

An appeal

- by -

Xcellence Concrete Pumping Ltd.
(“XCP”)

- 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/29

DATE OF DECISION: July 18, 2013

DECISION

SUBMISSIONS

Brian Dutt

on behalf of Xcellence Concrete Pumping Ltd.

OVERVIEW

1. Pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) Xcellence Concrete Pumping Ltd. (“XCP”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 7, 2012.
2. The Determination found that XCP had contravened Part 3, sections 17 and 18, Part 4, section 40 and Part 5, section 45 of the *Act* in respect of the employment of Samy A. Soliman (“Soliman”) and ordered XCP to pay wages to Soliman in the amount of \$9,506.74 and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$11,506.74.
3. XCP has grounded this appeal on the allegation that the Director failed to observe principles of natural justice in making the Determination and on new evidence becoming available that was not available when the Determination was being made.
4. The appeal was filed late, and XCP has requested the Tribunal extend the time period for filing. In correspondence dated May 29, 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.
5. 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 by XCP and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114, 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 subsection 114(1), 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;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

6. If any of the listed reasons are found to apply, the appeal can be dismissed under section 114(1) of the *Act*. If satisfied the appeal, or a part of it, should not be dismissed under section 114(1), Soliman will, and the Director may, be invited to file further submissions.

ISSUE

7. There are two issues arising under section 114(1) 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 will succeed.

THE FACTS

8. The facts relating to the issue of the timeliness of the appeal are as follows:
 1. The Determination was issued November 7, 2012;
 2. The time limited for filing an appeal expired on December 17, 2012;
 3. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Tribunal on or before the expiry of the appeal period;
 4. The web site address and the telephone number of the Tribunal are set out in the Determination;
 5. The Determination contains the following paragraph, with emphasis included:

A person named in a determination may make a written request for reasons for the determination. Your request must be delivered to an office of the Employment Standards Branch **within seven days of being served** with this determination. You are deemed to be served eight days after the determination is mailed, so **your request must be delivered by November 22, 2012.**
 6. The Determination contains excerpts from the *Act*, including section 112(2), which sets out the statutory requirements for filing an appeal;
 7. On, or about, November 19, 2012, Brian Dutt (“Mr. Dutt”), a director of XCP and its representative throughout the complaint process, delivered an appeal form and a very brief supporting submission to the Employment Standards Branch office (“the Branch”);
 8. On, or about, November 21, 2012, a delegate of the Director informed Mr. Dutt, verbally and by e-mail, that he was required to send a written request to the Branch for reasons for the Determination and that he was required to send his appeal to the Tribunal in accordance with the instructions set out in the Determination;
 9. No written request for reasons was made in response to that notification and no appeal was filed with the Tribunal;
 10. On April 22, 2013, a request for written reasons was made by XCP to the Director;
 11. The Director provided the reasons for the Determination on April 24, 2013, and sent them by registered mail to the parties; and
 12. An appeal was received by the Tribunal on May 21, 2013.

9. The facts relating to the merits of the appeal are as follows:
1. XCP operates a concrete pumping business;
 2. Soliman was employed by XCP as a concrete pump truck operator from May 2010 to July 23, 2011, at a rate of \$25.00 an hour;
 3. Soliman filed a complaint alleging XCP had contravened the *Act* by failing to pay regular and overtime wages, statutory holiday pay, length of service compensation, and concomitant annual vacation pay;
 4. XCP was provided with a copy of the complaint and the supporting documents;
 5. Following an unsuccessful attempt to mediate a resolution of the complaint, the Director scheduled a complaint hearing for May 14, 2012;
 6. The parties attended the complaint hearing on the scheduled date;
 7. XCP requested an adjournment, as Mr. Dutt had not brought the proper payroll records to the complaint hearing and needed more time to prepare;
 8. The adjournment request was agreed by Soliman;
 9. It was also agreed by XCP to provide Soliman with payroll records during the adjournment;
 10. The complaint hearing was rescheduled for September 24, 2012;
 11. On, or about, June 20, 2012, Mr. Dutt dropped off a box of records to the Director, with instructions that Soliman was not to have copies of those records;
 12. Soliman reviewed the records in the presence of a delegate of the Director;
 13. The documents were picked up by Mr. Dutt on, or about, August 8, 2012;
 14. As Mr. Dutt did not want Soliman to have a copy of the records, they were not admitted into evidence and not viewed by the Director when conducting the complaint hearing and making the Determination;
 15. On September 19, 2012, Mr. Dutt left a voice message for the Director indicating he was very busy at work and may not be able to attend the September 24 complaint hearing;
 16. On September 23, 2012, Mr. Dutt sent an e-mail confirming he would not attend the complaint hearing;
 17. On the morning of September 24, Mr. Dutt called to confirm again he was very busy at work and unable to attend the complaint hearing either in person or by phone;
 18. Mr. Dutt requested an adjournment of the hearing;
 19. The request was denied and the complaint hearing proceeded;
 20. Soliman provided verbal and documentary evidence;
 21. The Director found Soliman's evidence to be "credible";
 22. XCP had provided pay statements and cheque stubs prior to the hearing that the Director accepted into evidence and reviewed;
 23. The Director made findings adverse to the position presented by XCP in the pay statements of the hours worked by Soliman;

24. Based on the available evidence, the Director found Soliman was entitled to wages in the amount calculated in the Determination;
25. The Director denied Soliman's claim for length of service compensation; and
26. The Director found XCP had contravened Part 3, sections 17 and 18, Part 4, section 40 and Part 5, section 45 of the *Act*, issuing administrative penalties for those contraventions.

THE APPEAL

10. In respect of the late filing, Mr. Dutt, on behalf of XCP, simply says he did not know he had to send the appeal to the Tribunal. He says the appeal was filed with the Branch on November 18, 2012, and he "waited for a response", since he thought the appeal was in the process, and he did not know he had filed it wrong.
11. In respect of the merits, XCP says he was not given a copy of Soliman's cell phone records, which is where Soliman said he kept track of his start and finish times, transcribing this information each Monday prior to his payday into the log book he submitted to XCP as his hours worked. Soliman provided a printout of the dates and times recorded on his cell phone records to the Director for the complaint hearing.
12. XCP challenges evidence accepted by the Director that Soliman worked the hours reflected by his cell phone records and the evidence given by Soliman that he would conduct a daily pre-trip inspection of his pump truck as one of his work tasks.
13. The appeal submission claims Soliman is not a credible person.
14. XCP argues the Director should not have imposed administrative penalties for contravening sections 17 and 18, as Soliman never handed in his log book containing the hours he worked in his last pay period.
15. XCP identifies another employee as a person that should be contacted to verify the assertions being made in the appeal submission.

ANALYSIS

16. 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.

17. 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.
18. 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.
19. The delay in this case is lengthy – in excess of five months from the end of the appeal period. By way of explanation, XCP claims ignorance of the statutory requirements for filing an appeal, apparently both in terms of the content of an appeal and the administrative body to which an appeal must be delivered. XCP claims these errors were made notwithstanding the clearly expressed information contained in the Determination; information that should have informed any person attending to the appeal filing of the statutory requirements and correct filing procedure.
20. While not acknowledged or referred to in the appeal, the Determination and the information found in the section 112(5) “record” confirm that XCP was informed within days of delivering an incorrect form of appeal to the Branch that a written request for reasons needed to be made to the Director and the Appeal had to be filed with the Tribunal. Even if I accepted the initial mistakes were somehow excusable, that does not explain why, having been alerted to the deficiencies of the purported appeal, XCP then took nearly five months to make a request for written reasons and more than five months after the appeal period expired to deliver an appeal to the Tribunal.
21. I do not accept it is a good or sufficient reason for filing late for Mr. Dutt to say, in effect, he failed to read the clear instructions in the Determination for filing an appeal and I certainly do not accept there is any reason for failing to immediately correct the “mistakes” Mr. Dutt says he made, instead of waiting another five months to do what was required to be done within seven days of service of the Determination: see section 81(1.2) of the *Act*.
22. Other than the attempt to provide this somewhat unsatisfactory explanation for the delay, XCP has not attempted to demonstrate the existence of other relevant criteria. Some of the circumstances arguably suggest XCP had demonstrated an intention to appeal the Determination, but in light of the failure to respond once made aware of their errors and the length of the delay, I seriously doubt the ongoing *bona fides* of that intention.
23. I find there is no basis for extending the time allowed in the *Act* for filing an appeal.
24. That finding is sufficient to dismiss the appeal under section 114(1) of the *Act*.
25. I will, however, for the sake of completeness address the second issue identified above.
26. When considering whether the appeal has any reasonable prospect of succeeding, the Tribunal looks at relative merits of an appeal, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
27. 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 being made.*

28. 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 appeal.
29. XCP has alleged the Director failed to observe principles of natural justice in making the Determination. In the context of the complaint process conducted in this case, the notion of “natural justice” required the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or inappropriate way; see *Imperial Limousine Service Ltd.*, BC EST # D014/05. That requirement substantially echoes what is set out in section 77 of the *Act*.
30. XCP makes several arguments under this ground of appeal. None warrant a significant degree of analysis. Most do not raise natural justice issues at all, but express disagreement with conclusions made by the Director from the available evidence. These matters invoke challenges to findings of fact that typically seek to have the Tribunal re-visit and alter the challenged findings of fact. The authority of the Tribunal to consider such challenges is limited to circumstances where findings of fact raise an error of law. An examination of the section 112(5) “record” indicates there was evidence on which the Director could reasonably make the disputed findings. No error of law arises in the challenged findings of fact and consequently there is no ground of appeal available to XCP.
31. Mr. Dutt says he never received a copy of Soliman’s cell phone records. That may be so, but that fact does not provide XCP with a valid ground of appeal for at least two reasons. First, XCP was fully aware of the nature and the scope of Soliman’s wage claim. The hours recorded on the cell phone were transposed to the log book; XCP regularly had control of that log book for the purpose of recording those hours in their records and paying Soliman his wages. In other words, XCP had, or ought to have had, a complete record of Soliman’s hours worked. Mr. Dutt, in referring to the matter of hours worked, says “I have paper records of invoices showing job addresses, arrival of the pump truck on site, pump start times, stop pumping times & the time that the pump left the job site”. That may also be so, but that only leads me to the second reason, which is that Mr. Dutt chose to impose limitations on the material that could be given to Soliman and chose not to attend or participate in the complaint hearing. All of what he alludes to in the appeal submission could have been provided to the Director during the complaint process or at the complaint hearing. Having failed or refused to participate fully in the process, he may not now be heard to say the Tribunal should give some consideration and effect to this information on appeal. Such an argument is inconsistent with the objects and purposes of the *Act* and flies 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.
32. 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, it is apparent the information Mr. Dutt seeks to have accepted in this appeal was reasonably available during the complaint process and could have been provided to the Director. As well, I find the proposed evidence is neither credible nor probative when considered against the Director's finding that XCP's record of hours worked were "most likely" the result of unilateral reductions made by XCP in hours recorded by Soliman on his cell phone and in the log book and did not accurately represent the hours actually worked by Soliman.

33. Application of the above considerations to the "new evidence" ground of appeal chosen by XCP is immediately apparent and the result is fatal to the appeal. In result, the appeal does not show any merit.
34. In the circumstances, the appeal has no prospect of succeeding on the chosen grounds of appeal.
35. The absence of a basis for extending the appeal period and the absence of any reasonable chance the appeal can succeed justifies its dismissal. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
36. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

37. Pursuant to section 115 of the *Act*, I order the Determination dated November 7, 2012, be confirmed in the amount of \$11,506.74, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal