

An appeal

- by -

0799444 B.C. Ltd. carrying on business as Ajdan Properties
("Ajdan")

– 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)

and

An application for suspension

- by -

0799444 B.C. Ltd. carrying on business as Ajdan Properties
("Ajdan")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/64 & 2010A/65

DATE OF DECISION: July 29, 2010

DECISION

SUBMISSIONS

Nadja Burmatoff	on behalf of 0799444 B.C. Ltd. carrying on business as Ajdan Properties
Lorne Selland	on his own behalf
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 0799444 B.C. Ltd. carrying on business as Ajdan Properties, (“Ajdan”), pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued January 12, 2010.
2. Lorne Selland was employed as a resident caretaker for Ajdan, a property management company, from May 2001 until June 16, 2009. Mr. Selland filed a complaint alleging that he was not paid minimum wages as a resident caretaker as required by the *Employment Standard Regulation* (the “*Regulation*”). He also alleged that he was not paid statutory holiday or vacation pay as required under the *Act*.
3. Following an investigation into Mr. Selland’s complaint, the Director’s delegate determined that Ajdan had contravened Sections 17, 18, 58 and 63 of the *Act* in failing to pay Mr. Selland wages, vacation pay and compensation for length of service. The delegate also found Ajdan to be in contravention of s. 28 of the *Act* in failing to provide records required to be kept by an employer. The delegate concluded that Mr. Selland was entitled to wages and interest in the total amount of \$8,730.67. The delegate also imposed administrative penalties in the amount of \$2,000 for the contraventions of the *Act*, pursuant to section 29(1) of the *Regulation*.
4. The delegate was unable to conclude that Mr. Selland was entitled to statutory holiday pay.
5. Pursuant to section 112 of the *Act*, Ajdan’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Ajdan’s appeal period expired February 19, 2010. Ajdan filed an appeal of the Determination on May 4, 2010, contending that evidence had become available that was not available at the time the Determination was being made.
6. Ajdan seeks an extension of time in which to file the appeal and a suspension of the Determination. The Director agreed to suspend the Determination pending payment of funds by certified cheque, to be held in trust pending the outcome of the appeal.
7. These reasons address the timeliness of Ajdan’s appeal as well as the suspension application and are based on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

8. 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.

FACTS

9. Mr. Selland moved into a rental unit managed by Ajdan in 1999 and in May 2001, he began performing caretaking duties, receiving free rent in lieu of wages.
10. In August 2007, Ajdan purchased another building (the “Punchaw building”) and Mr. Selland performed duties at that building similar to those he performed at the building in which he resided. He travelled to the Punchaw building almost daily and received wages for duties performed at that building.
11. On June 16, 2009, Mr. Selland received a letter advising him of the immediate termination of his employment. He was given one and one half month’s rent in lieu of notice which Ajdan stated was equivalent to \$825.00.
12. On September 9, 2009, the Director’s delegate sent a letter to Ms. Burmatoff, the owner and sole director of Ajdan, advising her of the allegations and seeking her response. The delegate also issued a Demand for Employer Records which were to be provided by September 23, 2009. The letter was sent by regular mail and registered mail to the business address and to the address indicated in the Corporate registry for Ms. Burmatoff. The registered mail was successfully delivered on September 21, 2009. Neither of the letters sent by regular mail were returned.
13. The delegate discussed the complaint with Ms. Burmatoff on September 28, 2009. Ms. Burmatoff confirmed that Mr. Selland was the resident caretaker at one apartment building, for which he received rent in lieu of wages, and performed similar duties at the Punchaw building, for which he was paid \$300.00 per month. Although Ms. Burmatoff provided the delegate with copies of the monthly payments made to Mr. Selland related to his duties at the Punchaw building, she did not have or keep any other records related to Mr. Selland’s employment. Ms. Burmatoff communicated some information to the delegate by way of faxes sent September 29, 2009, and October 2, 2009.
14. The delegate made several subsequent attempts to contact Ms. Burmatoff, without success. On October 27, 2009, the delegate faxed her preliminary findings to Ms. Burmatoff. In those findings, the delegate advised Ms. Burmatoff that if she had any additional information relevant to the investigation, it was to be provided by November 18, 2009. The delegate advised Ms. Burmatoff that if she did not receive a response by that date, she would be issuing a Determination based on the information she had to date.
15. The delegate was satisfied that Ms. Burmatoff had been given full opportunity to respond to the complaint. The delegate concluded that Ms. Burmatoff had contravened section 28 of the *Act* in failing to maintain and provide employee records.
16. The delegate determined that Mr. Selland was employed as a resident caretaker as defined in the *Regulation*. Accordingly, Mr. Selland’s minimum wage was prescribed by s. 17(a) of the *Regulation*. The delegate found that Mr. Selland had not been paid wages as required. The delegate also determined that the *Act* did not provide for “in kind” wages such as free rent, and concluded that Mr. Selland was entitled to wages. As section 80 of the *Act* limited wages to six months from the date of the complaint or termination, the delegate calculated that Mr. Selland was entitled to wages in the amount of \$4,728.00.
17. The delegate was unable to conclude, on the evidence before her, that Mr. Selland was improperly compensated for work he performed at the Punchaw building. However, she concluded that he was not paid for the period June 1-16, 2010, in contravention of section 18 of the *Act*. The delegate found that Ajdan had contravened s. 17 of the *Act* for not paying Mr. Selland all wages earned in a pay period.

18. Although the delegate found that Ajdan had not paid Mr. Selland vacation pay, she was unable to conclude that he was entitled to statutory holiday pay.
19. Finally, the delegate concluded that Ajdan had not fully discharged its liability to pay Mr. Selland compensation for length of service and calculated the amount owing at \$2,008.56.

ARGUMENT AND ANALYSIS

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:
- (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.

24. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
25. Ms. Burmatoff's sole reason for not filing the appeal within the statutory time limit is that she "had moved and did not receive information, or provided with evidence utilized to equate determination".
26. Although I find Ms. Burmatoff's submission difficult to understand, she has provided no evidence that she was not properly served with the Determination. Admittedly, while it is difficult to prove a negative, the address used by Ms. Burmatoff in the appeal is the same address to which the Determination was sent in January 2010. The Determination was returned to the Director as "unclaimed". There is no evidence Ms. Burmatoff moved to any other address. In any event, Ms. Burmatoff had a number of conversations with the delegate and was aware that an investigation was being conducted and that a Determination was pending. As the delegate also faxed her a copy of the preliminary findings, Ms. Burmatoff was also aware of the result of that investigation. In my view, Ms. Burmatoff deliberately avoided service of the Determination by registered mail. However, I find that she received a copy of the Determination by the end of January 2010.

27. The appeal was filed on May 4, 2010, almost three months after the appeal period had expired. It appears that the filing of the appeal was prompted by collection efforts made on behalf of the Branch. There is no explanation, other than the alleged move, for this delay.
28. Mrs. Burmatoff did not communicate her intention to file an appeal of the Determination at any time.
29. Mr. Selland is owed wages from June 2009. I find there would be some prejudice to him if an extension were granted.
30. Finally, I am unable to find that there is a strong *prima facie* case in Ajdan's favour. Although Ajdan submitted new evidence on appeal, this evidence does not meet the Tribunal's test for new evidence.
31. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - the evidence must be relevant to a material issue arising from the complaint;
 - the evidence must be credible in the sense that it is reasonably capable of belief; and
 - the evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
32. Ms. Burmatoff contends that she directed Mr. Selland to post his business hours on his door and that he performed work "over and above what was expected by him". She suggests that Mr. Selland received additional compensation on a monthly basis for minor renovations or jobs which she paid in cash. In her appeal submission, Ms. Burmatoff made a number of complaints about Mr. Selland that are not relevant to the appeal.
33. In my view, none of this constitutes new evidence. It was clearly available during the delegate's investigation of the complaint and ought to have been provided to the delegate at that time. The Tribunal has a well established principle that it will not consider new evidence that could have been provided at the investigation or hearing stage (see *Tri-west Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97). The employer cannot now rely on this evidence as a basis for its appeal.
34. I deny Ajdan's applications.

ORDER

35. Pursuant to section 109(1)(a) of the *Act*, I deny Ajdan's application to extend the time for filing an appeal. I also deny Ajdan's application to suspend the Determination

Carol L. Roberts
Member
Employment Standards Tribunal