Employment Standards TRIBUNAL

An appeal

- by -

24/7 Excavating Ltd.
("24/7")

- 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.: 2015A/40

DATE OF DECISION: July 7, 2015

DECISION

SUBMISSIONS

James J.D. Wagner — counsel for 24/7 Excavating Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), 24/7 Excavating Ltd. ("24/7") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 30, 2014.

2. The Determination found that 24/7 had contravened Part 3, sections 17, 18 and 21, Part 5, section 45 and Part 8, section 63 of the *Act* and section 37.3 of the *Employment Standards Regulation* (the *"Regulation"*) in respect of the employment of Floyd Tayler ("Mr. Tayler") and ordered 24/7 to pay wages to Mr. Tayler in the amount of $7,532.11 and to pay administrative penalties in the amount of $3,000.00. The total amount of the Determination is $10,532.11.

3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination.

4. A form of appeal was received by the Tribunal on March 10, 2015. The appeal was filed outside of the statutory time limit set out in subsection 112(3) and did not, as required by subsection 112(2), include a copy of the Director's written reasons for the Determination.

5. On the same day, the Tribunal informed 24/7 the appeal was incomplete and advised 24/7 that the *Act* and the Tribunal's *Rules of Practice and Procedure* ("the *Rules*") required a completed Appeal Form and the written reasons for the Determination to be delivered to the Tribunal within the appeal period. 24/7 was also advised to provide written reasons for the request for an extension of the appeal period.

6. That conversation was confirmed in a letter from the Tribunal dated March 19, 2015. 24/7 was given a deadline of March 31, 2015, to complete the appeal and provide written reasons for the extension request.

7. On April 1, 2015, the Tribunal received an Appeal Form that did not include the written reasons for the Determination. 24/7 advised the Tribunal the Director had denied the request to provide reasons for the Determination.

8. On April 8, 2015, the Tribunal notified the parties that an appeal and a request for an extension of the appeal deadline had been received from 24/7, 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.

9. The "record" was provided by the Director to the Tribunal and a copy was sent to 24/7, which was advised of its right to object to the completeness of the "record". 24/7 has objected to the completeness of the "record", submitting it did not include the hearing notes of a delegate of the Director who had conducted a complaint hearing previous to the investigation that resulted in the Determination under appeal here nor did the "record" include "internal communication and correspondence regarding this file". In response, the Director has taken the position that the notes from the earlier hearing were irrelevant to the investigation and

would not have been used in making the Determination. In respect of the reference to internal communication and correspondence, the Director has indicated the "record" includes all documentation that was before the Director when the Determination was being made.

10. 24/7 has replied to the Director's position.

11. I am not satisfied the "record" is deficient in any material way. The Tribunal does not customarily order the production of the notes created by the director's delegate. In *United Specialty Products Ltd.*, BC EST # D057/12, (reconsideration denied BC EST # RD127/12), a panel of the Tribunal, substantially endorsing the Tribunal's decision in *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05, indicated, at para. 18, that it would most certainly be a rare and very unique situation for the Tribunal to order the notes taken by a delegate during a complaint hearing. In *Lockerbie & Hole Industrial Inc.*, *supra*, the panel explained the concerns with the Tribunal endorsing an approach to ordering production of a delegate's hearing notes that would be anything other than "highly exceptional". The reasons are grounded in jurisdictional and practical considerations:

> Without finally deciding whether the Tribunal could ever lawfully order such notes to be produced, there are two reasons why it would be highly exceptional to do so. First, there is a reliability concern. Note-taking by a Delegate is not the same as note-taking by a court reporter or hearing secretary. This is because a decision-maker's hearing notes are a personal *aide memoire* and as such are not created for the purpose of recording the entire proceeding for third parties. Second, there is a deliberative privilege concern, as such notes are closely linked with the deliberative process: see generally *Ellis-Don Ltd v. Ontario Labour Relations Board*, [2001] 1 S.C.R. 221. (at page 7)

12. Based on the approach of the Tribunal established and endorsed in the above cases, I would not, and possibly could not, order production of the hearing notes of the delegate who conducted the earlier hearing. The earlier hearing did not result in a Determination, due to the unexpected departure from the Employment Standards Branch of the delegate who conducted that hearing. The main objective of seeking that delegate's notes appears to be to create a tension or competition between any observations noted by the delegate in that case which were favourable to the appellant here and the Determination under appeal. 24/7 seems to believe the outcome of the earlier hearing would have resulted in a decision accepting its position in response to Mr. Tayler's complaint and a consequent dismissal of the claim. An additional objective might be to seek to create an argument relating to the weight of evidence in this appeal. It is, however, not particularly important what the rationale might be for seeking the notes, the request does not disclose those kinds of "highly exceptional" circumstances that would persuade the Tribunal it was appropriate to have the Director find and provide the notes. The delegate conducting the earlier hearing never made a decision following the hearing. In this case, the Director says the notes were irrelevant to the later investigation and would not have been used. I can see no useful purpose, by which I mean I can see no purpose consistent with the objectives of the *Act* and the complaint resolution process, for having them produced.

13. As for "internal communication and correspondence regarding this file", the Director says the "record" includes all documents that were before the Director when the Determination was made. Counsel for 24/7 seems to be under a misunderstanding about the scope of the "record". The obligation of the Director in respect of what must be included in the "record" is directed by statute. As the Director has pointed out, it requires inclusion of what "was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director". There is no general production obligation as there might be in civil proceedings in a Court of law. There is an obligation on the person alleging a deficiency in the content of the "record" to identify what has been omitted. In this case, I have not been pointed to any documents the Director has failed to include in the "record" that were "before the director at the time the determination was made".

14. Based on the above considerations and in the absence of any specific identification of a deficiency in the "record" I am satisfied the "record" is complete and will proceed with a consideration of this appeal on that basis.

15. Consistent with notice contained in correspondence from the Tribunal dated April 8, 2015, June 5, 2015, and June 16, 2015, I have reviewed the appeal, the appeal submissions and the "record".

16. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the "record" that was before the Director when the Determination was being made. Under section 114, 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) of the *Act*, which states:

> ***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 period;*
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> *(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.*

17. I am deciding whether 24/7 should be granted an extension of the appeal period or whether the appeal should be dismissed under either, or both, section 114(1) (b) and (h) of the *Act*. If I decide all or part of the appeal should not be dismissed under section 114(1) of the *Act*, Mr. Tayler will, and the Director may, be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

18. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

19. The facts relating to the issue under consideration are as follows:

1. The complaint of Mr. Tayler was filed with the Director on September 14, 2011;
2. An investigation of the complaint was conducted through several delegates of the Director, culminating in a complaint hearing being held by one of the delegates commencing May 14, 2012;
3. 24/7 was represented by legal counsel at the complaint hearing;

4. The delegate who conducted the complaint hearing left the Employment Standards Branch (the "Branch") before issuing a Determination on the complaint;

5. The file sat idle for approximately one year;

6. In May 2013, another delegate of the Director spoke with Mr. Larsen, advising him that the delegate who conducted the hearing had left the Branch and may not be returning, that no decision had been made and that she would be investigating from the beginning;

7. Mr. Larsen directed the delegate to the legal counsel who had represented him at the complaint hearing;

8. Later in May 2013, the delegate spoke with Mr. Larsen's legal counsel, who confirmed he was still representing Mr. Larsen, and explained the situation;

9. An additional discussion between the delegate and legal counsel for Mr. Larsen occurred in June 2013, in which legal counsel agreed to speak with Mr. Larsen concerning the employer's records and his availability to meet;

10. In a communication to Mr. Larsen's legal counsel dated July 5, 2013, the delegate asked if counsel had contact information for Mr. Larsen;

11. The "record" does not indicate there was a response to that e-mail or that, generally, any of the discussions elicited a response from 24/7;

12. The file sat another year;

13. In an e-mail dated July 31, 2014, another delegate of the Director communicated with legal counsel, indicating she had been assigned the file regarding Mr. Tayler's complaint, apologized for the delay, asked legal counsel whether he still represented Mr. Larsen and, if not, whether he had current contact information for him;

14. In an e-mail dated August 6, 2014, legal counsel replied, indicating he had represented Mr. Larsen and would see if he could get instructions to represent him, but believed Mr. Larsen was "out of the country and unreachable";

15. On August 11, 2014, the delegate sought to gauge what sort of chance legal counsel thought there was of contacting Mr. Larsen and what the time frame for that might be;

16. In response, legal counsel reiterated that Mr. Larsen was out of the country and he was unable to indicate when he would be able to reach him, but that he had tried and would continue to do so;

17. The appeal submission indicates Mr. Larsen was out of the country from June 2013 until August 2013, was living with his father on Mayne Island from August 2013 to February 2014, was in a rental suite on Mayne Island from February 2014 to July 2014 when he and his wife apparently purchased a property on Mayne Island;

18. In September 2014, the delegate e-mailed legal counsel to ask if there had been any success contacting Mr. Larsen;

19. Legal counsel replied he had had no luck;

20. In a letter dated October 8, 2014, addressed to 24/7 c/o the address of the law office of the legal counsel who had represented 24/7 and Mr. Larsen, the delegate advised that the branch was "prepared to proceed with issuing a Determination", indicating the evidence of 24/7 on file comprised a list attached as "Amended List of Documents" dated March 29, 2012, and, while

stating her understanding that legal counsel was not currently retained, the delegate noted the office of legal counsel was the "last known address and contact for 24/7";

21. The letter indicated 24/7 was being provide with a final opportunity to participate in the investigation;

22. Legal counsel responded in an e-mail dated October 8, 2014, indicating he would continue to attempt to contact Mr. Larsen and expressing the view that contacting his office was not notice to 24/7 and proceeding without notice to 24/7 was a breach of natural justice.

23. The Determination was issued on October 30, 2014;

24. The time limited for filing an appeal expired on December 8, 2014;

25. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;

26. The "record" indicates the Determination was sent by registered mail to the business address for 24/7 that was on file with the Branch and which is listed in the corporate records as its registered and records office, and to an address, also listed in the corporate records, as the mailing and delivery address for Peter Arney Larsen ("Mr. Larsen"), the sole director and officer of 24/7;

27. The tracking information for the Determination provided by Canada Post indicates delivery of the Determination was attempted but was not successful;

28. The appeal was not delivered to the Tribunal until April 1, 2015, although a form of appeal had been filed on March 10, 2015, and Mr. Larsen had communicated with the Tribunal in a letter dated March 9, 2015.

ARGUMENT

20. Counsel for 24/7 submits the appeal period should be extended because the Determination was not received by 24/7 and Mr. Larsen until February 26, 2015, when Mr. Larsen received a Certificate of Judgement against him as the director of 24/7 and, once Mr. Larsen became aware of the Determination, there was no delay in indicating an appeal would be made and in pursuing that appeal.

21. He also submits the failure to attach a copy of the written reasons for Determination should not be considered against the requested extension of time as the request for written reasons was made within 7 days of 24/7 receiving the Determination and was denied by the Director.

ANALYSIS

22. 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.

23. 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 the [*sic*] failure to request an appeal within the statutory limit;

ii) there has been a genuine and on-going *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 the 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.

24. 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.

25. The argument made by 24/7 on the timeliness of this appeal depends largely on the effect of the attempted delivery of the Determination by registered and regular mail to the address at 4142-108th Street in Langley, BC, which appears to have been both a business address for 24/7 and its registered and records office address.

26. This argument made in this appeal is not unique or unusual. The Tribunal has considered in several cases the argument that a Determination should not to be considered to have been served unless it is physically placed in the hands of the person to whom it is directed. The leading case on this argument is *The Director of Employment Standards (Re Charles Neil)*, BC EST # D330/00 (Reconsideration of BC EST # D122/00).

27. In that case, Mr. Neil had successfully argued in his appeal that because the Determination had been sent to his last known address – from which he had moved without providing a forwarding address – and returned to the Director unclaimed, the Determination had never been "served". The original panel agreed, but on reconsideration, the Tribunal disagreed, stating:

> In my view, given the above findings of fact, the adjudicator erred in finding that the Determination was never served – see *e.g. Patry*, BC EST #D120/96; *Tang*, BC EST #D211/96; *Fort Optical*, BC EST #D205/97; *Aujla*, BC EST #D012/99; see also *Laguna Woodcraft (Canada) Ltd. v. B.C. Employment Standards Tribunal* [1999] B.C.J. No. 3135 (B.C.S.C.). Although the Determination may not have been physically in Neil's hand in late July 1999, the Determination was nonetheless deemed, by reason of subsection 122(2), to have been lawfully served as of July 22nd, 1999 (8 days after July 14th) at which point the 15-day appeal period set out in section 112(2)(a) commenced running.

28. Section 122 of the *Act* deals with service of determinations, demands and notices under the *Act*. Subsection (1) deems a determination to have been served if it is sent by registered mail to the *"person's last known address"*. Subsection (2) deems service by registered mail *"to be served 8 days after the determination . . . is deposited in a Canada Post Office"*.

29. That is the case here: even though the Determination may never have physically been in 24/7's, or Mr. Larsen's, hands, subsection 122(2) deems it to have been lawfully served. The evidence in the "record" establishes the Determination was deposited with Canada Post for delivery by registered mail to the last known address of 24/7.

30. The argument that the deemed service is "overruled" because the Determination was not "received by" 24/7 or Mr. Larsen has no merit.

31. The date from which the appeal period is to be calculated is not, as argued by counsel for 24/7, February 26, 2015, but eight days from October 30, 2014.

32. Accordingly, even accepting I should ignore the deficiencies in the form of appeal received by the Tribunal on March 10, 2015, the delay in filing this appeal is more than three months. Such delay is unreasonable. I find nothing in the appeal that explains such an unreasonable delay. In particular, I do not accept 24/7 was unaware the earlier complaint process, including the complaint hearing, had been nullified by the departure of the delegate involved in that process and that the Director intended to conduct a fresh investigation in which he needed to participate. The "record" indicates Mr. Larsen was told in late May 2013 of the problems with the earlier process and of the requirement for another investigation. He referred the new delegate to his legal counsel who was not responsive to any inquiries made for information regarding either contact information for Mr. Larsen or to the invitation for 24/7 to participate in the new investigation. The new investigation was conducted over a period of more than a year. Mr. Larsen was not "out of the country" or unreachable during the period over which the investigation took place. Mr. Larsen had been in touch with the legal counsel who had represented 24/7 at the complaint hearing in May 2013. The October 4, 2014, letter to that same legal counsel indicated a Determination would be made imminently, with or without 24/7's participation.

33. In sum, 24/7 has not demonstrated there is any reason to extend the time period for filing an appeal. In the circumstances, it would be inconsistent with the purposes and objectives of the *Act* to allow the appeal to proceed. I do not need to address the failure to comply with the all of the requirements in section 112(2) in filing the appeal.

ORDER

34. Pursuant to section 115 of the *Act*, I order the Determination dated October 30, 2014, be confirmed in the amount of $10,532.11, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal