

An appeal

- by -

Iqbal Saini
(“Mr. Saini”)

- 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.: 2013A/71

DATE OF DECISION: November 8, 2013

DECISION

SUBMISSIONS

Darshen Narang

on behalf of Iqbal Saini

OVERVIEW

1. This decision addresses an appeal by Iqbal Saini (“Mr. Saini”) made under Section 112 of the *Employment Standards Act* (the “*Act*”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 14, 2013.
2. The Determination was made in respect of a complaint filed by Mr. Saini who alleged his former employer, Master-Halco Corp. (“MHC”), had contravened the *Act* by failing to pay length of service compensation.
3. The Determination found MHC had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. Mr. Saini has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. He has also grounded his appeal in new evidence coming available that was not available at the time the Determination was being made.
5. The appeal was filed late, and Mr. Saini has requested the Tribunal extend the time period for filing an appeal.
6. In correspondence dated September 25, 2013, and October 30, 2013, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
7. The Tribunal has 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 appeal and written submission made by Mr. Saini and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1), 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. If satisfied the appeal period should be extended and the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, MHC will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

9. There are two issues to be considered at this stage of the proceedings: first, whether the Tribunal should extend the appeal period; and second, whether, in any event, there is any reasonable prospect the appeal will succeed.

THE FACTS

10. The facts relating to the issue of the timeliness of the appeal are as follows:
1. The Determination was issued on August 14, 2013.
 2. The time limited for filing expired on September 20, 2013.
 3. The appeal was not delivered to the Tribunal until September 23, 2013.
11. The facts relating to the merits of the appeal are as follows:
1. MHC operates a wholesale fencing business.
 2. In March 2012, Mr. Saini was employed as a “Weaver” at a rate of \$26.00 an hour, having accepted a transfer to that position in November 2011.
 3. At the time Mr. Saini accepted the transfer, he was conducting a gate business of his own after his working hours.
 4. On taking the position, Mr. Saini accepted terms and conditions for the position that were reduced to writing and signed by him and a representative of MHC, Mr. Lodewykx.
 5. The document included a provision relating to conflict of interest.
 6. At the time he took the job, Mr. Saini was conducting a business called AJH Fencing & Welding Ltd. (“AJH”)
 7. Representatives of MHC gave evidence, which the Director accepted, that in the meeting where he signed the document, Mr. Saini was told that MHC considered his business was in conflict with the business of MHC and that he would have to shut it down. Mr. Saini agreed to do that.
 8. At some unspecified time after the document was signed, it was brought to the attention of representatives of MHC that Mr. Saini was still operating his business. These representatives of MHC took steps to confirm whether this information was correct and decided it was.
 9. As a result, Mr Saini was required to attend a meeting at which he was asked several questions concerning his business.
 10. The evidence before the Director, and accepted by him, was that Mr. Saini confirmed he was still operating the business but was only doing “ornamental work”.
 11. Mr. Saini was told MHC considered the performance of this work had placed him in a conflict of interest and in breach of his employment agreement.

12. Mr. Saini was terminated by MHC on March 29, 2012, for what MHC perceived was a conflict of interest.
13. The Director held a complaint hearing on August 14, 2013, and heard evidence from two witnesses on behalf of MHC and from Mr. Saini on his own behalf.
14. The Director found Mr. Saini was in a conflict of interest, in breach of the conflict of interest provision in his terms of employment and that HMC was justified in terminating him.
15. As a result of those findings, the Director determined MHC had discharged its statutory liability under section 63 of the *Act*.

ARGUMENT

12. In respect of the late filing of the appeal, Mr. Saini says three different attempts were made to fax the appeal package, but due to a fax error the material only got through on the fourth attempt, at which time it was about six minutes late. The submission does not specify the date on which the fax delivery was unsuccessfully attempted then successfully completed.
13. In respect of the chosen grounds of appeal, Mr. Saini submits the Director erred in law by making a decision on hearsay evidence and without looking at his employment contract with MHC. He says the Director failed to observe principles of natural justice by making the Determination on hearsay evidence. He has attached 18 pages of financial documents for AJH which he suggests were not provided at the complaint hearing because he had been told at the mediation session there was “no need to submit any supporting documents”.
14. The appeal does not identify what evidence is being referred to as “hearsay” or, as a matter of law, why, even if it was “hearsay”, it was not open to the Director to receive and use the impugned evidence. Nor does the appeal address the inclusion of the additional documents in the context of the requirements for adding new evidence on appeal.

ANALYSIS

15. 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.

16. 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 failure to request an appeal within the statutory 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.
17. 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.
18. Other than to provide an explanation for the delay, Mr. Saini has not attempted to demonstrate the existence of other relevant criteria and, while the delay in this case is not significant, I do not find the circumstances in which the delay occurred to be particularly compelling.
19. In any event, one of the considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. The presumptive merits of an appeal also stand as a consideration on which an appeal may be dismissed under section 114(1) of the *Act*.
20. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
 - (b) *the director failed to observe the principles of natural justice in making the determination;*
 - (c) *evidence has become available that was not available at the time the determination was being made.*
21. It is well established that the grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
22. Mr. Saini argues the Director committed an error of law by making a decision on hearsay evidence. I have two major difficulties with this argument. First I am unable to identify any “hearsay evidence” that was relied upon by the Director in making the Determination. Mr. Saini has not directed me to any such evidence in his appeal submission. The evidence of Mr. Pomeroy and Mr. Lodewyck was predominantly based on personal observation and knowledge. The single element of hearsay in their evidence – being informed Mr. Saini was continuing his business – resulted in an investigation in which they made their own observations and reached conclusions based on those observations. Mr. Saini’s assertion that the Director made his decision without looking at the employment agreement is simply not borne out by anything in the Determination or in the record. I find there is no substance to these arguments. Second, and in any event, as a matter of law the

Director is entitled to receive hearsay evidence and to rely on such evidence in making a Determination. An appellant may challenge the Director's reliance on such evidence, but in doing so has the burden of showing such reliance was an error of law (see above) or a breach of principles of natural justice.

23. In respect of the last point made above, a party grounding an appeal on the Director failing to observe principles of natural justice is required to provide some evidence to support this ground: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. Mr. Saini has failed in that regard. As noted above, his appeal does not identify the evidence alleged to be "hearsay" nor does it establish how his procedural rights or his right to a fair hearing was compromised in any way by what he alleges was the Director accepting "hearsay evidence".
24. On the matter of "new evidence", as a general statement of principle, an appeal to the Tribunal on this ground is not intended to simply provide an opportunity for a person dissatisfied with the result of a Determination to re-argue the effect of evidence that was provided during the complaint process or to seek out evidence to supplement what was already provided to, or acquired by, the Director during the complaint process with the objective of having the Tribunal review and re-weigh the evidence and reach a different conclusion if, in the circumstances, that evidence could have been provided at the time the Determination was made.
25. While the admission of evidence on appeal has a discretionary aspect, the Tribunal takes a principled approach to that task; one which is based on well established criteria: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The evidence sought to be introduced must satisfy the criteria identified in that case and, as with any other aspect of an appeal, the burden is on Mr. Saini to show the evidence meets that criteria. New evidence in an appeal is statutorily limited to evidence that was not available when the Determination was being made. This statutory limitation, and the approach of the Tribunal generally to evidence presented in an appeal that is neither "new" nor in the "record", is firmly grounded in the objective of fairness, efficiency and finality in the decision making process: see section 2(d).
26. Mr. Saini's appeal simply attaches 18 pages of financial information concerning AJH without any attempt to satisfy the burden that accompanies efforts to introduce such material under the "new evidence" ground. A brief assessment of the material attached to the appeal suggests it is neither "new", relevant or, if relevant, probative of the issue being addressed in the Determination.
27. I find the appeal as a whole lacks any presumptive merit. The absence of a *prima facie* case militates strongly against both the potential success of the appeal and allowing an extension of the statutory time period. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
28. Accordingly, I dismiss the appeal and confirm the Determination.

ORDER

29. Pursuant to section 115 of the *Act*, I order the Determination dated August 14, 2013, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal