

An appeal

- by -

Payman Fadaee, a Director or Officer of 19centscolorcopy.com Ltd.
("Fadaee")

- 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: Shafik Bhalloo

FILE No.: 2008A/83

DATE OF DECISION: September 22, 2008

DECISION

OVERVIEW AND FACTS

1. This is an appeal by Payman Fadaee (“Fadaee”) a former Director and Officer of 19centscolorcopy.comltd (“Colorcopy”) under Section 112 of the *Employment Standards Act* (the “Act”) against a determination of the Director of Employment Standards (the “Director”) issued against him on November 30, 2006 (the “Determination”).
2. On or about January 26, 2006 Chen Jin (“Jin”) filed a complaint under Section 74 of the *Act* alleging that her employer Colorcopy contravened the *Act* by failing to pay her regular wages, overtime wages, statutory holiday pay and vacation pay (the “Complaint”).
3. In and during March to June 2006, the Director’s delegate (the “Delegate”) conducted an investigation into the Complaint and issued a determination against Colorcopy on August 11, 2006 (the “Corporate Determination”) concluding that Colorcopy violated the *Act* and ordered the latter to pay Jin \$2,435.09 in respect of outstanding wages pursuant to Section 79 of the *Act*; \$347.68 in respect of vacation pay pursuant to Section 58 of the *Act*; \$522.00 in respect of statutory holiday pay pursuant to Sections 45 and 46 of the *Act*; \$758.00 in respect of overtime pay pursuant to Section 40 of the *Act* and \$130.95 in respect of accrued interest pursuant to Section 88 of the *Act*. The Director also imposed five administrative penalties of \$500.00 each for the said contraventions of the *Act* against Colorcopy.
4. Colorcopy neither appealed the Corporate Determination nor complied with the orders made in the Corporate Determination, and, as a result, the Director issued the Determination against Fadaee on the basis that the latter was a director and officer of Colorcopy during the material time when Jin’s wages were earned and payable.
5. The Determination was sent to Fadaee at his last known address by registered mail on November 30, 2006. Accordingly, pursuant to Section 122 of the *Act*, the Determination is deemed to be served eight days after it was “deposited in a Canada Post Office”. Fadaee had until about January 8, 2007 to appeal the Determination. Fadaee’s appeal of the Determination was filed on July 28, 2008, about 18 months after the expiry of the appeal period in Section 112 of the *Act*. As a result, the preliminary issue in Fadaee’s appeal is whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* to extend the time period for Fadaee’s appeal.
6. Fadaee has not requested an oral hearing of the Appeal. Pursuant to Section 36 of the *Administrative Tribunal’s Act* and Rule 17 of the Tribunal’s Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issue in this Appeal may be adjudicated on the written submissions of the parties without resorting to an oral hearing. Accordingly, I will decide the preliminary issue based on the Section 112(5) “record”, the submissions of the parties and the Reasons for the Determination.
7. If Fadaee is successful in obtaining an extension of time to file his appeal, then the Tribunal will consider both, the merits of the substantive ground of appeal in Fadaee’s appeal, namely, whether new evidence has become available that was not available at the time the Determination was made, and remedy requested by Fadaee that the matter be referred back to the Director for a determination based on the purported new evidence. In such case, the Respondents in this case, will be afforded an opportunity make

further submissions on the substantive ground of appeal and remedy. If, however, Fadaee fails to obtain an extension of time to file his appeal, then Fadaee's appeal is moot.

ISSUES

8. Should Fadaee be afforded an extension of time for requesting an appeal even though the appeal period has expired?
9. If the answer to the first question is in the affirmative, has Fadaee adduced new evidence that was not available at the time the Determination was being made? If so, should the Tribunal refer the matter back to the Director as requested by Fadaee?

ARGUMENT

Fadaee's submissions

10. As Fadaee's written submissions pertaining to his request for an extension of the appeal period are brief, I would like to set them out in full here. Fadaee submits:

I would like to kindly request to extend the appeal period for the above determination.

Since I left the company ten (10) months before the determination was made, therefore;

- (1) I was not informed that any determination is being made at that time.
- (2) I never received any copy of the determination during the appeal period or any time after until July 17, 2008.

With checking my credit report on July 16, 2008, I accidentally noticed that there is a legal file opened by 'Director of Employment Standards' in my record. I immediately contacted the Employment Standards Branch and asked for the reason. Then I was forwarded to the officer and was informed about the case. The next day I received a copy of the Determination via E-mail (July 17, 2008).

11. With respect to the substantive submissions of Fadaee pertaining to the "new evidence" ground of appeal, I do not wish to delineate those submissions here in light of my decision on the extension application. However, I have reviewed the purported "new evidence" presented by Fadaee and I will briefly address this ground of appeal under the heading Analysis herein.

Director's submissions

12. The Director submits that there has been "an unreasonably long delay" on the part of Fadaee to file his appeal. More specifically, the Director notes that two years have lapsed since the Corporate Determination against Colorcopy and the Determination against Fadaee was issued on November 30, 2006 (almost 19 months before Fadaee filed his appeal).
13. According to the Director, Fadaee participated in the Delegate's investigation of the Complaint and met with the Delegate on two occasions and also met with the Respondent in the "fact finding conference".

14. The Director notes that after the last meeting with Delegate, Fadaee made an offer to settle the Complaint “but did not follow through”. When the Delegate telephoned Fadaee on July 21, 2006, Fadaee was “too busy to talk then” and advised the Delegate that he would call him back later but never did. Thereafter, the Director notes that Fadaee discontinued further communication with the Delegate and could not be contacted at the last known address or telephone numbers the Delegate had for Fadaee.
15. The Delegate also submits that the Determination (which was issued on November 30, 2006) was sent by registered mail to the last known address of Fadaee and the Director relies upon Section 122 of the *Act*, which would deem the Determination served on Fadaee eight days after it was deposited in a Canada Post Office.
16. The Director concludes his submissions against Fadaee’s request for an extension of time to appeal by stating that Fadaee “deliberately discontinued any communication with the Delegate to avoid dealing with the (C)omplaint.” In the Director’s view, Jin “has been denied her wages for a long time and should not have to go through the ordeal of dealing with this late appeal”. The Director further submits “(t)he Respondent will be unduly prejudiced by the granting of an extension of time to file the appeal.”
17. With respect to the “new evidence” ground of appeal, the Director states that there is nothing in Fadaee’s documents or submissions that would qualify as new evidence or was not available at the time the Determination was being made.
18. Finally, the Director notes that the Corporate Determination was issued against Colorcopy on August 11, 2006 and has not been appealed and therefore Fadaee cannot now argue the merits of the Corporate Determination after the expiry of the appeal period.

ANALYSIS

19. Section 112(3) of the *Act* delineates the time limits for filing an appeal depending on the mode of service of the determination. In particular, subsection 112(3)(a) and (b) provide:
 - 112(3)(a) The appeal period referred to in subsection (2) is
 - (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
 - (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122 (3).

Section 109(1)(b) of the *Act* sets out the Tribunal’s authority to extend the time period for requesting an appeal under Section 112, and provides:

- 109(1) 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 even though the period has expired;

20. The Tribunal will exercise its statutory discretion pursuant to Section 109(1)(b) of the *Act* to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist. As indicated by the Tribunal in *Retag*, BC EST # D211/96:

“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. “

21. The Tribunal, in *Re: Dennill (c.o.b. Fibremaster Restorations & Carpet)*, BC EST # D080/01, articulated the following factors that an appellant seeking an extension of time to file an appeal should satisfy to show that compelling reasons exist for the Tribunal to extend the time for filing an appeal:

1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
2. There was a genuine and ongoing *bona fide* intention to appeal the Determination;
3. The respondent party as well as the Director was aware of this intention;
4. The respondent will not be unduly prejudiced by the granting of the extension;
5. There is a strong *prima facie* case in favour of the appellant.

22. In this case, I am not at all persuaded by Fadaee’s submissions that an extension ought to be granted.

23. First, in advance of the issuance of the Corporate Determination, Fadaee was aware of the existence of the Complaint and was indeed actively involved in the investigation of the Complaint including settlement discussions with the Delegate and the Respondent. While Fadaee states that he left the company ten months before the Corporate Determination was made and produces a corporate search showing that he ceased to be a director as of February 8, 2006, he was aware that the Complaint was ongoing as the Delegate contacted Fadaee on July 21, 2006 and the latter advised the Delegate that he would call him back as he was too busy at the time. However, Fadaee failed or neglected to follow up with the Delegate thereafter and the Director notes that he was not accessible to the Delegate at his last known address or telephone numbers. I do not believe that Fadaee can, with any level of credence, claim that he was not apprised that “any determination is being made at that time”. It would be unreasonable for him to assume that the Complaint would simply stop and cease to exist because he chose not to follow up with the Delegate or make himself inaccessible to the Delegate. Fadaee’s failure to contact the Delegate after July 21, 2006 was unreasonable and in my view he has no credible explanation for the failure to request an appeal of either the Corporate Determination or the Determination against him personally within the statutory limits.

24. Secondly, while Fadaee claims that he never received a copy of the Determination during the appeal period until July 17, 2008, there is sufficient evidence in the Section 112(5) Record showing that both the Corporate Determination and the Determination against Fadaee personally were sent by “certified mail”. In the case of the Corporate Determination, the Director sent it by certified mail to the business address of Colorcopy at 1925 West Broadway as well to the registered and records office of Colorcopy at 1367 Pemberton Avenue, in North Vancouver. A further copy of the Corporate Determination was also sent to Fadaee at the latter address, as that was also his address on the corporate search before he resigned as a director of Colorcopy. In the case of the Determination against Fadaee personally, the Director sent the

said Determination by certified mail to Fadaee's last known address on the corporate search at 1367 Pemberton Avenue, North Vancouver.

25. In my view, both the Corporate Determination and the personal Determination against Fadaee were deemed served 8 days after they were each deposited in a Canada Post Office pursuant to Section 122 of the *Act*. In the case of Colorcopy, the service of the Corporate Determination was affected on August 19th, 2006 and in the case of Fadaee, service of the personal Determination was affected on December 8, 2006. Both Colorcopy and Fadaee had 30 days after the said dates to file their respective appeals and both failed to comply. In the case of Colorcopy, it has yet to file an appeal of the Corporate Determination. In the case of Fadaee, his appeal is approximately 18 months late and he only filed the appeal after discovering, in July 2008, that the personal Determination was a blemish on his credit. In my view, there is no evidence, before that time, of any intention on the part of Fadaee to appeal the personal Determination.

26. Third, neither Jin nor the Director were aware of Fadaee's intention to appeal the Determination until after Fadaee filed his appeal on or about July 28, 2008, well past the appeal period.

27. Fourth, granting an extension of time to Fadaee to appeal the Determination would unduly prejudice Jin and the Director. Fadaee's appeal is approximately 18 months past the appeal period and it is subsequent to the commencement of enforcement proceedings by the Director who appears to have registered the personal Determination in the court registry. The Tribunal in *Re: Tang, supra*, when reviewing the shorter time periods for appealing a determination under the predecessor to the current Section 112 of the *Act*, stated:

Section 112(2) of the *Act* sets out the time period for appealing a determination. A person served with a determination has only 8 or 15 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 15 days after the date of service; the time period is only 8 days if the determination is personally served.

These relatively short time limits are consistent with one of the purposes of the *Act*, which is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is in the interest of all parties to have the complaints and appeals dealt with promptly.

28. This Tribunal has previously indicated that while the current provision in the *Act*, Section 112(3), increases the time periods for appealing a determination to 30 days in the case of service by registered mail or 21 days in the case of personal service, the purposes or intentions of the *Act* set out in *Re: Tang, supra*, remain undisturbed. Therefore, in my view, to permit Fadaee to file his appeal about 18 months after the expiry of the appeal period would most definitely be inconsistent with and contrary to the purpose in the *Act* of providing fair and efficient procedures for resolving disputes and prejudicial against the interests of both Jin and the Director who deserve a prompt and timely resolution. Accordingly, I cannot accede to Fadaee's request for an extension of time to appeal the Determination.

29. Finally, with respect to the purported "new evidence" of Fadaee, while I am not required to opine on the merits of the said evidence in light of my determination on the matter of the extension of time to appeal, I have reviewed Fadaee's "new evidence" thoroughly and there is nothing in the evidence produced that would qualify as "new evidence" under the test set out in *Re: Merilus Technologies Inc.* [2003] B.C.E.S.T.D. No. 171(QL). The purported "new evidence" appears to be the type of evidence that could, with the exercise of due diligence, have been discovered and presented to the Director during the

investigation or adjudication of the Complaint and at the very least prior to the Determination being made. In my view, Fadaee's appeal of the personal Determination is nothing more than a very transparent attempt to appeal and reargue the Corporate Determination, which was never appealed. This, in my view, is an inappropriate use of the appeal provisions of the *Act*.

ORDER

30. Pursuant to Section 114(1)(b) of the *Act*, the appeal is dismissed on the basis that a request for an appeal has not been made within the time permitted.
31. Further, pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest that may have accrued pursuant to Section 88 of the *Act* since the date of issuance.

Shafik Bhalloo
Member
Employment Standards Tribunal