

An appeal

- by -

Alpha Neon Ltd.

- 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.: 2011A/49

DATE OF DECISION: June 29, 2011

DECISION

SUBMISSIONS

Ashley R. Ayliffe	on behalf of Alpha Neon Ltd.
Adrian Tuck	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Alpha Neon Ltd. (“Alpha”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued March 17, 2011.
2. Adrian Tuck was employed by Alpha, a neon sign manufacturing and sales business, as a commissioned salesman from March 13, 2006, until May 31, 2010. On June 17, 2010, Mr. Tuck filed a complaint alleging that he was owed wages including commissions, vacation pay and compensation for length of service.
3. The Director’s delegate held a hearing into Mr. Tuck’s complaint on November 18, 2010. Tony Ziskos appeared on Alpha’s behalf. Mr. Tuck represented himself.
4. At the hearing, Alpha did not dispute Mr. Tuck’s entitlement to wages in the amount of \$8,062.31 and expenses in the amount of \$16,763.60. At issue between the parties was Mr. Tuck’s entitlement to commissions in the amount of \$84,277.81 and compensation for length of service. The parties also reached a partial settlement regarding vacation pay owed.
5. Following the hearing, the delegate determined that Alpha had contravened sections 18 and 58 of the *Act* in failing to pay Mr. Tuck wages, vacation pay and compensation for length of service in addition to the expenses agreed owing. The delegate found Mr. Tuck was entitled to an amount, including interest, of \$66,529.78. The delegate also imposed administrative penalties in the total amount of \$3,000 for the contraventions.
6. The deadline for filing an appeal of the Determination was 4:30 pm on April 26, 2011.
7. On April 26, 2011, Alpha’s counsel submitted the appeal by email in two parts, the first at 4:36 pm, the second at 4:42 pm. The first part contained Alpha’s written submissions, the second part contained documents in support of the appeal and an index to the appeal package.
8. On April 27, 2011, the Tribunal wrote to Counsel advising that the appeal was not only late but incomplete. The Tribunal noted that only the Reasons for Determination had been submitted, not the Determination itself. The Tribunal also asked for reasons why the appeal had not been filed by the appeal deadline. The Tribunal also requested that 4 hard copies of the appeal be provided to the Tribunal by 4:30 pm on April 29, 2011.
9. On April 29, 2011, Alpha provided the Tribunal a copy of the Determination, reasons the appeal had not been filed by 4:30 pm on April 26, 2011, and 4 hard copies of the appeal documents.

10. The grounds of appeal are that the Director erred in law, that the Director failed to observe the principles of administrative justice in making the Determination and that evidence has become available that was not available at the time the Determination was being made.
11. This decision addresses only the timeliness of Alpha's appeal and are based on the section 112(5) "record", the written submissions of the parties, and the Reasons for the Determination.

ISSUE

12. Whether 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

13. Counsel contends that the materials were prepared and ready to be transmitted by the April 26 4:30 pm deadline but that, because of his inexperience, he encountered technical difficulties attempting to scan the documents into a PDF format. He says that by the time he found someone to assist him, the deadline had passed by several minutes.
14. Counsel submits that Alpha had at all times intended for the appeal to be submitted in advance of the appeal deadline and that it had communicated its intention to appeal the Determination to the Tribunal before the deadline had expired.
15. The delegate contends that Alpha gave no reason why it missed the appeal deadline and submits that Alpha has not demonstrated why the Tribunal should extend the time period for filing the appeal.
16. The delegate further contends that Mr. Tuck will be unduly prejudiced by the granting of an extension given that he has waited almost one year to receive his outstanding wages.
17. Finally, the delegate submits that the appeal has little prospect of success.
18. In a submission dated May 4, 2011, Mr. Tuck argued that the time period in which to file an appeal should not be extended. On June 6, 2011, Mr. Tuck made a further submission regarding the accuracy of the Director's calculations.
19. Alpha's counsel made an additional submission after the deadline for making submissions had passed. I have not considered those submissions in making my decision.

ANALYSIS

20. 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.
21. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

22. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
23. 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.
24. These criteria are not exhaustive.
25. I find it appropriate to grant the application.
26. The evidence is that Alpha's counsel contacted the Tribunal on April 21, 2011, regarding the filing of an appeal of the Determination. The Tribunal provided counsel with information on filing the appeal and granted Alpha permission to submit its appeal by email. The Tribunal Appeal Manager indicated that the appeal was to be submitted by 4:30 pm April 26, 2011, with 4 complete hard copies to follow no later than 4:30 pm April 28, 2011.
27. As noted above, the appeal was filed by email in two parts and was completed by 4:45 pm April 26, 2011. The reasons provided for not meeting the 4:30 deadline were that counsel experienced some technical difficulties when attempting to convert the documents to a PDF format to send to the Tribunal by email. The outstanding appeal documents were submitted by April 27, 2011, and the 4 hard copies were provided by April 29, 2011, as requested by the Tribunal in its email of April 27, 2011.
28. Alpha demonstrated a genuine and ongoing and *bona fide* intention to file the appeal by the statutory deadline. Alpha's counsel contacted the Tribunal on April 21, 2011, notifying the Tribunal of an intention to file an appeal and seeking advice on how to do so. The Tribunal gave Alpha permission to file that appeal by email. Due to technical difficulties, the appeal was not transmitted before the appeal deadline. I accept that there is a reasonable and credible explanation for the appeal being filed less than 15 minutes after the appeal deadline.
29. Although there is no evidence either the Director or Mr. Tuck were aware of Alpha's intention to file an appeal until notified by the Tribunal, I find that they were aware of Alpha's intention to appeal shortly after the appeal deadline. There is no evidence they would have been notified much sooner than they were had the appeal been filed by the statutory appeal deadline.
30. While I accept that Mr. Tuck may be inconvenienced by the granting of an extension, I am not persuaded that he will be unduly prejudiced. Even though the Director states that Mr. Tuck will experience some prejudice in that he will have waited almost one year to receive his wages, I note that the Determination was issued six months after the hearing. Any prejudice to Mr. Tuck as a result of the delay in receiving his wages is attributable, in part, to the delegate's lengthy deliberations. Whatever further delay Mr. Tuck experiences by Alpha filing its appeal 15 minutes late is, in these circumstances, insignificant. I note as well that in his own submissions, Mr. Tuck did not identify any prejudice he might experience as a result of the granting of an extension.

31. I find that Alpha has a strong *prima facie* case on appeal. There are several grounds of appeal, all of which raise substantive arguments, including bias, errors of law in determining whether or not Mr. Tuck was constructively dismissed, and new evidence.

ORDER

32. Pursuant to section 109(1)(a) of the *Act*, I allow the application to extend the time for filing an appeal to April 27, 2011.

Carol L. Roberts
Member
Employment Standards Tribunal