

An appeal

- by -

Security Pro Management Inc.
("Security Pro")

- 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: David B. Stevenson

FILE No.: 2012A/63

DATE OF DECISION: August 22, 2012

DECISION

SUBMISSIONS

Jesse Keller	on behalf of Security Pro Management Inc.
Roger Abela	on his own behalf
Justin Malzahn	on his own behalf
Cody Nelson	on his own behalf
Steven Wraith	on his own behalf
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Security Pro Management Inc. (“Security Pro”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 24, 2012.
2. The Determination was made by the Director on complaints filed by Roger Abela, Anthony LaCroix, Justin Malzahn, Cody Nelson, and Steven Wraith (collectively, “the complainants”), who alleged Security Pro had contravened the *Act* by failing to pay regular wages, overtime, statutory holiday pay, annual vacation pay, and compensation for length of service. The Determination found that Security Pro had contravened Part 3, sections 18 and 27, Part 4, section 40, Part 5, section 45, Part 7, section 58 and Part 8, section 63 of the *Act* and ordered Security Pro to pay the complainants \$10,326.50, an amount which included wages and interest.
3. The Director also imposed administrative penalties on Security Pro under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$2,000.00.
4. The total amount of the Determination is \$12,326.50.
5. Security Pro has appealed the Determination on the ground the Director failed to observe principles of natural justice in making the Determination. Security Pro is seeking to have the Determination referred back to the Director. The appeal was filed late and Security Pro has applied to have the time period for filing the appeal extended. This decision deals with that application.
6. The Tribunal has discretion to choose the type of hearing for deciding an appeal and has decided the issue raised in this appeal can be decided from the written submissions and the material on the section 112(5) “record”, together with the submissions of the parties.

ISSUE

7. The issue in this appeal is whether the Tribunal should extend the appeal period. In correspondence dated June 21, 2012, the Tribunal requested submissions on that issue. Submissions have been received. If the Tribunal decides to accept the appeal, the substantive issue raised in the appeal is whether the Director failed

to observe principles of natural justice in making the Determination. As indicated by the Tribunal in its June 21, 2012, letter, if the appeal is accepted, the parties will be asked for further submissions on the merits of the appeal.

THE FACTS

8. The facts relating to the issue of timeliness are as follows:
 1. Five former employees of Security Pro filed complaints with the Employment Standards Branch alleging they were owed wages.
 2. The majority of the complainants filed their respective complaints with the Director during the period December 22, 2010 and January 26, 2011. Roger Abela filed his complaint with the Director on March 24, 2011.
 3. The Determination sets out, at page R3, the communications the Director had with Security Pro concerning the complaints:

A letter advising of the investigation process was sent to the employer, along with a demand for payroll records on January 27, 2011. On February 3, 2011 Mr. Jesse Keller, the sole owner/director of SPM, contacted the branch by telephone to discuss the allegations. This telephone conversation was followed with a letter from Mr. Keller to the branch, dated February 10, 2011.

On February 17, 2011 an e-mail was sent to Mr. Keller requesting information pertaining to the disposition of the contracts from Highland to SPM. Mr. Keller responded by e-mail on February 25, 2011.

Finally, a preliminary findings letter was sent by both regular and registered mail to SPM on October 11, 2011. The registered mail was returned to the Branch marked “unclaimed”. The regular mail was not returned. On November 1, 2011 I received an e-mail from Mr. Keller advising he had received the letter and requesting that I call him. On November 3, 2011 I returned his call to the number provided and left a voice mail message for him. I did not hear back from him and left a second message at the same number on November 9, 2011. As of this date [January 24, 2012], I have not heard back from the employer.
 4. The Determination was issued on January 24, 2012. It was sent to Security Pro and Mr. Keller by registered mail to the same address to which all other correspondence relating to the complaints, including the preliminary findings letter, had been sent. It was also sent by regular mail to Mr. Keller at what appears to be a home address and which is the same address that appears on this appeal.
 5. This appeal was filed with the Tribunal on June 19, 2012.
 6. The time period in the *Act* for filing an appeal of the Determination expired on March 2, 2012.
 7. The appeal is grounded in an alleged failure by the Director to observe principles of natural justice in making the Determination.

ARGUMENT

9. In this appeal, Security Pro has provided very little in the way of explaining a delay of more than three and one-half months in filing this appeal. In response to the June 21, 2012, letter from the Tribunal, Mr. Keller, on behalf of Security Pro infers he first found out about “this whole situation” on Monday, June 18, 2012, when a bailiff appeared at his door seeking to enforce the Determination. In his final reply, and primarily in

response to the submission of the Director on whether to extend the time for filing the appeal, Mr. Keller says he is not aware of having received the preliminary findings letter, cannot remember sending an e-mail to the Director in response to that letter (although he accepts he did), is unclear how he owes so much money and cannot recall receiving voice messages from the Director in November 2011.

10. The Director opposes an extension of the time for filing the appeal, as do all of the complainants who filed a reply.

ANALYSIS

11. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

12. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:

1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
2. There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party and the Director have been made aware of the intention;
4. The respondent party will not be unduly prejudiced by the granting of an extension;
5. There is a strong *prima facie* case in favour of the appellant.

13. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.

14. The first point I would make in respect of this application is that section 122(1) of the *Act* deems the Determination to have been served on Security Pro and Mr. Keller. The assertion by Mr. Keller that he was not aware of the Determination is not a factor that either adds to or derogates from the request to extend the appeal period.

15. Applying the above criteria, I find, first, that the delay was lengthy – more than three and one-half months. No reasonable explanation for that delay has been provided. For the reasons expressed in the Director's response, I am inclined to reject Mr. Keller's assertion that he was not aware a Determination had been made against Security Pro.

16. Second, there is no indication of an ongoing intention to appeal the Determination; the attempt to generate some review of the Determination appears to have been precipitated by the Director enforcing the Determination.

17. Third, a continuing delay in enforcing the entitlements in the *Act* in favour of the complainants operates against a fair and efficient resolution of their claims and is unduly prejudicial to their established rights under the statute.
18. Fourth, the *prima facie* case set out in the appeal is very weak. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds for appeal chosen against long standing principles that apply in the context of those grounds. As noted by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11:
- . . . this inquiry [into whether there is a *prima facie* case] flows from the section 2 purposes of the Act and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.
19. In this case, the relevant principles would include the evidentiary burden requiring a party alleging a denial of natural justice to provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. The appeal is devoid of the necessary evidence to satisfy that burden. It is apparent from the Determination and the material in the record that Security Pro was provided with the information relating to the claims and was given the opportunity to respond to them required by the *Act* and principles of natural justice.
20. At its core, however, the appeal raises matters in respect of which the Tribunal has no authority on appeal – challenging findings of fact made in the Determination, including the finding that Roger Abela was an employee of Security Pro, and was owed wages, and the calculations of wages owed to other complainants. The appeal cannot possibly succeed on the basis of what has been submitted by Security Pro and it meets no purpose to allow it to proceed.
21. I am not persuaded there is any basis on which the time limit for filing an appeal should be extended in this case.
22. For the above reasons, the application to extend the appeal period is denied. The appeal is dismissed.

ORDER

23. Pursuant to section 115 of the *Act*, I order the Determination dated January 24, 2012, be confirmed in the amount of \$12,326.50, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal