

An appeal

- by -

Pacific Western Coastal Constructors Ltd. ("PWC")

- 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.: 2008A/57

DATE OF DECISION: August 6, 2008



DECISION

SUBMISSIONS

William Thomson and Barry Lang on behalf of Pacific Western Coastal Constructors Ltd.

Terry Hughes on behalf of the Director of Employment Standards

OVERVIEW

- This is an appeal by Pacific Western Coastal Constructors Ltd. ("PWC") pursuant to Section 112 of the *Employment Standards Act* (*Act*), against a Determination of the Director of Employment Standards ("the Director") issued February 6, 2008.
- A number of individuals filed complaints alleging that PWC, a construction business, had failed to pay wages. The complainants were employees on a project for which PWC was a subcontractor during 2007. In late 2007, the developer, Aviawest Group of Companies ("Aviawest"), alleged that PWC had put "ghost" employees on their payroll and accused it of cost overruns and deficiencies on the project. Aviawest did not pay PWC sufficient funds to meet its mid December, 2007 payroll, instead making direct payments to its employees. The complainants worked the following pay period, December 12, 2007 to December 21, 2007 but Aviawest did not provide PWC with funds to meet this payroll. PWC ceased work on the site on December 21, 2007 and filed a builder's lien against the property. PWC did not dispute the complainants' allegations that they were not paid for work performed from December 12 21, 2007.
- A delegate of the Director investigated the complaints. He found that there was no dispute that the employees performed work for PWC or that they had not been paid any wages for the final pay period. The delegate determined that wages were owed in the total amount of \$51,056.60, including interest and that PWC had contravened section 17 of the *Act* in failing to pay wages no later than eight days after the end of a pay period. The delegate also imposed an administrative penalty in the amount of \$500.00 for the employer's contravention.
- ^{4.} PWC filed an appeal with the Tribunal on June 11, 2008 alleging that the delegate failed to observe the principles of natural justice in making the Determination. While PWC does not dispute the delegate's conclusion that the employees are entitled to wages in the amount of the Determination, it contends that the money owed to the complainants is being held by the court.
- Pursuant to section 112 of the Act, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. PWC's appeal period expired February 27, 2008.
- These reasons address only the timeliness of PWC's appeal and are based on the written submissions of the parties.



ISSUE

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.

ARGUMENT

- PWC says that it did not file an appeal before the deadline because the delegate was told that Aviawest would be paying the employees. PWC argues that it mistakenly believed that the Branch would seek recovery of the outstanding wages from the developer's holdback. It also contends that, at the time the Determination was issued, it was in court seeking to have the lien against Fairfield (one of the group of companies forming Aviawest) upheld, which it did successfully. PWC says it does not understand why the Branch has not attached the funds being held in court for the workers.
- ^{9.} The delegate denies that Aviawest agreed to pay the employees' wages. He says PWC was told that the developer was considering whether to make the payments and that the Determination was issued only after the developer decided it would not voluntarily make the payment. The delegate says that the Branch has attempted to collect the wages through demand notices and a Writ of Seizure and Sale, but has been unsuccessful.

THE FACTS AND ANALYSIS

- 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 15 days of service, if served by registered mail, or 8 days after service, if served personally.
- 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.
- Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
- 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.
- These criteria are not exhaustive.

- Having reviewed the submissions of the parties, I decline to grant the application for an extension for the following reasons.
- I find no genuine and ongoing intention to appeal the Determination within the statutory time limit. The first indication PWC intended to appeal the Determination was the appeal letter received by the Tribunal on June 10, 2008, nearly four months past the appeal deadline. It appears that the appeal was made only after the Branch made unsuccessful attempts to collect the outstanding amounts.
- I also find no reasonable and credible explanation for PWC's failure to appeal the Determination within the appeal deadline. While it states that it believed that the developer was going to pay the outstanding wages, the delegate delayed issuing the Determination until after the developer indicated it would not do so. Thus, at the time PWC received the Determination, it knew the developer had not agreed to pay the wages from its holdback.
- Finally, I find no strong *prima facie* case in PWC's favour. Although PWC alleges that the delegate failed to observe the principles of natural justice, there is no evidence PWC was denied the opportunity to know the claims made against it or to respond to them. Indeed, there was no dispute to the facts or that the employees were entitled to wages.
- Furthermore, while PWC suggests that the BC Supreme Court upheld its lien against the developer, the decision merely confirms that a contract bonus may properly be included in a lien claim. The amount of PWC's lien claim was paid into court pending the Determination of the dispute between PWC and the developer on its merits. (*Fairfield Project Limited Partnership v. Pacific Western Coastal Constructors Ltd.*, 2008 BCSC 135) PWC's ongoing dispute with the developer does not affect its obligation to pay wages to its employees.

ORDER

Pursuant to section 109(1)(a) of the Act, I deny the application to extend the time for filing an appeal.

Carol L. Roberts Member Employment Standards Tribunal