

An appeal

- by -

Sidhu Brother Trucking Ltd.
(“SBTL”)

- 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: Shafik Bhalloo

FILE No.: 2017A/60

DATE OF DECISION: June 20, 2017

DECISION

SUBMISSIONS

Jasdeep S. Auja

counsel for Sidhu Brother Trucking Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sidhu Brother Trucking Ltd. (“SBTL”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 20, 2017 (the “Determination”).
2. The Determination found that SBTL had contravened Part 5, section 45 (statutory holiday pay) and Part 7, section 58 (annual vacation pay) of the *Act* in respect of the employment of Dave Stubbs (“Mr. Stubbs”) and ordered SBTL to pay Mr. Stubbs wages in the amount of \$2,272.69 and to pay administrative penalties under section 29 of the *Employment Standards Regulation* (“*Regulation*”) in the amount of \$2,500. The total amount of the Determination is \$4,772.69.
3. SBTL appeals the Determination, alleging the Director failed to observe the principles of natural justice in making the Determination and there is new evidence available that was not available at the time the Determination was being made. SBTL seeks to have the Determination referred back to the Director.
4. SBTL’s appeal was received by the Tribunal on April 24, 2017, without a copy of the reasons for the Determination (“the reasons”). The appeal was filed outside of the statutory time limit set out in subsection 112(3) of the *Act*. The appeal contains a request for an extension of the statutory time period to file the appeal.
5. In correspondence dated April 26, 2017, the Tribunal notified the parties, among other things, that no submissions are being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite Mr. Stubbs and the Director to file reply submissions on the question of whether to extend the deadline to file the appeal and may request submissions on the merits of the appeal. SBTL will then be given an opportunity to make a final reply to the submissions, if any.
6. The Tribunal received the section 112(5) “record” (the “Record”) from the Director on May 2, 2017, and forwarded a copy of the same to SBTL, and provided the latter an opportunity to object to its completeness. SBTL did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.
7. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the appeal form, written submissions of SBTL’s counsel and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection, which provides:

- 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 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.

8. In this decision, I will decide whether SBTL should be granted an extension of the appeal period or whether the appeal should be dismissed under any of, section 114(1)(b), (f) and (h) of the *Act*. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1), Mr. Stubbs will, and the Director may, be invited to file further submissions. Conversely, 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

9. The issue, at this stage of the proceeding, is whether the appeal should be dismissed under subsection 114(1) of the *Act*.

THE FACTS

10. As indicated in the “Overview” section above, SBTL’s appeal was received by the Tribunal on April 24, 2017, without a copy of the reasons for the Determination. This makes my reliance on the record ever more significant to determine the facts in this case.
11. The facts relevant to the issue under consideration in this appeal are as follows:
- a. SBTL was incorporated on January 28, 2004, and operates a trucking business;
 - b. Sukhdev Sidhu (“Mr. Sidhu”) is the sole director and officer of SBTL and has a mailing address on Hilda Street, Burnaby, BC based on the BC Company search (the “Company Search”) conducted by the Director on November 18, 2016;
 - c. The Company Search also shows that the registered and records office address of SBTL is on Garden Street, Abbotsford, British Columbia;
 - d. A later company search of counsel for SBTL conducted on April 22, 2017, and included with counsel’s appeal submissions shows that the registered and records office address of SBTL and the mailing address of Mr. Sidhu is unchanged from the earlier Company Search of the Director;
 - e. Mr. Stubbs was employed as a truck driver with SBTL from January 4, 2016, to October 4, 2016;
 - f. Mr. Stubbs filed his complaint against SBTL on November 17, 2016;

- g. On November 22, 2016, the Director, by fax, notified SBTL of the complaint and requested SBTL to contact the office of the Director to discuss the complaint no later than November 28, 2016, or confirm its participation in mediation of the complaint;
- h. The Director's fax of November 22, 2016, included Mr. Stubbs' filed complaint form and various information Fact Sheets of the Branch (Paying Wages, Annual Vacation, Statutory Holidays, Mediation, Hearings, Keeping records, Enforcement, Wage Deductions, Termination of Employment);
- i. On November 23, 2016, a duplicate of the fax of November 22 was sent to SBTL's business address on Ewart Street, in Burnaby, BC, by regular mail;
- j. The fax report contained in the Record shows that the Director's fax of November 22, 2016, was not received by SBTL as there was "no answer".
- k. The letter of November 23, 2016, was also sent back to the Director with the notation "RETURN TO SENDER" stamped on the envelope;
- l. On December 2, 2016, the Director sent SBTL a Demand for Employer Records for Mr. Stubbs and a Notice of Complaint Hearing together with some Fact Sheets by registered mail to SBTL's business address on Ewart Street, Burnaby and to SBTL's registered and records office address on Garden Street, Abbotsford, and to Mr. Sidhu's Hilda Street address in Burnaby;
- m. The Record contains a delivery confirmation from Canada Post of the Demand for Employer Records and Notice of Hearing sent to the registered and records office of SBTL showing that a successful delivery of the items occurred on December 7, 2016, with the recipient, G. Gill's signature;
- n. On December 8, 2016, both the Demand for Employer Records and Notice of Hearing sent to SBTL's business address at Ewart Street, Burnaby and Mr. Gill's Hilda Street, Burnaby address were returned to the Director;
- o. On January 4, 2017, the Director sent SBTL, at its registered and records office address on Garden Street, Abbotsford, a letter enclosing all records submitted by Mr. Stubbs to the Branch and invited SBTL to submit its evidence "as soon as possible" so as to enable the Director to cross disclose to Mr. Stubbs;
- p. The Record shows no response from SBTL to any of the Director's correspondence;
- q. The Director issued the Determination on January 20, 2016, four days after the scheduled hearing, although it is not clear from the Record whether a hearing proceeded as scheduled without SBTL.
- r. On January 20, 2017, the Determination was sent by registered mail to the business address of SBTL on Ewart Street, Burnaby and to its registered and records office address at Garden Street, in Abbotsford and also to Mr. Sidhu at the Hilda Street address in Burnaby.
- s. The deadline for appealing the Determination was February 27, 2017, and set out in bold at page 3 of the Determination in a box entitled "Appeal Information". The box also contains express instructions that that the "appeal must include a copy of the Director's written reasons for the determination" and at page 2, a reminder that a written request for reasons for the Determination must be delivered to the Director by February 6, 2017.

ARGUMENT

12. In his written submissions, counsel states that SBTL has a registered and records office address on Garden Street, in Abbotsford (as set out in the Company Search) and Mr. Sidhu was its director and principal “at all material times”.
13. Counsel further submits that SBTL and Mr. Sidhu first became aware of the Determination on or about March 30, 2017, when informed by a representative of SBTL’s bank, the Canadian Western Bank (the “Bank”). He states the Bank informed SBTL of a Notice of Seizure they received from West Coast Court Bailiff Inc. (the “Bailiff”) on account of the Determination. As a result, the Bank placed “a freeze on the accounts” of SBTL.
14. Counsel states, once SBTL and Mr. Sidhu became aware of the Determination they contacted his firm to represent them for the purpose of appealing the Determination.
15. On April 5, 2017, counsel requested written reasons for the Determination and the record on which the Determination was made; however, the delegate of the Director denied the request because SBTL failed to comply with the deadline of February 6, 2017, to make a written request for reasons for the Determination.
16. Counsel states that the only documents available to SBTL to make its appeal are the record from Canada Post dated December 7, 2016, showing how service of documents (Notice of Hearing and Demand for Employer Records) was made; the delegate’s letter of April 5, 2017, denying SBTL’s request for reasons for the Determination; and the Bailiff’s letter to the bank dated March 28, 2017.
17. Counsel argues that SBTL should be “afforded the opportunity to make further submissions once a more complete record is provided, but [SBTL] will make submissions in any event.” He then argues that natural justice requires that a party should not be found in default of a proceeding if it is unaware of it. He states that a hearing conducted in the absence of an affected party “goes to the heart of natural justice” as it denies the party the right to be heard. Therefore, any decision made at such a hearing should be set aside or the matter “re-heard with the [affected] party in attendance.”
18. Counsel also submits that SBTL “was never personally served with the notice of hearing in respect of the Determination and never attempted to avoid service of any documents.”
19. He adds that as a director of SBTL, Mr. Sidhu is largely occupied at job sites and with vendors. He spends limited time at the office. He states that SBTL has “several staff and employees... [who] manage the facilities on a day to day basis.” In the exceptionally busy months of December and January SBTL had temporary employees assisting. He states SBTL has trained its receptionist and temporary receptionists with respect to incoming mail. He states that Mr. Sidhu “cannot recall receiving any notice or documents in relation to the hearing” and he does not know a “G. Gill” shown on the Canada Post sheet as having received the delivered documents from the Branch at SBTL’s registered and records office address. He further states that SBTL has “never received any correspondence in any form, from anybody located at that address in relation to these proceedings.”
20. As for Mr. Sidhu’s address, he states the latter “currently resides at [***] McKee Street in the City of Burnaby, in the Province of British Columbia and has lived there for approximately two years.” He states that Mr. Sidhu did not receive any correspondence at this address from the Director.

21. Counsel adds Mr. Sidhu was never contacted by telephone or by any other means in relation to this proceeding. He only became aware of the proceeding and the Determination when informed by the Bank. He then contacted counsel “as soon as practicable” and retained his present counsel on March 31, 2017.
22. Counsel submits that while the branch provided SBTL a deadline of February 27, 2017, to appeal the Determination, SBTL only became knowledgeable of the determination on March 30, 2017. In the circumstances, counsel argues, SBTL should be provided an extension of time to appeal the Determination and “there should be a re-hearing of this matter as of right” to allow SBTL to present its evidence.
23. Counsel also argues that SBTL has a meritorious defence. He states that while SBTL “is unaware of the evidence submitted” by Mr. Stubbs, “the evidence presented was not correct.” He then goes on to challenge the merits Mr. Stubbs’ complaint stating as follows:

The Applicants submit pay stubs take into account vacation pay and statutory holiday pay that was provided to Mr. Stubbs. Attached as Exhibit “F” are pay stubs for the employee from January 1 2016 through October 4, 2016.

The Applicants submit that even if the delegate finds the employee is entitled to vacation or statutory holiday pay, he is not entitled to the amount awarded by the delegate.

The pay stubs submitted by the Applicants show that Mr. Stubbs was paid \$1,327.68 in holiday pay. The Employee was terminated for cause in October.

It is unclear, how the amounts were calculated or what evidence was submitted, but the Applicants submit that they have a defense that is worthy of investigation at a re-hearing

ANALYSIS

24. Section 112(2) of the *Act* sets out the requirements for filing an appeal:
- (2) A person who wishes to appeal a determination to the tribunal under subsection (1) *must*, within the appeal period established under subsection (3),
 - (a) deliver to the office of the tribunal
 - (i) a written request specifying the grounds on which the appeal is based under subsection (1),
 - (i.1) *a copy of the director's written reasons for the determination*
 - (ii) payment of the appeal fee, if any, prescribed by regulation, and
 - (b) deliver a copy of the request under paragraph (a) (i) to the director. [Emphasis added]
25. The use of the word “must” in section 112(2) indicates that the requirements of subsection (2) are mandatory, that is, an appeal must both specify the grounds on which the appeal is based *and* include a copy of the director’s written reasons for the determination. These materials are required to be delivered to the Tribunal before the end of the appeal period – “30 days after the date of service of the determination if the person was served by registered mail” (see section 112(3) of the *Act*) as in the present case.
26. As indicated in the “Facts” section above, SBTL filed its appeal on April 24, 2017, over a month-and-a-half after the expiry of the date for filing its appeal. While SBTL has applied for an extension of time to appeal, it has failed to include a copy of the Director’s written reasons for the Determination with its late appeal as previously noted. I note that the Determination provides, at page 2, in bold, that “[a] person named in a Determination may make a written request for reasons for the Determination” and that request “must

be delivered to an office of the Employment Standards Branch **within seven days of being served** with this Determination.” The Determination also states that “[y]ou are deemed to be served eight days after the Determination is mailed, so **your request must be delivered by February 6, 2017.**” The failure of SBTL to include with its Appeal the reasons for the Determination is directly related to its failure to request the reasons from the Director by February 6, 2017. Counsel for SBTL requested the reasons on April 5, 2017, over 7 weeks after the expiry of the date for requesting the reasons set out in the Determination, and the delegate of the Director denied SBTL’s request.

27. Notwithstanding the issue of the late appeal, I find that SBTL’s failure to deliver a copy of the Director’s written reasons for the Determination to the Tribunal in its appeal means that SBTL’s appeal has not been perfected. Pursuant to section 114(1)(h) of the *Act*, the Tribunal has discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *Act*. By failing to submit the Director’s reasons for the Determination, SBTL has failed to meet the requirements of section 112(2)(a)(i.1) of the *Act*. This failure will not be cured, even if the Tribunal were to grant SBTL an extension of the statutory period to file its appeal (which I would not be inclined to grant in this case for the reasons below). In the circumstances, SBTL’s appeal is dismissed for failing to comply with the requirements of subsection 112(2)(i.1) of the *Act*.
28. Having said this, I also do not find there is any basis for the Tribunal to extend the statutory deadline for SBTL to file its appeal. More particularly, I note the *Act*, in subsection 112(3), imposes an appeal deadline to ensure appeals are dealt with promptly. Where the statutory appeal period has expired or where the appeal is lodged after the expiry of the appeal period, the *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal delineated its approach in considering requests to extend time limits for filing an appeal in the following very instructive passage:
- 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.
29. In *Re Niemisto*, BC EST # D099/96, the Tribunal set out a principled approach to the exercise of its discretion by requiring that 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 on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well 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.
30. The above criteria are not exhaustive. That is, there may be other unique criteria that the Tribunal may consider in making its decision but the burden of establishing any such criterion is on the party seeking an extension of time. In this case, SBTL has not shown any unique criteria.
31. Having said this, the delay in filing this appeal is over a month and a half, which I find unacceptable. I also do not find anything in the appeal submission of counsel that satisfactorily explains such delay. I also find

SBTL's reasons for the delay, as set out in counsel's submissions, neither reasonable nor credible. I furthermore do not accept that SBTL and Mr. Sidhu were unaware of Mr. Stubbs' complaint or did not have any notice of the proceedings leading to the Determination. The initial letter of the Director informing SBTL of the complaint was faxed and mailed to SBTL at its Ewart Street, in Burnaby. In counsel's submissions, SBTL does not deny that the Ewart Street address was not its current address at the time. I also note that the subsequent Demand for Employer Records and a Notice of Complaint Hearing were sent by the Director to both SBTL's Ewart street address and the registered and records office address at Garden Street, in Abbotsford and to Mr. Sidhu's Hilda Street address in Burnaby provided in the Company Search. While the mailings to the Ewart Street and Hilda Street addresses were returned to the sender (the Director), the mailing to the registered and records office address of SBTL was successfully delivered and received by a person named G. Gill who signed for the package as indicated in the Canada Post confirmation document in the Record. While Mr. Sidhu says he does not know who G. Gill is, counsel confirms in his submissions that the address provided for the registered and records office of SBTL in the Company Search is indeed correct and continued to be current as recently as April 22, 2017, as indicated in the company search of SBTL conducted by counsel. Based at least on the confirmation document of Canada Post, I am satisfied that SBTL received the mailing from the Director containing the Demand for Employer Records and a Notice of Complaint Hearing.

32. I also note that on January 20, 2017, the Determination was sent to SBTL's business address at Ewart Street and to its registered and records office address at Garden Street and to Mr. Sidhu's Hilda Street address. I am not persuaded with SBTL's contention that "they never received any correspondence in any form, from anybody located at [the registered and records office] address in relation to these proceedings." I also find that the Director was prudent to send a copy of the Determination and other correspondence in the proceeding to Mr. Sidhu's Hilda Street address. While counsel states that Mr. Sidhu currently resides at McKee Street in Burnaby and has resided at this address for approximately two years, it is Mr. Sidhu's responsibility to update his address change so it is accurately reflected in the Company Search of SBTL. It is not the responsibility of the Director to go behind the addresses in the company search to confirm whether the addresses provided in the search are current. I find it was open to and reasonable of the Director to rely on the addresses in the Company Search.
33. In the result, I find that the Determination was served on SBTL. I also note that the Determination prominently and in bold print sets out information indicating the last day for delivering an appeal and that it must be delivered to the Tribunal. It also sets out the Tribunal's web site as a source for the appellant to acquire information on how to appeal. Also, at the top of the Appeal Form, prominently displayed, it provides further notice that the Appeal Form must be delivered to the Tribunal and contains an encouragement to a party completing the Appeal Form to "read the Guide to the Appeal Form" that is provided with the Appeal Form. I find it probable that SBTL was disinterested in lodging an appeal of the Determination until it was apprised by the Bank of the execution proceedings and the freezing of its bank accounts. In conclusion, I find that there is neither a reasonable nor a credible explanation for SBTL's failure to request an appeal within the statutory time period.
34. There is also no evidence adduced by counsel showing a genuine and ongoing bona fide intention of SBTL to appeal the Determination.
35. There is also no evidence showing that SBTL made Mr. Stubbs and the Director aware of any intention to appeal the Determination.
36. As for the fourth criteria in *Re Niemisto* for considering whether to extend the period for filing an appeal – namely, whether the respondent party will be unduly prejudiced by the granting of an extension – I do not

find there is evidence to support an extension of time. I note that one of the expressed purposes of the *Act* in subsection 2(d) is to “provide fair and efficient procedures for resolving disputes”. Delaying a party from collecting his judgment while allowing a late appeal by a party who laid in the weeds during the proceedings and only awakened when it was notified by its bank of execution proceedings is, in my view, inconsistent with the purpose in subsection 2(d) and unduly prejudicial to the claimant, Mr. Stubbs, in this case.

37. The final consideration in *Re Niemisto* for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I am mindful that an assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds for appeal chosen against long standing principles that apply in the context of those grounds. In this case, SBTL invokes the natural justice and the new evidence grounds of appeal in subsections 112(1)(b) and (c) of the *Act*. I find counsel’s submissions, under both these appeal grounds, do not raise a strong *prima facie* case in favour of SBTL for the reasons set out below.

38. With respect to the natural justice ground of appeal, it is important to understand that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05).

39. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated*, BC EST # D050/96)

40. The onus is on SBTL, as the appellant, to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights. Having reviewed the Determination including, in particular, the Record and the written appeal submissions of counsel, I am sufficiently convinced that there is no basis whatsoever for the natural justice ground of appeal. I find that the Director and his delegate afforded sufficient opportunities to SBTL to know the case against it, the right to present its evidence and the right to be heard by an independent decision maker. I find it very probable that SBTL was disinterested in participating in the proceeding and disregarded all correspondence from the Director prior to the Determination. Only when the Bank contacted SBTL with respect to execution proceedings by the Bailiff and upon discovering that its bank accounts were frozen did SBTL move to appeal the Determination. I find no evidence to support a finding of a breach of natural justice in this case.

41. As for the new evidence ground of appeal, it too fails. The governing test for allowing new evidence on appeals is delineated by the Tribunal in *Re: Merilus Technologies Inc.*, BC EST # D171/03. In this case, the Tribunal said that for new evidence to be considered in the appeal, it must satisfy the following four conditions which are conjunctive:

- (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.

42. I find that nothing in the appeal submissions of counsel including particularly the very brief submissions of counsel under the heading “Meritorious Defense” satisfy the above requirements for admitting new evidence on appeal. What little SBTL presents as new evidence, namely, the bare assertions that Mr. Stubbs was “terminated for cause in October” and he is “not entitled to the amount awarded by the delegate” and that SBTL has “a defense worthy of investigation at a re-hearing” do not in the least satisfy the first part of the four-part test for new evidence above. I find the new evidence ground of appeal of SBTL is baseless and I dismiss it.
43. In the result, there is no basis to grant SBTL an extension of statutory time to file its appeal.
44. For all of the above reasons, I also find that there is no prospect that SBTL’s appeal will succeed.
45. In conclusion, pursuant to section 114(1)(b),(h) and (f) of the *Act*, I dismiss SBTL’s appeal of the Determination.

ORDER

46. Pursuant to subsections 114(1)(b), (h) and (f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal