

An appeal

- by -

Sharp Contacts Trading Co. Ltd.
(“Sharp Contacts”)

- 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.: 2016A/50

DATE OF DECISION: June 24, 2016

DECISION

SUBMISSIONS

Timothy KC Yip

on behalf of Sharp Contacts Trading Co. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sharp Contacts Trading Co. Ltd. (“Sharp Contacts”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 9, 2015.
2. The Determination found Sharp Contacts had contravened Part 3, sections 17 and 18, Part 4, sections 32 and 40, Part 5, section 45, Part 7, section 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Ka Yu Gary Tse (“Mr. Tse”) and ordered Sharp Contacts to pay Mr. Tse wages in the amount of \$12,686.72 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$14,186.72.
3. This appeal is grounded in an allegation the Director erred in law. Sharp Contacts seeks to have the Determination remitted to the Director.
4. The time period for filing an appeal of the Determination expired on January 18, 2016. This appeal was received by the Tribunal on April 11, 2016 – twelve weeks after the statutory time period had expired. Sharp Contacts seeks an extension of the statutory appeal period.
5. In correspondence dated April 14, 2016, 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 appeal does not meet the statutory requirements for an appeal set out in section 112(2) of the *Act*, as the appeal delivered to the Tribunal did not include the Director’s written reasons for the Determination. In correspondence dated April 29, 2016, the Tribunal instructed Sharp Contacts to deliver a copy of the written reasons to the Tribunal by May 13, 2016. Sharp Contacts has not complied with those instructions.
7. Mr. Tse has filed an unsolicited submission which will not be considered at this stage of the process.
8. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Sharp Contacts, which has been provided with the opportunity to object to its completeness. While Sharp Contacts delivered some additional attachments to their appeal, no objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
9. 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 Determination¹, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the

¹ The Reasons for Determination were provided to the Tribunal by the Director of Employment Standards as part of the Record for the appeal of the Determination issued against Ka Chun Yip as a Director and Officer of Sharp Contacts Trading Co. Ltd.

Determination was being made and any other material allowed by the Tribunal to be added to the record. 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.*

10. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Tse 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) of the *Act*, it is liable to be dismissed. In this case, I am looking at whether the time limit for filing an appeal should be extended, if there is any reasonable prospect the appeal can succeed and if Sharp Contacts has failed to meet the requirements of section 112(2) of the *Act*.

ISSUE

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

THE FACTS

12. Sharp Contacts operates a contact lens e-commerce on-line store. Mr. Tse worked at Sharp Contacts from May 2012 to May 31, 2015.
13. He filed a complaint alleging Sharp Contacts had failed to pay all wages owing to him.
14. The Director reviewed the complaint and decided to investigate.
15. On August 31, 2015, a delegate of the Director attempted to contact Sharp Contacts. There was no answer and a telephone message was left. On the same day the delegate sent an e-mail to Ka Chun Yip (“Mr. Yip”), the sole director and officer listed in the corporate records of Sharp Contacts, informing him of the complaint and requesting he call the delegate to discuss the complaint. It does not appear he did so.
16. On September 8, 2015, the delegate telephoned Sharp Contacts place of business again and left a detailed message informing the company that no reply to the earlier correspondence had been received and informing Sharp Contacts that a hearing on the complaint might be set down. On the same date an e-mail was sent to Mr. Yip asking that he contact the delegate.

17. Another telephone call was attempted on September 11, 2015, but it was not answered and no message could be left as the answering device stated the mailbox was full. On September 14, 2015, one more telephone call was attempted, a voice mail was left and a follow-up e-mail was sent to Mr. Yip.
18. The Director decided to conduct a complaint hearing.
19. On September 15, 2015, the Director sent a letter to Sharp Contacts informing it of the complaint and providing information about the complaint resolution process. The correspondence also contained a Demand for Employer Records and a Notice of Complaint Hearing. All of the documents were sent by registered mail to the business office of Sharp Contacts, which is also recorded as its registered and records office. No employer records were received from Sharp Contacts. The registered mail was unclaimed and subsequently returned to the Director.
20. On the date specified in the Notice of Complaint Hearing, a hearing was convened. No representative for Sharp Contacts appeared. The Director adjourned the hearing and attempted to communicate with Sharp Contacts by telephone. An e-mail was sent notifying Sharp Contacts the hearing would proceed in the absence of any representative from Sharp Contacts if there was no timely response from Sharp Contacts to the communications. There was no response and the complaint hearing proceeded.
21. The Reasons for Determination indicate the issues before the Director were whether Mr. Tse was an employee of Sharp Contacts and, if so, whether he was he entitled to wages under the *Act*.
22. The Director felt compelled to address the employment status of Mr. Tse as a result of a preliminary view of the nature of the relationship, which had the potential to result in a finding that Mr. Tse was a partner, director and shareholder of Sharp Contacts and not an employee.
23. The Director received evidence from Mr. Tse and from another person presented by Mr. Tse as a witness on his behalf, who was also a person formerly employed by Sharp Contacts.
24. No evidence or argument was presented by Sharp Contacts.
25. On the evidence that was presented, the Director found Mr. Tse was an employee under the *Act* and was not paid all wages owed to him. The Director awarded wages to Mr. Tse in the amount set out in the Determination.
26. The Determination was issued December 9, 2015, and sent by registered mail to Sharp Contacts at their business address. A copy of the Determination was sent to Mr. Yip at his mailing address as recorded in the BC Company Summary.
27. The time limit for filing an appeal was clearly marked in the Determination as January 18, 2016.

ARGUMENT

28. Sharp Contacts has made submissions on the request for an extension of time for filing the appeal and on the substance of Mr. Tse's complaint.
29. On the first matter, Sharp Contacts submits the delay in filing an appeal was due to the death of his father and the necessity for Mr. Yip to attend to the details of his passing. The appeal encloses a Certificate of

Death indicating Wai Man Yip, who I accept was Mr. Yip's father, passed away December 24, 2015, in Hong Kong.

30. On the substance of Mr. Tse's complaint, Sharp Contacts submits he was a partner and shareholder in the company and, as such, was not entitled to receive wages under the *Act*. In support of this submission, Sharp Contacts submits several documents, some of which are found in the record, having been provided to the Director by Mr. Tse, and several which were not provided to the Director during the complaint process. I will address the admissibility of the latter documents later in this decision.

ANALYSIS

31. 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 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.

32. 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
- i) there is a strong *prima facie* case in favour of the appellant.

33. 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. The Tribunal has required "compelling reasons": *Re Wright*, BC EST # D132/97.

34. This appeal has been filed twelve weeks after the expiry of the statutory appeal period. That delay is unacceptable and, absent an extremely strong and compelling explanation for such a delay, is usually sufficient on its own as a basis for denying the requested extension.

35. The explanation given by Sharp Contacts is that Mr. Yip, the sole director and officer of the company, was dealing with the death of his father. That explanation might be acceptable and quite reasonable absent circumstances that exist here. The explanation, however, does not address why Sharp Contacts failed to file an appeal in the two week period from the date of the Determination, December 9, 2015, until the date of Mr. Yip's father's death, December 24, 2015, or communicate the fact of this event to the Tribunal and request an extension of time when it became known to Mr. Yip he might be unable to meet the appeal date.

36. I am not persuaded, in these circumstances, that the explanation can be found to be a reasonable explanation for the delay in filing the appeal. Rather, I view this excuse as simply another method of seeking to avoid finality to the process.
37. My view is reinforced by the undeniable fact that Sharp Contacts made virtually no effort to participate in the complaint process prior to the Determination being made – failing or refusing to respond to telephone messages, e-mails, demands and notices – and failed to attend the complaint hearing. I shall address the additional effect of these failings later.
38. In the context of the request to extend the appeal period, however, the above suggests there was no intention on the part of Sharp Contacts to appeal the Determination. There is no indication to any other party or to the Tribunal that there would an appeal until the appeal documents were delivered to the Tribunal in April; the decision to appeal appears to have been prompted by collection proceedings initiated by the Director.
39. In any event, one of the other considerations for deciding whether an appeal period should be extended is the *prima facie* strength of the case on appeal. When considering this criteria, 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.
40. Sharp Contacts has grounded its appeal in error of law. The burden is on Sharp Contacts to show such error.
41. On an assessment of the Determination, I find Sharp Contacts has not shown the Director made an error of law.
42. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
43. In respect of the applicable provisions of the *Act* and the operative legal principles flowing from those provisions, the Director considered the relevant provisions in the *Act* relating to the issue of whether a person is an employee.
44. The Director applied findings of fact to those provisions. There is no error of law shown in the findings of fact.
45. The Tribunal noted in *Britco Structures Ltd.*, BC EST # D260/03, that the test for establishing findings of fact constitute an error of law 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 findings of fact made by the Director. The findings of fact in this case were reasonably and logically grounded in the evidence; they may not be disturbed by the Tribunal on appeal;

the appeal does not show there is any merit to the ground of appeal chosen and the appeal has no reasonable prospect of succeeding.

46. Sharp Contacts has failed to meet the requirements of section 112(2) of the *Act*. Section 114(1) (h) of the *Act* allows an appeal to be dismissed without a hearing of any kind for such a delinquency. Even if I were inclined to allow an extension of the appeal period and overlook the complete lack of any merit to the appeal, I would still dismiss this appeal for the failure of Sharp Contacts to meet the statutory requirements for delivering an appeal. The complete lack of any effort to satisfy the statutory requirements, even after having been instructed by the Tribunal to do so, militates significantly against relieving Sharp of this omission.
47. Although Sharp Contacts has not grounded the appeal in evidence becoming available that was not available when the Determination was being made, it clearly seeks to add material that it failed to provide to the Director during the complaint process.
48. I will, however, briefly comment on whether Sharp Contacts will be allowed to supplement the record by introducing previously undisclosed material as evidence on the merits of its argument regarding the substance of Mr. Tse's wage claim.
49. In respect of this attempt to supplement the record in such a way, the Tribunal has discretion to accept or refuse new or additional evidence. When considering whether to do so, 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*.
50. There are two obvious reasons why I refuse to consider this additional material. First, much of it is not "new"; it existed at the time the Determination was being made and could have been provided to the Director during the complaint process had Sharp Contacts decided to participate in the process.
51. I do not need to address the evidence included with the appeal that was before the Director, and included in the record, as that evidence was considered by the Director and findings were made in respect of it that may not be altered.
52. Second, while some of the other material, arguably, is "new" in the sense it might not have been "reasonably available" when the Determination was being made and might be allowed on that basis, I find nothing in this material that is relevant to or probative of the status of Mr. Tse under the *Act*, since none of this material relates directly to the issue of whether he was an employee of Sharp Contacts in respect of his complaint.
53. There is no basis for considering any of the additional material submitted as evidence with this appeal; the attempt to do so is entirely inconsistent with well-established principles.

54. Finally, and in respect of the validity of the appeal generally, the Tribunal has established the principle in *Tri West Tractor*, BC EST # D268/96 and *Kaiser Stables*, BC EST # D058/97, which it has confirmed and applied on many occasions subsequently, that an employer cannot fail or refuse to participate in the complaint process and then seek to make the case on appeal that should have and could have been presented to the Director during the course of the complaint process.
55. That is exactly what this appeal seeks to do. Even in the absence of the unacceptable delay in filing the appeal, on an application of the above principle the appeal would not be considered.
56. In sum, for any and all of the reasons stated above, this appeal is dismissed under section 114(1) of the *Act*. The request for an extension of the time limited for appeal is denied; the appeal on its face is devoid of merit and the requirements of section 112(2) have not been met.
57. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

58. Pursuant to section 115 of the *Act*, I order the Determination dated December 9, 2015, be confirmed in the amount of \$14,186.72, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal