

An appeal

- by -

Nadja Burmatoff, a Director of 0799444 B.C. Ltd. carrying on business as Ajdan
Properties

– 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 –

Nadja Burmatoff, a Director of 0799444 B.C. Ltd. carrying on business as Ajdan
Properties

– 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/66 & 2010A/67

DATE OF DECISION: July 29, 2010

DECISION

SUBMISSIONS

Nadja Burmatoff	on her own behalf
Lorne Selland	on his own behalf
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Nadja Burmatoff, a Director of 0799444 B.C. Ltd. carrying on business as Ajdan Properties (“Ms. Burmatoff”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued March 4, 2010.
2. Lorne Selland was employed as a resident caretaker for 0799444 B.C. Ltd. carrying on business as Ajdan Properties (“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*. The delegate was unable to conclude that Mr. Selland was entitled to statutory holiday pay.
4. Accompanying the Corporate Determination was a Notice to Directors and Officers setting out their personal liability for unpaid wages under section 96 of the *Act*.
5. Ajdan’s appeal period expired February 19, 2010. On March 4, 2010, after receiving no settlement of the Determination, the Director’s delegate issued a Director Determination against Ms. Burmatoff, in an amount of \$4306.56 representing two months wages and the administrative penalties.
6. Ajdan filed an appeal of the Corporate Determination on May 4, 2010, contending that evidence had become available that was not available at the time the Determination was being made. Ms. Burmatoff filed a companion appeal of the Director Determination.
7. Ms. Burmatoff seeks an extension of time in which to file the appeal and a suspension of the Determination. The Director did not oppose the suspension of the Determination as the Court Bailiff had collected \$4,343.91 in partial satisfaction of the Determinations.
8. These reasons address the timeliness of Ms. Burmatoff’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

9. 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

10. The delegate found that Ajdan was incorporated on August 10, 2007. Ms. Burmatoff was its sole director. The delegate found that Ms. Burmatoff was a Director between December 17, 2008, and June 16, 2009, when Mr. Selland's wages were earned or should have been paid.
11. The delegate calculated Mr. Selland's wages and vacation pay for two months to be \$2,306.56. She also determined that Ms. Burmatoff, as the sole director of Ajdan, was the person who hired Mr. Selland, directed his work, issued his cheques and issued his letter of termination. Therefore, the delegate determined that Ms. Burmatoff was personally liable for the administrative penalties assessed against Ajdan.

ARGUMENT AND ANALYSIS

12. 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.
13. 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*.
14. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
15. 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.

16. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
17. 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".

18. 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.
19. 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.
20. Ms. Burmatoff did not communicate her intention to file an appeal of the Determination at any time.
21. Mr. Selland is owed wages from June 2009. I find there would be some prejudice to him if an extension were granted.
22. Finally, I am unable to find that there is a strong *prima facie* case in Ms. Burmatoff's favour. Although she submitted new evidence on appeal, this evidence does not meet the Tribunal's test for new evidence.
23. 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.
24. 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.
25. 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.
26. I deny Ms. Burmatoff's applications.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal