

An appeal

- by -

Simply Green Home Services Inc.
(“Simply Green”)

- 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.: 2017A/71

DATE OF DECISION: July 5, 2017

DECISION

SUBMISSIONS

David Singh

on behalf of Simply Green Home Service Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Simply Green Home Services Inc. (“Simply Green”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 28, 2016. In that Determination, the Director found that Simply Green had contravened sections 45 and 58 of the *Act* in failing to pay Cascade Tong statutory holiday pay and vacation pay in the total amount of \$ 995.89. The Director also imposed three administrative penalties in the total amount of \$1,500 for the contraventions, for a total amount owing of \$2,495.89.
2. Simply Green appeals the Determination contending that the delegate erred in law in making the Determination. The date for filing an appeal of the Determination was 4:30 p.m. on September 6, 2016. Simply Green filed its appeal on May 15, 2017, and at the same time, sought an extension of time in which to file that appeal.
3. This decision is based on Simply Green’s submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. On April 21, 2016, Ms. Tong filed a complaint alleging that Simply Green had failed to pay her statutory holiday pay and vacation pay.
5. A delegate of the Director held a hearing on June 27, 2016. Ms. Tong appeared on her own behalf and Alex Kaplunov appeared on behalf of Simply Green.
6. Ms. Tong worked as an Office Manager and Talent Scout from August 24, 2015, until February 5, 2016. She had two periods of employment, the first from August 24, 2015, until January 3, 2016, under an independent contract; and the second from January 4, 2016, until February 5, 2016, under a contract with Simply Green.
7. The delegate noted that there were four business enterprises involved in the complaint; 1901977 Ontario Ltd. of which Ryan Birkland was the sole Director and Officer; Simply Green Home Services Inc., an Ontario incorporated company of which Mr. Kaplunov and Lawrence Krimker were both Directors and Officers; Simply Green Home Services (BC) Inc., a British Columbia incorporated company of which Mr. Krimker was the sole Director; and Simply Green Home Services, a sole proprietorship registered in British Columbia of which Simply Green Home Services (BC) Inc. was the proprietor. The Notice of Hearing and Demand for Employer records were served on, and acknowledged received by, the registered and records office of 1901977 Ontario Ltd. and Simply Green (Ontario). No one appeared at the hearing on behalf of 1901977 Ontario Ltd.
8. Mr. Kaplunov informed the delegate that Ryan Birkland, the sole director of 1901977 Ontario Ltd., had been a “small owner” of Simply Green, but had been “terminated” and that Simply Green had purchased back his shares. Mr. Kaplunov asserted that Ms. Tong was hired by 1901977 Ontario Ltd. and that 1901977 Ontario

Ltd. was responsible for her wages for the period August 24, 2015, until January 3, 2016. Simply Green's liability for Ms. Tong's vacation pay and statutory holiday pay for the second contract period was not disputed.

9. The delegate determined that Ms. Tong was hired by Mr. Birkland, who had informed her he was an owner of Simply Green. He provided her with business cards bearing Simply Green's logo. The delegate also found that Ms. Tong took directions from Mr. Birkland throughout the period of her employment. Ms. Tong was initially paid by cheques which were issued by 1901977 Ontario Ltd. and from which no deductions had been made. When Ms. Tong inquired about the deductions, Mr. Birkland told her she was an independent contractor, which was more advantageous for her. After expressing concerns about this arrangement, Ms. Tong was made an employee of Simply Green on January 4, 2016, and the second contract provided to her by Mr. Birkland reflected that relationship. Ms. Tong testified that there were no changes to her responsibilities and no changes to whom she reported or took directions.
10. Mr. Kaplunov asserted that all Simply Green's sales people were independent contractors who were able to engage their own support staff. He stated that Mr. Birkland was "terminated in May 2016." He then clarified that the contract between Mr. Birkland and Simply Green was terminated and Simply Green "bought back" Mr. Birkland's Simply Green shares.
11. The delegate determined that Ms. Tong was an employee, as Mr. Birkland directed her work, set her hours and provided her with equipment, including a laptop and office space. The delegate determined that Ms. Tong did not have authority to hire and fire employees, that she had no risk of loss or opportunity to make a profit, and that her work was integral to Simply Green's business. The delegate found that Ms. Tong was an employee, not an independent contractor.
12. The delegate also concluded that Simply Green was Ms. Tong's employer for the entire period of her employment. She noted that Ms. Tong applied for a position advertised by Simply Green and that all of the work appeared to her to be with Simply Green. Ms. Tong sent the first contract of employment, which identified Simply Green as the payer, to Simply Green at Mr. Birkland's request. The delegate identified one noteworthy difference from the first contract to the second, which was that during the second contract of employment, Ms. Tong was paid from Simply Green's payroll rather than from Mr. Birkland directly. When asked about how Mr. Birkland was compensated for paying Ms. Tong, the delegate noted that Mr. Kaplunov's response was vague. While admitting that Mr. Birkland would have been compensated for Ms. Tong's wages to some extent, Mr. Kaplunov was unclear whether Simply Green was partially or fully funding her position. Taking all factors into consideration, the delegate found, on a balance of probabilities, that Simply Green was Ms. Tong's employer for the entire period of her employment.
13. The delegate determined on the evidence before her (she did not have payroll records for Ms. Tong's first period of employment) that Simply Green had contravened the *Act* in failing to pay Ms. Tong statutory holiday pay or vacation pay as noted above.

ARGUMENT

14. Simply Green says that Alex Kaplunov, Simply Green's CEO at the time of the hearing, was "let go" in August 2016, and that the employment standards claim was not known to senior management of Simply Green. Mr. Singh says that he only became aware of the claim and the Determination when he received a letter from the Ontario Ministry of Finance on May 12, 2017, stating that Simply Green owed \$2,995.07. Mr. Singh says the Directors of Simply Green were not aware of the appeal process after Mr. Kaplunov's departure and missed the appeal deadline.

15. Simply Green asserts that Ms. Tong was a contractor who “worked for Ryan Birkland’s company 1901977 Ontario Inc.” from August 24, 2015, until January 3, 2016. Simply Green contends that Ryan Birkland and 1901977 Ontario Inc. are held responsible for Ms. Tong’s wages, not Simply Green.

ISSUES

16. 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.
17. Whether the delegate erred in law in making the Determination.

ANALYSIS

18. Section 114(1) of the *Act* provides that 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.
19. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.
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 section 2(d) of the *Act* which provides that the legislation 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:
- (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 ongoing *bona fide* intention to appeal the Determination;
- (iii) the respondent party (*i.e.*, the employer or employee), as well as 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.

These criteria are not exhaustive.

24. I decline to exercise my discretion to extend Simply Green's time to file an appeal for the following reasons.
25. The record indicates that the Determination was sent by registered mail to Simply Green and its directors. It was successfully delivered to the corporate office and three of Simply Green's directors on August 2, 2016. I find that Simply Green had knowledge of the complaint and the opportunity to respond. It did not do so. Further, despite being served with the Determination, Simply Green took no steps to appeal it until the Branch took steps to enforce it.
26. The appeal was filed well over eight months past the statutory time limit. The reason for the delay is stated to be Mr. Kaplunov's "firing." Mr. Kaplunov was a Director and Officer of Simply Green at the time of the hearing, not that of a mere employee. Furthermore, three other directors received a copy of the Determination, and a copy was successfully delivered to Simply Green's registered office. I find that Simply Green was aware of the Determination by August 2, 2016, and has provided no good reason for the delay in filing the appeal.
27. There has been no genuine, ongoing intention to appeal the Determination, and neither Ms. Tong nor the Director have been made aware of Simply Green's intention to appeal. At this point in the process, I am prepared to infer that Ms. Tong would be prejudiced by the granting of the extension, although I have no evidence she would be.
28. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
29. Finally, I am unable to find that there is a strong, *prima facie* case in Simply Green's favour.
30. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ No. 2275 (BCCA):
- 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 - 2. a misapplication of an applicable principle of general law;
 - 3. acting without any evidence;
 - 4. acting on a view of the facts which could not reasonably be entertained; and
 - 5. adopting a method of assessment which is wrong in principle.
31. Simply Green does not say how the delegate erred in law in finding Ms. Tong to be an employee of Simply Green. The appeal consists of nothing more than a re-stating of the position Mr. Kaplunov took at the hearing. An appeal is not an attempt to re-argue a case that has already been made before the delegate.

32. The appeal is dismissed. Pursuant to section 114(1)(b) and (f), I deny the appeal.

ORDER

33. Pursuant to section 115 of the *Act*, I Order that the Determination, dated July 28, 2016, be confirmed in the amount of \$2,495.89, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal