

An appeal

- by -

Eddy Caballero carrying on business as Destiny Construction
(“Caballero”)

- 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.: 2011A/66

DATE OF DECISION: September 14, 2011

DECISION

SUBMISSIONS

Edgar Caballero	on his own behalf
Jorge Luis Borges	on his own behalf
Julio Andy Valenzuela	on his own behalf
Greg Brown	on behalf of the Director of Employment Standards

INTRODUCTION

1. On April 8, 2011, a delegate of the Director of Employment Standards (the “delegate”) issued a Determination, pursuant to section 79 of the *Employment Standards Act* (the “*Act*”), against Eddy Caballero carrying on business as Destiny Construction (“Caballero”), ordering him to pay \$5,038.22 on account of unpaid wages and interest owed to three former employees (the “Determination”). The three complainants worked for Mr. Caballero’s construction business during the spring and summer of 2010 but were not paid. Further, and also by way of the Determination, the delegate levied two separate \$500 monetary penalties against Mr. Caballero and, accordingly, the total amount payable under the Determination is \$6,038.22. Mr. Caballero, although given ample opportunity to do so, did not participate in the delegate’s investigation and this appears to have been a deliberate course of action he chose to follow.
2. On May 16, 2011, Mr. Caballero filed an appeal of the Determination with the Tribunal pursuant to section 112(1)(c) – “evidence has become available that was not available at the time the determination was being made”. Mr. Caballero’s appeal was submitted in the form Tribunal’s Appeal Form (Form 1) and some other appended documents. Although he indicated on his form that he was attaching both the “written reasons for the Determination” and his reasons for appeal, he did not do so. As of May 16, 2011, the delegate had not issued reasons for decision and thus it was not possible for Mr. Caballero to append the delegate’s reasons to his Appeal Form. However, it also seems clear that Mr. Caballero failed to make a timely request for written reasons (see *Act*, section 81(1.2)) even though a notice was contained in the Determination regarding this procedural matter. The delegate subsequently issued “Reasons for the Determination” (the “delegate’s reasons”) on June 20, 2011.
3. The Tribunal’s Appeal Form directs an appellant to “provide your detailed explanation on a separate sheet of paper” regarding the particulars of the ground(s) of appeal advanced. Mr. Caballero, as noted above, did not file any reasons for appeal but he did append a letter to his Appeal Form in which he sought a time extension so that he could file his reasons.
4. An appeal to the Tribunal is not perfected (*i.e.*, completed) unless and until, among other requirements, the reasons for the determination and the appellant’s reasons for appeal are filed with the Tribunal within the applicable appeal period (see subsection 112(2)). Since Mr. Caballero’s appeal was incomplete, on May 18, 2011, the Tribunal’s administrator wrote to Mr. Caballero advising him that he must file the delegate’s reasons and his written reasons for appeal by no later than June 13, 2011. Mr. Caballero had previously advised the Tribunal that he would be meeting with the delegate on May 17, 2011, and the delegate had previously confirmed with the Tribunal that his reasons would be issued by June 3, 2011 (although, in

fact, the delegate's reasons were not issued until June 20, 2011). Mr. Caballero was also instructed to provide written reasons as to why his appeal was late.

5. Subsections 81(1.1) to (1.3) of the *Act* provide as follows:

81 (1.1) A person named in a determination under subsection (1) may request from the director written reasons for the determination.

(1.2) A request under subsection (1.1) must be in writing and delivered to the director within 7 days of the person being served with the copy of the determination under subsection (1).

(1.3) On receipt of a request under and in accordance with subsections (1.1) and (1.2), the director must provide the person named in the determination with written reasons for that determination.

6. On June 21, 2011, the Tribunal wrote to Mr. Caballero advising him that since he had not filed either the delegate's reasons or his own reasons for appeal, "the Tribunal is unable to proceed with your appeal and has closed this file." (see *Act*, subsection 112(2))

7. Following the Tribunal's June 21, 2011, letter, Mr. Caballero eventually submitted a number of documents including the delegate's reasons (as noted above, issued on June 20, 2011) but, once again, he did not include his reasons for appeal. Thus, on July 4, 2011, the Tribunal's administrator wrote another letter to Mr. Caballero confirming that his appeal file would remain closed.

8. By letter dated July 18, 2011, all parties were invited to provide submissions, by no later than August 9, 2011, regarding Mr. Caballero's application, made pursuant to section 109(1)(b) of the *Act*, to extend the appeal period and submissions were subsequently filed by the delegate and by two of the three respondent employees. Mr. Caballero's very brief submission was filed on August 10, 2011 (one day after the submission deadline).

9. These reasons for decision deal solely with the section 109(1)(b) application to extend the appeal period. If the appeal period is extended then the Tribunal will re-open the file and proceed to adjudicate this appeal on its merits. If the application is refused, the appeal will be summarily dismissed under section 114 of the *Act*.

FINDINGS

10. Mr. Caballeros, in his letter dated August 8 (but filed August 10), 2011 states: "By this letter I like to request an extension to accept the document there I submit after the deadlines" [*sic*]. Mr. Caballeros notes that there was an intervening postal strike and that the delegate's reasons were not issued until June 20, 2011. The delegate opposes the extension application, as do the two respondent employees. Mr. Caballeros still has not filed any written reasons for appealing the Determination.

11. The delegate notes that he personally met with Mr. Caballero on May 17, 2011, at which time Mr. Caballero acknowledged having received the three complaint forms and a demand for payroll records that he simply ignored. Mr. Caballero, as is detailed in the delegate's reasons at page R3, was provided with several opportunities to participate in the delegate's investigation but he resolutely refused to cooperate.

12. Mr. Caballero's appeal is predicated on "new evidence" and he did append some documents to his Appeal Form but not one of these documents satisfies the test for "new evidence" set out in *Davies et al.*, BC EST # D171/03, particularly since all of this material was available to be placed before the delegate during his investigation.

13. In my judgment, this appeal is frivolous on its face and Mr. Caballero has still not yet filed any reasons for appeal despite being repeatedly directed to do so. Further, Mr. Caballero has consistently refused to respond to this matter in a timely fashion (and in many instances, he simply failed to respond in any fashion). Taking all of these considerations into account, I do not think it appropriate to extend the time for filing an appeal to the Tribunal.

ORDER

14. This application to extend the time for filing an appeal is refused. Accordingly, pursuant to subsections 114(1)(b), (c), (e), (f) and (h), this appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal