

An appeal

- by -

Schneider Construction Group Ltd.
(“Schneider”)

- 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: R. Hoops Harrison

FILE No.: 2017A/26

DATE OF DECISION: June 5, 2017

DECISION

SUBMISSIONS

Rory S. Dunn

on behalf of Schneider Construction Group Ltd.

OVERVIEW

1. Schneider Construction Group Ltd. (“Schneider”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) dated January 12, 2017 (the “Determination”).
2. In its appeal, Schneider has requested an extension of time for appeal so as to produce new evidence that was not available at the time the Determination was made.

Determination

3. The Determination held that:
 - a. the Complainant, Mr. Mohammad Shoaib Taraki (“Mr. Taraki” or the “Complainant”), was owed wages in the amount of \$3,405.99,
 - b. both Schneider and Seydunn Global Enterprises Ltd. (“Seydunn”) were associated employers of the Complainant, pursuant to section 95 of the *Employment Standards Act* (the “*Act*”); and
 - c. pursuant to sections 17, 18, and 46 of the *Act*, Schneider and Seydunn were ordered to pay administrative penalties in the amount of \$1,500.00.
4. The total amount of the Determination is \$4,905.99.

Appeal

5. An Appeal Form, dated February 20, 2017, was received by the Tribunal on February 27, 2017. It:
 - a. was delivered after the expiry of the 30 day appeal period established by section 112 of the *Act*;
 - b. relies on one ground of appeal: that new evidence has become available that was not available when the Determination was rendered; and
 - c. requests an extension so as to produce the new evidence in support of its position that the Complainant was not a direct employee.
6. The Tribunal:
 - a. acknowledged to the parties that an appeal had been received from Schneider,
 - b. requested production of the section 112(5) record (the “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,

- c. established a deadline of March 27, 2017, for Schneider to provide additional supporting documentation respecting its appeal extension request,
 - d. provided Schneider with the Director's Record with a deadline of April 13, 2017, for Schneider to object to the completeness of the Director's Record.
7. Schneider provided written submissions to the Tribunal on March 8, March 27, March 31, April 4, April 11 and April 13, 2017.
8. Schneider did not object to the Director's Record and, accordingly, the Tribunal accepts the Director's Record as complete.
9. I am considering only the Determination, the reasons for Determination, the Appeal Form, the written submissions and materials filed by Schneider and my review of the Director's Record.

ISSUE

10. Under section 114 of the *Act*, 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:
- (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 that 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.*
11. If I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it may be dismissed under section 114(1) of the *Act*.
12. If I decide all or part of the appeal should not be dismissed under section 114(1), the Director, Seydunn and Mr. Taraki may be invited to file further submissions regarding the appeal extension.

FACTS

13. Schneider provides construction related services including, at least in this case, the provision of 'stucco' to a building project named "the Pointe" located at or near 5571 Ladner Trunk Road, British Columbia (the "Project").
14. Mr. Taraki was employed as a stucco worker from September 22, 2016, to October 25, 2016, for the Project.
15. Mr. Taraki was hired by Serhat Seyhoglu, also known as "Sam". Mr. Seyhoglu identified the employer as Sam Schneider Construction, a subcontractor to Concost [sic], the general contractor for the Project.

16. After not being paid following his first two weeks of work, Mr. Taraki contacted Concost. Concost advised Mr. Taraki that it had already paid \$35,000.00 to his employer and that Mr. Taraki should contact them.
17. Mr. Taraki (again, the “Complainant”) then contacted Mr. Seyhoglu. Mr. Seyhoglu addressed payment of wages as follows:
 - a. Mr. Seyhoglu provided the Complainant a cheque drawn from an account of Seydunn for approximately \$1,600. It did not clear.
 - b. The Complainant advised Mr. Seyhoglu that the cheque had bounced and Mr. Seyhoglu provided a second cheque from Seydunn.
 - c. As the last cheque did not clear, the Complainant presented the cheque to a Citibank teller who advised the Complainant that a) there was no money in the account and b) there hadn’t been any money in the account for eight or nine months.
 - d. The Complainant then met again with Mr. Seyhoglu, this time at a TD branch in Tsawwassen. Mr. Seyhoglu gave the Complainant a third Seydunn cheque as well as \$100 USD cash. That cheque did not clear either.
18. Remaining unpaid, Mr. Taraki did not return to work after October 25, 2016, and complained to the Director alleging that Schneider contravened the *Act* in failing to pay wages.
19. The Director conducted a complaint investigation which included a telephone call from the Employment Standards Branch (“ESB”) to Mr. Seyhoglu on November 17, 2017, at approximately 3:22 pm. During that call, Mr. Seyhoglu confirmed
 - a. his email address (the “Sam Address”),
 - b. that Seydunn was operating as Schneider Construction for the Project,
 - c. that Mr. Taraki worked for him, and
 - d. that wages were owed to Mr. Taraki but not as much as claimed so mediation was requested.
20. Following the call, a detailed email summarizing the complaint was sent to the Sam Address including dates for mediation.
21. The ESB obtained information from Bell that the name for the subscriber of telephone number for Mr. Seyhoglu was ‘Schneider Constructions Group Ltd.’ (the “Sam Number”)
22. The ESB continued to attempt to call Mr. Seyhoglu at the Sam Number but found it to be no longer in service and emails to the Sam Address were unanswered.
23. The ESB followed the lack of response with extensive notice and communications given to Schneider, Seydunn and their directors (which will be referred to in greater detail later in this decision).
24. A Hearing was held on December 29, 2016. The Director identified the following issues:
 - a. Was Mr. Taraki owed wages?
 - b. Were Schneider and Seydunn associated employers under the *Act*?

25. Mr. Taraki gave evidence on his own behalf, which the Director found credible. Without evidence to the contrary, the Director found in favour of Mr. Taraki concerning issues a and b.

ARGUMENT

26. Schneider has asked for an extension so as to raise new evidence.
27. Schneider's ultimate position is that Mr. Taraki was not a direct employee of Schneider but rather partnered with another subcontractor named Jason Hebert, who was paid and thus Mr. Taraki should actually be pursuing Mr. Hebert.
28. In support of its position, Schneider provided the Tribunal with 3 pictures of invoices purporting to be issued from Jason Hebert (the "Invoices"). Other than those materials, Schneider provided written submissions on March 8, March 27, March 31, April 4, April 11 and April 13, 2017.
29. I do note that in its written submissions, Schneider alluded to providing witness statements but none were ever received by the Tribunal.

DISCUSSION

30. The Tribunal has developed a principled approach to the exercise of its discretion to grant an extension as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be established:
- there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
 - the respondent party will not be unduly prejudiced by the granting of an extension; and
 - there is a strong *prima facie* case in favour of the appellant.
31. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.
32. Additionally, one of the purposes of the *Act*, section 2(d), is "to provide fair and efficient procedures for resolving disputes". "Fair and efficient procedures" includes the element of ensuring that disputes are resolved in a timely fashion.

ANALYSIS

Explanation

33. Schneider has founded its request for an extension in a letter, dated February 20, 2017, from Mr. Rory Dunn, a director and officer of both Schneider and Seydunn, that Schneider's reason for not being able to meet the statutory appeal period was the permanent absence of its managing director, Volkan Sel. (the "Request Letter")

34. Mr. Dunn however, was given notice directly with pre-hearing materials and demands from the ESB on November 25, 2016, and December 8, 2016. Delivery was confirmed by Registered mail. Delivery of the Determination was also provided to that same address. Most importantly though, the delivery address is in fact the same address listed by Mr. Dunn for Schneider in the Appeal Form.
35. Accordingly, I do not find it reasonable that Mr. Dunn, on behalf of Schneider, who did have notice of the complaint, investigation and Determination, can rely on the absence of another director as a credible explanation as to why Schneider was late in filing its appeal.

Intention

36. I also question the *bona fides* of Schneider's intention to appeal. A deadline of March 27, 2017, was given to Schneider to provide additional supporting documentation respecting its appeal extension request.
37. On March 27, 2017, a document under Schneider letterhead (and containing the Sam Address) in part, made reference to future witnesses that would be provided to the Tribunal.
38. Mr. Dunn, on March 31, 2017, via email stated that he hoped that the witness statements would be delivered by Monday (April 3, 2017).
39. Mr. Dunn, on April 4, 2017, delivered an email (cc'd to "Samuel") that he was having troubles obtaining the Reasons for Determination. No mention was made of the witness statements.
40. Lastly, on April 13, 2017, Mr. Dunn emailed the Tribunal that the witness statements would be forwarded that afternoon, more than two weeks after the deadline set by the Tribunal.
41. In the end, no witness statements were delivered to the Tribunal by Schneider either within the Appeal Period or within the deadline set by the Tribunal. As such, I question the seriousness given by Schneider to the Appeal and equate that to a casual and not a *bona fides* intention.

Notice to others

42. Furthermore, as the 'new evidence' sought to be raised on appeal was never produced, neither the Complainant nor the Director can be said to be fully made aware of the substantive intention to Appeal. Put another way, there may be an intention at most in form, but not in substance.

Prejudice

43. The fourth part of the *Re Niemisto* test qualifies the prejudice to the Complainant using the word "unduly." Prejudice, by any standard dictionary is defined to include a bias or a preconceived opinion. I interpret the qualification of prejudice in this part of *Re Niemisto* as a logical observation that any extension to appeal by its very nature would *in some way* prejudice the Complainant given that the appeal would proceed on the grounds of appeal raised. Therefore, what would be 'undue' could include an extension given on grounds that were ulterior in motive or otherwise without merit.
44. Applying that reasoning in the circumstances of this case, I think the analysis of undue prejudice is informed by a consideration of the merits in part 5 of the test. This analysis will also inform my considerations under section 114 of the *Act*.

A strong *prima facie* case

45. The only new evidence delivered by Schneider to the Tribunal for consideration are the 3 Invoices, each dated November 16, 2016. No witness statements were produced.
46. The opportunity to provide new or additional evidence is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made.
47. Specifically, in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03 (“*Davies*”) the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- (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.
48. As referred to previously, both Schneider and Mr. Dunn received the November 25, 2016, and December 8, 2016, communications from the ESB in a manner of delivery consistent with the *Business Corporations Acts* of both British Columbia and Alberta that would otherwise qualify as legally effected service on a corporation. Given that notice, the due diligence expected of the company and its director, Mr. Dunn, is that Schneider would have appeared at the December 29, 2016, hearing and provided the Invoices.
49. As Schneider had notice and opportunity and as the physical Invoices were in existence and could have been produced, Schneider does not meet the first part of the *Davies* test.
50. I also question their relevance as Schneider would still have to supply further evidence to materially link Mr. Hebert with the Complaint and in any event, without anything further, they are submitted for proof that payment was made to Mr. Hebert. However, no proof of payment accompanies them. Consequently, I would ascribe little weight to their credibility.
51. As to probative value, at the Determination, the Director had the benefit of Mr. Taraki’s evidence including:
- a. an October 6, 2016, proof of employment letter (drafted on the same Schneider letterhead as the March 27, 2017 written submissions) which stated that Mr. Taraki was employed full time by ‘Schneider Construction Group,’ and
 - b. A pay stub listing Schneider Construction Group Ltd. as employer.
52. Indeed, the whole of the evidentiary record was such that the Director was entitled to find the Complainant an employee given the broad definition under the *Act*.
53. Alternatively, and even if Schneider was not a ‘direct’ employer, there is uncontested evidence of employment with Seydunn. I do not think the Invoices or submissions of Schneider *qua* Seydunn would have been

relevant nor would they have resulted in the Director departing from its conclusion that Schneider and Seydunn were associated employers as the Director's reasoning at R8 – R9 of the Reasons for the Determination is not tainted by legal error. Finally, I note that Mr. Seyhoglu's concessions to the ESB on November 17, 2017, (mentioned previously) would be highly relevant in supporting the Director's ultimate conclusion.

CONCLUSION

54. Schneider has not provided a reasonable and credible explanation for their extension request nor do they have a strong *prima facie* ground for appeal. I am not inclined to exercise my discretion to grant an extension of the appeal period nor to accept any new evidence, all of which could have been relied upon and submitted to the Director at the investigative stage.
55. For the reasons stated previously, there is no possibility that this appeal can succeed. The purposes and objects of the *Act*, included as stated in section 2, would not be served by requiring other parties to participate and respond. They would be unduly prejudiced.
56. Accordingly, I would dismiss appeal pursuant to section 114 of the *Act*.

ORDER

57. Pursuant to section 115 of the *Act*, I order the Determination be confirmed together with any interest that has accrued under section 88 of the *Act*.

R. Hoops Harrison
Member
Employment Standards Tribunal