Employment Standards TRIBUNAL

An appeal

- by -

Rene Letroy carrying on business as Integrity Contracting
(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/100 & 2009A/101

DATE OF DECISION: September 29, 2009

DECISION

SUBMISSIONS

Ashley R. Ayliffe & Christopher D. Drinovz	on behalf of Rene Letroy
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. I have before me two separate applications that relate to an appeal filed by Rene Letroy (the "Appellant") of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on April 17, 2009 pursuant to which the Appellant was ordered to pay his former employee, Lars Jacobsen (the "Respondent"), $790.48 on account of unpaid wages and concomitant vacation pay and interest (the "Determination"). The delegate also levied a $500 monetary penalty against the Appellant and thus the total amount payable under the Determination is $1,290.48. The Appellant has filed both applications and these reasons for decision address only these two applications.

2. The first application (Tribunal File # 2009A/100), made pursuant to section 109(1)(b) of the *Employment Standards Act* (the "*Act*"), is for an extension of the appeal period. The appeal was filed on July 29, 2009, over two months after the appeal period expired (on May 25, 2009). The second application (Tribunal File # 2009A/101), made pursuant to section 113 of the *Act*, is an application to suspend the Determination pending the outcome of the appeal.

3. For reasons set out below, I am not prepared to order that the appeal period be extended. Accordingly, the suspension application is moot. I do note, however, with respect to this latter application, that the delegate advised the Appellant's legal counsel on July 24, 2009 that she was prepared to accept counsel's proposal that the Employment Standards Branch not take any enforcement proceedings if the Appellant deposited the "wage" portion of the Determination in the Director's trust account. Although the Appellant's proposal was accepted, the Appellant had not, as of August 13, 2009, deposited the funds as suggested. In my view, if I were to consider the suspension application on its merits, I almost certainly would have made an order in line with the parties' agreement regarding suspending enforcement proceedings.

ISSUE

4. As noted above, the only issue I will address in detail is the Appellant's section 109(1)(b) application for an extension of the appeal period. It is common ground that the appeal period (see section 112(3)(a)) expired on May 25, 2009. There is a notice contained in the Determination to that effect (see page 2).

5. The Appellant's application is being adjudicated based solely on the parties' written submissions. I have reviewed the Appellant's legal counsel's extensive brief in this matter as well as the Director's submission dated August 13, 2009. The Respondent did not file any submission regarding the Appellant's applications although he was invited to do so.

FINDINGS AND ANALYSIS

6. Section 109(1)(b) states that the Tribunal may extend the appeal period even though the application is filed after the appeal period has expired. In several decisions, commencing with *Niemisto*, BC EST # D099/96

(see also *Patara Holdings Ltd.*, BC EST # D010/08, confirmed on reconsideration: RD053/08, for a more recent discussion regarding the governing considerations), the Tribunal has identified a number of factors that will guide its discretionary authority to extend appeal periods. In particular, the Tribunal will examine why the appeal was filed late, whether the appellant had (and communicated) an ongoing *bona fide* intention to appeal, potential or actual prejudice to other parties, and the presumptive strength of the appeal grounds.

7. Counsel for the Appellant says that:

> • the Appellant was not even aware of the fact that a Determination had been issued against him until "June 2009" and that the Determination was originally mailed to an address at which he had ceased to reside as of October 2008;
>
> • the Appellant has had a continuing intention to appeal the Determination since he first became aware of its existence and that the Director (but not the Respondent) has known of that intention;
>
> • no party will be prejudiced by an extension of the appeal period; and
>
> • the appeal has considerable presumptive merit.

8. The delegate opposes the application to extend the appeal period because, to summarize her position, the Appellant's explanation regarding why the appeal was not filed in a timely manner is not credible and, in any event, the appeal is wholly devoid of merit.

9. The Appellant's counsel says that the Appellant did not know that a Determination had been issued against him until "June 2009" (no particular day in June was specified). This assertion is disingenuous. The Appellant's counsel's submission indicates that the Appellant knew about the Determination by no later than June 10, 2009 when he "travelled [on June 19th] to Kelowna to contest a Writ of Seizure and Sale issued pursuant to the Determination". Even if it were true that the Appellant first learned about the existence of the Determination on or shortly before June 10, 2009 [the date his motion for a stay of execution was filed), I am still puzzled as to why he waited until July 29, 2009 to file his appeal. This latter delay has not been adequately accounted for.

10. However, it seems clear that the Appellant was aware of the Determination at a much earlier point in time. The Appellant says that he ceased living at the residential address on file with the Employment Standards Branch ("ESB") as of October 2008. And yet, on January 19, 2009, when specifically asked for a mailing address by an ESB branch officer, he refused to provide a new address and consented to mail being forwarded to his former address (an address where his former spouse continued to reside). The Determination was mailed to this latter address and on April 20, 2009 (3 days after the Determination was issued and mailed to him), he telephoned the ESB and spoke with the delegate about her findings set out in her "Reasons for the Determination". The Appellant's counsel asserts that the Appellant did not know about the Determination until "June 2009", however, this assertion cannot be given any credibility when the evidence shows that the Appellant was complaining about findings made in the Determination within 3 days after it was issued. At paragraph 33 of the Appellant's affidavit sworn in support of his application for a stay of enforcement of the Determination, the Appellant states that he received the Determination "in <u>May</u> or June 2009" (my <u>underlining</u>). The Appellant's counsel states in his brief: "…after reading the Determination for the first time, the Applicant was outraged and phoned the delegate to contest its contents". Since the Appellant is not sure whether he called in May or June, and the delegate's records clearly show that the call was made on April 20, 2009, I find that the Appellant had the Determination in hand by no later than April 20th, 2009.

11. The evidence before me is that the Appellant again telephoned the delegate, leaving a voice mail message, on May 25, 2009 (the appeal deadline) stating "I'll be firing off a letter to you" that was to be received "before midnight tonight which is the 25th". I remain puzzled as to why the Appellant, despite his May 25 assertion, did not file his appeal until July 29, 2009. I am of the view that the most likely explanation is that the appeal was filed only after the Appellant learned that the Director was taking execution proceedings to enforce the Determination.

12. In light of the Appellant's clear attempt to deceive the Tribunal about the true facts, I am inclined, on that basis alone, to deny the application. But there is more. The Appellant appears to have been sparked into action not by the issuance of the Determination but, rather, by the Director's attempts to enforce the Determination. I am not satisfied that the Appellant intended to appeal the Determination from the moment he first knew about it (a date, I find, within a few days of its issuance). Indeed, the record before me shows that he intended to ignore it (a behaviour consistent with that displayed during the ESB adjudication process where the Appellant wilfully refused to participate in the investigative process – see Reasons for the Determination, pages 1-2).

13. As for the matter of prejudice, I am of the view that extending this appeal period would only unnecessarily delay the inevitable outcome, namely, that a Tribunal order would be issued confirming the Determination. I view this application as a colourable attempt to delay the timely enforcement of the Determination. In this latter regard, it is perhaps telling to note that the ESB accepted the Appellant's counsel's proposal that enforcement proceedings not be taken if the "wage" component of the Determination were deposited into the Director's trust account. The Appellant never deposited the funds and that failure, in my view, calls into question his assertion that he has always had a *bona fide* intention to appeal. Further delay simply gives the Appellant more time to organize his affairs so as to defeat the Respondent's lawful entitlement. In my view, the section 2(b) and (c) purposes of the *Act*, relating to fair treatment of employees and fair and efficient dispute resolution procedures, would be sacrificed if an extension were granted in this case.

14. Finally, I wish to briefly address the Appellant's assertion that he has a strong *prima facie* case. In my view, this appeal is frivolous and vexatious. The appeal is predicated on two grounds: natural justice (section 112(1)(b)) and new evidence (section 112(1)(c)). The material before me shows that the ESB generally, and the delegate, specifically, made every reasonable effort to secure the Appellant's participation in the adjudicative process but he frustrated their efforts at every turn. Whatever evidence the Appellant now wishes to place before the Tribunal could have been placed before the delegate had he not deliberately refused to participate in the ESB adjudicative process.

15. The ESB process began as a teleconference hearing but was converted to an investigative process (involving a new delegate) when the first delegate refused to allow the Appellant to tape record the teleconference. The original delegate was lawfully entitled to direct that the teleconference not be recorded (see section 84.1) by one of the parties and although I do not rest my decision on this point, I query whether the Appellant had the legal right to unilaterally decide to tape record the proceedings without the consent of the other parties involved in the hearing. In my view, civil privacy common law and legislation do not permit such unilateral action by a party to an administrative hearing.

16. Finally, the Appellant says that the Respondent was an independent contractor not an employee. This latter matter raises a question of law (or at least one of mixed fact and law) and the Appellant has not grounded his appeal on an error of law (section 112(1)(a)). Nevertheless, even if one were to accept that the Appellant is free to argue a point of law (and I do not necessarily say that he is estopped from doing so), this matter was fully addressed by the delegate in her reasons and I am wholly unable to accept that her conclusion that the

parties were in an employment relationship is legally or factually incorrect. I wish to add that I make the foregoing comments solely to explicate my view that the Appellant does not have a *strong prima* facie case.

ORDER

17. The Appellant's section 109(1)(b) application to extend the appeal period is refused. Pursuant to sections 114(1)(b) and (c) the appeal is dismissed and, accordingly, the Determination stands as issued in the amount of $1,290.48 together with any further section 88 interest that has accrued since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal