



An appeal

- by -

Chubb Richards operating as
Brian's Tree Service and Window Washing & Towing
("Brian's")

- 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: Carol L. Roberts

FILE No.: 2006A/78

DATE OF DECISION: August 4, 2006

DECISION

SUBMISSIONS

Chubb Richards	on behalf of Brian's Tree Service and Window Washing.
Kathleen Demic	on behalf of the Director of Employment Standards
Garry Kuse	on his own behalf
Neil Moncrieff	on his own behalf

OVERVIEW

1. This is an appeal by Chubb Richards operating as Brian's Tree Service and Window Washing ("Brian's") pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards ("the Director") issued November 4, 2005.
2. Laura Sommerfeld, Neil Moncrieff and Gary Kuse ("the complainants") filed complaints against Brian's, claiming unpaid wages, vacation pay and overtime.
3. The Director's delegate investigated the complaints. The delegate noted that Mr. Richards had participated in the investigation only briefly, confirming that Mr. Moncrieff and Ms. Sommerfeld had performed work before hanging up the telephone. His position was that the complainants were independent contractors.
4. Mr. Richards failed to respond to letters outlining the nature of the complaints, as well as a demand for payroll records. After considering all the evidence, the delegate issued a Determination in favour of the complainants. She concluded that the complainants were employees rather than independent contractors, and entitled to wages and interest in the total amount of \$1,282.77. The delegate also imposed administrative penalties in the amount of \$2,000.00.
5. Mr. Richards filed an appeal with the Tribunal on June 16, 2006 alleging that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
6. Pursuant to section 112 of the Act, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Brian's appeal period expired December 13, 2005.
7. These reasons address only the timeliness of Brian's appeal, and are based on the written submissions of the parties.

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.

ARGUMENT

9. Mr. Richards' submissions are somewhat lacking in detail, and, with respect to the reply submission, entirely irrelevant to the timeliness issue. Nevertheless, I understand Mr. Richards to say that he did not receive the Determination until March 10, 2006. While he acknowledges having telephone conversations with the delegate in the fall, he says that a family member was ill and he was out of the province a significant amount of time to deal with personal matters. Given that Mr. Richards refers to a time period before the Determination was issued, I infer that these comments relate to the appeal proper rather than the timeliness issue, and have not considered them further.
10. Mr. Richards says that he only became aware of the fact a Determination had been made against him when the Branch began enforcement proceedings in January, at which time Mr. Richards says he paid the full amount of the Determination into "a trust account". He also says that he was in continuous contact with Employment Standards Branch in Kelowna and its lawyer between March and April when things were "mutually adjourned".
11. Mr. Richards says that the Determination is based solely on information provided by the complainants, which was fabricated, and that he advised the delegate in the fall that the information she sought was available. He says that he was not given an opportunity to provide it. Once again, although these comments relate to the Determination proper, they are relevant to an assessment of whether Mr. Richards has a *prima facie* case.
12. Mr. Richards also submits that the complainants were contractors, and asked to be treated as such. He also contends that the complainants' fabricated their hours of work, stating that Ms. Sommerfeld's records did not match her daily time sheets.
13. The delegate provided the section 112(5) "record", documents relating to Mr. Richards' address as well as legal documents submitted by Mr. Richards in his application to have the payment hearing adjourned. She submits that the Determination was served on Mr. Richards. The delegate provided a letter from Mr. Richards' landlord confirming that she observed him on a near daily basis from November 2002 until March 2006 at the address the Determination was mailed to.
14. The delegate further submits Mr. Richards has been aware of the complaints since August 2005 and chose not to participate in the complaint resolution process. She says that the complainants have been waiting for almost one year for a decision regarding their claim for unpaid wages, and contends that the extension should be denied.
15. Mr. Kuse and Mr. Moncrieff both oppose an extension of time being granted.

THE FACTS AND ANALYSIS

16. 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 15 days of service, if served by registered mail, or 8 days after service, if served personally.
17. These time limits are in keeping with one of the purposes of the Act. Section 2(d) provides that one of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act.
18. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
19. 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.
20. These criteria are not exhaustive.
21. I decline to grant Mr. Richards' request for an extension for the following reasons.
22. I am not persuaded that there is a reasonable and credible explanation for Mr. Richards' failure to request an appeal within the statutory time limit. The record indicates that the Determination was sent to Mr. Richards' business and residential address on November 4, 2005. I am satisfied that this is the address Mr. Richards resided at and conducted his business from based on the letter from his landlord and the record of Residential Tenancy proceedings. On November 7, 2005, Canada Post left a card in Mr. Richards' mail notifying him about the registered mail. The Determination was unclaimed. Although Mr. Richards contends he was not aware of the Determination, I find that it was received by November 11, 2005, the date Canada Post indicates the notice was delivered. Given that Mr. Richards provided no evidence other than vague assertions that he was out of the province "in the fall" to frequently to care for an ill family member, I infer that he deliberately chose not to pick up the registered mail. Given that he was aware that the Branch was investigating the complaints, it is not likely the Determination would have come as a surprise.
23. When the Branch began collection proceedings in January following the expiration of the appeal period, Mr. Richards was served with a notice of seizure by the bailiff. Mr. Richards then made a partial payment of the judgement, which I infer is his reference to money being placed in a "trust account". Although Mr. Richards was aware, or could have made himself aware of the Determination in January, he apparently chose not to do so.

24. I find no evidence that Mr. Richards had a genuine, ongoing intention to file an appeal of the Determination even after he was notified of the Director's intent to collect on the Determination. Rather, the evidence discloses that Mr. Richards filed an application with the Supreme Court to set aside the Determination.
25. Mr. Richards apparently obtained a filed copy of the Determination on March 10, 2006 from the court registry. On May 15, 2006, the Supreme Court stayed the Director's collection proceedings until June 16 in order to allow Mr. Richards time to appeal the Determination. I note that Mr. Richard's appeal was filed on June 16, 2006, the last day provided by the Court.
26. Although none of the parties made submissions on the issue of prejudice, the complaints were originally filed over one year ago, and I can infer a certain amount of prejudice simply by reason of the delay.
27. Furthermore, I find no *prima facie* case in Mr. Richards's favor.
28. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
29. Mr. Richards' appeal identifies all three statutory grounds of appeal. However, there is nothing in his submissions that discloses any evidence supporting either the first or second grounds. Mr. Richards merely repeats his argument that the complainants were contractors without indicating how the delegate erred in law in concluding they were employees. There is also absolutely no merit to Mr. Richards' submission that he was not afforded natural justice. He acknowledged that he knew about the complaints and the record discloses that he was given every opportunity to respond.
30. Although Mr. Richards claims there is new evidence that was not available at the time the Determination was being made, it is clear that all of the "new evidence" was information that ought to have been provided to the delegate during the investigation. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* BC ESTD# 268/96 and *Kaiser Stables Ltd.* BC EST #D058/97).

ORDER

31. Pursuant to section 109(1)(a) of the *Act*, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal