

An appeal

- by -

Andrew Minter carrying on business as Total Roofing
(“Minter”)

- 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/31

DATE OF DECISION: July 30, 2013

DECISION

SUBMISSIONS

Andrew Minter on his own behalf carrying on business as Total Roofing

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “Act”) Andrew Minter carrying on business as Total Roofing (“Minter”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 20, 2013.
2. The Determination found that Minter had contravened Part 3, sections 18 and 27 of the *Act* in respect of the employment of James Doiron (“Doiron”), ordered Minter to pay wages to Doiron in the amount of \$1,432.27 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$2,932.27.
3. Minter has filed an appeal of the Determination on the ground that the Director erred in law in making the Determination.
4. The Tribunal has discretion, under section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*, to choose the type of hearing for deciding an appeal and has decided the matters raised in this appeal can be decided from the Determination, the written submission filed by Minter and the section 112(5) “record” filed by the Director.
5. The appeal was filed late, and Minter has requested the Tribunal extend the time period for filing an appeal. 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.
6. Consistent with this notice, I have reviewed the appeal, the section 112(5) “record” and the submission filed by Minter.

ISSUE

7. There are two issues 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 can succeed.

THE FACTS

8. The facts relating to the issue of the timeliness of the appeal are as follows:
 1. The Determination was issued March 20, 2013;
 2. The Determination was sent by registered mail to the address on file for Minter with the Director at the time the Determination was made;
 3. The time limited for filing an appeal expired on April 29, 2013;

4. The appeal was delivered to the Tribunal on May 27, 2013.
9. The facts relating to the merits of the appeal are as follows:
 1. Minter operates a roofing business at several locations in the province;
 2. Doiron filed a complaint alleging he had not been paid all wages owing;
 3. There was an unsuccessful attempt to mediate a resolution;
 4. On August 23, 2012, a Demand for Records was issued to Minter, in respect of which he provided an incomplete response;
 5. The Director conducted a complaint hearing on November 7, 2012, and January 3, 2013;
 6. A Determination was issued March 20, 2013;
 7. In the Determination, the Director found Doiron was employed by Minter as a roofer from April 5, 2012, to May 16, 2012, at several job sites in the Kootenays and was paid at a rate of \$26.00 an hour;
 8. The Director found Doiron earned wages, including overtime and annual vacation pay, in the amount of \$7,361.54 and had received wages in the amount of \$5,974.63;
 9. The Determination notes that Minter “did not provide payroll records to show the calculation of wages for Mr. Doiron, nor did he provide wage statements or any source documents to show how or when payments were made to Mr. Doiron.”
 10. Based on these amounts, the Director found Doiron was owed additional wages in the amount of \$1,396.91;
 11. The Determination was sent by registered mail to an address for Minter in Courtenay, BC that was on the file with the Director as an address for delivery; and
 12. The Director found Minter had contravened Part 3, sections 18 and 27 of the *Act* and section 46 of the *Employment Standards Regulation*, issuing administrative penalties for those contraventions.

THE APPEAL

10. In respect of the late filing, Minter says the Determination was sent “to a wrong address from 2 years ago”. He says his addresses “were up dated” with the Director.
11. In respect of the merits, Minter says the Director erred by using gross wages to calculate money paid to Doiron and failed to look at remittances that were, or should have been, made on his behalf. Minter says when the payroll taxes/contributions remitted, or required to be remitted, for Doiron, which Minter says were \$1,870.94, are included in the calculations, Doiron was actually overpaid by \$968.59.
12. Minter also submits Doiron only worked a total of 156 hours. In making this submission, he appears to dispute the finding by the Director that Doiron had worked a total of 246.5 hours. The finding of the Director on this was based on an acceptance of the evidence provided by Doiron regarding his days and hours of work and a rejection of the position taken by Minter that Doiron worked the same number of hours as those of another employee, Brandon Weston.

ANALYSIS

13. 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.
14. 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 the failure 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 as 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.
15. 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.
16. The delay in this case is fairly lengthy – nearly a month. While not specifically saying so, Minter appears to suggest the delay was occasioned by the Determination being sent to a wrong address. Minter says he had “updated” his address with the Director. There is no indication in the section 112(5) “record” of him doing that. While most of the communication between Minter and the Employment Standards Branch appears to have been by e-mail, the address to which the Determination was sent was the address on several documents in the file and was one to which other communications had been delivered. It was sent by registered mail. Subsection 122(1) of the *Act* deems a Determination to be served if it is sent by registered mail to the last known address of the person to whom it is sent. For the purposes of the *Act*, therefore, the Determination was effectively served.
17. No evidence has been provided that would assist in deciding whether there is a reasonable explanation for the delay here. Minter does not say when he actually received the Determination; there is no indication he could not have filed within the appeal period; there is nothing in the file that indicates he communicated any intention to appeal the Determination to any other party.

18. As well, one of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. This consideration, expressed as the relative or presumptive merits of an appeal, also stands as a consideration on which an appeal may be dismissed under section 114(1) of the *Act*, 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 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.*

19. When considering the relative merits of an appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the particular issues raised by the appeal.

20. 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.*

21. 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 grounds of appeal relied upon. The ground of appeal chosen by Minter is error of law. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

22. The appeal is not particularly clear on how an error of law arises from the Determination. If Minter is submitting the Director erred by using gross wage figures to decide the difference between what Doiron had been paid in wages and what he had earned – based on the Director’s calculation of wage rate and hours worked – no error of law arises.
23. If Minter is saying the Director should have adjusted the wages paid or payable to Doiron under the *Act* by the amount of remittances made or required to be made to Revenue Canada, I disagree. The Director has no responsibility for ensuring proper remittances are made under federal legislation on wages and earnings of an employee. That responsibility belongs to the employer, with the employee retaining a residual responsibility for ensuring the correct taxes are paid on income and earnings. If Minter failed to meet his legal responsibilities under federal legislation, that is not a concern of the Director in administering the *Act*. In the context of this case, the responsibility of the Director was only to ensure Doiron received the wages to which he was entitled under the *Act*. The taxing of those wages falls under another statutory regime that the Director does not administer and there is no error of law simply because the Director does not attempt to build in obligations under taxing and other federal legislation into decisions under the *Act*.
24. In any event, I note the failure of Minter to fully comply with the Demand for Records effectively denied the Director any evidence relating to Doiron’s wages, including hours, wage rate and what, if any, deductions were made and remitted, or were required to be remitted, on those wages. The Director committed no error of law by reaching conclusions based on the available evidence.
25. In sum, I find the appeal does not show any *prima facie* case supporting Minter’s contention there is an error of law in the Determination; it lacks presumptive merit.
26. Based on the above considerations and on what I have been provided by Minter, I do not find he has met the burden of establishing a basis for an extension of the statutory period for filing the appeal and I do not grant it.
27. The absence of a basis for extending the appeal period and the absence of any presumptive merit to the appeal militates strongly against allowing an extension of the statutory time period or allowing this appeal to continue. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
28. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination dated March 20, 2013, be confirmed in the amount of \$2,932.27, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal