

An appeal

- by -

Jesse Keller a Director or Officer of Security Pro Management Inc.  
(“Mr. Keller”)

- 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/64

**DATE OF DECISION:** August 22, 2012

## DECISION

### SUBMISSIONS

Jesse Keller	on his own behalf a Director or Officer 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 is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Jesse Keller (“Mr. Keller”) of a Determination that was issued on March 2, 2012, by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Mr. Keller was a director of Security Pro Management Inc. (“Security Pro”), an employer found to have contravened provisions of the *Act*, at the time wages owed to Roger Abela, Anthony LaCroix, Justin Malzahn, Cody Nelson, and Steven Wraith (collectively, “the complainants”) were earned or should have been paid and as such was personally liable under Section 96 of the *Act* for an amount of \$9,980.67.
2. In his appeal, Mr. Keller says the Director failed to observe principles of natural justice in making the Determination. He seeks to have the Determination referred back to the Director.
3. The appeal was filed late and Mr. Keller is seeking to have the time period for filing an appeal extended. This decision deals with that request.
4. The Tribunal has reviewed the appeal, the submissions and the material submitted by the parties, including the Section 112 (5) “record” filed by the Director, and has determined this appeal can be decided from the material in the file.

### ISSUE

5. 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 whether the appeal period should be extended. Submissions have been made on that matter. If the Tribunal decides to accept the appeal, the issue raised in the appeal is whether the Director failed to observe principles of natural justice in making the Determination against Mr. Keller. 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

6. The facts relating to the issue of timeliness are as follows:
  1. On January 24, 2012, the Director issued a Determination (the “corporate Determination”) against Security Pro Management Inc. (“Security Pro”). The corporate Determination included notice that should Security Pro wish to appeal the Determination, such appeal was required to be delivered to the Tribunal no later than 4:30 pm on March 2, 2012.
  2. No appeal of the corporate Determination was filed by that time.
  3. There has been a late filing of the corporate Determination and an application to extend the time period for filing. The application has been denied and the appeal dismissed.
  4. The corporate Determination, a copy of which was sent to Mr. Keller, included a notice to him, as the sole director of Security Pro, explaining his potential personal liability under section 96 of the *Act*.
  5. A search of Alberta Corporations conducted by the Director in January 2011 showed Security Pro was incorporated on March 17, 2010, and that Mr. Keller was listed as the sole director of the company between August 1, 2010, and January 3, 2011, when the wages owed were earned or should have been paid.
  6. Mr. Keller participated in the investigation on behalf of Security Pro of the complainants’ claims by way of correspondence, e-mails and phone calls with the Director.
  7. The Determination under appeal here was issued on March 2, 2012, and was sent by registered and regular mail to Mr. Keller to the same address for Security Pro to which all other correspondence relating to the complaints was sent and to what appears to be a home address for Mr. Keller, which is the same address for Mr. Keller that appears on this appeal.
  8. This appeal was filed with the Tribunal on June 19, 2012.
  9. The time period for filing an appeal of the Determination under appeal here expired on April 10, 2012.
  10. The appeal is grounded in an alleged failure by the Director to observe principles of natural justice in making the Determination.

## ARGUMENT

7. Mr. Keller has provided very little in the way of explaining a delay of more than two and one-half months in filing this appeal. In response to the June 21, 2012, letter from the Tribunal, Mr. Keller says the “this whole situation” was only brought to his attention on Monday, June 18, 2012, when a bailiff appeared at his door seeking to enforce the Determination. In his final reply, which primarily responds 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.
8. The Director opposes an extension of the time for filing the appeal, as do all of the complainants who filed a reply.

## ANALYSIS

9. As expressed in the application to extend the time for filing an appeal of the corporate Determination, 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.
10. 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.
11. 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.
12. 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 Mr. Keller. The assertion that he was not aware of the Determination, even if believed, is not a factor that either adds to or derogates from the request to extend the appeal period.
13. Applying the above criteria, I find, first, that the delay was lengthy – more than two 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 him.
14. Second, I find 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.
15. Third, in my view 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.
16. Fourth, I find there is no *prima facie* case set out in the appeal. 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 appeal 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.

17. In this case, the relevant principles would include, first, the evidentiary burden that requires a party alleging a denial of natural justice to provide some evidence in the appeal to support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. The appeal is devoid of the necessary evidence necessary to satisfy that burden. It is apparent from the Determination and the material in the record that Keller was provided with the information relating to his potential liability as a director or officer of Security Pro and was given the opportunity required by the *Act* and principles of natural justice to respond to that matter.
18. As well, the appeal has failed completely to address the issues which a person challenging a director/officer Determination is limited to arguing under section 96, which are whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. The arguments that question the correctness of the corporate Determination may not be raised in this appeal.
19. Specifically, Keller may not question the validity of the findings by the Director that Security Pro was Roger Abela's employer, that Security Pro contravened the *Act* or that the wage calculations made by the Director were correct. The conclusions reached by the Director on all of these matters were based on findings of fact made in the corporate Determination that may not be challenged in this appeal.
20. Accordingly, this appeal, simply put, cannot possibly succeed and no purpose exists for allowing it to proceed.
21. For the above reasons, I am not persuaded the time period for filing this appeal should be extended. The application to extend the time for appeal is denied and the appeal is dismissed.

## **ORDER**

22. Pursuant to section 115 of the *Act*, I order the Determination dated March 2, 2012, be confirmed in the amount of \$9,980.67, together with any interest that has accrued under Section 88.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**