

An appeal

- by -

Davi Tiann, a Director of Consumers Distributing Inc.
(“Ms. Tiann”)

- 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.: 2017A/29

DATE OF DECISION: May 24, 2017

DECISION

SUBMISSIONS

Marc Cartlidge King

on behalf of Davi Tiann, a Director of Consumers
Distributing Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Davi Tiann (“Ms. Tiann”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 5, 2016.
2. The Determination found Ms. Tiann was a director of Consumers Distributing Inc. (“CDI”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Veronica Lo (“Ms. Lo”), and as such was personally liable under section 96 of the *Act* for wages in the amount of \$1,151.44.
3. This appeal is grounded in an assertion that the Director erred in law in making the Determination. The appeal seeks to have Ms. Tiann removed as a director of CDI from all decisions and orders issued under the *Act*.
4. The appeal was delivered to the Tribunal on March 6, 2017; almost two months after the time period for filing an appeal of the Determination had expired. Ms. Tiann has applied under section 109(1)(b) of the *Act* for an extension of the appeal time period.
5. In correspondence dated March 9, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Ms. Tiann, who has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material 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, for any of the reasons listed in the subsection, 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 any 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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Ms. Lo will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether Ms. Tiann should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

10. The facts relating to this appeal are brief.
11. Ms. Lo filed a complaint alleging CDI had contravened the *Act* by failing to pay her all wages owed. The Director investigated the complaint, conducted a complaint hearing and, on May 27, 2016, issued a Determination against CDI (the “corporate determination”) which found it liable for wages to Ms. Lo in the amount of \$1,151.44. The Director also imposed administrative penalties on CDI in the amount of \$1,000.00.
12. The corporate determination was delivered to Ms. Tiann by registered mail to the place of business of CDI.
13. The Determination was issued December 5, 2016, and was delivered to Ms. Tiann by registered mail to the place of business of CDI.
14. The statutory time period for an appeal under the *Act* expired on January 12, 2017.
15. The appeal by CDI of the corporate determination was filed on March 6, 2017, and has been dismissed: see *Consumers Distributing Inc.*, BC EST # D057/17.
16. A search of the Federal Corporation Information registry conducted by the Director on October 16, 2015, indicated CDI was incorporated on March 2, 2012, and Ms. Tiann was listed as a director. The search indicated Ms. Tiann was a director of CDI during the period Ms. Lo’s wages were earned or should have been paid.
17. Based on the information acquired and the findings made, the Director concluded Ms. Tiann was liable under section 96 of the *Act* for the amount set out in the Determination. Ms. Tiann was not found liable for the administrative penalties imposed on CDI in the corporate determination.

ARGUMENT

18. Marc Cartlidge King (“Mr. King”) has filed this appeal for Ms. Tiann.
19. Mr. King, on behalf of Ms. Tiann, says she was not a director of CDI after July 24, 2015.
20. Mr. King, on behalf of Ms. Tiann, claims she was never provided with a copy of the Determination or any documents from the Director.

ANALYSIS

21. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with 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.

22. 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 must be satisfied to grant an extension:
 - i. there is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
 - ii. there has been a genuine and ongoing *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.
23. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
24. In this case, I find the delay to be unacceptable. Ms. Tiann has provided no reasonable explanation for that delay.
25. The circumstances strongly suggest there was no intention to appeal the Determination until collection proceedings were initiated against Ms. Tiann.
26. I am not persuaded Ms. Tiann has presented a strong *prima facie* case in her favour. When making an assessment on this criterion, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.

27. Ms. Tiann is recorded in the Federal Corporation registry as being a director of CDI when the wages of Ms. Lo were earned or should have been paid.
28. In *Director of Employment Standards (Re Michalkovic)*, BC EST # RD047/01 (Reconsideration of BC EST # D056/00), the Tribunal summarized the law under the *Act* for deciding whether a person may be found to be a director of officer and personally liable under section 96, stating:

... the case law reviewed here and in *Wilnofsky* stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation's registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may presumptively rely on those corporate records to establish director or officer status.
 2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
 3. There may well be circumstances where it would be inappropriate to find that a person is a director or officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not simply by showing that he or she did not actually perform the functions, duties or tasks or a director or officer.
 4. The determination of director-officer status should be narrowly construed, at least with respect to Section 96.
29. In *David Wilnofsky and another*, BC EST # D106/99, the Tribunal commented on the burden imposed on an individual recorded in the corporate records as a director or officer of a company to show the corporate information is wrong:

... where an individual is recorded as an officer or director of a company in the records maintained by the Registrar, a rebuttable presumption arises that the individual actually is a director or officer ... of the company This presumption, however, may be rebutted by credible and cogent evidence that the Registrar's records are inaccurate—the burden of proving that one is not a corporate director or officer rests with the individual who denies such status.

30. Ms. Tiann has not come close to satisfying that burden. She relies on a rather vague assertion that she stopped being a director of CDI on July 24, 2015. Her statement does not indicate how it is she was no longer a director of CDI after July 24, 2015, or indicate whether that was documented in any way and if not, why not. A failure to document such a matter is completely at odds with her legal responsibilities as a director of a federal corporation. Ms. Tiann does not provide a resignation letter or a copy of a corporate resolution accepting her resignation. The situation is also complicated by the fact she shows in the record as the sole director. There may be no fewer than one director and there is no objective evidence any additional directors were appointed so that she could cease being a director. The corporate record does not show any corporate filing recording a change in directors, even though corporations operating under the *Canada Business Corporations Act* are required to update any director information within 15 days of any change.
31. As well, the record indicates Ms. Tiann continued to be involved in the business of CDI in August 2015. In a text message exchange between Mr. King, who was Ms. Lo's supervisor, and Ms. Lo, Mr. King states: "Davi is doing up your discharge papers and record of employment." While this evidence does not necessarily

confirm her continuing as a director, neither does it assist her in rebutting the presumption she did not continue as a director of CDI after July 2015.

32. On the facts present here, there is no reasonable prospect of Ms. Tiann succeeding in avoiding personal liability under section 96 of the *Act*.
33. In respect of the assertion that she was never provided with a copy of the Determination or other documents, based on the information on the Registered Mail Trace Sheet, I simply do not accept she did not receive the Determination. I am unclear what other documents Ms. Tiann believes she was entitled to, but did not receive. There are none specifically identified in the appeal submission. In any event, section 122 of the *Act* deems delivery of documents sent by registered mail to a person's last known address.
34. The request for an extension of the time limited for appeal is denied. The delay in filing the appeal is unreasonably long. There is no acceptable reason given for the delay. The appeal on its face has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (b) and (f) of the *Act*.

ORDER

35. Pursuant to section 115 of the *Act*, I order the Determination dated December 5, 2016, be confirmed in the amount of \$1,151.44, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal