



An appeal

- by -

BlueCurl Technologies Inc.  
(“BlueCurl”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2012A/47

**DATE OF DECISION:** June 28, 2012

## DECISION

### SUBMISSIONS

Chris Slattery	on behalf of BlueCurl Technologies Inc.
Stephen Van Deventer	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

### INTRODUCTION

1. On March 12, 2012, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination, pursuant to section 79 of the *Employment Standards Act* (the “*Act*”), against BlueCurl Technologies Inc. (“BlueCurl”) ordering it to pay the total sum of \$4,671.57 representing \$3,671.57 in unpaid wages (calculated at the applicable minimum wage) and interest owed to its former employee, Stephen Van Deventer (“Van Deventer”), and a further \$1,000 reflecting two separate \$500 monetary penalties (see *Act*, section 98). The Determination was issued following a complaint hearing before the delegate held on November 1, 2011. BlueCurl was represented by legal counsel at the complaint hearing; Mr. Van Deventer appeared on his own behalf.
2. There were two broad issues before the delegate. First, was Mr. Van Deventer an “employee” as defined in section 1 of the *Act*? Second, was he entitled to any unpaid wages, and if so, in what amount? The delegate determined that Mr. Van Deventer was an employee and BlueCurl does not appear to be challenging that finding. The delegate also determined that Mr. Van Deventer had not met the condition precedent in his employment contract triggering his monthly \$12,500 wage and, accordingly, she calculated his unpaid wages based on the statutory minimum wage (at the relevant time period) of \$8 per hour.
3. The time period for filing an appeal with the Tribunal under section 112 of the *Act* expired on April 19, 2012. On May 4, 2012, approximately 2 weeks after the appeal period expired, BlueCurl filed an Appeal Form (with several attachments including a brief submission letter and some other documents that were contained in the record before the delegate). Although the Appeal Form sets out the three statutory grounds of appeal (see section 112(1)(a), (b) and (c)), none of the appropriate “boxes” on the form was checked off and the attached letter in support of the appeal does not specifically identify any particular ground of appeal although the material suggests to me that BlueCurl is asserting that the delegate erred in law in interpreting the terms of the parties’ written “employment letter”.
4. In light of its late appeal, Blue Curl now seeks an extension of the appeal period under section 109(1)(b) of the *Act*. These reasons for decision relate solely to this latter application.
5. Simply for the sake of completeness, I should also note that the Director collected \$4,240.63 and presently holds these funds in trust. BlueCurl applied for a section 113 suspension of the Determination pending the outcome of this appeal. Given that most of the amount due under the Determination had been collected, and in light of the Director’s position that it did not oppose a suspension, Tribunal Member Stevenson granted the suspension request on terms (see BC EST # D062/12 issued June 20, 2012).

## THE PARTIES' POSITIONS

6. Paragraph 4 of the Tribunal's Appeal Form directs an appellant to "provide an explanation why you did not file [your appeal] on time" and further directs the appellant to Rule 9 of the Tribunal's *Rules of Practice and Procedure* (this rule deals with late appeals). In a letter dated May 3 (appended to the Appeal Form), Mr. Slattery, BlueCurl's President and CEO, provided the following rather cursory explanation for the late appeal:

I must first apologize for filing this appeal late but this was due to the fact that I had been waiting for a response from the Langley branch on a very key question and was under the impression that I needed to obtain that information prior to any formal appeal. That was obviously not the case when the order came through to siezed [sic] the funds from our company account which has placed our company in a very tenuous position as we are a very small company just trying our best to survive and continue to pay out [sic, our?] team and suppliers.

7. On May 8, 2012, the Tribunal's Administrator and Appeals Manager sent a letter to all parties requesting their submissions regarding the late appeal. This letter specifically identified the various criteria that have emerged from the Tribunal's section 109(1)(b) jurisprudence and asked the parties to address these factors in their submissions. By way of response, Mr. Slattery, on behalf of Blue Curl, submitted a letter dated June 4, 2012, that briefly referred to the merits of its appeal and additionally contained the following (and still very cursory) further information regarding its late appeal:

With respect to our Appeal being filed late. [sic] Having never been in this situation I was waiting for a response back from the Employment Standards Branch in Langley for clarification on a point and did not receive a call back until well after the expiry date, for that I am truly sorry for any delay this may have caused.

8. Perhaps not surprisingly, Mr. Van Deventer opposes BlueCurl's application to extend the appeal period referring to its application as a "delay tactic". Mr. Van Deventer says that if BlueCurl intended to appeal, it should have given the matter priority.
9. The delegate, in her submission dated May 25, 2012, suggest the appeal lacks merit and, like me, also expresses some concern about the vague nature of BlueCurl's assertions regarding the reasons for its late appeal:

The appellant claims the appeal was late as it was waiting for a response to a "key" question asked of the "Langley branch". The appellant claims it was "under the impression" that it needed this information prior to filing an appeal. The vagueness of this assertion makes it difficult to formulate a response.

Between the time the determination was issued on November 1, 2011 and the end of the appeal period, there is no record of the appellant ever contacting the Employment Standards Branch. There was no indication that BlueCurl Technologies Inc. intended to file an appeal until after collections proceedings commenced (after the expiration of the appeal period).

10. The delegate's reference in her May 25, 2012, submission to "November 1, 2011" must be an error. The complaint hearing was held on November 1, 2011, but the Determination, along with the delegate's accompanying "Reasons for the Determination", were not issued until March 12, 2012.

## FINDINGS AND ANALYSIS

11. While one could hardly characterize the delay in this case as “undue delay”, the fact remains that this appeal was filed after the appeal period set out in subsection 112(3)(a) of the *Act* expired. Parties are expected to meet their statutory obligations and appeal period extensions are certainly not granted as a matter of course simply because the delay involved was not particularly significant. Further, in this case, I have no particulars before me about the so-called “very key question” that BlueCurl apparently wanted the Employment Standards Branch to answer. In any event, BlueCurl does not suggest that anyone from the Employment Standards Branch gave it the impression that the appeal period would somehow be held in abeyance or otherwise postponed pending its inquiry being answered. Further, the Director has no record (and none is before me) about any inquiry having ever actually been made. There is simply no credible explanation before me as to why this appeal was not filed within the statutory appeal period. It is incumbent on an applicant for a section 109(1)(b) extension to provide a reasonable and credible explanation for having failed to file a timely appeal.
12. The Determination clearly identified (in a text box headed “Appeal Information”) that all parties had only until 4:30 PM on April 19, 2012, to file an appeal with the Tribunal. This notice also provided a reference to the Tribunal’s website where further information could be obtained and the Tribunal’s telephone number. There is no record before me that shows BlueCurl attempted to contact the Tribunal prior to filing its late appeal documents.
13. The catalyst to this appeal being filed appears to have been the fact that the Director undertook collection proceedings; there is nothing in the material before me to indicate that BlueCurl planned to appeal the Determination prior to becoming aware of the collection proceedings.
14. Finally, although an application for an extension of the appeal period is not the place where the underlying merits of the appeal should be judiciously scrutinized, the Tribunal has nonetheless consistently ruled that if an appeal does not seemingly have at least some presumptive merit, that circumstance augurs against granting an extension. In the case at hand, I am hard-pressed to characterize this appeal as anything other than frivolous. The alleged errors of law (if, in fact, BlueCurl’s is even alleging that the delegate erred in law) do not, in my judgment, amount to errors of law. As I read BlueCurl’s submission, it would have the Tribunal make an order (specifically, ordering payment to Mr. Van Deventer by issuance of shares rather than by payment of money) that is contrary to the express provisions of the *Act*.
15. In sum, there is no credible explanation before me regarding why this appeal was not filed in a timely manner. The appellant does not appear to have formed an intention to appeal until it was faced with execution proceedings. The appeal appears to be of dubious merit; indeed, I would characterize it as something very close to a frivolous appeal. In light of these circumstances, I do not think it appropriate to extend the appeal period.

## ORDER

16. BlueCurl’s application to extend the time for filing an appeal of the Determination is refused. Pursuant to section 114(1)(b) of the *Act*, this appeal is dismissed and the Determination issued March 12, 2012, is confirmed in the amount of \$4,671.57 together with whatever further section 88 interest that has accrued since the date of issuance.

17. As previously noted, on June 20, 2012, the Tribunal issued an order suspending the Determination “until the completion of the appeal or until further order of the Tribunal, whichever is earlier”. Accordingly, the suspension order issued June 20, 2012, is cancelled.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**