

An appeal

- by -

U.C. Glass Ltd.
("U.C. Glass")

- 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.: 2008A/97

DATE OF DECISION: October 29, 2008

8. The Determination sets out the circumstances of Mercado's employment and the details of his complaint. The Director found, as a matter of fact, that Mercado worked during the period from December 14 to 21, 2007, on January 3 and 4, 2008 and attended work on January 7, 2008.
9. More relevant to this appeal is the description in the Determination of the unsuccessful efforts made by both Mercado and the Director to have U.C. Glass address the claim by Mercado that he was owed wages. These efforts included Mercado delivering a completed Self Help Kit to the business address of U.C. Glass, two delegates of the Director making several attempts to contact Mr. Basi, the principal of U.C. Glass, by telephone and delegates of the Director communicating with Mr. Basi and U.C. Glass by correspondence (including a registered mail delivery of a Notice of Complaint Hearing and a Demand for Employer Records), whose contents notified Mr. Basi and U.C. Glass of the claim made by Mercado and the process, the role of the Employment Standards Branch in the process, requested a response to he complaint, fixed a date for a complaint hearing, reminded Mr. Basi of the complaint hearing date and invited participation in mediation, pre-hearing disclosure of documents and submissions.
10. U.C. Glass did not respond to any of these efforts nor did Mr. Basi or any other representative of U.C. Glass attend the complaint hearing. The complaint hearing was held on July 16, 2008. Prior to the hearing commencing, a final unsuccessful effort was made to communicate with Mr. Basi to remind him of the hearing and to canvas his intentions regarding attendance.
11. At the complaint hearing, the Director heard evidence from Mercado and made findings based on that evidence.
12. The Determination was issued July 25, 2008 and the appeal was delivered to the Tribunal on September 3, 2008.

ARGUMENT AND ANALYSIS

13. U.C. Glass says the Determination is "unjust, unfair and not applicable . . . based on reasonable grounds and pertinent facts to be brought forward at this time". U.C. Glass argues the facts as found in the Determination are not entirely correct and the corrected facts should result in a lesser amount of wages being owed to Mercado than found in the Determination.
14. Mr. Basi explains that his failure to deal with the claim for wages made by Mercado or to respond to the verbal and written communications from the Director and his delegates was the result of a significant personal tragedy in his life that occurred on January 10, 2008.
15. In response, the Director says that Mr. Basi and U.C. Glass were provided an ample opportunity to participate in the complaint process, including the complaint hearing and failed to provide any response or evidence in respect of the claim for wages. The Director also notes that the administrative penalties were correctly imposed and are not negotiable.
16. In the final reply, U.C. Glass, in response to the Director's indication that proper payroll information was not provided to Mercado, has submitted a wage statement for him. In the reply, Mr. Basi also acknowledges he received several telephone messages from delegates of the Director and made some efforts, albeit unsuccessful, to return those calls.

17. On the issue of timeliness, U.C. Glass says the appeal was filed “on time” but was hand delivered to the Ministry of Labour and Citizen’s Services (Employment Standards Branch) in Burnaby, instead of the Tribunal, in error. The Director has taken no position on the timeliness issue. The appeal submission is dated as having been received in the Employment Standards Branch Lower Mainland office on August 29, 2008.
18. This appeal must be dismissed on the issue of timeliness.
19. The Tribunal has taken a fairly strict approach to granting extensions of time, even where the delay is, as in this case, very brief. 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.
20. The Tribunal has identified several factors which should be considered in determining whether there are compelling reasons for extending the time for appeal:
- i) whether there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) whether there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) whether the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) whether the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) whether there is a strong *prima facie* case in favour of the appellant.
21. There are several factors that would support an extension of time in this case. The delay is very brief – one day – and U.C. Glass has provided a credible explanation for the delay – they delivered the appeal to the wrong location. As well, the delivery of the appeal to the Employment Standards Branch office within the time limits is a clear indication of a *bone fide* intention to appeal within the time limit. The Director was aware of this intention, although there is no indication that Mercado was notified. There does no appear there would be undue prejudice to Mercado by extending the time for filing by one day.
22. The last factor, however, militates strongly against this appeal and is determinative of my decision not to extend the time for filing. Simply put, U.C. Glass has not demonstrated there is any case in favour of this appeal. The appeal is entirely without merit and it would be an unnecessary waste of the time and resources of the tribunal to allow it to proceed.
23. The key elements that compel this conclusion are that U.C. Glass failed or refused to participate in the complaint process and has failed to identify a proper ground of review.

24. This appeal is based entirely on evidence that could have been produced during an investigation but was not because U.C. Glass failed or refused to participate in the complaint process. The Tribunal has consistently said in many decisions, stemming from the decisions in *Tri-West Tractor Ltd.*, BC EST # D268/96) and *Kaiser Stables Ltd.*, BC EST # D058/97, that it will not normally allow an appellant to raise issues or present evidence which could have been raised or presented during the complaint process. In *Tri-West*, the principle is stated as follows:
- This Tribunal will not allow appellants to ‘sit in the weeds’, failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. . . . The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.
25. In *Kaiser Stables*, the concerted efforts of a delegate to have an employer participate in the investigation of a Complaint were ignored by the employer. The employer then appealed the delegate's Determination and sought to introduce new evidence on appeal. That evidence was ruled inadmissible. The Adjudicator in that decision states, “The Tribunal will not allow an employer to completely ignore the Director's investigation and then appeal its conclusions”. The circumstances are not dissimilar here.
26. Decisions like *Tri-West* and *Kaiser Stables* preserve the integrity of the Director’s decision-making process. If it were not for the principle set out in these decisions, and affirmed in many other decisions, the ability of the Director to make quick and final decisions on complaints made under the *Act* would be seriously impaired and the appeal process would become unmanageable and eventually fall into disrepute.
27. While the personal circumstances of Mr. Basi were unfortunate, they apparently did not completely debilitate his ability to make some efforts to contact the delegates of the Director in response to their communications. The complaint process extended over a period in excess of six months. There is no reasonable excuse for ignoring Mercado’s claim or the efforts of the Director to administer the claim for that entire period of time, particularly when Mr. Basi accepts a substantial portion of Mercado’s claim is valid.
28. In any event, the ground of appeal chosen by U.C. Glass is unavailable in the circumstances. The appeal is grounded in evidence becoming available “*that was not available at the time the determination was being made*”: section 112(1)(c). It is apparent, however, that all of the evidence which U.C. Glass seeks to present in this appeal is evidence that was reasonably available at the time the Determination was being made. The Tribunal has taken a relatively strict view of what will be accepted as new, or additional, evidence in an appeal. While the Tribunal has discretion to allow new or additional evidence, it does not exercise that discretion in favour of a appellant who seeks to introduce evidence on appeal that was reasonably available during the complaint process and should have been provided to the Director during the complaint process (see *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03 and *Senor Rana’s Cantina Ltd.*, BC EST #D017/05). Such a circumstance not only runs contrary to the *Tri-West* and *Kaiser Stables* decisions, and those decision which apply the principle stated in them, it is also inconsistent with the provisions of Section 112 which identify the statutorily allowable grounds of appeal.

29. Based on the refusal to extend the time, it is not necessary to consider the request to suspend the effect of the Determination.

ORDER

30. Pursuant to Section 115 of the *Act*, I order the Determination dated July 25, 2008 be confirmed in the amount of \$2,870.95, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal