



An appeal

- by -

Landrock Construction Ltd.
("Landrock Construction")

- 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.: 2016A/61

DATE OF DECISION: July 13, 2016

DECISION

SUBMISSIONS

Katy E. Allen

counsel for Landrock Construction Ltd.

OVERVIEW

1. Landrock Construction Ltd. (“Landrock Construction”) appeals, pursuant to subsection 112(1) of the *Employment Standards Act* (the “*Act*”), a Determination issued against it by a delegate of the Director of Employment Standards (the “delegate”) on February 5, 2016. By way of the Determination, Landrock Construction was ordered to pay its former employee, Andrew Porter (“Mr. Porter”), the total sum of \$10,600.32 (\$7,455.20 of which was section 63 compensation for length of service) on account of unpaid wages and section 88 interest.
2. Further, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Landrock Construction thus bringing the total amount of the Determination to \$11,600.32.
3. Landrock Construction’s appeal should have been filed by no later than March 14, 2016, an appeal deadline presumably calculated in accordance with the “deemed service” provisions contained in section 122 of the *Act*. However, Landrock Construction’s appeal was not actually filed with the Tribunal until May 12, 2016. Accordingly, Landrock Construction now seeks an extension of the appeal period pursuant to subsection 109(1)(b) of the *Act*.
4. In my view, this is not an appropriate case to grant an extension of the appeal period and, as such, this appeal must be dismissed. My reasons for refusing to extend the appeal period now follow.

EXTENDING THE APPEAL PERIOD – RELEVANT CONSIDERATIONS

5. Subsection 109(1)(b) of the *Act* provides as follows: “In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: ... (b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired”.
6. Although the Tribunal has a statutory discretion to extend the appeal period in a proper case, extensions are not routinely granted. The applicant must satisfy the Tribunal that it has a good reason for failing to file a timely appeal and that the appeal itself is presumptively worthy of being considered on its merits. When assessing appeal extension applications, the Tribunal is very mindful of subsection 2(d) of the *Act* which states that one of the purposes of the *Act* is to ensure the fair and efficient resolution of disputes arising under the *Act*.
7. In *Niemisto*, BC EST # D099/96, the Tribunal set out a non-exhaustive list of the factors that should be considered when deciding whether to extend the statutory appeal period in a particular case. These factors include: i) Is there a reasonable and credible explanation for the failure to file a timely appeal?; ii) Has the appellant demonstrated an ongoing *bona fide* intention to appeal?; iii) Will any respondent party be unduly prejudiced by an order granting the application to extend the appeal period?; and iv) Is the appeal presumptively meritorious?

FINDINGS

8. In the instant case, the appeal is quite late (it was filed May 12, 2016), having been filed about two months after the statutory appeal period expired. I am not satisfied that Landrock Construction has provided a reasonable and credible explanation for its failure to file a timely appeal.
9. The catalyst for the filing of the appeal appears to have been the Determination enforcement proceedings that were undertaken by the Director of Employment Standards. A “Notice of Seizure” was issued out of the Kelowna Registry of the B.C. Supreme Court on April 26, 2016, and Landrock Construction now says: “Upon discovering that the Determination had been filed as a court order for execution at the end of April, [Landrock Construction’s principal, Vincent D’Arpino (“Mr. D’Arpino”), who represented the firm at the oral complaint hearing] sought further legal advice on how to appeal the Determination”.
10. As noted above, Mr. D’Arpino – who is, according to the record before me, Landrock Construction’s president and sole director and shareholder – appeared, by teleconference, at the complaint hearing before the delegate. Mr. D’Arpino was the only person to testify on Landrock Construction’s behalf at the hearing and, similarly, Mr. Porter testified on his own behalf but did not call any other witnesses. The Determination was issued on February 5, 2016, and it was mailed, by registered mail, to Landrock Construction’s “registered office” and “mailing address” as recorded in the B.C. Corporate Registry. The Determination was also mailed to Mr. D’Arpino at this same address.
11. Landrock Construction says that although it received the Determination in a timely manner and intended to appeal, it failed to do so: “The Determination...was received by the Appellant on February 12, 2016. On or around February 12, 2016, D’Arpino asked his brother Aldo Trinetti (“Trinetti”) to appeal the Determination. However, Trinetti did not do so.”
12. Landrock Construction says that during the appeal period, Mr. Trinetti was “in and out of the hospital” for an asthmatic condition and, apart from that, was dealing with the stress of divorce proceedings and the “forced sale” of the family residence. Landrock Construction says that Mr. D’Arpino “realized his brother had failed to appeal approximately a week after the 30 day time limit was over [and] [h]e immediately began gathering evidence to use on the appeal”. I understand that, in fact, Mr. Trinetti is Mr. D’Arpino’s brother-in-law.
13. I have several concerns with respect to the above assertions. First, Mr. Trinetti did not appear at the complaint hearing and thus passing off the task of preparing the appeal submissions to someone without any direct knowledge about what transpired at the hearing strikes me as being a rather wrong-headed decision. This is particularly the case since an appeal to the Tribunal is, essentially, an appeal on the record that was before the delegate when the Determination was being made.
14. Second, even accepting that it was appropriate to fob off the responsibility for preparing the appeal to Mr. Trinetti, I have to question why Mr. D’Arpino would have done so given that, as his brother-in-law, surely he must have had some knowledge about Mr. Trinetti’s health and other problems. At the very least, I would have expected Mr. D’Arpino – in these highly unusual circumstances – to have taken greater care by following up with his brother-in-law to ensure that a timely appeal was filed.
15. Third, since the appeal was ultimately filed by legal counsel, I must question why Landrock Construction seemingly waited so long to engage counsel. It may be that retaining counsel was a decision taken only after Landrock Construction realized that the appeal period had expired, but I still question why there was such a

marked delay from February 12, 2016 (when the Determination was in hand) until May 12, 2016 (when the appeal was finally filed).

16. Fourth, Mr. Trinetti filed an affidavit in this matter in which he states: “My brother-in-law didn’t know until after March 14, 2016, that I had not filed the appeal...I think we had a discussion for the first time about the fact that I had not filed the appeal about a week or two after March 14, 2016, but I cannot remember the exact date.” Mr. Trinetti also states in his affidavit that he was requested “[o]n or around February 12, 2016” to file the appeal on Landrock Construction’s behalf. Thus, it seems that Mr. D’Arpino instructed Mr. Trinetti to file an appeal of the Determination in mid-February 2016. The appeal deadline (March 14, 2016) was clearly set out in a text box at the bottom of the second page of the Determination; this text box also included information about the appeal process generally. Mr. Trinetti thus knew – or certainly should have known – that the appeal had to be filed by no later than March 14, 2016. However, it appears that Mr. Trinetti had a rather cavalier attitude to the entire matter since he did not even speak with his brother-in-law about the appeal until “a week or two” after the appeal deadline expired – obviously, this matter was not a priority for him. Certainly, it is reasonable to expect that if his health or other difficulties were interfering with his ability to file a timely appeal (and I am extremely sceptical about that), he would have raised the matter with Mr. D’Arpino sooner than one or two weeks after the appeal deadline expired. As previously noted, Mr. D’Arpino for his part also seemingly had a rather cavalier attitude, since he could not be bothered to follow up with Mr. Trinetti to ensure that the appeal had, in fact, been filed well before the expiration of the appeal period.
17. In sum, the delay involved in this case is significant and Landrock Construction has not adequately explained why it failed to file a timely appeal. I am not satisfied that Landrock Construction had an ongoing *bona fide* intention to appeal – in my view, the critical catalytic factor was the Director’s enforcement action; up to that point, Landrock Construction appears to have had a rather disinterested attitude to the entire matter.
18. The *Niemisto* criteria also include an evaluation of the underlying presumptive merits of the appeal. Landrock Construction’s appeal has three fundamental thrusts. First, it says that Mr. D’Arpino – who attended hospital the night before the complaint hearing complaining of abdominal pains apparently attributable to “bioduct stones” [*sic*, bile duct stones?] – was not fully capable of presenting Landrock Construction’s case to the delegate. Mr. D’Arpino apparently applied at the outset of the hearing for an adjournment but that request was refused. The delegate’s reasons make no mention of any such adjournment application. If, in fact, such an application was made, there should be something in the record (and preferably in the delegate’s reasons) to indicate why the adjournment was refused. Second, Landrock Construction now says it had just cause to terminate Mr. Porter’s employment. Third, Landrock Construction says that the delegate incorrectly calculated Mr. Porter’s vacation pay entitlement inasmuch as she failed to account for a \$829.67 vacation pay payment made to Mr. Porter by cheque dated July 11, 2014.
19. In my view, while I am not prepared to say that this appeal is frivolous, I nonetheless consider the appeal to have rather dubious merit.
20. In my view, Landrock Construction’s first ground of appeal (based on a breach of the principles of natural justice) has little, if any, merit. Mr. D’Arpino has not provided any corroborating medical evidence to demonstrate that he was medically unfit to present Landrock Construction’s evidence and argument to the delegate. My review of the delegate’s reasons leads me to believe that Landrock Construction’s position was clearly communicated to the delegate. Given that Mr. Trinetti was the one and only Landrock Construction official who seemingly had direct knowledge about the matters in question, I must query why he did not testify at the complaint hearing. Surely, Landrock Construction’s case could have been presented by Mr.

Trinetti if, in fact, Mr. D'Arpino was medically unfit to do so. However, I repeat, it appears that Mr. D'Arpino was sufficiently capable of presenting Landrock Construction's position to the delegate.

21. With respect to this latter observation, Landrock Construction's position at the complaint hearing was that Mr. Trinetti did not have the authority to fire Mr. Porter – although the former clearly did so on January 21, 2015. One can hardly criticize Mr. Porter for believing that he had been legitimately fired, given Mr. Trinetti's position as his direct supervisor and the person who originally hired him. Mr. Trinetti, curiously, did not testify at the complaint hearing. In any event, Landrock Construction's position with respect to Mr. Porter's claim for compensation for length of service was as follows (delegate's reasons, page R4):

Mr. D'Arpino was not present on [Mr. Porter's] last day of work, so he has no first-hand knowledge about what happened between Mr. Trinetti and [Mr. Porter]. After Mr. D'Arpino became aware that Mr. Trinetti had fired [Mr. Porter], he called [Mr. Porter] and told him to go back to work. He told [Mr. Porter] Mr. Trinetti and told him to go back to work. He told [Mr. Porter] Mr. Trinetti did not have the authority to fire him. Mr. Trinetti also called [Mr. Porter] to rectify the situation. Mr. D'Arpino argued that as soon as he was made aware [Mr. Porter] was fired, he called him to rectify it. [Mr. Porter] chose not to return to work, therefore he quit his employment.

22. Mr. Porter's evidence regarding his dismissal was that Mr. Trinetti told him "he was fired and to grab his things and leave" following which Mr. Porter turned in his keys and left the work site. Mr. Porter acknowledges that Mr. D'Arpino subsequently telephoned him and asked him to return to work but that he did not wish to return. "[Mr. Porter] stated Mr. D'Arpino was rude and he started telling [Mr. Porter] that he quit when he refused to come back to the yard" (delegate's reasons, page R3). Mr. Porter also acknowledged that Mr. Trinetti contacted him by telephone but the latter stated that he did not really wish Mr. Porter to return to work and was only calling because "Mr. D'Arpino made Mr. Trinetti call him" (delegate's page R3).

23. Thus, the only argument advanced by Landrock Construction at the complaint hearing was that section 63 compensation for length of service was not payable because Mr. Porter quit his employment (see subsection 63(3)(c) of the *Act*). As the delegate quite rightly determined (page R6): "It is not possible for [Mr. Porter] to have quit his employment the following day as his employment had already been terminated". Landrock Construction does *not* challenge the delegate's finding in this regard. However, Landrock Construction now says that "it had cause to terminate [Mr. Porter's] employment, and it has new evidence to prove this".

24. This "new evidence" takes the form of two affidavits. The first, sworn by Mr. D'Arpino on May 20, 2016 (over a week after Landrock Construction's late appeal was filed), refers to Mr. Porter's alleged use of marijuana at the workplace. Mr. D'Arpino states that even before Mr. Porter was terminated, he suspected Mr. Porter was using marijuana at work but never had firm proof. Mr. D'Arpino further states that he asked Mr. Porter at the hearing if smoked marijuana at work but Mr. Porter denied doing so. *After the hearing concluded*, Mr. D'Arpino says that he and Mr. Trinetti "interviewed some of our employees because we were concerned about employees smoking marijuana at work" and "[t]his was the first time another employee, Geoff Storey, confirmed to me that Mr. Porter smoked marijuana at work during working hours". Landrock Construction filed a second affidavit, also sworn on May 20 by the aforesaid whistleblower, Mr. Storey. Mr. Storey, who apparently has not been fired for smoking marijuana at work, states that he and Mr. Porter smoked marijuana at work "about eight or ten times over the last four years of Mr. Porter's employment" and that they did so during working hours but were never caught because they were "discreet".

25. I do not consider this "new evidence" to be admissible in light of the *Davies et al.* criteria (see BC EST # D171/03). First, I question its relevance. Landrock Construction's only argument before the delegate regarding its liability to pay section 63 compensation for length of service was that none was payable because Mr. Porter quit. Landrock Construction did not argue just cause. It now wishes to argue, *ex post facto*, that it

had just cause. This is not, in my view, a case of after-acquired cause since, by its own admission, Landrock Construction never even investigated the matter – despite its apparent suspicion – until after the hearing ended (see *Van den Boogaard v. Vancouver Pile Driving Ltd.*, 2014 BCCA 168). This sort of evidence could have been gathered, and should have been gathered, prior to the complaint hearing. Further, if Landrock Construction was so concerned about Mr. Porter’s possible marijuana use at work, why did it wish to have him return to the workplace after having fired him? Finally, if marijuana usage is such a fundamental breach of its workplace rules, why does Mr. Storey apparently remain on Landrock Construction’s payroll?

26. Finally, Landrock Construction says that the delegate erred in calculating Mr. Porter’s vacation pay entitlement. More specifically, it submits a copy of a cheque apparently issued on July 11, 2014, to Mr. Porter in the amount of \$829.67 – the reference note on the cheque states “VAC pay 2014”. Landrock Construction says “[t]he Delegate failed to take into account a vacation pay cheque attached to Vince D’Arpino’s affidavit as Exhibit B. The award should be reduced by this amount.”
27. I have some concerns about this cheque. Landrock Construction’s payroll records – entered as an exhibit at the complaint hearing – show, in tabular form, all of the payments made to Mr. Porter in 2014. There are two July 2014 entries and neither entry refers to any vacation pay. Further, the cheques issued to Mr. Porter throughout 2014 all follow a logical increasing ordering commencing with Cheque No. 1872 issued on January 4 through to July 5. The two July 2014 cheques are numbered 1994 and 1108, respectively. The cheques issued thereafter range from No. 2002 to No. 2050 issued on December 6th. There is a further record of Cheque No. 6274 issued on December 12 with a reference “Hol Pay to Dec 6/14”. The delegate did credit Landrock Construction with this payment on account of Mr. Porter’s vacation pay entitlement (see delegate’s reasons, page R7).
28. The July 14 cheque now submitted as new evidence is Cheque No. 6175 and is not recorded in Landrock Construction’s own payroll records submitted to the delegate. As such, this evidence – even assuming it constitutes evidence of vacation pay paid to Mr. Porter in 2014 – was not part of the evidentiary record before the delegate and Landrock Construction has not provided any explanation as to why it was not part of the payroll records that it submitted to the delegate. The delegate did not “fail to take this payment into account” for the simple reason that this evidence was not before her at the complaint hearing – it is not contained in the subsection 112(5) record and Landrock Construction’s legal counsel, although invited to do so, never suggested that the record provided to the parties by the Tribunal (and delivered to the Tribunal by the delegate) was incomplete.
29. I understand that the full amount of the Determination has now been secured and has been deposited to the Director of Employment Standard’s trust account. That being the case, it perhaps is difficult to suggest that Mr. Porter would be prejudiced (other than by further delay) if the appeal period were to be extended. However, I am not satisfied that Landrock Construction has provided a reasonable and credible explanation for its failure to file a timely appeal and, in any event, its appeal strikes me as having little, if any, merit. Accordingly, I am refusing Landrock Construction’s application to extend the appeal period.
30. I wish to reiterate, however, that whatever the merits of Landrock Construction’s appeal might be (and I believe the appeal to be wholly lacking in merit), I would not have granted the extension even if the appeal had some merit since, in my view, Landrock Construction has not provided any credible and reasonable explanation for its failure to file a timely appeal.

ORDER

31. Landrock Construction's application to extend the appeal period in this matter is refused. Pursuant to subsections 114(1)(b) and (f) of the *Act*, this appeal is dismissed. The Determination is confirmed as issued in the amount of \$11,600.32 together with whatever additional interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal