

An appeal

- by -

Fine Water Inc.  
(“FWI”)

- 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:** Carol L. Roberts

**FILE No.:** 2010A/45

**DATE OF DECISION:** June 23, 2010

## DECISION

### SUBMISSIONS

Alan With on behalf of Fine Water Inc.

Ed Wall on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Fine Water Inc., (“FWI”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued November 27, 2009.
2. Stephen Shulman filed a complaint alleging that FWI had contravened the *Act* by failing to pay him regular wages and compensation for length of service. FWI’s position was that Mr. Shulman had never been hired as an employee.
3. Following an investigation into Mr. Shulman’s complaint, the Director’s delegate determined that Mr. Shulman was an employee and that FWI had contravened Sections 18 of the *Act* in failing to pay him wages. The delegate determined that Mr. Shulman was entitled to \$1,754.84 in wages and interest. The delegate was unable to find that Mr. Shulman was entitled to compensation for length of service. The delegate also found that FWI had contravened Section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in failing to comply with a Demand for Employer Records. The Director imposed a \$1,000 penalty on FWI for each of the contraventions, pursuant to section 29(1) of the *Regulation*. Since the Determination was issued, all of the wages owing have been collected from Mr. MacKinnon, a former officer of FWI and paid to Mr. Shulman, leaving only the administrative penalty outstanding.
4. FWI contends that the delegate failed to observe the principles of natural justice in making the Determination. FWI further says that evidence has become available that was not available at the time the Determination was being made. FWI contends that it did not have the ability to prove that Mr. Shulman was never an employee of FWI to the Director’s satisfaction. FWI says that it was only after Mr. Shulman appeared in court on another matter and testified that he was not a FWI employee that it had sufficient evidence to refute his claim for wages.
5. FWI seeks to have the Determination cancelled.
6. FWI filed an appeal of the Determination on March 22, 2010. Pursuant to section 112 of the *Act*, FWI’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. FWI’s appeal period expired December 29, 2009.
7. FWI was granted an extension of time to provide additional documentation in support of its appeal.
8. These reasons address the timeliness of FWI’s appeal and are based on the written submissions of the parties.

### ISSUE

9. Whether or not the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## FACTS AND ARGUMENT

10. Mr. Shulman said that he was hired as FWI's sales manager on December 6, 2008. He was provided with a business card that identified him as a sales consultant and was told he was to be paid an hourly rate plus undetermined commissions and expenses. Mr. Shulman said that after he was hired, he discovered that FWI had no bottles for the water so on January 8, 2009, a numbered company that Mr. Shulman was a director of loaned FWI \$20,000 for the bottles.
11. Mr. Shulman said that in mid January it became clear to him that Mr. With, the President of FWI, was not capable of managing FWI so he and Mr. MacKinnon, FWI's Vice President, asked Mr. With to step aside. Mr. With refused and Mr. Shulman continued his sales calls. Mr. Shulman said that Mr. With fired him on March 7, 2009, with no notice, and told him that although FWI had no money, he would see to it that he would receive his wages.
12. Mr. Shulman provided the delegate with a record of the hours he spent working for FWI.
13. After receiving Mr. Shulman's complaint, the delegate sought FWI's response, including its records of the hours Mr. Shulman worked and his wage payments.
14. FWI contended that Mr. Shulman was never an employee. Mr. With stated that Mr. Shulman was retained as a commissioned salesperson on a 90 day probationary period. Mr. With said that Mr. Shulman served in this capacity between December 2008 and January 2009 and that FWI provided him with a vehicle and fuel. Mr. With also said that FWI provided Mr. Shulman with a \$500 advance and paid his expenses. FWI also provided Mr. Shulman with company clothing. Mr. With could not provide the delegate with Mr. Shulman's commission rate because FWI had been locked out of its offices by the landlord.
15. Mr. With advised the delegate that Mr. Shulman maintained no record of his activities on FWI's behalf despite being told he had to report the daily vehicle mileage and information of the people he had contacted. Mr. With said that he terminated Mr. Shulman's employment following some concerns he had about Mr. Shulman's performance.
16. The delegate also spoke with Mr. MacKinnon who stated that he was present when Mr. Shulman was hired and fired. Mr. MacKinnon confirmed Mr. Shulman's wage and commission structure to the delegate.
17. The delegate determined that Mr. Shulman was an employee based on the *Act's* definition of an employee. The delegate concluded that Mr. Shulman was engaged in activities that were normally performed by an employee on FWI's behalf.
18. The delegate found the evidence as to the dates of Mr. Shulman's employment were inconsistent. FWI provided no record of employment and Mr. Shulman's own evidence of his dates of hire and firing were inconsistent. The delegate noted that Mr. Shulman's own records showed that he was employed for less than three consecutive months. Consequently, the delegate determined that Mr. Shulman was not entitled to compensation for length of service.
19. The delegate determined Mr. Shulman's wage entitlement based on his hourly wage alone as there was no evidence what his commission rates was to be. The delegate noted that FWI had not produced employer records and considered Mr. Shulman's records to be the best evidence.

20. On June 18, 2009, Mr. Shulman filed a statement of claim in Provincial Court in an attempt to recover the money he lent to FWI. On February 23, 2010, Mr. Shulman amended his claim to include “wages as ordered by the Labour Board”. On March 9, 2010, Mr. Shulman further amended his claim to remove his claim for wages.
21. Mr. With says that at the Small Claims hearing, Mr. Shulman stated under oath that he was not an employee of FWI, and that Ms. Hardy, a witness for FWI, testified that she had not hired him. Mr. With also contended that Mr. Shulman and Mr. MacKinnon, a former officer of FWI, were friends and that Mr. MacKinnon supplied Mr. Shulman with money, company clothes, fuel and expenses from his own pocket.
22. Mr. With seeks an extension of time in which to file the appeal. He submits that he did not receive the Determination until just before the Christmas holiday season and “legal council’s (sic) office was closed the week leading up to Christmas”. Further, he submits that FWI was required to appear in Small Claims Court for three days during the appeal period. Mr. With submits that he did not have sufficient time or resources to bring an appeal within the time period.
23. The Director’s delegate says that Mr. With received the Determination on November 19, 2009, well before the Christmas holiday season and had sufficient time to file an appeal. The delegate contends that FWI has not provided any reasons why the appeal could not have been filed before the deadline, and that the extension application should be denied on this basis alone. Further, the delegate submits that there is no evidence FWI demonstrated an intention to appeal the Determination or that either the Director or Mr. Shulman was made aware of FWI’s intention to appeal.
24. The Director submits that FWI’s appeal is an attempt to re-argue the appeal on the merits. The delegate says that FWI does not raise a strong case that Mr. Shulman was not an employee. The delegate notes that Mr. With acknowledged that Mr. Shulman was a commission salesman on a 90 day probationary “tryout”, and that he “terminated” this “tryout” when he was dissatisfied with Mr. Shulman’s performance. The delegate further submits that Mr. Shulman’s evidence in Court regarding his beliefs about his employment status are not relevant to this appeal.

## ANALYSIS

25. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
26. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
27. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
28. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;

- (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.

29. These criteria are not exhaustive.

30. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit. Indeed, FWI sets out no explanation for failing to request an appeal within the statutory time limit other than that the Christmas holiday season intervened. Given that the Determination was received well over one month before the holiday season began, I am not persuaded that this is a reasonable or credible explanation. I find that FWI did not have a genuine, ongoing intention to file an appeal of the Determination. There is also no evidence there was an ongoing, *bona fide* intention to appeal the Determination, or that either Mr. Shulman or the delegate were aware of FWI's intention.

31. I am also unable to find that there is a strong *prima facie* case in FWI's favour. Although FWI suggests there is new evidence on appeal, I am not persuaded that this "evidence" would alter the outcome of the Determination.

32. FWI asserts that Mr. Shulman expressed his opinion that he was not an employee of FWI in a hearing of a claim to recover monies lent to FWI. The test of whether or not an individual is an employee is a legal test. The delegate assessed the evidence before him in light of the *Act's* definition of employee and employer. Even if Mr. Shulman testified in a later proceeding on his views as to his employment status that fact is hardly conclusive and, in any event, that decision was already made by the delegate for purposes of this process.

33. Having reviewed the record and the Determination, I find that the delegate's conclusion on this issue was supportable on the evidence before him and thus find no *prima facie* case in support of any of the grounds of appeal.

34. FWI does not say how it was denied natural justice and the documents do not disclose any basis for this ground of appeal.

35. Finally, as the Determination has been satisfied but for the administrative penalty, I find no basis to allow FWI's application.

## **ORDER**

36. Pursuant to section 109(1)(a) of the *Act*, I deny FWI's application to extend the time for filing an appeal.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**