



An appeal

- by -

Northwestern Utility Construction Ltd.
(“NUC”)

- 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.: 2016A/79

DATE OF DECISION: August 18, 2016

DECISION

SUBMISSIONS

John A. McLachlan

counsel for Northwestern Utility Construction Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Northwestern Utility Construction Ltd. (“NUC”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 13, 2016.
2. The Determination found NUC had contravened Part 8, section 63 of the *Act* in respect of the employment of John Ferch (“Mr. Ferch”) and ordered NUC to pay Mr. Ferch wages in the amount of \$4,140.32 and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$4,640.32.
3. This appeal is grounded in an allegation the Director erred in law. NUC seeks to have the Determination cancelled.
4. The statutory time period for filing an appeal of the Determination expired on June 20, 2016. This appeal was received by the Tribunal on June 21, 2016. NUC seeks an extension of the statutory appeal period.
5. In correspondence dated June 24, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to NUC, which has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 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.

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Ferch will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the statutory time limit for filing an appeal should be extended and whether if there is any reasonable prospect the appeal can succeed.

ISSUE

9. The issue is whether this appeal should be allowed to proceed or dismissed under section 114(1) of the *Act*.

THE FACTS

10. The facts are summarized in the Determination. The appeal does not submit there are new, or additional, facts that bear on this appeal, but does argue the Director reached a wrong conclusion on the facts presented by the parties.
11. NUC operates a fibre and copper cable installation and maintenance business. Mr. Ferch was employed by NUC as a Lineman Helper from April 2011 to July 14, 2015, when his employment was terminated. He filed a complaint alleging that NUC had contravened the *Act* by failing to pay compensation for length of service on his termination.
12. The Director conducted an oral complaint hearing on October 20, 2015. Mr. Ferch testified on his own behalf and presented one other witness. NUC presented two witnesses.
13. The Determination identifies there were two issues being considered by the Director:
1. Whether NUC's principal business was construction and whether Mr. Ferch was employed at one or more construction sites; and
 2. Whether Mr. Ferch was owed compensation for length of service.
14. The Determination indicates the evidence relating to the work performed by Mr. Ferch involved Mr. Ferch working on a contract to either Telus or Shaw either placing cables over ground on existing poles or through existing conduit underground. A typical job was of two or three days' duration and the work would take place along an easement. There were periods when Mr. Ferch worked in the NUC shop or yard. He was employed consecutively with NUC for four years and three months.
15. The Determination also indicates there was evidence from NUC that about 90% of their work was acquired through job bids. NUC indicated that, overall, the work performed by their business included repair, construction, tear downs and high load moves at night.
16. The Director found the evidence, taken as a whole, showed the principal work performed by NUC, and by Mr. Ferch, was "replacing cables in existing structures". The Director concluded NUC had failed to establish that its principal business was construction, as that term is defined in the *Act*, but was, on the evidence, more accurately described as "maintenance of existing structures". The Director also found there was no evidence that showed Mr. Firth was employed on "one or more construction sites".

17. Based on the evidence and the conclusions reached by the Director from that evidence, it was found Mr. Ferch was not excepted by section 65(1)(e) from entitlement to compensation for length of service and that he was, therefore, entitled to such in the amount set out in the Determination.
18. The appeal was delivered to the Tribunal one day after the statutory appeal period had expired.

ARGUMENT

19. NUC submits it is a construction company and the Director erred in law in the Determination. The appeal submission contains the following assertion:

NUC provided construction services to several utility companies. NUC replaced cable and other telecom infrastructure at the request of the utilities when problems were encountered and NUC was contracted to fix the problems. This was not routine maintenance.

20. The appeal submission alleges the Director erred by classifying the services provided by NUC as outside the construction sector.
21. On the request for an extension of the statutory appeal period, NUC says it attempted to submit the appeal by facsimile on the final day of the appeal period, but mistakenly sent it to only one of the two fax numbers shown on the Appeal Form. NUC submits it intended to file the appeal within the time period.

ANALYSIS

22. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit 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.

23. 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 must be satisfied to grant an extension:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.

24. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. The Tribunal has required

“compelling reasons”: *Re Wright*, BC EST # D132/97. There do not appear to be any unique criteria being advanced in this case.

25. This appeal has been filed one day late. That delay is not significant.
26. The explanation given by NUC is that it made a mistake by not sending the appeal to both fax numbers shown on the Appeal Form. The explanation is not unreasonable.
27. I am satisfied NUC intended to deliver the appeal to the Tribunal within the appeal period. Apparently the Director was provided with a copy of the appeal within the time period. There is no more prejudice to Mr. Ferch by the delay than if the appeal were filed within the appeal period.
28. The first four criteria for granting an extension are satisfied.
29. The final consideration for deciding whether an appeal period should be extended is the *prima facie* strength of the case on appeal. When considering this criteria, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under this criterion is not dissimilar to that undertaken in assessing whether the appeal has any reasonable prospect of succeeding.
30. Both of these matters, delay in filing and the prospect of the appeal succeeding, are listed in section 114(1) as reasons why the Tribunal may dismiss an appeal without a hearing of any kind.
31. NUC has grounded its appeal in error of law. The burden is on NUC to show such error.
32. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
33. The issue raised in this appeal is not strictly one of law, but is rather one of mixed law and fact: that is, whether the Director correctly applied the applicable definitions and terms relating to the construction exception found in section 65 to the facts as found. It is important to note that under section 112 of the *Act*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent.
34. In this appeal, there is no indication that NUC is arguing the Director’s findings of fact raise an error of law, but rather is arguing the Director’s conclusion based on the facts as found was a misinterpretation and misapplication of the provisions of the *Act*. As well, there is no submission that the Director failed to consider the relevant provisions in the *Act* relating to the issue of whether Mr. Fetch was entitled to

compensation for length of service, but that those provisions were misapplied and the wrong result was reached. I am assessing this appeal based on this view of the basis for the appeal.

35. If my perception, described above, is not correct, and NUC is arguing against the findings of fact, I cannot find any error of law in the findings of fact; none has been argued and none has been shown.
36. On the question of whether the Director has misinterpreted and misapplied the definitions and terms relating to the construction exception to the facts, I find, on an assessment of the Determination and the materials in the file, no error of law in the Determination. The decision of the Director is consistent with the approach to the construction exception on an employee's entitlement to compensation for length of service mandated by decisions of the Tribunal.
37. In that respect, the Tribunal has advocated and adopted a functional analysis to decisions about both the principal business of the employer and the situs of the work of the employee, with the burden of showing the exception applies being on the party, typically the employer, advocating exclusion from the statutory benefit provided in section 63 of the *Act*.
38. The definition of construction, and the consequent construction exception, is not broadly applied, but rather, for reasons relating to the nature and purpose of the *Act* and the interpretive principles relating to it, is narrowly construed. This approach is expressed in the following excerpt from *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05 (Reconsideration denied, BC EST # RD188/05), where the Tribunal stated, at pages 6 – 7:

Construction, as defined in the *Act* means, “the construction, renovation, repair or demolition of property or the alteration or improvement of land”. In *E. Nixon Ltd.*, BC EST # D573/97, the Tribunal made the following comment concerning that definition:

The definition of construction in the *Act* is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the *Act*, this is hardly appropriate. The *Act* is intended to have a general application to employees in the province. Provisions of the *Act* that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed.

39. The above point was affirmed in the Reconsideration decision, at paragraph 25:

In our view, “concrete coring and testing” might be characterized as being ancillary to the “construction”, “renovation” or “repair” of property. Further, the “cutting of concrete or tarmac roadways” might possibly fall within the ambit of “alteration or improvement of land”. However, we also note that section 65(1)(e) of the *Act* removes what would otherwise be a statutory employment benefit, namely, compensation for length of service. It is, of course, a well-established principle that employment standards legislation, being “benefits-conferring” legislation, must be given a large and liberal interpretation - see e.g., *Re Rizzo and Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27. That being the case, statutory provisions that take away employment benefits should be construed narrowly.

40. See also *Heron Construction & Millwork Ltd.*, BC EST #D087/08 (Reconsideration denied, BC EST # RD113/08), where the Tribunal stated at paragraph 31:

It is evident that the definition of “construction” in the *Act* is very comprehensive. Care must be taken to ensure that the term is applied in an appropriate manner given the context of the *Act*. Because section 65

establishes statutory exceptions to the usual rights of employees to receive either written notice or pay in lieu of notice, the exceptions are to be narrowly construed, and the employer must bring itself strictly within the statutory language (see *M.J.M. Conference Communications of Canada Corp.*, BC EST #D182/04; and *Re Daryl-Evans Mechanical Ltd. et al.*, [2002] BCSC 48).

41. A further rationale supporting the correctness of the Determination is found in comments from *E. Nixon Ltd.*, *supra*, where the Tribunal decided that a sand and gravel pit operation did not fall within the meaning of “construction site” in subsection 65(1)(e) of the *Act*. The decision reads, in part, as follows at pages 3 to 4:

The reference in subsection 65(1)(e) to “construction site” evokes the typical notion of a construction project, which involves the erection of a single, large, permanent structure at a fixed location. Such an undertaking involves a complex network of participants, many of whom specialize in some segment of the operation. The owner is the client, the purchaser of the product of the operation. It hires an architect and/or engineer to design and oversee construction. The contract is put out for bid, sometimes in its entirety, sometimes in stages. The successful bidder often does much of the contracted work itself and manages those parts of the contract for which it is responsible. It may subcontract other parts of the work to specialized construction employers, who come on site only for the purpose of making a specific contribution to the project. Employees working on construction sites for construction employers often exhibit the same specialization as their employers, coming to the construction site only to perform the function required of them and, when they are finished, leave the site and, more often than not, leave the employ of the construction employer.

Construction employers do not normally maintain a regular work force, but normally acquire employees as and when required. Persons employed on construction sites are employed for a finite term which is generally predictable, either by the duration of their role in the project or by the duration of the project itself. It is this characteristic of employment in construction, resulting from both the way individual construction projects are organized and the erratic pattern of construction activity generally, that justifies the exception in the *Act*. Knowledge on the part of the employee of the finite aspect of the duration of their employment is the same characteristic shared by some of the other exceptions found in subsection 65(1).

42. There is no evidence whatsoever in this case that the principal work of NUC conforms with the above concept of construction or is performed on a construction site.
43. Using a functional analysis, and considering the overall circumstances of the nature of the work in which NUC was engaged and in which Mr. Ferch was employed, I accept the evidence did not support a conclusion that “the principal business” of NUC was construction or that the predominant kind of work performed by Mr. Ferch could be characterized as employment “at one or more construction sites” and the Director did not err in reaching that conclusion.
44. In summary, I agree with the conclusion of the Director, that NUC did not meet the burden of showing Mr. Ferch was excepted by section 65(1)(e) from the benefit provided by section 63 of the *Act*. I find nothing in the evidence that establishes the “principal” business of NUC falls within the definition of “construction” in the *Act* or demonstrates any of Mr. Ferch’s work was performed on “one or more a construction sites”.
45. The request for an extension of the statutory time period does not satisfy all of the criteria for granting such extension. I find, as well, the appeal has no reasonable prospect of succeeding. The interpretation and application of the construction exception to section 63 of the *Act* found in section 65(1)(e) was not wrong on the facts as found.
46. It is appropriate to exercise discretion under section 114(1) and dismiss this appeal. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

47. Pursuant to section 115 of the *Act*, I order the Determination dated May 13, 2016, be confirmed in the amount of \$4,640.32 together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal