

An appeal

- by -

Greg Klem  
("Mr. Klem" or the "Appellant")

- 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:** Rajiv K. Gandhi

**FILE No.:** 2015A/172

**DATE OF DECISION:** May 10, 2016

## DECISION

### SUBMISSIONS

Greg Klem	on his own behalf
Darlene Campbell	on behalf of Don Zappone Contracting Ltd.
Elaine Ullrich	on behalf of the Director of Employment Standards

### OVERVIEW

1. Greg Klem (“Mr. Klem” or the “Appellant”) appeals a determination (the “Determination”) of the Director of Employment Standards (the “Director”) issued on November 3, 2015, according to according to section 79 of the *Employment Standards Act* (the “Act”).
2. In reasons issued on March 8, 2016, and reported at BC EST # D036/16 (the “Initial Decision”), I dismissed the bulk of Mr. Klem’s appeal pursuant to section 114(1)(f) of the *Act*, on the basis that there was no reasonable prospect of success.
3. I declined to make such an order, however, with respect to the Director’s calculation of wages paid to the Appellant prior to the Determination. I also made no ruling with respect to the timeliness of Mr. Klem’s appeal.
4. Having now had the benefit of additional submissions from:
  - (a) Don Zappone Contracting Ltd. (the “employer”), filed March 16, 2016;
  - (b) the Director, filed March 23, 2016; and
  - (c) Mr. Klem, filed April 5, 2016,

I am prepared to deal with these outstanding matters.

#### *Timing of the Appeal*

5. The Determination was issued November 3, 2015. Mr. Klem’s appeal was not received until December 18, 2015, seven days after the end of the appeal period, as calculated according to section 112(3) of the *Act*. In order for Mr. Klem’s appeal to proceed, the Tribunal must extend the appeal period according to section 109(1)(b) of the *Act*.
6. The appeal materials were originally dated December 3, 2015. In the version actually received by the Employment Standards Tribunal, Mr. Klem notes that his original package was faxed to the wrong telephone number. He did not realize the error until December 15, 2015.
7. The Director does not object to an extension of time. The employer does object, naturally, but I do not find the employer’s submissions helpful on that point.
8. I am satisfied that Mr. Klem had and continues to have a “genuine and on-going *bona fide* intention to appeal the Determination” (see *Niemisto*, BC EST # D099/96, at page 3). I find the explanation given for the

technical failure to file before the end of the appeal period to be reasonable and credible. I also agree with the Director in that the seven-day delay is not in any way prejudicial to the employer.

9. Accordingly, the appeal period is extended to the extent necessary to permit Mr. Klem's appeal to proceed on the limited basis set out in the Initial Decision.

*Calculation of Wages*

10. In the Initial Decision, at paragraphs 27 and 28, I held:

*Where the Determination appears to fall short is in the Director's calculation of wages paid to the Appellant prior to the Determination. In reviewing both the Determination and the Record, I am unable to say how the Director concluded that the Appellant was paid gross wages of \$3,405.36. I am also unable to say that the Director dealt with the propriety of specific wage deductions raised by the Appellant in his original complaint.*

*The Director says that two payments were made by the Employer, one on October 2, 2014, the second on October 23, 2014. Wage calculation worksheets included in the Record show an aggregate gross amount payable of \$3,274.38; with vacation pay, this would be \$3,405.36, which is consistent with the Director's calculation. However, the cheque stubs for the payments made on October 2, 2014 and October 23, 2014 indicate gross payments of \$2,156.58. This is consistent with what is reported on the copy of the T4 slip included in the Record, but does not match either the wage calculation worksheets or the Director's number. The difference appears to be found in what is noted on the cheque stubs as "subsistence pay", which amounts to \$1,200.75, and vacation pay that would be calculated on that amount, equal to \$48.03.*

11. Mr. Klem says that he did not agree to deductions for sustenance pay, but does not contest the calculations.
12. In the employer's submissions, it is noted that subsistence pay is deducted from earnings and paid separately. The employer says that subsistence pay was delivered in three payments - \$443.77 on January 24, 2015; \$160.10 on October 29, 2015, and the balance of \$596.88 once the employer realized that the Director would not allow a deduction for a lost or destroyed tarp.
13. The Director says that both Mr. Klem and the employer agreed that the gross amount of wages paid, inclusive of vacation pay, was \$3,405.36. The Director says that, prior to the Determination, Mr. Klem did not contest the matter of subsistence pay, but only a deduction with respect to the tarp that was subsequently repaid to him. The Director also confirms that vacation pay was not originally calculated on the amount characterized as subsistence pay, but this was corrected and \$48.03 paid before the hearing conducted on May 6, 2015.
14. Although the subsistence pay payments are not apparent to me when I examine the Record, I am satisfied that calculations are noted in the Record, and that the Director's findings of fact in this regard, based on the Record and testimony received in the original hearing, are properly made. Even if I had authority to interfere with those findings, I would not be inclined to do so, based on the materials before me.

**ORDER**

15. Mr. Klem's appeal is dismissed, and the Determination is confirmed, according to section 115(1)(a) of the *Act*.

---

**Rajiv K. Gandhi**  
**Member**  
**Employment Standards Tribunal**