

An appeal

- by -

Prince George Funeral Service (2008) Ltd.
(“PGFS”)

- 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.: 2010A/117

DATE OF DECISION: October 15, 2010

DECISION

SUBMISSIONS

Gail Klyne	on behalf of Prince George Funeral Service (2008) Ltd.
Robert Glenn Klyne	on his own behalf
Tyler Siegmann	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “*Act*”) by Prince George Funeral Service (2008) Ltd. (“PGFS”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 2, 2010.
2. The Determination was made by the Director on a complaint filed by Robert Glenn Klyne (“Klyne”), who alleged PGFS had contravened the *Act* by failing to pay regular wages, annual vacation pay and length of service compensation. The Determination found that PGFS had contravened Part 3, section 28 and Part 8, section 63 of the *Act* and ordered PGFS to pay Klyne \$870.18, an amount which included wages and interest.
3. The Director also imposed administrative penalties on PGFS under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
4. The total amount of the Determination is \$1,870.18.
5. PGFS has appealed the Determination on the grounds the Director erred in law and failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled. The appeal was filed late, and PGFS has requested the time period for filing the appeal be extended.
6. The Tribunal has a discretion whether to hold an oral hearing on an appeal, but has decided an oral hearing is not necessary in this case. The issues involved in this appeal can be decided from the submissions and the material on the section 112(5) Record.

ISSUE

7. There is an initial issue about whether the Tribunal should extend the appeal period. If the Tribunal decides to accept the appeal, the issues raised in the appeal are whether the Director has erred in law or failed to observe principles of natural justice in making the Determination. As indicated by the Tribunal in its letter of August 20, 2010, if the appeal is accepted, the parties will be asked for further submissions on the merits of the appeal.

THE FACTS

8. The facts relating to the matter of timeliness are as follows:
 1. The Determination was issued on July 2, 2010;

2. PGFS received the Determination and the reasons for the Determination on, or about, July 7, 2010;
3. The Determination provided appeal information and indicated any appeal was required to be delivered to the Tribunal “by 4:30 pm on August 9, 2010”;
4. On July 8, 2010, Gail Klyne (“Mrs. Klyne”), on behalf of PGFS, delivered to the Director a letter expressing her concern with the investigation and the result of the Determination and asking the Director to appoint a new delegate to re-investigate the complaint;
5. On July 8, 2010, the Director answered the above letter; implicit in the letter is that the matter would not be re-assigned or re-investigated; the letter indicated the appropriate course of action for Mrs. Klyne would be to file an appeal of the Determination;
6. On July 9, 2010, Mrs. Klyne visited the Employment Standards Branch office in Prince George to retrieve some documents she had provided during the investigation; she expressed disagreement with the decision and was told she should file an appeal; she was referred to the explanation of the appeal process and the time limit for filing an appeal that were contained in the Determination;
7. On August 8, 2010, Mrs. Klyne submitted a package to Canada Post in Prince George; she claims the package was an appeal that was lost by Canada Post;
8. A trace on the package indicates it was not addressed to the Tribunal, but to the Office of the Employment Standards Branch in Victoria; it was delivered to that Office on August 10, 2010.
9. On, or about, August 16, 2010, Mrs. Klyne was advised by a representative of the Employment Standards Branch that if she wished to appeal the Determination, she should contact the Tribunal;
10. This appeal was delivered to the Tribunal on August 18, 2000.
11. The opening lines of the appeal submission (including emphases), which shows a date of July 9, 2010, reads:

“I am writing this letter **NOT TO APPEAL**, but to request an entirely **NEW** set of meetings with an **ACCREDITED** Director of Employment Standards, . . .”

ARGUMENT

9. PGFS says there was compliance with the time limit for filing an appeal, but the appeal package was lost by Canada Post. PGFS submits the attempted filing of an appeal by submitting the package to Canada Post on August is a reasonable demonstration of an intention to appeal in a timely way and the error by Canada Post should not affect that intention or cause the Tribunal to refuse the appeal.
10. The Director has filed a response on this issue. The Director says an extension should not be granted: there is no reasonable explanation for PGFS failing to file the appeal within the period allowed; there is no objective indication that PGFS ever intended to file an appeal before the appeal period had expired; there was no indication to the Director during the appeal period that PGFS ever intended to appeal the Determination; and PGFS does not have a strong case on appeal.
11. The Director says the reason given for the late filing is inaccurate; the package sent by PGFS from Canada Post in Prince George on August 8, 2010 was not lost, but was, in fact, addressed and delivered to the Office of the Director in Victoria, BC. The information from a Canada Post trace does not show the package was

ever sent to the Tribunal. The Director also says the allegations of bias by the Director in the investigation and error of law in the Determination are not grounded in any objective evidence and not established.

12. In the final reply, Mrs. Klyne does not explain why she initially indicated the appeal package had been lost, but says the misdirecting of the appeal was a result of not understanding the rules and regulations.

ANALYSIS

13. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: section 2(d). The *Act* allows the 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 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.

14. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, [1996] BC EST # D099/96. 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.

15. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. No unique criteria are indicated in this case.

16. In respect of the first criterion, I do not find the explanation provided by PGFS to be a reasonable and credible explanation for the delay. It is clear from the material the package sent by Mrs. Klyne from Canada Post on August 8, 2010, was not “lost” but was sent to the Office of the Director of Employment Standards. Without acknowledging the inaccuracy or attempting to explain it, Mrs. Klyne expresses a failure to understand the rules and regulations as the basis for the error, even though the Determination clearly expresses the requirement to deliver any appeal to the Tribunal and provides the Tribunal’s web site and telephone number as sources for obtaining information on how to appeal. The Appeal Form, which Mrs. Klyne filled out and sent in the August 8, 2010, package contains a Check List. One of the items on the check list is:

Submit all your documents to the Tribunal within the appeal period.

(by mail to Suite 650, 1066 West Hastings Street, Vancouver, BC, V6E 3X1, or by e-mail to registrar.est@bcest.bc.ca or by fax to 604-775-3372)

17. Mrs. Klyne checked that box on the Appeal Form she sent to the office of the Director.

18. In my view, there is no reasonable explanation for checking that box and failing to comply with its direction, whether or not one does not fully understand all of the rules associated with filing an appeal.
19. On the second criterion, I am not persuaded there was an ongoing and *bona fide* intent by PGFS to appeal the Determination. Based on the material in her file, it appears her intention was not to appeal, but to have the Director set aside the Determination and order another investigation before another delegate. That is the objective of the July 7 letter to the Branch Manager, the July 9 letter to the Director and the apparent threat to contact the Ombudsman's office over the investigation and Determination. As I have indicated above, the opening words of the appeal submission, which could have been altered when the material was sent to the Tribunal, say the letter is not an appeal.
20. There is no evidence the Director was ever advised on any intention on the part of PGFS to appeal the Determination. The information from the Director, which I accept, indicates the contrary.
21. The fourth criterion is neutral. While I do not find any evidence of undue prejudice to Klyne, to grant the extension would cause further delay to him in receiving his award and be contrary to one of the purposes of the *Act* as set out in Section 2(d): to provide fair and efficient procedures for resolving disputes.
22. The fifth criterion operates heavily against PGFS on this issue. I do not find there is a strong *prima facie* case in favour of PGFS. To establish a strong *prima facie* case, the appeal must have some apparent chance to succeed. Except to the extent necessary to determine if there is a case that might succeed, the Tribunal does not consider the full merits of the appeal when deciding whether to extend the appeal period: see, for example, *Re Onolabi (c.o.b. Just Beauty)*, BC EST # RD193/04.
23. PGFS alleges bias in the manner in which the investigation was conducted and the Determination arrived at. As the submission of the Director correctly points out, an allegation of bias is a serious matter that demands clear objective evidence supporting it. No such evidence is apparent in this case. The allegations of bias are premised on the Director making decisions, in both findings of fact and legal principles under the *Act*, with which Mrs. Klyne disagrees. However, bias is not established from the fact the Director has not accepted the position of one party or has applied provisions of the *Act* in a way with which a party disagrees. In this complaint, the Director had to make some choices between the competing positions of the parties, reach some conclusions on the facts and apply the requirements of the *Act*. The reasons for those choices, findings and conclusions are explained in the Determination.
24. The Director found PGFS did not keep a record of hours worked by Klyne on each day. The Determination indicates the basis for that finding was an acknowledgement by PGFS. Nothing in the appeal indicates there was any error in that finding; recording hours in a pay period does not satisfy the statutory requirement to keep a record of hours worked on each day.
25. PGFS says the Director made reference to the complainant being her son. Quite apart from the fact that such a reference does not demonstrate bias, and contrary to the view taken by Mrs. Klyne, the fact of a familial relationship between her and the complainant was relevant and necessary to addressing the reasonable cause question.
26. PGFS says the Director sent a document to the wrong address. It is not evidence of bias to send a document to the wrong address.
27. Mrs. Klyne says she was misquoted by the Director. The alleged misquote arises in that portion of the Determination setting out the argument and the evidence of PGFS on the matter of reasonable cause and

relates to allegations concerning the theft of \$50,000.00 by the complainant from Mrs. Klyne. While Mrs. Klyne's may have been misquoted in the Determination, it falls far short of showing bias by the Director. The actual finding by the Director on the allegation was that there was no evidence to support it. That conclusion was a finding of fact which the Tribunal would not disturb on appeal.

28. The argument by PGFS on the "two separate acts of theft" fails to recognize the conclusion of the Director was based on an application of principles of law under the *Act*: one relating to the requirements for establishing just cause for termination and the other relating to "after acquired cause". Applying principles of law to facts as found may be errors of law, but it is not demonstrative of bias.
29. PGFS may not like the findings made by the Director or how the *Act* was applied to the findings made, but PGFS was provided with an opportunity to present their position in evidence and argument and, in the circumstances, I do not see a *prima facie* case of bias that has any chance to succeed.
30. Neither am I persuaded there is any *prima facie* case that the Director erred in law. Much of the argument in the appeal submission on the alleged errors of law challenges findings of fact or re-argues positions taken by PGFS during the complaint process that were not found by the Director to be persuasive. The *Act* does not allow appeal based on challenges to findings of fact alone.
31. For the above reasons, the application to extend the appeal period is denied. The appeal is dismissed.

ORDER

32. Pursuant to section 115 of the *Act*, I order the Determination dated July 2, 2010, be confirmed in the amount of \$1,870.18, together with any interest that has accrued under Section 88.

David B. Stevenson
Member
Employment Standards Tribunal