Employment Standards TRIBUNAL

An appeal

- by -

0716350 B.C. Ltd. carrying on business as Park Royal Roofing
(the "Employer")

- 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: Robert Groves

FILE No.: 2007A/54

DATE OF DECISION: August 15, 2007

DECISION

OVERVIEW

1. 0716350 BC Ltd., doing business as Park Royal Roofing (the "Employer") appeals a determination dated September 18, 2006 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate") in respect of a complaint filed pursuant to section 74 of the *Employment Standards Act* (the "*Act*") by one John W. MacLean ("Mr. MacLean"). The Delegate ordered the Employer to pay Mr. MacLean wages, vacation pay, and interest in the amount of $1,822.80 plus two administrative penalties imposed pursuant to section 29 of the *Employment Standards Regulation* (the "*Regulation*"). The total found to be owed was $2,822.80.

2. The Employer filed its Appeal Form with the Tribunal on June 18, 2007. It being thought that the appeal had been filed late, the Tribunal invited submissions from the parties in respect of the preliminary question whether the Tribunal should extend the time within which the Employer might be permitted to file its appeal.

3. I have before me the Employer's Appeal Form and attached submission, the Determination and the Reasons for the Determination issued by the Delegate, the record that was before the Delegate at the time the Determination was made, a submission on behalf of the Director, and a submission from one Sean W. Teather ("Mr. Teather"), the principal of the Employer.

4. The Tribunal has determined that I will decide the preliminary issue on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

5. The Employer is a roofing contractor. Mr. MacLean is a self-employed roofer who operates primarily in the Prince George area, but prior to the events which give rise to these proceedings he had performed work for the Employer in Vancouver on a casual basis for a period of years. Early in 2006 the Employer obtained a large contract to re-roof a condominium complex in Port Moody, and retained Mr. MacLean to remove the old shingles, replace plywood sheathing as required, and apply new felt and shingles.

6. Mr. Teather fired Mr. MacLean on March 10, 2006. The issue precipitating the discharge was Mr. MacLean's allegedly causing damage to the condominium, for which the Employer deducted $500.00 from the wages Mr. MacLean claimed he was then owed in his capacity as an employee.

7. In the proceedings before the Delegate, the Employer argued that Mr. MacLean was an independent contractor, rather than an employee, with the result that no amounts were owed to Mr. MacLean under the *Act*.

8. The Delegate conducted a hearing of Mr. MacLean's complaint on July 17, 2006, at which Mr. MacLean attended in person, and Mr. Teather by telephone. After considering the evidence and submissions of the parties, and the usual legal tests for determining the employment status of persons in like circumstances, the Delegate decided that Mr. MacLean was an employee for the purposes of the *Act*. While he

concluded that Mr. MacLean was owed wages, including reimbursement for the $500.00 withheld by the Employer, the Delegate declined to order that the Employer pay compensation for length of service to Mr. MacLean, given that Mr. MacLean had not completed the requisite number of months of consecutive employment. The failure to pay wages, and the deducting of the $500.00, resulted in the Delegate's ordering the Employer to pay the two administrative penalties.

9. The Determination was issued on September 18, 2006. As I have indicated, the Employer did not file its appeal with the Tribunal until June 18, 2007, some nine months later.

ISSUES

10. Has the Employer filed its appeal late?

11. If it has, should the Tribunal exercise its discretion to extend the time for the filing of the appeal so that it may be determined on its merits?

ANALYSIS

12. Section 112(3) of the *Act* provides that a person served with a determination has either thirty days or twenty-one days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is thirty days after the date of service. The time period is only twenty-one days if the determination is personally served or served by means of a transmission of the determination to the person electronically or by fax machine.

13. In this case, the record contains a Canada Post Advice of Receipt signed by Mr. Teather and dated September 19, 2006. In his submission filed with the Tribunal the Delegate states that this document confirms the Employer's receipt of the Determination on that date. Mr. Teather takes no issue with this statement. Indeed, he acknowledges, as does the Employer's Appeal Form, that the appeal was filed late. I conclude, therefore, that the Employer's appeal should have been filed thirty days after September 19, 2006, at the latest. It was not.

14. The time limits within which one must appeal a determination are to be construed having regard to the purposes of the *Act*, set out in section 2. One of those purposes is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have complaints and appeals dealt with promptly. It is perhaps for this reason that section 114(1)(b) of the *Act* provides that the Tribunal may dismiss an appeal if it is not filed within the applicable time limit.

15. Pursuant to section 109(1)(b) of the *Act*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. In considering whether to extend the time, the Tribunal is exercising a discretion, and it will not grant an extension as a matter of course. Rather, the appellant has the burden of demonstrating that there are compelling reasons why the appeal should be permitted to proceed on the merits, notwithstanding that it has been filed late (see *Niemisto* BC EST #D099/96; *Tang* BC EST #D211/96).

16. The following is a non-exhaustive list of factors the decisions of the Tribunal suggest should be considered when it determines whether an appeal filed late should be permitted to proceed on its merits:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing *bona fide* intention to appeal the determination;
- The respondent party and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent party will not be unduly prejudiced by the granting of the extension, and;
- There is a strong prima facie case in favour of the appellant.

17. Other decisions have added a sixth: whether the period of time from the expiry date to the date on which the appeal is actually brought is unreasonably long (see, for example, *Bravo Cuccina Restaurante Italiano Ltd.* BC EST #D343/00).

18. I will deal with these factors in order.

19. Mr. Teather's explanation for the lengthy delay in filing the Employer's appeal in this case is that he wishes to lead further evidence from two witnesses, Mssrs. Sinclair and Meise, who signed a written statement that was exhibited at the hearing conducted by the Delegate. Despite numerous attempts to contact these individuals by telephone, Mr. Teather says that he only managed to speak to them a week before the Employer's Appeal Form was filed with the Tribunal.

20. While I have no reason to disbelieve Mr. Teather's explanation, I am unable to say it is reasonable in the sense that the difficulty identified acted in such a way as to preclude the Employer from filing its appeal within the time prescribed. My review of the submissions filed by the Employer in support of this appeal reveals that there were grounds which the Employer believed might support a meritorious appeal of the Delegate's determination that Mr. MacLean was an employee that did not depend on the further evidence sought to be adduced from the witnesses in question. Examples include the Employer's assertions that Mr. MacLean did not work under the Employer's control, that the Employer did not supply Mr. MacLean with tools, that Mr. MacLean was not an integral part of the Employer's business operation, and that Mr. MacLean's working relationship with the Employer was short and sporadic rather than permanent. In circumstances such as this, it is my opinion that the Employer, acting reasonably, should have filed an appeal within time, on the grounds within its knowledge at that time, while advising the Tribunal at the same time that it contemplated other grounds of appeal for which further material in support was being sought.

21. One may infer from Mr. Teather's explanation that the Employer had a genuine and ongoing *bona fide* intention to appeal the Determination, which it did not perfect because of its difficulty in contacting its witnesses. But again, the force of such an inference is undermined by the fact that the Employer has asserted other grounds in support of its appeal unrelated to its difficulty in contacting those witnesses. If the Employer intended to appeal, and the intention was genuine and ongoing, those other grounds should have prompted the Employer to appeal within the time prescribed. I also observe that the Employer's appeal was filed with the Tribunal a little over a month after another delegate of the Director of

Employment Standards issued a determination on May 11, 2007 against Mr. Teather personally, in his capacity as a corporate director of the Employer, pursuant to sections 96 and 98 of the *Act*. That determination was grounded upon the Delegate's finding the Employer liable in the Determination which is the subject of this preliminary decision. The proximity of the issuance of the May 11, 2007 determination, and the Employer's filing its appeal of the Determination, suggests that the two events are related. If so, it also suggests that the Employer may not have had a genuine and ongoing *bona fide* intention to appeal the Determination, and may only have formed that intention after its principal, Mr. Teather, became the subject of the May 11, 2007 determination. I find, therefore, that the circumstances relating to the question whether the Employer had a genuine and ongoing *bona fide* intention to appeal the Determination is at best equivocal, and certainly not compelling.

22. There is no evidence the Director and Mr. MacLean were made aware the Employer intended to appeal at any time prior to the date the Employer actually filed its Appeal Form on June 18, 2007.

23. There is no indication that Mr. MacLean will be prejudiced if the appeal is permitted to proceed on its merits, at least in the sense that his ability to respond to the appeal effectively has been compromised owing to the Employer's failure to file its appeal in a timely manner. Presumably, any further delay in Mr. MacLean's receiving the sums the Determination ordered the Employer to pay may be mitigated by requiring the Employer to pay further interest, should its appeal on the merits be dismissed.

24. In my view, the Employer has not shown a strong *prima facie* case in support of a successful appeal. I have read the Employer's submissions on this appeal in detail and I understand that the Employer disagrees with the Delegate's Determination and believes it to be wrong. In order to determine whether the Employer has shown a strong *prima facie* case, however, one must first understand the nature of an appeal under the *Act*. First and foremost, an appeal is not an opportunity merely to re-argue or bolster positions taken in proceedings before a delegate, in the hope that the Tribunal will come to a different conclusion than the one set out in a determination. The Tribunal's appeal jurisdiction as currently revealed in section 112 of the *Act* does not contemplate a *de novo* re-hearing of a complaint. Rather, it is an error correction process. This means that the Tribunal must confirm a determination unless an appellant can show that a delegate has committed an error of law or failed to observe the principles of natural justice, or that evidence has become available that was not available at the time the determination in question was being made. All of these aspects of the Tribunal's appellate jurisdiction involve legal terms of art. That jurisdiction is, therefore, by definition a restricted one. It follows that it is not sufficient for the Tribunal to cancel a determination that it would have come to a different conclusion than a delegate on the evidence presented, if the determination reveals no errors of the type identified in section 112.

25. I am not persuaded that the Employer has shown a strong *prima facie* case that the Delegate committed any errors of law. The Delegate considered the several legal tests for determining whether Mr. MacLean should be characterized as an independent contractor or as an employee for the purposes of the *Act*. He analyzed those tests in light of the evidence presented and gave reasons for the conclusion he drew that Mr. MacLean should be characterized as an employee. I do not discern grounds for an assertion that the Delegate misapplied those legal tests. It must be remembered in this context that the definition of "employee" in the *Act* casts a somewhat broader net than that embraced in the common law tests. Part of the reason for this is that the protections included in the *Act* are intended to be inclusive, not exclusive. This is in keeping with the comments of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* [1992] SCJ No.41 to the effect that an interpretation of the *Act* which encourages employers to

comply with the minimum requirements of the *Act*, and so extends its protection to as many employees as possible is favoured over one that does not.

26. The Employer asserts that the Delegate further committed an error of law in "placing a burden of proof on me" to provide evidence in the form of pay stubs, paycheques or records of hours of work for Mssrs. Sinclair and Meise to support its position that these men were employed by Mr. MacLean, and not by the Employer, on the condominium project. I am not convinced, however, that the Delegate's language can support a suggestion that he was imposing a burden of proof *per se*. The Delegate did not say he was imposing a burden of proof in the formal sense. Rather, what he said was that the Employer did not produce evidence of this type which would have supported its claim that Mssrs. Sinclair and Meise were employed by Mr. MacLean on the condominium project. Essentially, the Delegate was merely commenting on the lack of evidence proving that Mssrs. Sinclair and Meise were employees of Mr. MacLean. That is different from the Delegate's imposing a legal burden of proof on the Employer to prove that they were.

27. The Employer argues that the Delegate failed to observe the principles of natural justice when he gave no consideration to the written statement tendered by the Employer at the hearing and alleged to have been prepared by Mssrs. Sinclair and Meise to the effect that Mr. MacLean was a sub-contractor on the condominium project and that these men were his employees on that job. In my opinion, that argument is misconceived. A challenge based on an alleged failure to observe the principles of natural justice gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in the Employer's either not having an opportunity to know the case it was required to meet, or an opportunity to be heard in its own defence. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

28. A failure of this sort is not what the Employer is referring to in this instance. What the Employer is really saying here is that the Delegate committed an error of law by failing to consider the evidence of Mssrs. Sinclair and Meise at all. For my part, I do not accept that the Delegate ignored the Sinclair and Meise statement. I agree that the Delegate's wording in dismissing the statement, that the "letter was not given consideration in this matter", was inelegant. However, I prefer to conclude that what the Delegate meant was that the letter should be given minimal weight on its own, particularly as the Employer could have called these gentlemen to give evidence at the hearing, which would have been of far greater assistance in determining whose employees they were at the relevant time. The weight to be given to evidence is, of course, a matter that lay squarely within the domain of the Delegate to determine, particularly where, as here, the Delegate conducted a hearing before making his Determination.

29. While the Employer suggests that the new evidence to be supplied by Mssrs. Sinclair and Meise will be conclusive of the result on this appeal, I am not persuaded that the evidence sought to be adduced was evidence that was unavailable to the Employer, and therefore could not have been presented at the hearing the Delegate conducted before the Determination was made. Clearly, the Employer had been in contact with Mssrs. Sinclair and Meise prior to the hearing, as he had obtained a written statement from them. No explanation is given why the evidence the Employer now seeks to tender from them could not have been presented at the original hearing involving the Delegate.

30. The Employer also protests that since the Delegate gave the written statement of Mssrs. Sinclair and Meise limited weight it was incumbent on the Delegate to have informed the Employer that this was his

intention, so that the Employer could have provided other evidence to verify the information their statement contained. Further, the Employer suggests that the Delegate should have attempted to contact Mssrs. Sinclair and Meise in order to confirm their statement if he believed it to be of limited value on its own. In my opinion, these arguments attempt to impose on the Delegate obligations that were not his to fulfill, given that he decided to conduct a hearing in order to dispose of Mr. MacLean's complaint. Different considerations might have applied if the Delegate had decided to conduct an investigation under section 76 of the *Act*, rather than adjudication. In an investigation, a delegate's role is more inquisitorial in nature. In an adjudication, a delegate's role is by its nature more passive. Accordingly, it is for the parties to make themselves aware of the requirements of the *Act*, and what it may be necessary to present as evidence and argument in order to persuade the delegate that a complaint is made out, or not. It is not for the delegate to take a pro-active role in an adjudication to advise a party that its evidence may be insufficient to meet the requisite standard. Indeed, if a delegate were to provide such information in the context of an adjudication it might induce the other party to question the delegate's impartiality, and give rise to an allegation of bias (see *Whitaker Consulting Ltd.* BC EST #D033/06; *Re 492907 BC Ltd. (cob Slumber Lodge Motel)* BC EST #D099/05). For the same reasons, I see no strong *prima facie* case for error on the basis of an allegation that the Delegate should have attempted to contact Mssrs. Sinclair and Meise either at, or after, the hearing. It was the Employer who sought to tender their evidence, and it was its responsibility to ensure it was presented in a way that would have the desired effect when it came time for the Delegate to determine the complaint. It was no part of the Delegate's duty to seek it out.

31. The length of the delay following the time for filing the appeal was in this instance inordinately long. It is a not a factor which weighs in favour of the Employer.

32. After considering all these factors, I have decided that it would be inappropriate for me to exercise the discretion to allow the Employer's application to extend the time for its appeal.

ORDER

33. Pursuant to section 114(1)(b) of the *Act*, I order that the appeal be dismissed.

Robert Groves
Member
Employment Standards Tribunal