

An appeal

- by -

Overseas Career and Consulting Services Ltd. carrying on business as Overseas
Immigration
("Overseas Immigration")

- 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.: 2015A/80

DATE OF DECISION: August 13, 2015

DECISION

SUBMISSIONS

Kuldeep Kumar Bansal

on behalf of Overseas Career and Consulting Services Ltd.
carrying on business as Overseas Immigration

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Overseas Career and Consulting Services Ltd. carrying on business as Overseas Immigration (“Overseas Immigration”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 20, 2015.
2. The Determination found that Overseas Immigration had contravened Part 3, sections 18 and 27 of the *Act* and Part 8, section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Young Gil Jun (“Mr. Jun”) and ordered Overseas Immigration to pay the Mr. Jun wages in the amount of \$2,124.63 and to pay administrative penalties under section 29 of the *Regulation* in the amount of \$1,500.00. The total amount of the Determination is \$3,624.63.
3. Overseas Immigration appeals the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Overseas Immigration seeks to have the Determination varied, cancelled and/or referred back to the Director.
4. A form of appeal was received by the Tribunal on June 8, 2015. The appeal was filed outside of the statutory time limit set out in subsection 112(3) of the *Act* and was incomplete. On June 11, 2015, the Tribunal notified Overseas Immigration of the deficiencies in the appeal. These were addressed by Overseas Immigration and the appeal resubmitted to the Tribunal on June 16, 2015. The appeal form does not contain a request for an extension of the statutory time period for filing an appeal, although the letter attached to the resubmitted appeal form contains a paragraph providing reasons for the late filing.
5. In correspondence dated June 18, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Overseas Immigration, who has been given the opportunity to object to its completeness. There has been no objection to the completeness of the “record” and, accordingly, the Tribunal accepts it as complete.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal by Overseas Immigration and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

8. I am deciding whether Overseas Immigration should be granted an extension of the appeal period or whether the appeal should be dismissed under any of, section 114(1) (b), (f) and (h) of the *Act*. If I decide all or part of the appeal should not be dismissed under section 114(1), Mr. Jun will, and the Director may, be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

9. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

10. The facts relating to the issue under consideration are as follows:
- 1. Overseas Immigration operates an immigration and recruiting consulting service;
 - 2. Mr. Jun was employed as the business's accountant from November 1, 2012, to June 6, 2014;
 - 3. The complaint of Mr. Jun was filed on September 8, 2014;
 - 4. On December 14, 2014, Overseas Immigration was notified of the complaint and requested to contact the office of the Director to discuss it;
 - 5. There was no response from Overseas Immigration by January 4, 2015, and on January 5, 2015, the Director sent a letter to Overseas Immigration detailing the issues raised in the complaint and a Demand for Employer Records for Mr. Jun;
 - 6. The letter requested a response by January 16, 2015;
 - 7. There was no response by that date and on January 21, 2015, the Director telephoned Overseas Immigration and talked briefly with Kuldeep Kumar Bansal ("Mr. Bansal"), who is listed as the sole director of Overseas Immigration;
 - 8. Mr. Bansal agreed in that discussion to immediately forward a cheque for the amount claimed by Mr. Jun in his complaint;
 - 9. No cheque was received;
 - 10. There were additional conversations with Mr. Bansal, with more assurances of payment, but no cheque was provided;
 - 11. The Director sent preliminary findings to Overseas Immigration on February 24, 2015,

12. Overseas Immigration was advised in the preliminary findings letter that the Director would call to discuss its contents on March 2, 2015;
13. The Director called on that date, but Mr. Bansal was unavailable;
14. On March 5, 2015, the Director received a response to the preliminary findings letter from Cynthia Hirak, a paralegal at Overseas Immigration's office;
15. Further information was requested by the Director from Overseas Immigration;
16. In an email dated March 10, 2015, Ms. Hirak provided a chronology of events relating to the termination of Mr. Jun in June 2014;
17. Further attempts at communication with Overseas Immigration were unsuccessful, as were requests for further information;
18. The Determination and the reasons for Determination were issued on March 20, 2015;
19. The time limited for filing an appeal expired on April 27, 2015;
20. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
21. An incomplete appeal was delivered to the Tribunal on June 8, 2015;
22. The appeal was completed and resubmitted to the Tribunal on June 16, 2015;
23. Mr. Jun was given two weeks' written notice of termination on May 15, 2014;
24. On May 30, 2014, which was to be his last day worked, his last work day was extended to June 6, 2014;
25. The Director found the written notice of termination given to Mr. Jun on May 15, 2014, was of no effect, as he had continued to work past the end of the notice period and that he was entitled to length of service compensation;
26. Mr. Jun worked 40 hours in the week June 2 – 6, 2014, but was not paid for all the wages he earned in that period nor was he paid annual vacation pay on the wages earned in that period;
27. The Director found that Overseas Immigration had failed to provide Mr. Jun with a wage statement for the last two pay periods of his employment;
28. The Director found Overseas Immigration had failed to respond to the Demand for Employer Records issued on January 5, 2015.

ARGUMENT

11. Overseas Immigration has submitted an appeal that attaches two emails sent to the Director during the complaint investigation process as its "reasons for appeal", and summarizes those reasons as follows:

... we do not feel that we should pay any further wages nor compensation for an employee for which was terminated and not authorized to return to work. We have also filed a complaint with Service Canada upon knowledge of Mr. Jun completing and signing his own Record of Employment which is illegal to produce fraudulent document as well as assaulting an employee of the company.
12. A copy of Mr. Jun's Record of Employment is also attached to the appeal.

13. In its reasons explaining the late appeal. Overseas Immigration says the appeal was submitted with other documents to the office of the Director and it was under the assumption the Director had received it, as the other documents were processed.

ANALYSIS

14. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: see 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.

15. 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:

- i) there is a reasonable and credible explanation for the the [sic] failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
- iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

16. 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. The Tribunal has required “compelling reasons”: *Re Wright*, BC EST # D132/97. There are no unique criteria in this case.

17. The delay in filing this appeal is almost two months. Such delay is unacceptable. I find nothing in the appeal that satisfactorily explains such delay. I do not accept that the reasons provided for the late filing of the appeal are reasonable or credible. The Determination contains information indicating the last day for delivering an appeal and that it must be delivered to the Tribunal. That information is prominently displayed on the Determination. The web site for the Tribunal is provided as a source for acquiring information on how to appeal. Also, at the top of the Appeal Form, again prominently displayed, provides further notice that the Appeal Form must be delivered to the Tribunal and contains an encouragement to a party completing the Appeal Form to “read the Guide to the Appeal Form” that is provided with the Appeal Form. One would need to be careless in the extreme or completely disinterested in ensuring the correctness of an appeal to miss the filing requirements and statutory obligations.

18. Even when first delivered to the Tribunal, the appeal was deficient. It did not include a copy of the reasons for Determination, which is a statutory requirement set out in section 112(2)(a)(i.1) of the *Act*, did not provide written reasons for the appeal, did not include supporting documents and did not include written reasons for the late filing. These are significant deficiencies that reinforce the above comments and concern. The above facts and circumstances strongly suggest no genuine intention to appeal the Determination.

19. One of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I am satisfied there is no *prima facie* case raised in this 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 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.
20. I also note that the presumptive merits of an appeal, listed in section 114(1)(f) of the *Act* as whether there is a reasonable prospect of the appeal succeeding, stands as a distinct consideration on which an appeal may be dismissed under section 114, which is set out above in its entirety. I will consider the effect of this part of section 114 later in this decision.
21. The other factors listed as criteria for considering whether to extend the period for filing are neutral, neither supporting nor assisting an extension of time.
22. Overall, Overseas Immigration has not shown there is a reason to extend the time period for filing the appeal. I dismiss the appeal on this basis.
23. For completeness, however, I will add that I am not persuaded the appeal has any presumptive merit. The appeal does not present the slightest support for the grounds of appeal chosen by Overseas Immigration. The findings and conclusions stated in the Determination are well grounded in the evidence provided to the Director and in the provisions of the *Act*. The appeal does not provide any basis on which the Tribunal would be justified interfering with the findings and conclusions made by the Director.
24. I also add that, at its core, this appeal is of the type that has been consistently rejected by the Tribunal: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97. It is apparent that Overseas Immigration pursued a course of minimal participation and cooperation with the Director's investigation; it ignored a Demand for Employer Records, and now, after an unfavourable Determination, seeks to have the Tribunal interfere with it. The Tribunal will rarely consider an appeal in such circumstances. The rationale for adopting such an approach is grounded in fairness and efficiency; it is neither fair nor efficient for a party to refuse or fail to participate in the complaint resolution process then seek a review of the resulting decision of the Director when a Determination is issued which they do not wish to accept.
25. The appeal is dismissed.
26. In sum and in the circumstances, it would be inconsistent with the purposes and objectives of the *Act* to allow the appeal to proceed. I do not need to fully address the failure to comply with the all of the requirements in section 112(2) in filing the appeal.

ORDER

27. Pursuant to section 115 of the *Act*, I order the Determination dated March 20, 2015, be confirmed in the amount of \$3,624.63, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal