Employment Standards TRIBUNAL

An appeal

- by -

Raincoast Community Rehabilitation Services Incorporated
("Raincoast")

- 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: David B. Stevenson

FILE No.: 2015A/95

DATE OF DECISION: September 22, 2015

DECISION

SUBMISSIONS

Jason D. Ellis	on behalf of Raincoast Community Rehabilitation Services Incorporated

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Raincoast Community Rehabilitation Services Incorporated ("Raincoast") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 24, 2015.

2. The Determination denied an application under section 72 of the *Act* for a variance of the provisions of section 40 of the *Act*.

3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. The appeal was received by the Tribunal on July 8, 2015, outside of the statutory time limit set out in subsection 112(3) of the *Act*.

5. Raincoast seeks an extension of the statutory appeal period.

6. On July 10, 2015, the Tribunal notified the parties that an appeal and a request for an extension of the appeal deadline had been received from Raincoast, requested production of the section 112(5) "record" (the "record") from the Director, and notified the parties, among other things, that no submissions were being sought from the other party pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.

7. The "record" was provided by the Director to the Tribunal and a copy was sent to Raincoast, which was advised of its right to object to the completeness of the "record". On July 27, 2015, the Tribunal received e-mail correspondence from Raincoast attaching "documents missing from the Record received from the Director of Employment Standards". Responding to that correspondence, the Director says one of the documents was "routine correspondence" and the two pages with employee signatures were not submitted as part of the application; none of the added documents were included in the "record" as they were not considered by the Director in deciding the application.

8. Raincoast has not replied to the Director's position.

9. Although I am not satisfied the "record" is deficient in any material way, I do not accept the position of the Director on the reasons for not including the documents in the "record". The Director says the April 14, 2015, letter was not included as it was "routine correspondence". The Director has correctly pointed out, the "record" is comprised of what "was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director" (see section 112(5) of the *Act*). However, there is no exclusion for "routine correspondence". This letter was "before the director at the time the determination... was made" and should have been included as part of the "record". One of the two pages with employee signatures does not appear to have been associated with the

variance application. That page, as the Director notes, appears to have been transmitted in November 2014. There is nothing on it that indicates it was sent by Raincoast with the intention of being part of the variance application made in March 2015. The other page appears to have been submitted in relation to the application and ought to have been included in the "record".

10. Based on the above considerations, I agree with Raincoast that the "record" is deficient, but will proceed with this appeal as though the April 14, 2015, letter and the employee signature page are included. In any event, I do not find the documents added to the "record", or even the earlier employee signature, to be material to either the application or the merits of this appeal.

11. Consistent with notice contained in correspondence from the Tribunal dated July 10, 2015, I have reviewed the appeal, the appeal submissions and the revised "record".

12. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and my review of the "record" that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

> ***114*** *(1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*
>
> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect that the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

13. I am deciding whether Raincoast should be granted an extension of the appeal period or whether the appeal should be dismissed under either, or both, section 114(1)(b) and (f) of the *Act*. If I decide all or part of the appeal should not be dismissed under section 114(1), the Director will be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

14. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

15. There are two elements to this appeal: timeliness and the relative merits of the appeal.

16. The facts relating to the first element are as follows:

1. The Determination was issued on April 24, 2015;
2. The time limited for filing an appeal expired on June 1, 2015;
3. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
4. The Appeal Information clearly indicates an appeal must be delivered to the Tribunal and provides a web site address and telephone number for the Tribunal as locations for acquiring resource information for how to appeal;
5. The appeal was received by the Tribunal on July 8, 2015.

17. The facts relating to the merits of the appeal are as follows:

1. On March 10, 2015, Raincoast applied to the Director for a variance of the provisions of section 40 of the *Act*;
2. The application requested that Raincoast be exempt from paying an employee overtime until that employee had worked over 10 hours in a day; employees could work up to 40 hours in a week; employees working over 10 hours, but less than 12 hours in a day, would be paid 1.5 times their regular wage; and employees working over twelve hours in a day would be paid 2 times their regular wage. The application requested the variance for a period of 5 years;
3. The reason provided by Raincoast in the application for the requested variance was to "avoid the strict application of section 40 and enjoy greater flexibility in scheduling", allowing employees to travel from client to client and reducing the need to hire more employees working part time;
4. The application indicated a variance "would allow employees to have greater flexibility in the scheduling of their work week", by allowing them to choose to work more than eight hours on some days and less than eight hours on others, while still working 40 hours a week;
5. The application did not include a work schedule;
6. The Director found the proposed variance was inconsistent with the purposes of the *Act*, as it failed to identify any tangible benefit to employees balancing the overtime exemption sought in the application;
7. The Director found the variance did not meet the requirements of section 73(1)(b) of the *Act* and declined to grant it.

ARGUMENT

18. In respect of the request to extend the time period for filing, Raincoast submits the delay in filing the appeal with the Tribunal was the result of a genuine mistake that resulted in the appeal being sent to the Employment Standards Branch, within the appeal period, rather than to the Tribunal. This error was corrected by Raincoast as soon as it was discovered.

19. In respect of the merits, Raincoast has filed two submissions, one with the appeal (the "appeal submission") and which appears to have been prepared on or near June 1, 2015, and one dated July 2, 2015. The latter addresses the matter of a perceived "benefit to employees" of granting the requested variance.

20. The appeal submission argues the Director erred in law and failed to observe principles of natural justice in making the Determination. The principal foundation for the appeal is that the Director "overturned" a 12 year history of granting variances to Raincoast and its predecessor company without providing "comprehensive reasons" and without providing Raincoast with "an opportunity to respond in a more fulsome manner" before making the declining the application.

21. In responding to the concerns with the application identified in the Determination, Raincoast says there "cannot be a set shift schedule" given the nature of the industry and the special needs of the brain-injured clients to whom Raincoast provides services. Raincoast takes issue with the view of the Director that the application appears to be a way to avoid paying overtime. Raincoast says it has routinely paid overtime over the course of previous granted variances "in a way that has allowed the company to compete within a competitive industry". Raincoast argues the application was not inconsistent with the *Act*.

22. As indicated above, the July 2, 2015, submission addresses the issue of whether the application provides a benefit to employees. Raincoast submits the Director overlooked the fact that several of the affected employees work more than one job and that, by allowing longer daily hours and a resulting shorter work week, these employees are freed up to attend other jobs to supplement their income. This argument was not included in the application.

ANALYSIS

23. When considering an appeal under section 114 of the *Act*, the Tribunal considers several aspects of an appeal, including timeliness and its relative merits, examining the statutory grounds of appeal chosen against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.

24. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

25. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

26. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: see section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

> 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.

27. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:

1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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 employee), as well the Director, must have been made aware of this intention;
4. the respondent party will not be unduly prejudiced by the granting of an extension; and
5. there is a strong *prima facie* case in favour of the appellant.

28. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive, but no additional criteria are advanced in this case.

29. I find, in the circumstances of this case, the first criterion is neutral, neither supporting nor operating against an extension of time. I also find that Raincoast has satisfied the second, third and fourth criteria for being granted an extension of the appeal period. The critical factor, for both an exercise of discretion under section 109(1)(b) and for a consideration under section 114(1)(f), is whether this appeal has sufficient merit or a reasonable prospect of succeeding.

30. The relevant part of section 73 provides:

> (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that
>
> (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
>
> (b) the variance is not inconsistent with the purposes of this Act set out in section 2.
>
> (1.1) The application and operation of a variance under this Part must not be interpreted as a waiver described in section 4.

31. Section 73 vests the Director with discretionary authority to approve or disapprove of variance applications. The Tribunal will not interfere with the exercise of discretion by the Director unless it can be shown that there has been an abuse of power or jurisdictional error or that the Director has acted unreasonably or has failed to exercise his discretion within "well established legal principles" (see *Kevin Jager*, BC EST # D244/99 and the cases cited therein).

32. The central purpose of the *Act* is to establish minimum terms and conditions of employment for those employees subject to it, including overtime wages. For this reason employees and employers are not free to "contract out" of the *Act*: see section 4.

33. The Director's decision to deny the application was influenced primarily by the effect of the variance, which would have denied the employees overtime wages, a result that is prohibited by section 4 of the *Act*, without balancing the loss of that statutory benefit with any tangible improvement in other areas of their employment. That is an appropriate, and indeed necessary, consideration for the Director to undertake.

34. Although Raincoast disagrees with the Determination, they have not shown any basis upon which the Tribunal should interfere with the refusal by the Director to grant the variance. The variance application did

not, on its face, set out any benefit to the employees. The sole reasons for the application were to allow Raincoast to avoid payment of overtime and hiring more employees. There was nothing in the application supporting the purported flexibility Raincoast said would be provided to employees. The attempt to show a benefit after the fact comes too late and, in any event, does not materially affect the characterization of the application made by the Director. I would not view having employees work 10 hour days at straight time so they can acquire alternate employment to be a benefit that would balance loss of overtime in those 10 hour days. As well as being too late for consideration with the appeal, the later attempt at justification appears to contradict earlier assertions about "routinely" paying overtime when it states that without a variance Raincoast "must prohibit all overtime". Even if submitted within the time period and considered, such statements do nothing to advance its argument.

35. I endorse the comments of the Tribunal in *James L .Armstrong*, BC EST # D026/97, that applications for variances should involve some sort of *quid pro quo*, that is, the employee should receive some other benefit in exchange for the loss of the statutory entitlement. None was present in this case.

36. I am unable to find that the Director erred in law in denying the application. The Director considered the *Act*, including its purposes, and applied the appropriate tests in exercising the discretion allowed by the *Act*.

37. I am also unable to conclude that the delegate failed to observe principles of natural justice in considering factors she ought not have considered, or failed to consider factors she ought to have. There is nothing in the *Act* that indicates the granting of a variance provides a right to another variance without the need to demonstrate to the Director such variance is justified under the *Act*. I find the Director exercised her discretion for *bona fide* reasons and that the decision was not arbitrary or based on irrelevant considerations.

38. In summary, I find the appeal presents neither a strong *prima facie* case nor a case that has a reasonable prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other party to respond to it.

39. The appeal is denied.

ORDER

40. Pursuant to section 115 of the *Act*, I order the Determination dated April 24, 2015, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal