

An appeal

- by -

Hansrudolf Tschudi, a Director of Imagination (Canada) Corporation
(“Mr. Tschudi”)

- 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/65

DATE OF DECISION: August 14, 2017

DECISION

SUBMISSIONS

Hansrudolf Tschudi on his own behalf as a Director of Imagination (Canada) Corporation

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Hansrudolf Tschudi (“Mr. Tschudi”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 11, 2016.
2. The Determination found Mr. Tschudi was a director of Imagination (Canada) Corporation (“Imagination”), an employer found to have contravened provisions of the *Act*, at the time wages were earned or should have been paid to Xuewen (Raymond) Liang (“Mr. Liang”), and as such was personally liable under section 96 of the *Act* for wages and administrative penalties in the amount of \$13,365.61.
3. Mr. Tschudi seeks to appeal the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. He 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, nearly ten months after the time period for filing an appeal of the Determination had expired. Mr. Tschudi 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 Mr. Tschudi, who 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 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 Mr. Tschudi should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

10. The facts relating to this appeal are brief.
11. Mr. Liang filed a complaint with the Director, claiming he was owed unpaid wages and compensation for length of service by Imagimation.
12. The Director conducted a complaint hearing and, on February 3, 2015, issued a Determination against Imagimation (the “corporate determination”) which found it liable for wages in the amount of \$37,750.24. The Director imposed administrative penalties on Imagimation in the amount of \$1,500.00
13. The corporate determination was delivered by registered mail to Imagimation and Mr. Tschudi. No appeal of the corporate determination was made within the time period prescribed in section 112(3) of the *Act*.
14. An appeal of the corporate determination, along with a request to extend the appeal period, was delivered to the Tribunal on April 27, 2017. The requested extension has been denied and the appeal dismissed: see *Imagination*, BC EST # D087/17.
15. The record shows the Determination being considered in this appeal was delivered to Mr. Tschudi by registered mail shortly after it was issued on July 11, 2016. The statutory period for an appeal under the *Act* expired on August 18, 2016.
16. A BC On-Line: Registrar of Companies – Corporation Search conducted by the Director on July 8, 2016, indicated Imagimation was registered in BC on July 5, 2013, and that Mr. Tschudi was listed as a director. The search also revealed Mr. Tschudi was a director of Imagimation during the period Mr. Liang’s wages were earned or should have been paid.
17. Based on the information acquired and the findings made, the Director concluded Mr. Tschudi was liable under section 96 of the *Act* for the amount set out in the Determination. Mr. Tschudi was also found liable for the administrative penalties imposed on Imagimation in the corporate determination.

ARGUMENT

18. The arguments made by Mr. Tschudi in this appeal on both the merits and the request for an extension of the statutory appeal period mirror those made in the appeal of the corporate determination.
19. Nothing in the appeal addresses any considerations arising under section 96 of the *Act*.

ANALYSIS

20. 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.

21. 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.
22. 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.
23. In this case, I find the delay to be unacceptable. Mr. Tschudi has provided no reasonable explanation for that delay. I do not accept Mr. Tschudi did not receive the Determination. The record indicates otherwise.
24. The circumstances reveal there was no intention on Mr. Tschudi’s part to appeal the Determination until collection proceedings were initiated against him in January 2017. Even afterward, there was unacceptable delay in delivering his appeal to the Tribunal.
25. I am not persuaded Mr. Tschudi has presented a strong *prima facie* case in his favour. When making an assessment on this criterion, 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.

26. I reiterate what I have already noted earlier in this appeal: the corporate determination has been dismissed. There is no further argument that there is an error in the corporate determination. Mr. Tschudi is bound by both the corporate determination and the result of the appeal of the corporate determination.
27. It is firmly established that a person challenging a determination issued under section 96 of the *Act* is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the *Act*. The director/officer is precluded from raising and arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96.
28. Mr. Tschudi has provided nothing in the appeal that addresses any of those matters that are allowed to be raised by him relating to his liability under section 96 of the *Act*.
29. There is no dispute from Mr. Tschudi that he was recorded as being a director of Imagination when the wages of Mr. Liang were earned or should have been paid. He has not challenged the amount of liability imposed under section 96 or that he should not be held personally liable because he falls within the circumstances described in section 96(2).
30. Mr. Tschudi's appeal is devoid of any merit and has no reasonable prospect of succeeding.
31. Applying the criteria expressed in *Re Niemisto, supra*, the request for an extension of the time limited for appeal is denied. The delay in filing the appeal is unreasonably long. There is no acceptable reason given for the delay. Applying well established principles relating to the allowable scope of an appeal of a section 96 determination, this appeal 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.
32. The appeal is dismissed under section 114(1) (b) and (f) of the *Act*.

ORDER

33. Pursuant to section 115 of the *Act*, I order the Determination dated July 11, 2016, be confirmed in the amount of \$13,365.61, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal