

An appeal

- by -

Stahlcon Construction Ltd.
(“Stahlcon”)

- 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.: 2014A/64

DATE OF DECISION: August 6, 2014

DECISION

SUBMISSIONS

John Brett

on behalf of Stahlcon Construction Ltd.

OVERVIEW

1. This decision addresses an appeal filed pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Stahlcon Construction Ltd. (“Stahlcon”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 3, 2014.
2. The Determination found that Stahlcon had contravened Part 7, section 58 and Part 8, section 63 of the *Act* in respect of the termination of employment of D’Arcy A. Cato (“Ms. Cato”) and ordered Stahlcon to pay Ms. Cato wages (including interest) in the amount of 2,102.05. Under section 29 of the *Employment Standards Regulation* (the “Regulation”) the Director also ordered Stahlcon to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$2,602.05
3. This appeal alleges the Director failed to observe principles of natural justice in making the Determination and that evidence has come available that was not available at the time the Determination was being made.
4. The appeal was filed late and Stahlcon has asked for an extension of time for filing their appeal.
5. In correspondence dated May 22, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any 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. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to Stahlcon, who has been given the opportunity to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
7. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of Stahlcon and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), 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 that subsection, 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 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;*

(b) one or more of the requirements of section 112(2) have not been met.

8. The principle consideration here is the timeliness of the appeal. If satisfied the appeal should be considered timely and should not be dismissed under section 114(1), Ms. Cato will, and the Director may, be invited to file further submissions. On the other hand, if the appeal period should not be extended, it will be dismissed. In this case, I am looking at the criteria, which will be set out below, that inform my decision to extend the appeal period or not.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

10. Stahlcon operates a construction, road building and excavation business in Campbell River, BC. Ms. Cato was employed by the business as a bookkeeper from July 16, 2012, until November 26, 2013, at a rate of pay of \$25.00 an hour.
11. Ms. Cato claimed entitlement to length of service compensation under the *Act*, asserting she was terminated on November 26, 2013 without cause and without notice or pay in lieu of notice.
12. The Director investigated the complaint.
13. For the purpose of the issues raised in this appeal, the Director made the following findings:
 - Steve L. Houle (“Mr. Houle”), one of the directors of Stahlcon, did not dispute Ms. Cato was entitled to compensation for length of service and believed she had been received it;
 - Ms. Cato had received a cheque from Stahlcon on November 29, 2013 that included regular wages and an amount of \$2000.00 for compensation for length of service but that cheque had been returned to her as “dishonoured”;
 - Another cheque was issued later that included only regular wages and vacation pay;
 - The reason given to Ms. Cato on her Record of Employment (“ROE”) for her termination was stated as “shortage of work due to company hardship and cutbacks”;
 - Ms. Cato was entitled to length of service compensation in the amount of \$2000.00, together with vacation pay and interest on that amount;
 - The Determination was issued without reasons;
 - The Determination clearly indicates Stahlcon was entitled to request written reasons and such request – if made – was required to be delivered to the Director by April 22, 2014;
 - The request for reasons was delivered to the Director on April 24, 2014;
 - Written reasons for the Determination are dated May 6, 2014 and were sent out for delivery by registered mail on May 7, 2014;

- The reasons were received by Mr. Houle on May 7, 2014 and by John Kenneth Brett (“Mr. Brett”), another director and the representative for Stahlcon in this appeal, and Stahlcon on May 12, 2014;
- The time for filing an appeal expired on May 12, 2014; and
- The appeal was filed on May 15, 2014.

14. Along with its request for an extension of time, Stahlcon has filed its submissions and documents on the merits of its appeal. Without reviewing all of the specific allegations of fact contained in the appeal, Stahlcon submits Ms. Cato was not entitled to length of service compensation as there was cause to dismiss her. The alleged cause arises from events that occurred and information uncovered subsequent to her dismissal. Stahlcon also submits Mr. Houle was not the proper person to have dealt with the Director concerning Ms. Cato’s claim.

ARGUMENT

15. The request for an extension of time to file the appeal is based on Mr. Brett and Stahlcon not receiving the reasons for the Determination until May 12, 2014, which is the same day as the expiry of the appeal period. This position, however, fails to appreciate other elements of this scenario: first, the request for reasons was filed late; second, the reasons were delivered to Mr. Houle and to the registered and records office of Stahlcon on May 7, 2014; and third, the delay in delivery to Mr. Brett and Stahlcon was occasioned by a redirection of the reasons to a new address for Mr. Brett and Stahlcon and a failed attempt at delivery to that new address on May 8, 2014. The request does not address any of these matters, particularly why there was an initial delay in requesting reasons.
16. The arguments on the merits of the appeal do little more than attempt to challenge the Director’s finding that Ms. Cato was, on the facts provided to and accepted by the Director, entitled to length of service compensation. Stahlcon has sought to support this challenge on an allegation of a failure by the Director to observe principles of natural justice and on after-acquired facts.

ANALYSIS

17. The *Act* imposes an appeal deadline, and the other deadlines relating to the efficient handling of appeals, 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.

18. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST # D099/96. The following criteria should be satisfied to grant an extension:
- i. There is a reasonable and credible explanation for failing to request an appeal within the statutory 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), and the Director 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.
19. 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.
20. Although the delay in this case is not lengthy and appears on its face to have resulted in the reasons not being delivered to Mr. Brett and Stahlcon until the last day of the appeal period, those facts do not determine the outcome of the request. I must consider all of the criteria identified above, as well as any unique criteria that have been identified in the request.
21. Considering the criteria, I do not find any basis for concluding Stahlcon had “a genuine and ongoing *bona fide* intent to appeal”. Stahlcon certainly never communicated to any other party an intention to appeal the Determination before expiry of the appeal period.
22. In the circumstances, I make no finding that the explanation for the length of delay in this case is reasonable or credible. On the one hand, Mr. Brett is quite correct in submitting that receipt of the reasons on the last day of the appeal period made a delay in filing inevitable. On the other, the unexplained delay in requesting the reasons and the absence of an immediate response to the missed delivery attempt both fall squarely at Mr. Brett’s feet. In the circumstances this criterion is a non-factor.
23. One of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I also note that the presumptive merits of an appeal stand as a distinct consideration on which an appeal may be dismissed under section 114(1) of the *Act*, which is set out above.
24. When considering the relative merits of an appeal, or the *prima facie* strength of the case on 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 issues raised by the appeal.
25. 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.*
26. 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. More particularly, a party alleging a breach of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

27. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. A finding that a person has been terminated without cause or notice is generally one of fact alone.
28. In this context, I note the Director's finding that Ms. Cato was entitled to compensation for length of service was based on the facts available at the time. The appeal takes no issue with any of those facts but, as indicated above, challenges the Director's conclusion on there being no cause for termination. That challenge is based on natural justice arguments and on facts uncovered or occurring after Ms. Cato's termination.
29. I will first address the natural justice ground of appeal. Simply put, there is absolutely no evidence from which it could be found the Director failed to observe principles of natural justice in making the Determination. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:
- 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 to respond to the evidence and arguments presented by an adverse party: see *BWT Business World Incorporated*, BC EST #D050/96.
30. The appeal submission on the merits does not even remotely allude to circumstances where Stahlcon was denied the procedural protections of the principles of natural justice that arise in this case. There is nothing in the section 112(5) "record" that would in any way suggest Mr. Houle should not have or was not able to represent Stahlcon in answering Ms. Cato's claim. What the section 112(5) "record" does show is that Mr. Houle, Mr. Brett and Stahlcon were provided with notice and particulars of Ms. Cato's claim and that Mr. Houle and Mr. Brett were invited to "discuss the situation": see the March 19, 2014 letter from the Director. The reason stated for issuance of the ROE and the effect of the cancelled cheque are both referred to in that letter. Mr. Brett did not respond to the invitation; Mr. Houle did. The Determination also notes that mediation was offered. Mr. Houle agreed to attempt a voluntary resolution through mediation; Mr. Brett did not. The above facts are only used to demonstrate that Mr. Brett was given ample opportunity to respond in his own words to Ms. Cato's claim and to be part of the resolution and subsequent investigation of her complaint but, on the available information, chose to distance himself from both processes.
31. The "new evidence" ground of appeal is similarly without merit. All of the facts to which Mr. Brett alludes in the appeal were known, or reasonably ought to have been known, to him before the Determination was made. He could have provided that information during the complaint investigation. The allegations supporting the argument of just cause for termination relate not only to matters that were known during the investigation, but also to facts that either occurred after Ms. Cato's termination or were uncovered after her termination and are being used in the appeal for the first time to establish or support cause for termination. The Tribunal has resisted such attempts, concluding in several decisions that the concept of "after acquired cause" is not incorporated into the statutory provisions relating to length of service compensation: see *BNW Travel Management Ltd., operating as Brave New World*, BC EST # D170/04. In other words, an employer dissatisfied with the Director's finding on just cause may not go looking for further evidence of "cause" and

look for a review of the Director on the basis of the additional material. Such efforts do not accord with the statutory objectives of certainty, finality and efficiency in decision making by the Director.

32. The Tribunal has firmly established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal.
33. The evidence sought to be admitted into this appeal does not remotely resemble the kind of evidence that would be considered as acceptable. It is neither “new” nor relevant. At its core, this ground of appeal smacks of the kind of approach consistently rejected by the Tribunal, where there has been a failure or refusal by a party to participate in an investigation and a subsequent appeal by that party raising facts and arguments that could, and should, have been presented to the Director during the investigation: see *Tri-West Tractor Ltd.*, BC EST # D268/96 and *Kaiser Stables Ltd.*, BC EST # D058/97.
34. Stahlcon has not demonstrated there is any merit at all to the appeal, let alone a *prima facie* case. It would be inconsistent with the purposes and objectives of the *Act* to require the other parties to the Determination to respond to an appeal that has no likelihood of succeeding.
35. I do not allow an extension of the appeal period. The appeal is, accordingly, dismissed and the Determination confirmed.

ORDER

36. Pursuant to section 115 of the *Act*, I order the Determination dated April 3, 2014, be confirmed in the amount of \$2,602.05, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal