



An appeal

- by -

Scott Andrews Investments Inc.  
(“SAII”)

- 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.:** 2014A/74

**DATE OF DECISION:** August 12, 2014

## DECISION

### SUBMISSIONS

Scott Andrews

on behalf of Scott Andrews Investments Inc.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Scott Andrews Investments Inc. (“SAII”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 25, 2013, (the “Corporate Determination”).
2. The Corporate Determination found that SAII contravened Part 3, section 18, (wages) and Part 7, section 58 (vacation pay) of the *Act* in respect of the employment of Curtis Stevenson (“Mr. Stevenson”) and ordered SAII to pay wages to Mr. Stevenson in the total amount of \$7,093.96, inclusive of accrued interest. The Corporate Determination also levied administrative penalties against SAII in the amount of \$1,500.00 pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for contravention of sections 18 and 58 of the *Act* and section 46 of *Regulations*. The total amount of the Corporate Determination is \$8,593.96.
3. The time for appealing the Corporate Determination expired on May 2, 2014, with SAII filing its appeal after the expiry date on June 20, 2014, although I note the Appeal Form is dated June 16, 2014.
4. SAII appeals the Corporate Determination on all three grounds of appeal under Section 112 of the *Act*. In particular, SAII submits that the Director erred in law and failed to observe the principles of natural justice in making the Corporate Determination and new evidence has become available that was not available at the time the Corporate Determination was being made.
5. On June 27, 2014, the Employment Standards Tribunal (the “Tribunal”) acknowledged to the parties that an appeal had been received from SAII and requested the Section 112(5) “record” from the Director. The Tribunal also notified the parties that no submissions were being sought from the other parties but once the Tribunal has received the record from the Director, the Tribunal would provide a copy of it to SAII. The latter would then be given a deadline to provide objections, if any, to the completeness of the record.
6. On July 14, 2014, after receiving the Director’s record, the Tribunal disclosed the same to SAII and gave the latter an opportunity to provide objections, if any, to the completeness of the record by July 28, 2014, but no objections were received by the Tribunal.
7. This appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal solely on the Corporate Determination, the Appeal Form, the written submissions of SAII made by its sole director and officer, Scott Andrews (“Mr. Andrews”), and the record that was before the Director when the Corporate Determination was being made.
8. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Mr. Stevenson and the Director may be invited to file a reply submission on the appeal and SAII may be given an opportunity to make a final reply to these submissions, if any. Conversely, if it is found that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

## ISSUES

9. At this stage of the proceeding, there are two issues to be considered, namely, whether the Tribunal should extend the appeal period; and whether, in any event, is there a reasonable prospect that the appeal can succeed.

## THE FACTS

10. Mr. Stevenson filed a complaint under section 74 of the *Act* on October 24, 2013, alleging that SAII contravened the *Act* by failing to pay him regular wages and annual vacation pay (“Complaint”).
11. In the Complaint, Mr. Stevenson notes that he was a driver and worked for SAII from June 2007 to August 30, 2013, when he quit his employment.
12. A hearing was conducted into Mr. Stevenson’s Complaint on February 3, 2014, and a Delegate of the Director issued a Corporate Determination against SAII on March 25, 2014, finding wages and interest were owed to Mr. Stevenson totalling \$7,093.96 inclusive of interest. The Delegate also levied three administrative penalties against SAII totalling \$1,500.00.
13. The appeal period for the Corporate Determination expired on May 2, 2014, and SAII lodged its appeal on June 20, 2014, approximately 49 days after the expiry of the appeal date.
14. I note that neither the Appeal materials nor the Director’s record contains the Reasons for the Corporate Determination. I further note that the Corporate Determination states on the second page:

**“A person named in a determination may make a written request for reasons for the determination. Your request must be delivered to an office of the Employment Standards Branch within seven days of being served with this determination. You are deemed to be served eight days after the determination is made, so your request must be delivered by April 9, 2014.”**  
(Emphasis in original)

15. SAII appears not to have requested Reasons for the Corporate Determination by the stated deadline of April 9, 2014. In the Appeal submissions, Mr. Andrews (“Mr. Andrews”) submits an email dated June 24, 2014, stating that he contacted the Employment Standards Branch (the “Branch”) and asked for the Reasons for the Corporate Determination but he did not receive any response. I note Mr. Andrews does not provide the date when he made his request, whether it was at the time he filed the late appeal or before, nor does he provide any evidence of the written request he sent to the Branch.

## SUBMISSIONS OF SAII

### (a) Submissions relating to the late appeal

16. In his email of 7:21 p.m. on June 19, 2014, enclosing the Appeal Form on behalf of SAII, Mr. Andrews states “late due to out of town”. He also attaches his handwritten Appeal submissions wherein he states “this appeal is late because I was on holidays and had a family tragedy, for that I apologize for the delay.”

**(b) Submissions relating to the merits of the appeal**

17. With respect to the merits of the appeal, Mr. Andrews, on behalf of SAI, submits that Mr. Stevenson was a subcontractor who paid his own taxes and CPP and other expenses, therefore, he was not entitled to holiday pay. Mr. Andrews submits that Mr. Stevenson “was making 40% of the one truck I had and that’s it”.
18. Mr. Andrews further submits that Mr. Stevenson was negligent “in so many ways” and caused him damages. He indicates that Mr. Stevenson stole fuel and failed to give proper notice to SAI before he quit and damaged SAI’s truck which went into the ditch because Mr. Stevenson failed to put the parking brakes on.
19. Mr. Andrews further submits that he and/or SAI suffered “loss of income of \$10,000.00 or more” because of Mr. Stevenson’s negligence over the course of seven years. He states that he or SAI has had to pay several significant mechanics’ bills for failure by Mr. Stevenson to check the oil levels in the truck and failure to maintain the truck he was provided by SAI.
20. Mr. Andrews attaches to his written submissions a Notice of Claim filed in the Provincial Court of British Columbia (Small Claims Court) by SAI against Mr. Stevenson for damage to SAI’s truck and for theft of fuel. SAI is claiming \$14,277.78 in the action.
21. Mr. Andrews also attaches two mechanical bills from G.T. Mechanical for \$7,121.78 and \$1,702.78 purportedly for repairs to the truck that was provided to Mr. Stevenson. The invoices are dated September 5, 2012, and January 10, 2013, which is during the period Mr. Stevenson was working for SAI.
22. Mr. Andrews also states that the Delegate responsible for making the Corporate Determination “instead of looking at the evidence” decided to attach a lien against his house and freeze his bank accounts “for a judgment that is unlawful” and seeks the Tribunal to cancel the Corporate Determination. I note that Mr. Andrews has included with his written Appeal submissions a copy of the Certificate of Judgment filed on May 29, 2014, by the Director against Mr. Andrews residence. This Certificate of Judgment relates to a S.96 director’s determination that was issued against Mr. Andrews by the Director at the same time as the Corporate Determination.
23. Mr. Andrews has also included in the Appeal a letter from Coast Capital Savings to Mr. Andrews advising him that his personal account has been “frozen” because of a Demand Notice from the Province of British Columbia in the amount of \$7,093.96. Again, this document relates to the S.96 director’s determination made against Mr. Andrews personally since SAI did not pay the Corporate Determination.

**ANALYSIS**

24. Section 112(3) of the *Act* sets out appeal deadlines to ensure appeals are dealt with promptly. In the case of determinations served on a person by registered mail, subsection 112(3)(a) of the *Act* provides that the appeal period is “30 days after the date of service of the determination”. In this case, SAI was sent the Corporate Determination by registered mail, and the Corporate Determination, at page 3, states “(s)hould you wish to appeal this Determination, your appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on May 2, 2014”. However, SAI failed to comply with the stated deadline and filed its appeal about 49 days past the expiry date on June 20, 2014.
25. Section 109(1)(b) of the *Act* permits the Tribunal to extend the time limit for an appeal. In *Re: Tang*, BC EST # D211/96, the Tribunal explained the principles governing the exercise of its discretion under this section as follows:

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 extension 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.

26. In *Blue World IT Consulting Inc.*, BC EST # D516/98, the Tribunal delineated the following non-exhaustive factors it may consider in deciding whether to grant an extension of the appeal:
- 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 and ongoing *bona fide* intention to appeal the Determination;
  - 3) the respondent party (i.e. the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
  - 4) the respondent party will not be unduly prejudiced by the granting of the extension; and
  - 5) there is a strong *prima facie* case in favour of the appellant.
27. Having reviewed all of the considerations above in context of the facts in this case and for the reasons delineated below, I am not persuaded that this is a case where the Tribunal should exercise its discretion to grant an extension of time to file an appeal.
28. First, I am not persuaded that there is a reasonable and credible explanation for SAIIP' failure to request an appeal within the statutory time limit. SAIIP and Mr. Andrews do not deny receiving the Corporate Determination in a timely fashion. However, Mr. Andrews says, in his email of June 19, 2014 to the Tribunal submitting SAIIP's appeal, that the appeal is "(l)ate due to out of town". In his attached written Appeal submissions he explains he "was on holidays" and there was "a family tragedy" that caused him delay in filing. As for the holidays, I am not convinced that being on a holiday, after one has participated in the Complaint Hearing and knows that there is an impending decision, excuses a delay of 49 days to file an appeal. As for the purported "family tragedy", Mr. Andrews does not provide any particulars other than his bare assertion. There is no indication of when the alleged family tragedy occurred and no explanation of any efforts by him to contact the Tribunal to request an extension.
29. Second, I am not persuaded that there is any evidence of a genuine and ongoing *bona fide* intention on the part of SAIIP or Mr. Andrews to appeal the Corporate Determination during the appeal period. It appears to me that Mr. Andrews was likely motivated to appeal the Corporate Determination when he received the Certificate of Judgment filed by the Director against his personal residence and the letter from his financial institution advising him that his personal bank account was frozen.
30. Third, there is no evidence that the Director or Mr. Stevenson were made aware of SAIIP' intention to appeal the Corporate Determination until after the late appeal was filed.
31. Fourth, while there may not be any prejudice to Mr. Stevenson in granting SAIIP an extension of time to appeal, the Tribunal needs to be mindful of the need for a timely disposition of an appeal, as well as the stated purpose in section 2(d) of the *Act*, which is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*". In this case, even if I were persuaded by Mr. Andrews' explanation for the delay in SAIIP' filing of its appeal, I do not find that there is any prospect of success of SAIIP' appeal, which I will briefly discuss below.

32. The last factor for consideration set out by the Tribunal in *Blue IT Consulting Inc., supra*, is whether there is a strong *prima facie* case in favour of the applicant warranting a grant of extension of the appeal period. In this case, while I feel somewhat disadvantaged by the lack of Reasons for the Corporate Determination, I have reviewed all of the submissions of Mr. Andrews in the appeal very carefully and I am not persuaded that there has been any breach of natural justice or error of law on the part of the Director in making the Corporate Determination.
33. In terms of the new evidence ground of appeal, again while I am again disadvantaged by the lack of Reasons for the Corporate Determination, I do not see any evidence presented by Mr. Andrews that would qualify as new evidence under the Tribunal's test for admitting new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. In particular, all of the evidence Mr. Andrews now adduces on behalf of SAII appears to be evidence that could have, with the exercise of due diligence, been presented to the delegate during the investigation or adjudication of the Complaint and prior to the Corporate Determination being made. I cannot say if any evidence now proffered by Mr. Andrews constitutes a re-argument as I do not have the Reasons for the Corporate Determination to make that assessment. However, I can say unequivocally that some of the evidence adduced is clearly irrelevant and not probative such as the yet to be determined Provincial (small claim) Court action of SAII against Mr. Stevenson and the purported invoices for mechanical repairs to the truck SAII provided Mr. Stevenson while he was working for SAII.
34. In these circumstances, I am not persuaded that there is a reasonable prospect that SAII's appeal will succeed.

## ORDER

35. Pursuant to section 114(1)(b) and (f) of the *Act*, I dismiss the appeal of SAII on the grounds that it has not been filed within the applicable time limit and there is no reasonable prospect that it will succeed. Accordingly, the Corporate Determination, dated March 25, 2013, is confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**