

An appeal

- by -

Adityas Dance School Ltd.
("Adityas")

- 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/85

DATE OF DECISION: August 25, 2015

DECISION

SUBMISSIONS

Aditya Sood

on behalf of Adityas Dance School Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Adityas Dance School Ltd. (“Adityas”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 8, 2013.
2. The Determination found that Adityas had contravened Part 3, sections 17 and 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Priya Girish Mehta (“Ms. Mehta”) and ordered Adityas to pay wages to Ms. Mehta in the amount of \$1,274.94 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$2,774.94.
3. This appeal is grounded in evidence that has become available that was not available when the Determination was being made.
4. A form of appeal was received by the Tribunal on June 22, 2015. It had been filed outside of the statutory time limit set out in subsection 112(3) of the *Act* and did not include a copy of the Director’s written reasons for the Determination, which is a statutory requirement for inclusion with an appeal: see subsection 112(2)(i.1) of the *Act*.
5. On June 29, 2015, the Tribunal informed Adityas the appeal was incomplete and requested Adityas to provide written reasons for requesting an extension of the statutory appeal period, to provide a copy of the Director’s written reasons for the Determination and to provide a missing page of the Determination. The correspondence provided Adityas with a deadline of July 14, 2015, for the requested and required items to be delivered to the Tribunal. That deadline was not met.
6. The correspondence also included a request to the Director to produce the section 112(5) “record” (the “record”) and notified the other 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 “record” was provided by the Director to the Tribunal. A copy has been delivered to Adityas and it has been given the opportunity to object to its completeness. Adityas has not objected to the completeness of the “record” and the Tribunal accepts it as complete.
8. On July 24, 2015, the Tribunal received correspondence from Adityas which speaks to some of the matters identified in the Tribunal’s June 29, 2015, correspondence. The Director’s written reasons for the Determination were not included and have not been provided by Adityas. That material was provided to the other parties.
9. On August 5, 2015, the Tribunal notified the parties that the appeal had been assigned, that it would be reviewed and that following review, all or part of the appeal may be dismissed.

10. Consistent with the notice contained in correspondence from the Tribunal dated June 29, 2015, and August 5, 2015, I have reviewed the appeal, the appeal submission and the “record”.

11. 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 appeal, my review of the “record” that was before the Director when the Determination was being made and any evidence allowed by the Tribunal to be included with the appeal and considered. Under section 114 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 subsection 114(1), 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 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.*

12. I am deciding whether Adityas should be granted an extension of the appeal period or whether the appeal should be dismissed under any, or all, of section 114(1)(b), (f) and (h). If I decide all or part of the appeal should not be dismissed under section 114(1), Ms. Mehta 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

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

THE FACTS

14. The facts relating to the issue under consideration are as follows:

1. Adityas operates a dance school in Surrey BC;
2. Aditya Sood (Mr. Sood”) is listed as the sole director of Adityas in the BC Company Summary maintained by BC Registry Services;
3. The complaint of Ms. Mehta was filed with the Director on September 27, 2012;
4. Ms. Mehta claimed she had worked for Adityas for 109 hours in a one month period, June 29, 2012, to July 29, 2012, and had been paid no wages;
5. A delegate of the Director tried, unsuccessfully, to contact Mr. Sood at, or around, the end of November 2012;

6. On November 30, 2012, the delegate sent Adityas a Notice of Mediation Session to the business address for Adityas;
7. The mediation session did not materialize;
8. On January 3, 2013, a Notice of Complaint Hearing and a Demand for Employer Documents was hand delivered to the business office of Adityas;
9. There was no response from Adityas to the Demand;
10. The complaint hearing, which was scheduled for March 18, 2013, either did not materialize or proceeded in Adityas' absence;
11. In either event, the Director received evidence from Ms. Mehta on her claim and a Determination was issued on April 8, 2013, sent by registered mail to the business office of Adityas, to the registered office of Adityas and to the personal address of Mr. Sood shown in the BC Company Registry documents;
12. The appeal period expired on May 16, 2013; and
13. An incomplete appeal was filed with the Tribunal on June 22, 2015.

ARGUMENT

15. On the request for an extension, Adityas denies all knowledge of the complaint or the complaint process. Mr. Sood says he was out of Canada from September 2012 to July 2013 and claims he never received any documents related Ms. Mehta's claim.
16. In respect of the appeal against Ms. Mehta's claim, Adityas does not dispute Ms. Mehta is owed wages, but says it did not pay her any wages mainly because it disagreed with the number of hours she claimed to have worked. Ms. Mehta claimed to have worked 109 hours, Adityas says she was only asked to work 24 hours.
17. Adityas has provided a copy of a Writ of Seizure and Sale filed against Adityas in the BC Supreme Court, photocopied passport pages, what is alleged to be a time sheet (a calendar page for July 2012 with some time references placed on it) for Ms. Mehta for her period of employment and an email to Ms. Mehta from Adityas dated July 30, 2012.

ANALYSIS

18. 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.

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 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 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 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.

21. This appeal has been filed more than 25 months after the expiry of the statutory appeal period. On its face that is completely unacceptable. Such a delay requires an extremely strong and compelling explanation.

22. The explanation provided by Adityas is that it was totally unaware of the complaint made by Ms. Mehta or of the complaint process being conducted by the Director. On the facts, that assertion is neither credible nor reasonable. I need only point to the Director hand delivering the Notice of Complaint Hearing and the Demand for Employer Records to the business office of Adityas. That provides clear notice there is a claim by Ms. Mehta and that it is being addressed by the Director. There are other facts that put a lie to the assertion being made by Adityas: email communications between Ms. Mehta and Mr. Sood wherein Ms. Mehta indicated she would take her claim to the Employment Standards Branch (August 21, 2012 and Sept. 4, 2012) and Mr. Sood inviting her to do so (Sept. 5, 2012); calls from a delegate of the Director in November 2012; the notice of mediation mailed to the business address for Adityas in November 2012; and the delivery of the Determination to the business address for Adityas in April 2013.

23. One of the other considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I am completely 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.

24. 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. In this respect, I am totally convinced there is absolutely no merit to the appeal, which is grounded in “new” evidence.

25. The Tribunal is given discretion to accept or refuse new or additional evidence. When considering this ground of appeal, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a

material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

26. There are three reasons for finding there is no basis for allowing or considering the documents that are attached to the appeal filed by Adityas.
27. First, it is apparent that all of this evidence existed at the time the Determination was being made. If Aditya believes this evidence is important, it should have been provided to the Director during the complaint process. I also observe some of the evidence it seeks to attach to this appeal is material that might have been provided in response to the Demand for Employer Records, with which Adityas failed or refused to comply.
28. Second, much of the additional evidence submitted with the appeal is, on its face, not relevant or probative.
29. Third, to allow this “new” evidence to be considered, or indeed to allow this appeal to proceed at all, would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to cooperate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Adityas failed to respond or participate in any way in the complaint process. This failure compels a finding that they may not now seek to challenge the Determination using arguments and evidence that could have been made had they decided to participate in the process. I do not accept for an instant that Mr. Sood’s apparent absence from Canada excuses the failure of Adityas to participate in the process. The dance school continued to operate and mail was undoubtedly received at the business address of Adityas during the period in which the complaint was filed and processed. Communications between Surrey and India are not such that would allow me to accept it was impossible for Mr. Sood to have received the communications and correspondence that were made and delivered to Adityas’ business office. All of the circumstances smack of a deliberate effort by Adityas to thwart the complaint process through non-response.
30. Finally, this appeal has not met one of the requirements of section 112(2) of the *Act* and can be dismissed on that basis.
31. In sum, the request by Adityas for an extension of the time limited for appeal is denied. As well, an assessment of this appeal shows it has no prospect of succeeding and the appeal does not meet one of the requirements of section 112(2). The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
32. I dismiss the appeal and confirm the Determination.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination dated April 8, 2013, be confirmed in the amount of \$2,774.94, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal