

An appeal

- by -

Jacqui Bauer
a Director of Sync2 Agency Ltd.
("Ms. Bauer")

- 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.: 2011A/94

DATE OF DECISION: September 8, 2011

DECISION

SUBMISSIONS

Sukh Kaila

on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Mr. John Moore (“Mr. Moore”) on behalf of Jacqui Bauer (“Ms. Bauer”), a Director of Sync2 Agency Ltd. (“Sync2”), of a determination that was issued on June 3, 2011, (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”) against Ms. Bauer. The Determination concluded that Ms. Bauer was a Director of Sync2 (an employer found to have contravened provisions of the *Act*) and, pursuant to section 96 of the *Act*, ordered Ms. Bauer to pay an amount of \$50,665.66 representing two months’ unpaid wages for eight (8) employees of Sync2.
2. In the Appeal Form, with respect to the grounds of appeal, Mr. Moore has handwritten the following comments: “See file and original submissions” and not checked off any boxes on the Form identifying the available grounds of appeal in section 112 of the *Act*. What Mr. Moore is referring to here is the submissions he made on his own behalf when he filed an appeal of the Director’s determination against himself personally under section 96 (which appeal this Tribunal dealt with in a separate decision). In the later appeal, Mr. Moore invoked two grounds of appeal, namely, the Director erred in law and failed to observe the principles of natural justice in making the determination.
3. As a remedy, Mr. Moore is asking for the tribunal to change or vary the Determination against Ms. Bauer.
4. Before considering the parties’ submissions on Ms. Bauer’s substantive grounds of appeal, there is a preliminary issue of the timeliness of the appeal. More specifically, the deadline for filing the appeal of the Determination was 4:30 p.m. on July 11, 2011, the same as the deadline for Mr. Moore to file an appeal of the determination against him personally. While Mr. Moore filed an appeal of his own determination in a timely fashion on July 11, 2011, he filed Ms. Bauer’s Appeal Form and submissions on July 17, 2011.
5. Having said this, under section 109(1)(b) of the *Act*, the Tribunal has the discretion to extend the deadline for requesting an appeal even though the appeal period has expired. In this decision, the Tribunal will only consider the issue of whether or not it should exercise its discretion and extend the deadline to appeal even though the period for seeking an appeal has expired. If the Tribunal grants an extension of time to appeal to Ms. Bauer then the Tribunal will afford the parties a full opportunity to respond to the merits of the appeal, although the parties appear to have made some submissions on the merits already.
6. Pursuant to section 36 of the *Administrative Tribunals Act* (the “*ATA*”), which is incorporated into these proceedings by section 103 of the *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 deciding appeals. In my view, the preliminary issue of the timeliness of the appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

7. Should the Tribunal exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the period for seeking an appeal has expired?

FACTS AND ANALYSIS

8. By way of background, on November 10, 2010, after an investigation into the complaints lodged by eight (8) former employees of Sync2, the Director issued a determination against Sync2 (the “Corporate Determination”) in the total amount of \$50,005.51 for wages owing to these employees, including accrued interest. The Director also levied three (3) administrative penalties of \$500 each under the *Employment Standards Regulation* for contraventions of the *Act* by Sync2.
9. Subsequently, the Corporate Determination, which contained a notice to directors and officers explaining their personal liability under the *Act*, was sent to Sync2 and copies to the registered and records office of Sync2 and to Ms. Bauer, a director of Sync2, and to Mr. Moore, an officer of Sync2.
10. Mr. Moore on behalf of Sync2 later appealed the Corporate Determination. However, this Tribunal, on March 9, 2011, dismissed the appeal and confirmed the Corporate Determination.
11. When subsequently Sync2 failed to pay the amount ordered in the Corporate Determination, the Director, under section 96 of the *Act*, issued two (2) determinations, one against Mr. Moore and another against Ms. Bauer. The determination against Mr. Moore, as indicated previously, has been appealed and will be dealt with separately by this Tribunal.
12. With respect to the Determination against Ms. Bauer, the delegate performed a corporate search on BC Online on January 5, 2010, which search showed Sync2 was incorporated on January 29, 2009, and Ms. Bauer was its director. The delegate, subsequently on October 26, 2010, performed another corporate search of Sync2 and this search continued to show Ms. Bauer as Sync2’s director.
13. Since, according to the delegate, Ms. Bauer was a director of Sync2 during the material time when the employees’ wages were earned or should have been paid, the delegate issued the Determination against Ms. Bauer holding her personally liable for up to two (2) months’ unpaid wages for each employee. The total of the Determination, as previously indicated, is \$50,665.66 including accrued interest.
14. With respect to the administrative penalties levied against Sync2 in the Corporate Determination, the delegate did not find sufficient evidence that Ms. Bauer “authorized, permitted or acquiesced” in the contraventions of Sync2 and therefore, the Director did not hold Ms. Bauer liable for those penalties under the *Act*.
15. As indicated previously, Mr. Moore filed Ms. Bauer’s appeal of the Determination on July 17, 2011, approximately 6 days after the expiry of the time for filing an appeal. Mr. Moore states that when, on July 11, 2011, he filed an appeal of the Director’s determination against him he was also jointly filing an appeal on behalf of Ms. Bauer. However, when he was subsequently, on July 14, 2011, informed by the Tribunal that he needed to file “additional documents for [Ms. Bauer]”, he complied and did so on July 17, 2011.
16. I note, however, the Appeal Form Mr. Moore originally filed on July 11, 2011, only showed his name as the “person making the appeal”. Further, the submissions accompanying the appeal form did not dispute the delegate’s conclusion that Ms. Bauer was a director of Sync2 during the material times when the employees

earned wages or should have been paid. The submissions mainly focused on Mr. Moore's own position or status in relation to Sync2 and the calculation of amounts owing to the employees taking into consideration an offset for the company's computers in the possession of the employees. As Mr. Moore has resubmitted those submissions in his appeal of the Determination against Ms. Bauer, I propose to set them out verbatim below:

July 7, 2011

SYNC2 AGENCY LTD.
#205 2922 Glenn Drive
COQUITLAM DRIVE, BC V3B 2P5

Dear Sirs and Madames:

These attachments and statements re: SYNC2 Agency Ltd. Appeal are:

1. I John Moore have NEVER be an Officer or Director of SYNC2 Agency Ltd. [sic] I made that very clear to Jim Dunne six months ago with my first meeting with him. Check the corporate registry. I am not an officer or director
 2. Delete my name from the Determination ORDER!!
 3. I provided Jim a detailed account of what was agreed to when we shut-down
 4. Copy of My Letter [sic] attached for your reference.
 5. The Parent Company of SYNC2 Agency LTD: SYNC2 Network Corp position is that the staff voluntarily took the computers as partial payment net of CRA deductions based on the FMV of the computers and the software they had with both the IMB and MAC operating systems
 6. The EST Appeal Statement [referring to the Corporate Determination made by this Tribunal] which I obtained which was submitted by Shafik Bhalloo was very informative.
 7. Net cheques will be issued for November 30 and December 15 pay based on CRA deductions and deductions for computers and IBM and MAC operating software which were taken as part payment of outstanding pay
 8. Call me at [number omitted]
17. Mr. Moore also resubmitted, with Ms. Bauer's late filed appeal, a five (5) page undated letter with attachments (the "Letter") (which he previously submitted with his own appeal on July 11). The Letter appears to have been previously sent by him in the earlier corporate proceeding against Sync2 wherein he appears to be responding to some preliminary determinations by the delegate of amounts owing to the eight (8) employees of Sync2 and outlines the offsets against the wages owing to them because they had in their possession the company's computers. The only pertinent submission in the Letter that relates to the s. 96 Determination against Ms. Bauer (as well as the determination against Mr. Moore) is the following statements he makes:
- I as CEO of SYNC Networks Corp. and not an Officer or Director of SYNC2 Agency Ltd. [sic] *The only Director is Jacqui Bauer and there are no officers as the Company is currently inactive.* [Italics mine]
- I [sic] been asked to respond to the information sent to both Jacqui Bauer and the Company's registered office.
18. The first of the above passages, particularly the italicized words, appears to lend support to the Director's conclusion that Ms. Bauer was a Director of Sync2 at the material times in question.

19. Having said this, I note that the Director has made no submissions on the issue of the timeliness of Ms. Bauer's appeal. However, on the substantive issues, the Director submits that the Determination should be confirmed and Ms. Bauer's appeal dismissed. In support of his position, the Director states that he relies on "the Delegate's original submission addressing Tribunal File Number: 2010A/181" which led to the Corporate Determination. However, the submissions of the delegate in the corporate proceeding do not really address the dispute raised in the appeal of Ms. Bauer of the s. 96 Determination made against her.
20. As indicated earlier, Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time to appeal has expired. However, the onus is on the party seeking an extension of time to appeal to show that there are compelling reasons before the Tribunal will exercise its discretion under the said provision in the *Act* to grant an extension of the appeal period. The specific, non-exhaustive, factors the Tribunal may consider in deciding whether to grant an extension of the appeal period are set out in the Tribunal's decision in *Blue World It Consulting Inc.*, BC EST # D516/98:
- (1) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 - (2) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - (3) The respondent party (i.e., the employer or the employee) as well as the Director of Employment Standards, must have been made aware of this intention;
 - (4) The respondent party will not be unduly prejudiced by the granting of the extension; and
 - (5) There is a strong *prima facie* case in favour of the appellant.
21. I have reviewed all these considerations in context of the facts in this case and for the reasons delineated below, I find that Ms. Bauer (or Mr. Moore on her behalf) fails to satisfy the criteria for granting an extension of time to file an appeal.
22. First, I do not find that there is a reasonable or credible explanation for the failure to request an appeal within the time period allowed in this case. I find it curious that there are no written submissions challenging anything in the Determination against Ms. Bauer in the appeal Mr. Moore filed on his own behalf on July 11, 2011. If he meant to include an appeal on Ms. Bauer's behalf together with his own appeal one would think that there would be some substantive submissions challenging the Determination against Ms. Bauer in his submissions. To the contrary, in the Letter he filed with the appeal submissions he appears to support the delegate's conclusion that Ms. Bauer was a director of Sync2 as he outrightly states "(t)he only Director is Jacqui Bauer and there are no officers as the company is currently inactive".
23. Second, there is no evidence of a genuine and on-going *bona fide* intention on the part of Ms. Bauer (or Mr. Moore on her behalf) to appeal the Determination during the appeal period.
24. Third, there is no evidence that the Director was ever aware of Ms. Bauer's or Mr. Moore's intention to appeal to appeal the Determination against Ms. Bauer during the appeal period. I find that Mr. Moore's resubmission of the materials he submitted in his appeal in the late filed appeal of Ms. Bauer's Determination quite telling in this regard as it does not, just like the earlier filed appeal of July 11, contain any substantive submissions disputing the section 96 Determination against Ms. Bauer.
25. Fourth, while, *prima facie*, there is no undue prejudice to the former employees of Sync2 in granting Ms. Bauer an extension of time to appeal, I am mindful of the need for a timely disposition of an appeal and the stated purpose in Section 2(c) of the *Act* "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In this case, even if I were to find in favour of Ms. Bauer on this

factor, because of the limited or virtually no prospect of success of Ms. Bauer on her appeal on the merits (discussed below), I do not think a finding of no prejudice to former employees of Sync2 assists Ms. Bauer on the balance, particularly when all relevant factors are considered in determining whether an extension of time for appealing the Determination should be granted in this case.

26. Finally, with respect to the merits of Bauer's appeal, it should be noted that except to the extent necessary to determine if there is a "strong prima facie case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re Onolabi (c.o.b.) Just Beauty*), BC EST # RD193/04, *Re BNN Enterprises Ltd.*, BC EST # D165/04). In this case, I have reviewed the submissions of Mr. Moore on behalf of Ms. Bauer and there is nothing in those submissions that would lead me to conclude that Ms. Bauer's appeal constitutes a "strong prima facie case that might succeed". To the contrary, there appears to be a strong evidentiary basis that would lead me to conclude otherwise. I say this because in both the corporate searches of Sync2 performed by the delegate, Ms. Bauer is listed as a director. However, the corporate records raise a rebuttable presumption that a person is a director or officer (See *Re British Columbia (Director of Employment Standards)*, BC EST # RD047/01). It is then open for Mr. Bauer to prove on the balance of probabilities that the company records are inaccurate or she may adduce evidence of any circumstances that would make it inappropriate to find her a director of Sync2. However, there is nothing in the submissions in support of Ms. Bauer's appeal that would remotely rebut the presumption that she was a director of Sync2 during the material period in question. Instead, there is evidence, in the form of the Letter of Mr. Moore to the Tribunal in the corporate proceeding (which he submitted together with the late filed appeal of Ms. Bauer) in which Mr. Moore indicates in unequivocal language that Ms. Bauer was the only director of Sync2.

ORDER

27. I find that Ms. Bauer has not met the burden of showing that the time limit for appealing the Determination dated June 3, 2011, should be extended in this case. Therefore, I decline to exercise my discretion to extend the appeal period.
28. Pursuant to Section 115 of the *Act*, I order the Determination be confirmed in the amount of \$50,665.66, together with any interest that has accrued pursuant to section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal