



An appeal

- by -

Q & A Investments Ltd. carrying on business as LipoLaser & Spa
(“LipoLaser”)

- 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.: 2011A/111

DATE OF DECISION: October 13, 2011

DECISION

SUBMISSIONS

Jason Ackerman	on behalf of Q & A Investments Ltd. carrying on business as LipoLaser & Spa
Jennifer L. Sencar	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Q & A Investments Ltd. carrying on business as LipoLaser & Spa (“LipoLaser”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued July 8, 2011.
2. Linda Miller worked as a marketing manager for LipoLaser, a spa and nail bar, from September 16, 2010, until November 25, 2010. On December 2, 2010, Ms. Miller filed a complaint with the Director alleging that LipoLaser had contravened the *Act* in failing to pay wages and vacation pay.
3. Following an investigation, a delegate of the Director issued a Determination finding that LipoLaser had contravened Sections 18 and 28 of the *Act* in failing to pay Ms. Miller wages and annual vacation pay in the total amount of \$1,425.73. The Director also imposed administrative penalties in the amount of \$1,000 for each the two contraventions, pursuant to Section 18 of the *Act*.
4. The deadline for filing an appeal of the Determination was August 15, 2011. Although the appeal documents are dated August 12, 2011, the Tribunal did not receive the appeal, which was submitted by facsimile, until August 16, 2011. On the face of the appeal form, Mr. Ackerman wrote: “Any missing or late documents yesterday were due to fax communication error.”
5. The basis of LipoLaser’s appeal is that the Director erred in law in finding Ms. Miller to be an employee rather than a self-employed contractor.
6. These reasons address only the timeliness of LipoLaser’s appeal and are based on the section 112(5) “record”, the written submissions of the parties, and the Reasons for the Determination

ISSUE

7. Whether or not 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

8. Ms. Miller was originally hired as the marketing manager for LipoLaser but contended that she subsequently performed some managerial duties, including assisting with hiring and firing some staff. She said she was required to use a punch card to keep track of her hours of work. Ms. Miller said that she invoiced LipoLaser for her hours of work in her company name “Bodies after Babies” at Mr. Ackerman’s request. In December, Mr. Ackerman advised all his staff that because LipoLaser was not doing well financially, he would be

reducing their wages and invited anyone who did not want to receive lower wages to end their employment. Ms. Miller refused to continue working. She contended that Mr. Ackerman had not paid her final invoice.

9. Mr. Ackerman argued that Ms. Miller was a self-employed contractor who was responsible for marketing and advertising for both LipoLaser and a real estate management company he owned. He advised the delegate that Ms. Miller worked from home about 50% of the time, but in November, she worked out of the spa because he was out of town. Mr. Ackerman contended that it was Ms. Miller's suggestion that she bill him as a contractor through her company. He also contended that Ms. Miller operated her own clothing company while she was at the spa. Mr. Ackerman acknowledged that he determined and instructed Ms. Miller on her job duties and that he determined her work location and hours of work. During one of the conversations with the delegate, Mr. Ackerman referred to Ms. Miller as his employee. Mr. Ackerman agreed that following the staff meeting in December, Ms. Miller asked him to acknowledge that he owed her for her hours of work at that point. He contended that he only did so, but only to get her to leave the spa, not as an acknowledgement that he owed her money. Mr. Ackerman also contended that he did not owe Ms. Miller money because she did not work all the hours she claimed and did not do the work she was requested to do.
10. The delegate contacted two witnesses, one of which was suggested by both Ms. Miller and Mr. Ackerman and another whose statement was provided to the delegate by Mr. Ackerman. When that witness denied the statements attributed to her, Mr. Ackerman accused her of lying.
11. The delegate reviewed the legal tests used to determine whether an individual is a self-employed contractor or an employee. She found that although Ms. Miller may have been hired initially as a marketing manager, her duties gradually evolved to assisting the manager of the spa. The delegate found that Mr. Ackerman directed the work Ms. Miller performed as well as the hours of work. The delegate also noted that when Mr. Ackerman was out of town, he left Ms. Miller in charge of the spa and required her to keep track of her time just as he did with other employees. The delegate concluded that Ms. Miller was an employee, finding, on a preponderance of the evidence, that Ms. Miller was performing work normally expected of an employee as well as performing work under the direction and control of Mr. Ackerman.
12. The appeal document sets out the grounds for appeal as well as a submission from Mr. Ackerman outlining reasons he believes Ms. Miller should be considered a self-employed contractor. The submissions consist largely of Mr. Ackerman's view of the facts combined with his assertion that the delegate was wrong in her conclusion. Mr. Ackerman's submissions also include personal attacks against the delegate as well as allegations that one of the witnesses was dishonest. Mr. Ackerman provided no reasons for the lateness of the appeal other than to say that there was a facsimile transmission problem.
13. The delegate says that on July 11, 2011, shortly after the Determination was issued, she received an email from Mr. Ackerman stating that he had received the Determination and disagreed with her findings. She says that she provided him with contact information for the Tribunal and advised him of the appeal deadline. The delegate also says that she advised Mr. Ackerman on more than one occasion about the appeal deadline as well as the process for contacting the Tribunal to ensure the appeal procedure was followed. She notes that Mr. Ackerman provided no reasons why he was unable to meet the appeal deadline.
14. The delegate submits that Mr. Ackerman's arguments on appeal are similar to those made during the investigation and that he simply disagrees with the result. She argues that Mr. Ackerman has not demonstrated that she applied an incorrect legal test for determining whether or not Ms. Miller was an employee. Consequently, the delegate says that LipoLaser does not have a strong case that might succeed if the Tribunal grants an extension.

15. The delegate submits that, on a review of all the factors, an extension of the appeal deadline should not be granted.
16. In a reply submission, Mr. Ackerman contends that he could not meet the appeal deadline because of a fax error. He says that he learned of this error when he received a telephone call from the Tribunal advising him that his facsimile had not been received in its entirety. He says that he advised the Tribunal staff that he would send the missing documents the following morning. He also submits that the delegate was not responding to his emails regarding the appeal so the appeal application “was started later in the deadline timeframe”.
17. Mr. Ackerman’s reply submission contains additional arguments about the merits of the Determination.

ANALYSIS

18. 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.
19. 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*.
20. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
21. 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.
22. It appears that LipoLaser attempted to file its appeal on August 15, 2011, the statutory deadline for filing the appeal. The attempt prompted a telephone call from Tribunal staff to advise Mr. Ackerman that the transmission was unsuccessful. Even though the appeal was not “perfected” until the following day, I find that Mr. Ackerman made an attempt to meet the deadline, an attempt that failed due to mechanical problems.
23. Based on the delegate’s submissions, Mr. Ackerman demonstrated a genuine and ongoing intention to file his appeal by the deadline. He notified her of his disagreement with the Determination, as well as his intention to appeal it, within days of receiving it. The delegate notified Ms. Miller of Mr. Ackerman’s intentions.
24. While I find that LipoLaser had a genuine, ongoing and *bona fide* intention to appeal the Determination, it is not clear to me why Mr. Ackerman waited until the last possible day to file it. Information about the date and

process for filing an appeal is contained in the Determination itself. Waiting for the delegate to provide him with further information on how to file the appeal is not an explanation for Mr. Ackerman's failure to file the appeal documents within the appeal deadline. There is nothing in the appeal submissions that explains why Mr. Ackerman did not file his appeal immediately after notifying the delegate that he disagreed with her Determination or at any time within before the expiration of the statutory time period.

25. Although Ms. Miller has made no submissions on LipoLaser's application for an extension of time, I accept that she will be inconvenienced by the granting of an extension since it will further delay the recovery of any outstanding wages. However, I am not persuaded that she will be unduly prejudiced given that the appeal was submitted only one day after the appeal deadline.
26. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
 - the director failed to observe the principles of natural justice in making the determination; or
 - evidence has become available that was not available at the time the determination was being made
27. I am not persuaded that LipoLaser has a strong *prima facie* case on any of the statutory grounds of appeal. As this Tribunal has repeatedly pointed out, the Appellant has the burden of demonstrating one of the grounds of appeal. In this case, Mr. Ackerman must persuade the Tribunal that the Director erred in law in concluding that Ms. Miller was a self-employed contractor.
28. Having reviewed the record and the Determination, I conclude that the delegate's decision was supportable on the evidence before her. Mr. Ackerman makes no arguments on how the delegate erred in applying the appropriate legal tests to Ms. Miller's situation. His submissions appear to be nothing more than a restatement of the position he took before the delegate during the investigation. An appeal is not an opportunity to re-argue a case already made.
29. Considering all of the factors, I conclude that the Tribunal should not exercise its discretion extending the time in which to file an appeal.

ORDER

30. Pursuant to section 109(1)(a) of the *Act*, I deny LipoLaser's application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal