

An appeal

- by -

Imagination (Canada) Corporation
(“Imagination”)

- 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.: 2017A/66

DATE OF DECISION: August 14, 2017

DECISION

SUBMISSIONS

Hansrudolf Tschudi

on behalf of Imagination (Canada) Corporation

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Imagination (Canada) Corporation. (“Imagination”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 3, 2015.
2. The Determination found Imagination had contravened Part 3, sections 17 and 18 and Part 8, section 63 of the *Act* in respect of the employment of Xuewen (Raymond) Liang (“Mr. Liang”) and ordered Imagination to pay Mr. Liang wages in the amount of \$37,750.24, an amount that included concomitant vacation pay and interest under section 88 of the *Act*. The Director imposed administrative penalties for contraventions of the *Act* in the amount of \$1,500.00.
3. Imagination seeks to appeal the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. Imagination also grounds the appeal in evidence becoming available that was not available at the time the Determination was being made.
4. The appeal was delivered to the Tribunal on April 27, 2017, more than twenty-five months after the time period for filing an appeal of the Determination had expired. Imagination has applied under section 109 of the *Act* for an extension of the appeal time period.
5. In correspondence dated June 7, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, 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 Imagination. It has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, any additional evidence allowed to be included with the appeal 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, for any of the reasons listed in the subsection, which reads:

- 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 any 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 that 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. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Liang will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether Imagimation should be granted an extension of the statutory time period for filing an appeal or if the appeal should be dismissed as untimely, and, even if an extension is allowed, whether there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

THE FACTS

10. At the time the Determination was issued, Imagimation operated a software business. Mr. Liang was employed by Imagimation as an Internet Developer from March 3, 2004, to August 23, 2013, at an annual salary of \$62,000.
11. Mr. Liang claimed he was owed nearly five months' wages and compensation for length of service. The complaint was timely.
12. The Director conducted a complaint hearing. It was agreed between Imagimation and Mr. Liang that, in the event Imagimation was found liable for regular wages to Mr. Liang, the amount of regular wages owed was \$24,558.35.
13. The Director found Imagimation liable for regular wages in the amount agreed and for compensation for length of service in the amount of \$9,538.46.
14. The Determination was issued February 3, 2015, and the record indicates a copy of it was delivered by registered mail to the place of business of Imagimation and to Hansrudolf Tschudi ("Mr. Tschudi"), who was listed in the corporate record as its sole director at the relevant time.
15. The statutory time period for an appeal under the *Act* expired on March 13, 2015. No appeal of the Determination was filed within the statutory time period.

ARGUMENT

16. On the merits of its appeal, Imagimation submits it has been conducting an investigation of Mr. Liang that has been ongoing for three years, during which time, Imagimation says it has uncovered evidence that Mr. Liang has failed to comply with his employment agreement, has worked on third party projects and on his side business while he was supposed to be working for Imagimation, has committed breaches of trust,

fraud and theft against Imagimation, has committed fraud against the Director and the government of Canada and is a cyber- criminal.

17. In respect of the request for an extension of the appeal period, Imagimation submits neither it nor Mr. Tschudi ever received a copy of the Determination and the first it was aware of the Determination having been made was January 17, 2017, through a court bailiff seeking to execute a writ of seizure and sale. I note, parenthetically, that even if the operative date for the commencement of the time for filing an appeal of the Determination, might be considered to be January 17, 2017, the appeal would still be more than two months late.

ANALYSIS

18. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with 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.

19. 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 must be satisfied to grant an extension:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and on-going *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.

20. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.

21. In this case, I find the length of the delay to be unacceptable. Imagimation has provided no reasonable explanation for the delay. In considering the delay, it is unnecessary to consider the January 17, 2017, date as I do not accept that Imagimation was unaware of the Determination. The record shows it was sent via registered mail to the business address of Imagimation and to Mr. Tschudi. The Determination was not, as seems to be suggested in the appeal submission, sent by regular mail. The record does not indicate the Determination was undelivered and returned to the Director and on the evidence in the record, it defies belief that Imagimation was unaware of it.

22. The circumstances indicate Imagination had formed no intention to appeal the Determination until collection proceedings were initiated against it in January 2017.
23. While not necessary for the purpose of reaching a conclusion on the request for an extension of the appeal period in this case, for the sake of completeness, and for the purpose of section 114(1)(f), I will comment on the *prima facie* strength of the case presented by Imagination in this appeal. When considering this criterion in a request for an extension of the time period for filing an appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under section 114(1)(f) is similar.
24. I find there is absolutely no merit to the appeal. Even if I accepted the “new evidence” provided, this material does not explain or excuse the failure of Imagination not to pay Mr. Liang any wages for nearly five months. If the Determination did not express it clearly enough for Imagination and Mr. Tschudi, there is simply no excuse or reason, short of circumstances described in section 22 – which are not present in this case – for refusing to pay an employee wages earned. In this case, Imagination and Mr. Liang agreed there were regular wages outstanding in the amount of \$24,558.35. During the complaint process, Imagination simply took the position that, for reasons it did not prove, it did not have to pay Mr. Liang the wages he had earned. Neither does the “new evidence” have any effect on or alter the basis upon which the Director found Mr. Liang was entitled to compensation for length of service.
25. The request for an extension of the time limit for appeal is denied. The delay in filing the appeal is unacceptably long. There is no acceptable reason given for the delay. The appeal on its face is devoid of merit. It has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(b) and (f) of the *Act*.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated February 3, 2015, be confirmed in the amount of \$39,250.24, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal