

An appeal

- by -

Ebenezer Ben Akinkeyin carrying on business as Commando Enterprises
("Commando")

- 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: Carol L. Roberts

FILE No.: 2012A/91

DATE OF DECISION: October 12, 2012

DECISION

SUBMISSIONS

Ebenezer Akinkeyin	on his own behalf carrying on business as Commando Enterprises
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Ebenezer Akinkeyin carrying on business as Commando Enterprises (“Commando”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued May 29, 2012.
2. On August 17, 2011, Jonathan D. Peter filed a complaint with the Director alleging that Commando had contravened the *Act* in failing to pay regular wages, overtime wages, statutory holiday pay and annual vacation pay.
3. Following an investigation, the Director concluded that Commando had contravened sections 16, 17, 18 and 28 of the *Act* in failing to pay Mr. Peter all wages owing, overtime, and annual vacation pay. The Director’s delegate determined that Mr. Peter was entitled to wages and accrued interest in the total amount of \$1,287.85. The Director also imposed four administrative penalties in the amount of \$500 each for Commando’s contraventions of the *Act*, for a total amount payable of \$3,287.86. The deadline for filing an appeal of the Determination was July 6, 2012.
4. Commando filed an appeal alleging that the delegate failed to comply with principles of natural justice in making the Determination. Commando also sought an extension of time in which to file an appeal. Although the appeal form is dated August 16, 2012, the Tribunal did not receive Commando’s appeal until August 20, 2012.
5. These reasons address only the timeliness of Commando’s appeal and are based on the section 112(5) “record”, the written submissions of the parties, and the Reasons for the Determination.

ISSUE

6. Whether the Tribunal should exercise its discretion under Section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

7. Mr. Akinkeyin operates a cleaning and maintenance business in Surrey under the name Commando Enterprises. Commando is registered as a sole proprietorship to Mr. Akinkeyin, with a business address in Surrey, B.C.
8. Mr. Peter claimed that he was employed by Commando from April 7 - 30, 2011. At issue before the Director’s delegate was whether Mr. Peter was an employee or an independent contractor; and if he was an employee, whether or not he was owed any wages. Mr. Peter claimed that he was interviewed and hired by

Mr. Akinkeyin, who paid him a per unit rate. Mr. Peter alleged that Mr. Akinkeyin failed to pay him all wages owing. Mr. Peter provided the delegate with evidence in support of his claim.

9. On January 23, 2012, the Director sent a letter outlining the details of Mr. Peter's complaint, Mr. Peter's documentary evidence, and a Demand for Employer Records to Mr. Akinkeyin by registered mail. Although Mr. Akinkeyin provided written responses to the delegate by fax and email, he did not provide any of the requested documents.
10. After considering Mr. Akinkeyin's responses, the delegate concluded that Mr. Peter was an employee as defined in the *Act*, and that he was entitled to wages as set out above.
11. The delegate says that he sent Mr. Akinkeyin a preliminary findings letter on March 27, 2012. Mr. Akinkeyin responded to that letter by emails on March 29, 2012, and April 3, 2012.
12. Mr. Akinkeyin appeals that Determination. He claims that he did not file his appeal within the statutory time period because the delegate sent the Determination to a wrong address, a house that he had not lived at for 12 years.
13. The delegate submits that there is no reasonable or credible explanation for failing to request an appeal within the statutory limit. He notes that although Mr. Akinkeyin claims that the Determination was sent to an incorrect address, he did not indicate what that incorrect address was in his submissions. The delegate says that the Determination was sent to a number of addresses, including the one used by Mr. Akinkeyin on his appeal form as well as in his submissions. The delegate says that the Determination sent to the address used by Mr. Akinkeyin on his appeal form was returned by Canada Post as "unclaimed".
14. The delegate also submits that Mr. Akinkeyin's arguments are nothing more than an attempt to re-argue the case presented to the Director at first instance and that, in any event, there is no likelihood the appeal will succeed even if the Tribunal grants an extension of time in which to file an appeal.

ANALYSIS

15. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.
16. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
17. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
18. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
 - (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, ongoing *bona fide* intention to appeal the determination;
 - (3) the respondent party as well as the director has 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.

These criteria are not exhaustive.

- 19. I do not find it appropriate to grant the application.
- 20. Commando's appeal was filed well over one month after the statutory deadline for filing the appeal. Mr. Akinkeyin's explanation for the failure to file within the deadline is that the Director sent the Determination to an old address. However, Mr. Akinkeyin does not explain how he came to receive other correspondence sent by the Director to the address he uses on appeal. The evidence suggests that Mr. Akinkeyin simply refused to accept the registered mail sent to his address.
- 21. There is no evidence Commando had a genuine and ongoing intention to file his appeal by the statutory deadline or that any of the other parties were aware of Mr. Commando's intention to appeal.
- 22. I am also not persuaded that Commando has a strong *prima facie* case. The appeal submissions consist of nothing more than arguments Mr. Akinkeyin made before the delegate, arguments that were fully considered by the delegate in arriving at his decision. An appeal is not an opportunity to re-argue a case that has already been made before the delegate.
- 23. Finally, there is no basis for Commando's ground of appeal, that is, that the Director failed to comply with the principles of natural justice in making the Determination. The record discloses that Mr. Akinkeyin knew of the allegations against him and was given full opportunity to respond to the allegations. Mr. Akinkeyin was also sent a copy of the preliminary findings and given further opportunity to respond to those.

ORDER

- 24. Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal