

An appeal

- by -

Elite Rope Access and Ground Wurx Inc.  
(the “Employer”)

- 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:** Yuki Matsuno

**FILE No.:** 2008A/112

**DATE OF DECISION:** December 8, 2008

## DECISION

### SUBMISSIONS

Alan Gilbertson	for the Employer
Jonathan Wyrwal	for himself
Andres Barker	for the Director of Employment Standards

### OVERVIEW AND BACKGROUND

1. The Employer, Elite Rope Access and Ground Wurx Inc., appeals a determination (the “Determination”) of the Director of Employment Standards (the “Director”), pursuant to section 112 of the *Employment Standards Act* (the “Act”).
2. A delegate of the Director (the “Delegate”) found in the Determination that the Employer had contravened sections 18 (wages), 58 (vacation pay), 45 (statutory holiday pay), 40 (overtime), and 21 (deductions) of the *Act* with respect to two employees, Jonathan Wyrwal and Joseph McCance. The Delegate also found that accrued interest under section 88 of the *Act* was owing to the employees, and that the total wages payable to the employees was \$6817.39.
3. The Delegate also imposed five administrative penalties of \$500.00 each on the Employer for breaching five sections of the *Act*. The total amount administrative penalty amount was \$2500.00. The total amount payable by the Employer was \$9317.39.
4. The Employer operates a window washing and general cleaning business. Mr. Wyrwal worked as a window washer and general cleaner from May 3 to August 28, 2007. He filed a complaint for unpaid wages with the Employment Standards Branch on November 15, 2007. Mr. McCance worked as a rope access technician from April 17, 2006 to August 31, 2007. He filed a complaint regarding unpaid wages with the Employment Standards Branch on December 12, 2007.
5. On June 16, 2008, the Delegate held a hearing into the complaints, at which Alan Gilbertson appeared for the Employer and Mr. Wyrwal and Mr. McCance appeared for themselves. The Delegate subsequently issued the Determination on June 30, 2008. With respect to appeal timelines, the Determination indicated the following:

Should you wish to appeal this Determination to the Employment Standards Tribunal, your appeal must be delivered to the Tribunal by 4:30 on August 7, 2008.
6. On August 26, 2008, the Employment Standards Tribunal (the “Tribunal”) received an appeal form from Mr. Gilbertson, appealing the Determination on behalf of the Employer. Before the appeal was received, and after, there were a number of email exchanges between Mr. Gilbertson and the Tribunal with respect to additional documents which Mr. Gilbertson indicated he would submit.

7. The Tribunal subsequently received three letters from the Employer, which may all be considered “new evidence” that the Employer wishes the Tribunal to consider (collectively, “the Letters”). On September 30, 2008, the Tribunal received from the Employer a letter dated September 20, 2008. It was signed by Will George who indicated that he worked as a subcontractor for the Employer on projects that Mr. Wyrwal also worked on, and that his hours did not match Mr. Wyrwal’s hours. On November 13, 2008, the Tribunal received from the Employer a final reply dated November 12, 2008, consisting of two letters. One was signed by Jordan Clark and the other by Zephyr Wilson. Each indicated they worked as subcontractors for the Employer on certain projects and appended records of the hours they worked on those projects. They indicated that Mr. Wyrwal also worked on those projects.
8. By letter dated October 3, 2008, the Tribunal invited Mr. McCance, Mr. Wyrwal, and the Director to respond to the Employer’s late appeal. Mr. Wyrwal and the Director (represented by the Delegate) both forwarded submissions.
9. In deciding this appeal, I have before me the appeal form and submissions of the Employer, the submissions of Mr. Wyrwal and the Delegate, and the Record provided by the Delegate. I have reviewed and carefully considered all these materials in coming to my decision.

## ISSUE

10. Should the Tribunal exercise its discretion under section 109(1)(b) of the *Act* to extend the appeal period in this case? The section provides:

109(1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:

- (b) extend the time period for requesting an appeal even though the period has expired [.]

## ARGUMENT AND ANALYSIS

11. In deciding whether to exercise my discretion to extend the appeal period under section 109(1)(b), I must be satisfied that all of the following apply:
  - there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  - the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been made aware of this intention;
  - the respondent party will not be unduly prejudiced by the granting of an extension; and
  - there is a strong *prima facie* case in favour of the appellant.
12. See *Niemesto*, BC EST #D099/96. These factors are not exhaustive.

13. The Tribunal will not grant extensions as a matter of course and will do so only where there are compelling reasons. The burden is on the appellant to show that the time period for an appeal should be extended: *Moen & Sagh Contracting Ltd.*, BC EST #D298/96.
14. The Determination indicates the deadline for appeal is August 7, 2008. The Employer's appeal was filed on August 26, almost three weeks later. In his explanation for the late appeal, Mr. Gilbertson on behalf of the Employer makes the following points:
- He was not aware that a decision had been made in his case and was waiting for the decision to be forwarded to him.
  - He understands that the decision was sent by registered mail, but he never received it.
  - The first knowledge he had that a decision had been made was when he received a letter from "employment canada collections" (presumably the Employment Standards Branch) stating that he owed \$9000.00 and that the amount had to be paid in full by August 27, 2008. The letter came approximately 6 weeks after the hearing had been held.
  - When he first received the letter he was under the impression that this was the first correspondence about his case and he would get an opportunity to appeal.
  - He feels an appeal is in order as there is information that was not presented at the first hearing that will have an impact on this case.
15. In his submissions with respect to timeliness, the Respondent Mr. Wyrwal indicates he is adamantly opposed to any granting of time to extend the appeal period. He says that he was never informed of the Employer's intent to appeal until he received the letter requesting an extension. Mr. Wyrwal says that delays in the resolving his complaint so far have negatively impacted him, as he has been forced to borrow money from others as a result of not receiving payment from the Employer.
16. The Delegate indicates in his submissions regarding timeliness that the Determination was served in accordance with section 122 of the *Act*. It was sent to the business address of the Employer, where it was successfully delivered and signed for on July 2, 2008; the Delegate appends a Certificate of Delivery showing delivery that was he says was downloaded from the Canada Post website. The Delegate says that since the Determination was properly delivered, the Employer has no reasonable and credible explanation for failing to file within the statutory time limit.
17. The Delegate also submits that the Employer does not have a strong case that might succeed. He correctly says that if the Employer wishes the Tribunal to consider the Letters, it must meet all four criteria outlined in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03:
1. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  2. the evidence must be relevant to a material issue arising from the complaint;

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 the material issue.
18. The Delegate says that the Letters would fail to meet the first *Bruce Davies* criterion because they, or the information contained within them, could have been discovered and presented to the Delegate during the investigation or adjudication of the complaint; in any event, prior to the Determination. Mr. Wyrwal makes the same point in his submissions. In none of his submissions does the Employer address the question of why he did not bring forward the new evidence during the investigation of the Determination, i.e. before or at the hearing on June 16, 2008.
19. With respect to the fourth criterion, the Delegate says the Letters are of low probative value and would not create a case strong enough to upset the findings of the Determination. Mr. Wyrwal agrees with the Delegate. The Employer does not address this point in his submissions.
20. Considering the submissions of the all the parties, the Record, and the *Niemesto* factors, I find that the Employer has not met the burden of showing that the time period for an appeal should be extended in this case.
21. It should be remembered that the burden is on the Employer to show that all four *Niemesto* factors must be met for a late appeal to be granted. First, I find that the Employer has provided no reasonable or credible explanation for its delay in filing an appeal. I am satisfied that the Determination was properly delivered to the Employer, in accordance with section 122 of the *Act*, on July 2, 2008. Mr. Gilbertson's assertion that he did not receive the Determination is not sufficient to meet the evidence of the Canada Post certificate indicating delivery to the Employer's business address.
22. The submissions do not reveal whether the Employer had a genuine and ongoing *bona fide* intention to appeal the Determination or whether the Director was aware of such an intention. Mr. Wyrwal indicates that he was not aware of any such intention on the Employer's part. As for prejudice to the Respondent, there is some evidence that an extension would prejudice Mr. Wyrwal by further delaying his ability to recover his unpaid wages.
23. The most important factor in my decision, however, is the absence of a strong *prima facie* case on the Employer's part. In my view, the Letters would fail the test for new evidence in *Bruce Davies*. The Letters, or the information contained in the Letters, could have been collected and presented during the course of the investigation or on the day of the hearing. The Employer had ample time to gather this evidence, since the complaints were filed in November and December of 2007 and the hearing took place on June 16, 2008. In addition, the information contained in the Letters is of very little probative value and would not have changed the outcome of the Determination.
24. The Employer not met its burden of showing that the time limit for appeals should be extended in this case. I decline to exercise my discretion to extend the appeal period.

**ORDER**

Pursuant to section 109(1)(b) of the *Act*, I deny the application to extend the appeal period.

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**Yuki Matsuno**  
**Member**  
**Employment Standards Tribunal**