



An appeal

- by -

Brian Sawyer carrying on business as Compass Management
(the “Appellant”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2009A/086

DATE OF DECISION: August 26, 2009

DECISION

SUBMISSIONS

Brian Sawyer	on his own behalf
Peter Johnson	on his own behalf
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. These reasons for decision concern the timeliness of an appeal filed by Brian Sawyer (the “Appellant”) regarding a Determination that was issued on April 8, 2009, pursuant to which the Appellant was ordered to pay its former employee, Peter Johnson (“Johnson”), \$4,728.92 on account of unpaid wages and interest (the “Determination”). Pursuant to the Determination the Appellant was also assessed two monetary penalties each in the amount of \$500 under section 98 of the *Employment Standards Act* (the “Act”). Thus, the total amount payable under the Determination is \$5,728.92.
2. A delegate of the Director of Employment Standards (the “delegate”) issued the Determination after an October 9, 2008, oral hearing (supplemented by subsequently filed written submissions) and concluded that: first, Mr. Johnson was an “employee” rather than, as had been asserted by the Appellant, an “independent contractor” (and thus would have been outside the ambit of the *Act*); second, Mr. Johnson was owed certain wages (including concomitant vacation pay); and, third, the Appellant was terminated for just cause and, accordingly, was not entitled to any compensation for length of service under section 63 of the *Act*.
3. On June 15, 2009, the Appellant filed an appeal with the Tribunal asking to have the Determination cancelled because the Director of Employment Standards “is asking us to pay for work not performed”. The Appellant’s Appeal Form (Form 1) dated June 12, 2009 does not actually specify a recognized appeal ground; rather, the Appellant deleted the reference to “erred in law” on the form (one of the three statutory grounds set out in section 112(1) of the *Act*) so that the only appeal ground advanced reads as follows: “The Director of Employment Standards [“erred in law” is deleted] is asking us to pay for work not performed”. The Appellant does not rely on either of the other two statutory grounds (breach of natural justice; new evidence).
4. Further, and this is the issue now before me, the Appellant’s Appeal Form, having been filed on June 15, 2009 was filed over one month after the statutory appeal period expired (the last day to file a timely appeal was May 19, 2009). Even though this appeal was filed after the 30-day statutory appeal period expired (see section 112(3)(a)), section 109(1)(b) of the *Act* empowers the Tribunal to extend the appeal period “even though the period has expired”.
5. On June 26, 2009, the Tribunal’s Appeal Manager wrote to the parties seeking their submissions regarding the timeliness of this appeal. I now have before me the parties’ written submissions on the preliminary issue of whether the appeal period should be extended. After reviewing the governing legal principles and Tribunal jurisprudence and considering the parties’ submissions, I am of the view that it would not be appropriate to extend the appeal period in this case. Accordingly, the appeal is dismissed and the Determination stands as issued. My reasons for so concluding now follow.

THE SECTION 109(1)(b) APPLICATION

6. The Tribunal Appeal Manger's June 26, 2009 letter to the parties identified the specific criteria that the Tribunal assesses when deciding whether to extend the appeal period (see generally, *Niemisto*, BC EST # D099/96 and *Patara Holdings Ltd.*, BC EST # RD053/08 for a fuller discussion regarding the principles governing section 109(1)(b) applications). The Tribunal's June 26 request for submissions was absolutely clear as to its purpose – the parties were invited to submit evidence and argument regarding the timeliness issue (especially in light of the relevant considerations that were provided to the parties in summary form). The June 26 letter stated that if the appeal period were extended the parties would be given a separate opportunity to present evidence and argument regarding the underlying merits of the appeal. Notwithstanding this clear direction, the Appellant's submission dated August 4 (and filed August 11), 2009, does not advance *any* evidence or argument concerning the timeliness of the appeal. The Appellant's submission contains 19 separately numbered arguments each and every one of which speaks to the merits of Mr. Johnson's unpaid wage claim; I reiterate that there is not a single shred of evidence or argument contained in the submission that speaks to the timeliness issue.
7. The only argument the Appellant has advanced regarding the timeliness issue is found in a 2- page letter dated "May 2009" appended to the Appellant's Appeal Form that states: "First, we only received the determination on the 21st May 2009 – apparently the early package was registered and not sent by courier. We did not receive it."
8. As previously noted, the Appellant's submission dated August 4 (filed August 11), 2009, does not address the timeliness issue. I am thus not able to determine from that submission whether there is *any*, let alone a legally sufficient, reason why this appeal was not filed within the statutory time limit. The delegate's submission dated July 17 (filed July 21), 2009, speaks directly to the timeliness issue and particularly the Appellant's assertion that he "did not receive it".
9. The material before me shows that on April 9, 2009, the Determination, dated April 8, 2009, was forwarded by registered mail to both the Appellant and Mr. Johnson. The Appellant's address was the same address that had been used in previous correspondence (which had apparently always been received without incident). A card was left identifying the location where the envelope could be picked up, however, the Appellant did not attend at that post office location and then envelope was returned to the Employment Standards Branch at the end of April with a notation that the envelope was "unclaimed".
10. The Appellant has not provided any explanation as to why he failed to claim the registered envelope. The Appellant says that he "did not receive" the Determination yet, clearly, at some point he did since he filed an appeal on June 15, 2009 – I am at a loss to determine when the Appellant actually received the Determination and what may have transpired between that point and June 15 when the appeal was filed. The Director notes that under section 122(1)(b) of the *Act*, the Determination was deemed to have been properly served and further notes that, in any event, the appeal has little chance of succeeding in terms of its substantive merit.
11. I find, based on the material before me, that the Determination was been properly served. I have no explanation from the Appellant regarding why he failed to attend at the post office to pick up the Determination that was delivered by registered mail. I do not know when the Appellant actually received the Determination nor, of course, do I have an explanation for the time delay between that date and the actual appeal filing date.

12. The appeal, on its face, appears to have virtually no chance of success since the Appellant has not even identified a valid ground of appeal. The Appellant's position seems to be that the delegate erred in finding that Mr. Johnson did the work that was the basis for the unpaid wage award. Although findings of fact can constitute "errors of law", that is only so where the "facts" in issue cannot be supported by any credible evidence. Clearly, the Appellant disagrees with certain facts found by the delegate, however, as the delegate's "Reasons for the Determination" clearly demonstrate, the delegate's findings were grounded in the evidence that was before her and thus cannot be assailed on appeal.

ORDER

13. The Appellant's application to extend the appeal period is refused. Pursuant to section 114(1)(b) of the *Act* the appeal is dismissed. It follows from my order that the Determination stands as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal