Employment Standards TRIBUNAL

An appeal

- by -

Ioridge Technology Ltd.

- 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: John Savage

FILE No.: 2006A/94

DATE OF DECISION: October 26, 2006

DECISION

SUBMISSIONS

Jason Lee, for Ioridge Technology Ltd..

Susan Kim, for Heewon Kim.

Rod Bianchini, for the Director of Employment Standards.

INTRODUCTION

1. In this appeal the issue before me is whether the Tribunal should extend the time for requesting an appeal pursuant to section 109(1)(b) of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 (the "*Act*").

2. On June 15, 2006, the Director rendered a Determination (the "Determination") following an oral hearing April 7, 2005 and April 15, 2005, with final closing arguments and submissions received in 2006. The parties to the appeal were Ioridge Technology Ltd. ("Ioridge"), Jason Lee ("Lee") and the complainant, Heewon Kim ("Kim").

3. Ioridge filed an appeal from the Determination, which was received by the Tribunal July 26, 2006. According to Ioridge it only received the Determination on July 7, 2006 since it was delivered to a former address.

4. The Determination of the Director concerned four issues. The issues in dispute were whether the complaint should be adjudicated under the *Act* or in other court proceedings, whether there was an association of Lee and Ioridge pursuant to Section 95 of the *Act*, whether the complainant was an employee, and whether the complainant was owed wages.

5. The Determination resulted in divided success. The Delegate found that the complaint was properly before him, that there should not be an association between Lee and Ioridge, that Kim was an Employee, and that Ioridge owed Kim wages.

6. The substantive grounds of appeal advanced by Ioridge are that the Director failed to observe the principles of natural justice and that evidence has become available that was not available at the time of the hearing. Under those heads four substantive matters are raised. In its reply submission Ioridge argues that delay in the Director issuing his Determination is a ground for extending the time to appeal.

7. Following receipt of the appeal by Ioridge the Tribunal by correspondence dated July 27, 2006 requested that the parties make written submissions on the timeliness of the appeal by August 17, 2006. By correspondence dated August 11, 2006 the Director declined to make a submission. Kim through his solicitors requested a short extension and submitted a lengthy submission dated August 25, 2006.

8. Kim's submission was forwarded to the parties on August 28, 2006 with a request that a final reply be received by September 12, 2006. Ioridge received extensions to September 19, 22, and 29th, 2006 to submit its reply. Ioridge's reply is dated September 28, 2006 and was received September 29, 2006.

9. The Tribunal determined to hear this appeal by way of a review of the record and the written submissions received.

SUMMARY OF ISSUES

10. As indicated above, the issue in the appeal is whether the Tribunal should exercise its discretion to extend the time for filing an appeal pursuant to section 109(1)(b) of the *Act*. The main thrust of Kim's objection to the extension of time is that there is no merit in the appeal.

LEGISLATION

11. Section 112 of the *Act* establishes a statutory code respecting appeals from Determinations of the Director. There are strict time limits for appealing a determination of the Director provided by Subsection 112(3). Section 112(1)-(3) sets out the appeal procedure as follows:

> 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.
>
> (2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, within the appeal period established under subsection (3),
>
> (a) deliver to the office of the tribunal
>
> (i) a written request specifying the grounds on which the appeal is based under subsection (1),
>
> (i.1) a copy of the director's written reasons for the determination, and
>
> (ii) payment of the appeal fee, if any, prescribed by regulation, and
>
> (b) deliver a copy of the request under paragraph (a)(i) to the director.
>
> (3) The appeal period referred to in subsection (2) is
>
> (a) 30 days after the date of service of the determination, if the person was served by registered mail, and
>
> (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).

12. While Subsection 112(3) sets out appeal periods, Subsection 109(1)(b) gives the Tribunal the authority to extend the time for filing appeals. Subsection 109(1)(b) reads as follows:

> 109. (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
> (a) [Repealed 2002, c. 42, s. 58(a)]
> (b) extend the time period for requesting an appeal even though the period has expired.

13. In considering whether to exercise the authority to extend the time for filing appeals, the Tribunal must be cognizant of the purposes of the *Act*:

> 2. The purposes of this Act are as follows:
>
> (a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;
>
> (b) to promote the fair treatment of employees and employers;
>
> (c) to encourage open communication between employers and employees;
>
> (d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;
>
> (e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;
>
> (f) to contribute in assisting employees to meet work and family responsibilities.
>
> 1995, c. 38, s. 2.

14. In my opinion, in considering whether to extend the time for filing an appeal this Tribunal must particularly be concerned with the "fair treatment" of the parties and that there be "fair and efficient procedures for resolving disputes".

EXTENDING TIME FOR APPEAL

15. While the Legislature saw fit to grant the Tribunal the authority to extend the time limits for appeals it did not establish any criteria on which the Tribunal should exercise this discretionary power.

16. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST #D 099/96. The following criteria should be satisfied to grant an extension:

> 1. There is a reasonable and credible explanation for failing to request an appeal within the statutory limit;
>
> 2. There has been a genuine and ongoing bona fide intention to appeal the determination;
>
> 3. The respondent party and the Director have been made aware of the intention;
>
> 4. The respondent party will not be unduly prejudiced by the granting of an extension;
>
> 5. There is a strong prima facie case in favour of the appellant.

17. The criteria set out in *Niemisto* noted above have been considered and applied in numerous decisions of this Tribunal including, most recently, *Re Trevor Bereck*, BC EST #D 022/06 and *Re Chubb Richards*, BC EST #D 086/06. These criterion are not exhaustive and, in general, the Tribunal has required "compelling reasons": *Re Wright*, BC EST #D 132/97.

APPLICATION OF *NIEMISTO* CRITERION

A. Reasonable and Credible Explanation for Delay

18. In Ioridge's original appeal submission dated July 25, 2006 the only explanation it gave for the delay was that "The Respondent did not receive the Decision until July 7, 2006 as it was delivered to his former address where his ex-wife resided. Mail does not always get forwarded in a timely manner". While this explanation addresses why the appeal documents were not delivered before July 7, 2006 it does not address why there was delay until July 25, 2006.

19. In its reply submission Ioridge asserts language issues. While these are asserted, there is no indication in the record that there were language issues at the hearing of the appeal.

20. In the various litigation documents that form part of the record there is also an affidavit deposed to by Lee that is sworn in English and deposed September 20, 2004.

21. In light of my findings on the issue of whether Ioridge has produced a strong prima facie case, I find it unnecessary to decide this issue.

B. Bona Fide Intention to Appeal
C. Parties Made Aware of Intention to Appeal

22. While these criterion assert different matters it is convenient to discuss them together.

23. The questions of whether there was a bona fide intention to appeal or whether Kim knew of the intention to appeal are simply not addressed in the material before me.

24. There is nothing in the material before me that suggests that Ioridge notified or otherwise communicated with Kim or the Director its intention to appeal.

25. In light of my findings on the issue of whether Ioridge has produced a strong prima facie case, I find it unnecessary to decide this issue.

D. Respondent Prejudice

26. Kim asserts that further delay will result in prejudice to him. Certainly he will be denied the benefit of the application of a Determination that on the monetary issues is favourable to him. Ioridge, on the other hand, would lose an opportunity to raise the matters that it finds problematic with the decision.

27. In light of my findings on the issue of whether Ioridge has produced a strong prima facie case I find it unnecessary to decide this issue.

E. Merits of the Appeal – Strong prima facie case

28. The grounds of appeal are itemized in an attachment to the Appeal Form. The first stated ground is that the Director of Employment Standards failed to observe the principles of natural justice in making the

Determination. This ground of appeal is not further elaborated on, however, given the matters asserted under the second ground of appeal, I will assume that it is subsumed in that ground.

29. The second ground of appeal is that evidence has become available that was not available at the time the Determination was being made. Under that ground four matters are raised: (1) procedures leading up to the hearing, (2) events on the day of the hearing, (3) the admission at the hearing of certain evidence, and (4) the Delegate's reliance on the "schedule-worksheet" put in evidence by Kim.

30. Firstly, I note that all of these matters raised as being evidence that has become available that was not available at the time the Determination was being made, concern matters that occurred either at or before the hearing or after the oral hearing but before the Determination was made. The correspondence and procedure and events that occurred on the day of the hearing are not evidence "that was not available at the time the Determination was being made". Likewise, events on the day of the hearing, and correspondence that went between the Delegate and the parties prior to the Determination but after the oral hearings are all matters that occurred and were known before the Determination of June 15, 2006.

31. Section 112(1)(c) of the *Act* provides a right of appeal where a party has "evidence has become available that was not available at the time the determination was being made". In deciding whether the Tribunal should receive new evidence on appeal the Tribunal noted in *Re Merilus Technologies Inc.*, BC EST #D171/03 that it has been guided by the test applied in civil courts for admitting fresh evidence on appeal.

32. The test for admitting fresh evidence on appeal involves the consideration of the following factors: (1) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing, (2) the evidence must be relevant to a material issue in the appeal, (3) the evidence must be credible in the sense that it is reasonably capable of belief, and (4) the evidence must have high probative value in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on a material issue.

33. The matters raised are not new evidence. The real basis of Ioridge's appeal is that the four matters raised give rise to an inference that there was a breach in natural justice in the hearing process. In order to determine whether a strong prima facie case is made out, it is necessary to examine each of the matters raised by Ioridge.

1. Procedures leading up to the hearing

34. Ioridge says it was denied natural justice when an adjournment request of a scheduled hearing was denied by the Director. The basis of the adjournment request was because Ioridge's lawyer was in the UK.

35. Kim, in his submission, says that in point of fact Ioridge had changed representation within the firm prior to the hearing and that the lawyer that had departed for the UK had already passed the file to another counsel within the same firm well before the hearing. Moreover, Ioridge was represented at the hearing by one Metrakos who was represented by one of Ioridge's other solicitors as his counsel.

36. Although Kim makes a detailed submission regarding the representation of Ioridge by Mr. Hawes, Mr. Thomas, and Mr. Metrakos, including emails and other correspondence, Ioridge does not to reply to this submission. Ioridge says generally that "With respect to Ms. Kim's assertions, I will not take them up one by one although her file and information is quite dated and certainly incorrect". This submission is not helpful.

37. I note that the hearing was not concluded on April 7, 2005, but continued until the delivery of written submissions in 2006. My review of the documents submitted and record before the Director does not substantiate that there was any breach of natural justice in the conduct of the hearing respecting the adjournment.

38. Ioridge suggests that it received inconsistent treatment because Kim was given an extension to pursue a section 95 argument. In fact, as noted by Kim, the Director requested submissions on the section 95 argument and the extension given was supplied in response to that request. Ioridge asserts that the Director failed to consider a submission it made concerning the extension, and thus "the essential fairness of the proceedings with respect to the Respondent was denied". As noted by Kim, it is difficult to understand this assertion in view of the fact that the section 95 argument was wholly decided in favour of Ioridge and Lee.

39. In this case the Delegate was faced with an application to adjourn the hearing. Clearly the Delegate had discretion whether to adjourn the hearing or not. A breach of natural justice can arise from the exercise of such discretion only where the power to adjourn was "exercised in a manner which the court considers unreasonable, a fraud upon the law, a flagrant injustice or characterized by a patently unreasonable error": *Canada Post Corp. v. P.S.A.C.* (1988), 50 D.L.R. (4th) 543 at 553. There is no evidence of that here.

40. In my opinion this ground lacks merit and on this issue Ioridge has not demonstrated a strong prima facie case.

2. Events in the Mediation on the day of the Hearing

41. Prior to the hearing commencing, the parties participated in a mediation with a representative of the Employment Standards Branch. Ioridge repeats in its submission statements from the mediator, and Kim references other statements that were made by the mediator. In the circumstances I am prepared to deal with this issue recognizing that, in general, such proceedings are without prejudice and confidential.

42. It is important to note that the representative who conducted the mediation was not the same person as the Delegate who conducted the hearing. Ioridge says that statements made by the mediator regarding the strength of their case "…caused significant prejudice to the Respondents and that there was bias in advance of any submissions in defense of the allegations made by the Petitioner".

43. In response, Kim says that the parties voluntarily agreed to participate in mediation and settlement discussions before the hearing. The representative that was appointed to conduct the negotiations was someone other than the person conducting the hearing, Mr. Jim Ross. Mr. Rod Bianchini conducted the hearing. During the course of those discussions, the mediator "discussed the strengths and weaknesses of each case, including the weaknesses of Mr. Kim's case, in order to encourage settlement". Ioridge does not take issue with these statements.

44. In light of the procedure taken, there was no prejudice to Ioridge in having a mediator discuss the merits of their case in the course of the mediation, and prior to the hearing, where the hearing adjudicator is not present. Indeed, it is difficult to contemplate any mediation or settlement discussions taking place without a candid discussion of the strength and weaknesses of positions. This information regarding statements made by the mediator is not evidence of bias on the part of the Delegate that heard the appeal.

45. This ground is without merit and does not show a strong prima facie case.

3. Admission of Evidence

46. Ioridge takes objection to the introduction in evidence at the hearing of documents comprising the Chambers Record in a concurrent Supreme Court action. According to Kim, these documents were known to Ioridge and Ioridge agreed to allow entry of these documents into the record after being given time to consider their admission. Kim says that Ioridge ultimately consented to their entry after it determined that some of the affidavit materials would assist Ioridge. Ioridge does not respond to this assertion concerning what took place at the hearing.

47. In my opinion if a party consents to the introduction of documentary evidence it cannot, following a hearing and Determination, then raise as a ground for reviewing the Determination, the entry into evidence of those same documents. A party cannot approbate and reprobate on the consensual admission of evidence.

48. I have also reviewed the Chambers Record to which Ioridge now objects. It consists of a record of prior court proceedings between Kim, Lee, and Ioridge with various affidavits filed in those proceedings, including affidavits filed by Lee on behalf of Ioridge.

49. Kim provided evidence that the Chambers Record had already been provided to Ioridge in advance of the Employment Standards Board hearing which, in the ordinary course of court proceedings, is to be expected. Moreover, as I have noted, there was a substantial delay between the time the hearing commenced and the time submissions were closed and a decision rendered. If there was anything in the Chambers Record that needed explanation or qualification, Ioridge had ample opportunity to provide such.

50. In the circumstances, in my opinion, there is no merit to the position that a breach of natural justice was occasioned by this evidence being admitted.

4. The Delegate's Reliance on the Worksheet

51. Under this ground Ioridge says that "Throughout the decision, the Director's Delegate relied heavily upon the 'schedule-worksheet' that was submitted into evidence by the Petitioner". In fact, in the Determination the Delegate says this:

> "As in the case of the wage rate there is little or no evidence of the hours worked by Kim at Ioridge. Kim presented as evidence a summary of the hours worked. Kim, when questioned, admitted these hours were produced from memory recall but asserted they were an accurate representation….".

52. The Delegate then goes on to discount the schedule-worksheet by deducting from those stated times allowances for lunch, for store opening and store closing (pages 17-18 of the Determination). The stated premise of this issue, that the Delegate "relied heavily" on the schedule-worksheet, is not accurate.

53. Ioridge then states in its submission that in the concurrent proceedings in Supreme Court "…Ms. Kim announced that it was she who had created the worksheet on Mr. Kim's behalf" (Ms. Kim is Kim's counsel).

54. Based on the evidence before me this assertion is simply not accurate. An excerpt from an examination for discovery is submitted by Kim in which he states that he created the worksheets but his counsel, Ms. Kim, acknowledges that the handwritten notations are those of Ms. Kim. The excerpt reads as follows:

> 306 Q The next page and several pages thereafter are entitled "Worksheets". Can you tell me who produced this document?
>
> A I did.
>
> 307 Q And the handwritten a notations on the document are yours?
>
> MS. KIM: The calculations were counsel's attempt at doing math.
>
> A The signature at the bottom is mine.
>
> MR. PIAMONTE: Okay.
>
> 308 Q And your lawyer wrote the balance? Apart from the statements here, the rest of the handwriting is hers?
>
> A I didn't write them.
>
> MS. KIM: The calculations, the numbers, counsel, those are my writings, in handwriting, the numbers. Now, I don't know if that's correct. Is that clear?
>
> MR. PIAMONTE:
>
> 309 Q You prepared the charts in front of you, correct?
>
> A Yes.
>
> 310 Q Okay.

55. In my opinion, the only reasonable interpretation of this passage is that Kim produced the worksheets and Ms. Kim made handwritten notations doing calculations on the same sheets. It is also clear that the Delegate did not rely on the handwritten notations but used the worksheets as a reference from which he made deductions. Thus, he referenced the evidence of Kim, as he was entitled to do, but made adjustments to the hours based on what he considered reasonable.

56. What this ground takes issue with is the weight to be afforded certain evidence before the Delegate. The weight to be afforded evidence does not give rise to a ground of appeal, as appeals are restricted to matters of law. Nor does the weight assigned to evidence by the Delegate give rise to any suggestion that there was a breach of natural justice in the proceedings below.

57. In my opinion, Ioridge has not shown that it has a strong prima facie case so as to warrant providing it an extension. When examined in context, there is no merit in any of the grounds alleged.

5. Delay in Director issuing Determination

58. In its reply submission Ioridge adds a new ground, namely, that it was justified in delaying its appeal because the Determination of the Director was issued many months after the commencement of the hearing. That delay is explained by the fact that the proceedings were adjourned and further submission received including written submissions on the association issue that was found in favour of Ioridge.

59. Assuming this ground is properly before me, I am convinced that this ground lacks merit. The substantive grounds of appeal that are advanced are all matters relating to the procedures related to the hearing.

Upon examination I have found that they lack merit and do not show, as required, a strong prima facie case. Since Ioridge has already had the benefit of producing its submissions here outside the time limits for the appeal, this cannot be the basis of an independent ground for review.

SUMMARY

60. Ioridge seeks an extension of the time limit to appeal the Determination of the Delegate. The Tribunal finds that such extension should be denied on the basis that the substantive grounds of appeal lack merit and the proposed appellant has not shown that it has a strong prima facie case.

ORDER

61. This Tribunal declines to extend the time limits for submitting an appeal pursuant to section 109(1)(b) of the *Act*.

John Savage
Member
Employment Standards Tribunal