”, the deadline for the parties to appeal the Determination is 4:30 p.m. on January 14, 2011. The Appellants are three (3) months late in filing their appeal.
10. Having said this, section 109(1)(b) of the *Act* affords the Tribunal the discretion to extend the deadline for requesting an appeal even though the appeal period has expired. Therefore, the Tribunal, in this decision, will consider the issue of whether it should exercise its discretion and extend the deadline for the Appellants to appeal even though the period for seeking an appeal has expired. If the Tribunal grants an extension of time to appeal to the Appellants, then the Tribunal will proceed to determine the request for suspension of the Determination pending the determination of the substantive issues in the appeal.
11. Pursuant to section 36 of the *Administrative Tribunal's Act* (the “*ATA*”), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issues in this appeal can be adjudicated on the basis of the section 112(5) “record” and the written submissions of the parties, as well as the Reasons for the Determination to the extent they are of any assistance.

ISSUES

12. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the period for seeking an appeal has expired?
13. If the answer to the first question is in the affirmative, should the Tribunal suspend the Determination, all or in part, pending consideration of the appeal?

FACTS AND ANALYSIS

14. As indicated above, the Determination was made on December 7, 2010. The Determination was then sent by registered mail to all of the Appellants. More particularly, it was sent to Savvy Consultants and CUIS at their registered and records office address at 683 East 44th Avenue, Vancouver, BC and also to Mr. Trehan at the same address as well at 3 – 5955 Fraser Street, Vancouver, BC, as both those addresses are shown as Mr. Trehan’s mailing and delivery addresses on the corporate searches of CUIS and Savvy Consultants. Neither Mr. Trehan nor any of the other Appellants dispute receiving the Determination in a timely fashion.
15. As indicated previously, the Determination, on the last page, indicates in clear terms, that any party wishing to appeal the Determination must do so by delivering its appeal to the Tribunal by “4:30 p.m. on January 14, 2011”.

16. While the appeal in this case has been filed three (3) months after the expiry of the time to appeal provided in the *Act* and the Determination, the Tribunal has the authority under section 109(1)(b) to extend the time period for requesting an appeal beyond the expiry date. The basic principles governing the Tribunal's authority under this section are governed by the following non-exclusive criteria delineated in *Re Niemisto*, BC EST # D099/96:
- 1) There is a reasonable and credible explanation for the delay;
 - 2) The employer has had a genuine and on-going intention to appeal;
 - 3) The respondent and the Director were aware of the intention to appeal;
 - 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.
17. It should be noted that the above criteria are not conjunctive in nature; that is, the Tribunal need not find that all these criteria favour the applicant seeking an extension before granting an extension of time to appeal (see *Re Patara Holdings Ltd. c.o.b. Best Western Canada Lodge*, BC EST # D010/08, reconsideration dismissed, BC EST # RD053/08).
18. It is also important to note that the Tribunal will not grant an extension of time to file a late appeal as a matter of course, but will only do so where there are compelling reasons. The onus is on the appellant in such case to show that the time period for an appeal should be extended (see *Moen & Sagb Contracting Ltd.*, BC EST # D298/96).
19. Having set out some of the authorities and principles the Tribunal will consider in determining whether to exercise its discretion to grant an extension of time to appeal, I note that the Director, in this case, opposes the Appellants' application for an extension of time to appeal and asserts that the Appellants have failed to set out "any compelling reasons which warrant extending the time period for requesting an appeal".
20. Having reviewed the criteria in *Re Niemisto*, supra, in context of the facts of this case, I am in agreement with the Director. More specifically, I note that on the first of the five (5) criteria in *Re Niemisto*, I find there is lacking any reasonable and credible explanation on the part of the Appellants for their failure to request an appeal within the statutory time limit. Mr. Trehan, in his submissions on this point, states that since 2002, he has been involved in numerous accidents, as a result of which he has suffered severe injuries to his neck, back and spinal column, causing him difficulty "sometimes [in] remembering basic work-related tasks and dates [and] times and deadlines". He further submits that his injuries are permanent in nature and have "limited his ability to earn a living". He also submits that he is suffering "severe personal and family issues" and is unable to remember "items and tasks". He attaches to his submissions some medical documentation pertaining to accidents he had on July 23, 2000, and April 17, 2008. These documents appear to be from the file of his personal injury counsel and consist of some medical and clinical records of various doctors Mr. Trehan has seen since the accidents.
21. One such doctor, Dr. D.E. Griesdale, a Neurosurgeon and an Associate Professor in the Faculty of Medicine at the University of British Columbia, writes in his report of June 18, 2002, to Mr. Trehan's family that Mr. Trehan reported that he "lost his memory" after the accident. Dr. Griesdale describes this as "odd" and goes on to state that on examination of Mr. Trehan, "there really isn't much to find". In his view, Mr. Trehan "looks well" and "his neurological examination is normal" but he has "a very mild limitation of rotation of his neck in either direction". Dr. Griesdale goes on to conclude that he really could not "find any neurological problem" with Mr. Trehan, but suspected that Mr. Trehan "is really convinced that there is something in his head causing his neck problems".

22. I also note that there is another report from Dr. Gabriel Yong, dated December 6, 2005, pertaining to Mr. Trehan's first accident of July 23, 2000. Dr. Yong does not indicate any issue with Mr. Trehan's memory and alleged forgetfulness. He does make note of an MRI Mr. Trehan underwent of his cervical spine (a copy of which Mr. Trehan has also produced with his submissions) which shows a protrusion of a disc at the C6-7 level, and which is unrelated to the allegations of memory loss Mr. Trehan is making.
23. Mr. Trehan has also produced from his personal injury counsel's file another medical report pertaining to his second accident of April 17, 2008. This medical report is dated July 28, 2010, and is from an Orthopaedic Surgeon, Dr. William Yu. I have read Dr. Yu's report and there is nothing in this report that suggests any deficiency or defect with Mr. Trehan's memory. In Dr. Yu's conclusionary remarks, Dr. Yu states "Mr. Trehan has been self-employed since the end of 2001 [and] he has continued working but due to his ongoing neck pain he has not been able to work regular hours". According to Dr. Yu, both the April 17, 2008, accident and the earlier July 23, 2000, accident have had "a significant negative impact on his employment and future employability".
24. In my view, Mr. Trehan's personal injuries in both motor vehicle accidents do not explain or justify his late filing of the appeal on behalf of the Appellants.
25. I also note that Mr. Trehan has included some tax documents from Canada Revenue Agency; in particular, his Notice of Reassessment, dated December 13, 2010, which suggests that he was not making very much in the way of income. This information is, in my view, also irrelevant and does not justify an extension of time for requesting an appeal.
26. With respect to the second criteria, whether the Appellants always intended to appeal the Determination I note that Mr. Trehan has not made clear or made any submissions on that point, and the Director, in his submissions, indicates that no prior indication was given of the Appellants' intention to appeal the Determination. The Director points to an email of Mr. Trehan of December 9, 2010, subsequent to the Determination, wherein Mr. Trehan indicates that he would be filing for bankruptcy and a trustee would be contacting the delegate. Subsequently, the Director indicates the delegate, on January 14, 2011, emailed Mr. Trehan and asked for the contact information for the bankruptcy trustee, but Mr. Trehan never responded to that email. Thereafter, on February 10, 2011, the delegate sent Mr. Trehan a letter, dated February 11, 2011, by way of registered mail, regular mail, and email, confirming the Director's intention to proceed to collect the award made in the Determination against Mr. Trehan personally and again requested from Mr. Trehan contact information for his bankruptcy trustee. In response to that contact, Mr. Trehan responded to the delegate by way of an email on February 17, 2011, advising that he would be retaining counsel. However, no mention was made in that email of the Appellants' or Mr. Trehan's intention to file an appeal.
27. It was only when another delegate, tasked with commencing collections proceeding, contacted Mr. Trehan on March 9, 2011, that Mr. Trehan responded on March 31, 2011 advising, for the first time, of his intention to appeal the Determination. At which point, the delegate who made the Determination emailed Mr. Trehan appeal information, including the website information for the Employment Standards Tribunal.
28. In my view, neither Mr. Trehan, nor the other Appellants, showed any genuine intention to appeal the Determination during the appeal period. It was only after the Director commenced enforcement proceedings that Mr. Trehan, approximately 2.5 months after the expiry of the appeal period, expressed an intention to appeal. Granting an extension when enforcement proceedings have already begun will only result in undue prejudice to Mr. Singh, particularly if the threat of potential bankruptcy made by Mr. Trehan previously materializes (see *Birla Investments Ltd.*, BC EST # D022/05).

29. With respect to the third criteria, neither Mr. Singh nor the Director (as previously indicated), were made aware by Mr. Trehan or the other Appellants of their intention to appeal the Determination. It was only after 2.5 months after the expiry of the time limit for filing an appeal that the Director was informed of Mr. Trehan's intention to appeal.
30. With respect to the fourth criteria; namely, whether the granting of an extension would unduly prejudice Mr. Singh, I agree with the Director that if Mr. Trehan follows through with his intention to file for bankruptcy, then Mr. Singh will surely suffer prejudice. However, notwithstanding the bankruptcy question, with the three (3) months' delay in filing the appeal without a credible reason, the consequent delay occasioned to Mr. Singh in collecting his award in the Determination and the threat of bankruptcy looming which may prevent Mr. Singh from collecting any award, I would think that there is prejudice to Mr. Singh if an extension were granted to the Appellants to allow their late appeal.
31. With respect to the final criteria, whether there is a strong *prima facie* case in favour of the Appellants, I have reviewed the substantive submissions of Mr. Trehan and conclude that he has not made out a strong *prima facie* case in favour of the Appellants here. I find that there is no new evidence or evidence that would qualify as "new" evidence under the fourfold test in *Re Merilus Technologies Inc.*, BC EST # D171/03, adduced by Mr. Trehan. I also agree with the Director that a large part of the Appellants' appeal constitutes re-argument of the case on its merits, which is not the purpose of an appeal.
32. I also find that the Appellants, or Mr. Trehan, in his submissions, are misguided in arguing that the Director erred by making a finding of an employment relationship between the Appellants and Mr. Singh in the Determination, premising the Determination or awards in the Determination on that finding. In my view, the delegate in the Determination made no finding of an employment relationship between Mr. Singh and any one or more of the Appellants. Moreover, the Director was not required to make that determination in his rulings under sections 10 and 12 of the *Act* case.
33. In addition to the criteria in *Re Niemisto, supra*, the Tribunal, under s.109 (1)(b), also considers in its decision-making whether there was an unreasonably long delay in filing the appeal. Here I am mindful of one of the purposes of the *Act* delineated in section 2(d); namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*". While three (3) months may not be an unreasonably long delay in filing an appeal *if* there is a good reason for the delay, and the other factors delineated in *Re Niemisto* favour granting an extension of time, that is not so in this case and therefore the delay of three months does not, in context of all others factors militating against granting of an extension, change my decision to reject the Appellants' application for an extension to file their appeal.
34. I, therefore, deny the Appellants' application for an extension of time to file their appeal.

THE APPELLANTS' APPLICATION FOR SUSPENSION

35. Given the result in the application for an extension of time to file the appeal late, there is no need for me to consider the Appellants' application for suspension of the Determination pending the appeal.

ORDER

36. The Appellants' request for an extension of the appeal period is denied and, accordingly, I dismiss the Appellants' appeal pursuant to section 114(1)(b) of the *Act*.
37. Pursuant to section 115(1) of the *Act*, the Determination dated December 7, 2010 is confirmed, along with any additional interest calculated in accordance with section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal