Employment Standards TRIBUNAL

An appeal

- by -

Mr. David Help You Enterprises Ltd.
("DHY")

- 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: Shafik Bhalloo

FILE No.: 2012A/102

DATE OF DECISION: November 1, 2012

DECISION

SUBMISSIONS

Xiangdong Zheng	on behalf of Mr. David Help You Enterprises Ltd.
Kristine Booth	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the "*Act*") brought by Mr. David Help You Enterprises Ltd. ("DHY") of a determination that was issued on June 27, 2012, (the "Determination") by a delegate of the Director of Employment Standards (the "Director").

2. On August 23, 2011, Yi Zhang (the "Complainant") filed a complaint with the Director alleging that DHY had contravened the *Act* in failing to pay him wages earned between July 16, 2011, and August 4, 2011, and in failing to pay him a cell phone allowance (the "Complaint"). Following an investigation, the Director concluded that DHY contravened sections 17 (wages), 18 (wages), 21 (business costs), 36 (hours free from work), 40 (overtime), 45 (statutory holiday pay), and 58 (annual vacation pay) of the *Act*. The Director's delegate determined that the Complainant was entitled to wages and accrued interest in the amount of $1,903.76. The Director also imposed five (5) administrative penalties in the amount of $500.00 for DHY's contraventions of sections 17, 18, 21 and 40 of the *Act*, as well as section 46 of the *Employment Standards Regulation* (the "*Regulation*").

3. The deadline for filing an appeal of the Determination was August 7, 2012. However, DHY filed an appeal on September 14, 2012, in excess of one (1) month after the expiry of the appeal date. DHY, in its appeal, alleges that the Director failed to observe the principles of natural justice in making the Determination and further submits that new evidence has become available that was not available at the time the Determination was being made.

4. By way of remedy, DHY is seeking the Tribunal to either change or vary the Determination or refer it back to the Director.

5. This decision will only address the issue of the timeliness of DHY's appeal and whether the Tribunal should exercise its discretion under section 109(1)(b) and extend the statutory time limit for DHY to appeal. If my decision is in the affirmative, then only will the parties be invited to make full submissions on the substantive issues raised in the appeal.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (s. 103) and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issue of the timeliness of DHY's appeal may be adjudicated on the basis of the section 112(5) "record", the Reasons for the Determination (the "Reasons") and the written submissions of DHY.

ISSUE

7. Should the Tribunal 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. DHY operates a moving business in the Lower Mainland in British Columbia and employed the Complainant from May 24, 2011, to August 5, 2011, when he resigned.

9. The Complainant filed the Complaint against DHY alleging that he was owed $1,349.00 in regular wages for work he performed between July 16, 2011, and August 4, 2011, and further claimed that DHY did not pay him overtime, statutory holiday pay or annual vacation. He provided his record of hours he claimed to have worked between July 1, 2011, and August 4, 2011, as well as a list of the time he commenced working each day during the period between July 2, 2011, and July 31, 2011.

10. When employed in the capacity of a driver for DHY, the Complainant's evidence was that he was paid $15.00 per hour, but when he worked as a helper for DHY, his rate was $13.00 per hour. He claimed he worked a total of 88 hours between July 16, 2011, and August 4, 2011, and was not paid for any of those hours.

11. The Complainant also alleged that on July 18, 2011, he was asked by DHY to collect a package and some luggage from the airport and to deliver to DHY's clients and to collect payments in the amounts of $40.00 and $50.00 respectively for these deliveries. The Complainant was to receive 30% of the amounts collected for these deliveries. The deliveries took him from three (3) to three and one-half (3.5) hours to complete.

12. The Complainant produced copies of wage statements he received from DHY, and these wage statements did not show or include annual vacation pay.

13. The Complainant also claimed reimbursement for use of his cell phone for DHY's business. He stated DHY did not provide him with a cell phone, but asked him to use his personal cell phone to be in contact with DHY's clients and promised to pay him a cell phone allowance in the amount of $100.00 at the end of the month. The basic cost of his cell phone plan was $31.64 per month but during the period the Complainant used it for work, between July 1, 2011, and July 31, 2011, he received a bill of $122.42. According to the Complainant, $90.78 of this bill was related to business costs.

14. DHY participated in the investigation of the Complaint through its sole director, Xiangdong Zheng ("Mr. Zheng"). Mr. Zheng submitted that DHY did not pay the Complainant wages earned between July 16, 2011, and August 4, 2011, because the Complainant:

    1) Withheld $290.00 of the Employer's money on August 3rd, 2011 and August 4th, 2011;
    2) Caused damage to DHY's vehicle;
    3) Incorrectly recorded his hours worked and kept DHY's money and treated customer payments as personal tips;
    4) Kept two keys for company vehicles; and
    5) Posted comments on the internet which resulted in DHY suffering a business loss due to a tarnished reputation.

15. DHY adduced evidence of cash payments made by its clients between July 25 and July 30, 2011, and totalled the difference between the amounts the clients claimed to have paid the Complainant and the amounts the Complainant claimed to have received on July 29, 2011, and concluded that DHY lost a total of $120.00 and further estimated that because the Complainant was employed for 60 days that DHY lost $500.00.

16. DHY also produced its statement, which was prepared in context of a WorkSafe BC claim of the Complainant. In its statement, DHY states that the Complainant worked 84 hours between July 16, 2011, and August 4, 2011.

17. The delegate of the Director, during her investigation of the Complaint, issued a Demand for Employer Records to DHY, requiring that any and all payroll records pertaining to the Complaint be provided by May 7, 2012. However, DHY did not provide any employer records. As a result, the delegate, in the Reasons, notes that she had to use the best available evidence that was before her to determine the number of hours worked by the Complainant and the wages due to him. In preferring the evidence of the Complainant, the delegate reasoned as follows:

> The employer did not directly dispute the Complainant's claim that he worked 88 hours between July 16, 2012 [*sic*] and August 4, 2012 [*sic*]. However, a submission prepared by the Employer regarding a claim the Complainant made to WorkSafe BC included a notation stating that the Complainant worked a total of 84 hours between July 16, 2012 [*sic*] and August 4, 2012 [*sic*]. I prefer the Complainant's evidence regarding the hours he worked between July 16, 2012 [*sic*] and August 4, 2012 [*sic*]. The Complainant's evidence was more detailed, and he provided a daily record of the number of hours worked that was not challenged by the Employer. The Employer provided no records to support its submission although it was issued a Demand for Employer Records. As such, I will afford the Complainant's evidence, regarding the number of hours he worked, full weight.
>
> The Complainant claimed he earned $15.00 an hour when he drove and $13.00 an hour when he performed duties as a 'helper'. Although the Employer did not challenge the wage rates the Complainant claimed, the Employer's submission included a response the Employer prepared regarding a claim the Complainant made to WorkSafe BC; this response showed that the Complainant earned $12.00 an hour. This wage rate was directly related to June 30, 2011 and July 1, 2011. In addition to June 30, 2011 and July 1, 2011 being specific to a date outside of the timeframe claimed by the Complainant, the Complainant's wage statement for the pay period of July 1, 2011 to July 15, 2011 reflects the same wage rates claimed by the Complainant. I find that between July 16, 2011 and August 4, 2011 that the Complainant earned $13.00 when he performed duties as a 'helper' and $15.00 an hour when he performed duties as a driver.

18. The delegate then reviewed the Complainant's records and concluded that he worked 66 regular hours between July 16, 2011, and July 31, 2011, during which period he earned the driver's wage of $15.00 per hour, and 8.5 hours at the helper's wage of $13.00 per hour. The delegate calculated total wages, without including hours the Complainant worked over eight (8) in a single day, and arrived at a regular wage owing to the Complainant of $1,100.50.

19. The delegate also noted that the Complainant's evidence, that he collected a package and some luggage from the airport on July 18, 2011, for which he was to receive $27.00, was unchallenged by DHY. Therefore, the total of the regular wages owed to the Complainant for the period and dates above is $1,127.50. Since the Complainant was not paid this amount within eight (8) days of the end of his pay period, in this case, July 31, 2011, the delegate found that DHY had contravened section 17 of the *Act* and levied a $500.00 penalty against DHY.

20. The delegate also noted, based on the Complainant's record, that he worked 3.5 hours on August 3, 2011, and 2.5 hours on August 4, 2011, as a driver, but was not paid. The total the delegate calculated for those two (2) days was $90.00, which DHY should have paid the Complainant within six (6) days after the Complainant terminated his employment but did not and thus contravened section 18 of the *Act*. As a result, the delegate levied a further $500.00 penalty against DHY for the said contravention.

21. The delegate also noted, based on the Complainant's records, that he worked each day starting July 24, 2011, through to and including July 31, 2011. During this period, the Complainant did not at any time receive 32 hours free from work. Section 36 requires, in such case, the employer to pay the employee 1.5 times the regular wage for time worked by the employee during the 32-hour period the employee would otherwise be entitled to have free from work. The delegate found that during relevant period, and particularly on July 25, 2011, the Complainant should have earned 1.5 times the regular wage for two (2) hours he worked as a driver, but was paid at the regular wage rate, and, therefore, awarded the Complainant $15.00 in additional pay. However, the delegate did not levy an additional administrative penalty for this contravention as it is subsumed in the previous section 17 contravention.

22. The delegate also found that the Complainant earned overtime pay of $10.50 during the period of July 1, 2011, to July 15, 2011, and a further overtime pay of $243.75 during July 16, 2011, to July 31, 2011, which DHY neglected to pay him. Therefore, the delegate, in addition to ordering DHY to pay the Complainant overtime wages owed, levied an administrative penalty of $500.00 for breach of section 40 of the *Act*.

23. The delegate further noted that the uncontested record of the Complainant showed that he worked 19 out of the 30 days preceding the BC Day statutory holiday, on August 1, 2011, and, therefore, he was entitled to statutory holiday pay. DHY failed to pay him this holiday pay. The delegate calculated this holiday pay at $84.92. The delegate did not issue a further administrative penalty for this contravention, as it is subsumed under the penalty levied for the previous contravention of section 18.

24. The delegate also found that DHY did not pay the Complainant any annual vacation pay earned on all wages, and she calculated such to be $200.63. As with the statutory holiday pay, this contravention did not attract an additional administrative penalty as it was subsumed under the penalty levied for the previous contravention of section 18.

25. Finally, the delegate noted that the evidence of the Complainant that he incurred costs for cell phone use related to DHY's business was uncontested. In particular, the delegate noted that the Complainant used his personal cell phone to place and receive calls from DHY's clients. The basic cost of the Complainant's cell phone plan was $31.64 per month. For the material period during which he used his cell phone for DHY's business, July 1, 2011, to July 31, 2011, his cell phone company charged him $122.42. Based on the delegate's review of the invoice, the Complainant's personal calls did not exceed the allotted 300 minutes covered in his cell phone plan. The 291 additional minutes that were used over and above the 300 minutes covered in his cell phone plan resulted in a charge of $81.48, inclusive of taxes, and these calls and charges related to DHY's business. Accordingly the delegate ordered DHY to pay this amount to the Complainant and assessed DHY an administrative penalty of $500.00 for contravention of section 21 of the *Act*.

26. In its appeal, DHY has attached an estimate for car repair, which Mr. Zheng previously provided to the delegate during the investigation of the Complaint. Mr. Zheng has also adduced two (2) pages of documents purportedly showing cash receipts by the Complainant from customers, which also were adduced during the investigation of the Complaint. However, he has now also provided an English translation of the latter documents. The only document that does not appear to have been provided during the investigation is a single page entitled "Working Record" which purportedly sets out a record of total hours worked by the Complainant, whether as a truck driver or helper, during the period July 16 to August 4, 2011, and the amount the Complainant purportedly earned. There is no explanation of when this document was prepared and why it was not adduced earlier in the investigation of the Complaint.

27. I also note Mr. Zheng has provided written submissions on behalf of DHY. He states that he was unable to appeal the Determination against DHY earlier because he was working as a tour guide during a business trip to the Rocky Mountains, and did not receive the Determination that was sent by registered mail. He states he did not realize that the Determination had been made until he received a final request of payment after August 23, 2012.

28. Mr. Zheng further submits that the Complainant worked for DHY for about two (2) months and he was hired on a temporary basis on a "straight hourly rate" and, therefore, he is not entitled to vacation pay or statutory holiday pay. Mr. Zheng states that the Complainant did not complete his 3-month probationary period. According to Mr. Zheng, DHY owes the Complainant $1,262.00 in wages but there are other issues between DHY and the Complainant that need to be resolved. He states he tried to contact the Complainant to pay him his wages after he quit but the Complainant changed his address and DHY was unable to find him.

29. With respect to the "other issues" that Mr. Zheng claims DHY has with the Complainant, these issues appear to be matters previously raised by Mr. Zheng in the investigation of the Complaint. In particular, he notes that the Complainant remitted only a portion of the payment from customers to DHY and kept the rest as "tip". Mr. Zheng notes that the Complainant damaged DHY's vehicle and has been holding $290.00 in payments made by clients of DHY. Mr. Zheng also states that the Complainant is in possession of keys for two (2) vehicles of DHY, which DHY, as a result, has not been able to use in its business for "nearly half a month". Mr. Zheng then goes on to point out that the Complainant also filed an action in Small Claims Court against DHY, but the Small Claims Court Judge evaluated all the circumstances of the case and tried to assist the parties to settle, but the Complainant refused to settle. Mr. Zheng goes on to describe the terms of the settlement proposals discussed at the small claims settlement conference with the presiding Judge, but I do not find this discussion particularly relevant and, therefore, I have not set it out here.

30. Mr. Zheng also submits that the Complainant failed to pay for the repair of the vehicle he damaged and, therefore, DHY suffered a $500.00 loss.

31. In conclusion, Mr. Zheng, on behalf of DHY, proposes that it is only reasonable for DHY to pay the Complainant $600.00 in wages, based on what Mr. Zheng says was discussed in the Small Claims Court settlement conference, but rejected by the Complainant. Mr. Zheng also seeks the Complainant to return to DHY the keys to the vehicles and $290.00 in payments received from clients.

ANALYSIS

32. Section 112 of the *Act* governs appeals of Director's determinations. In subsection (3), it delineates the appeal period for a person who wishes to appeal a determination to the Tribunal as follows:

> 112 (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).

33. Section 122 of the *Act* provides:

> 122 (1) A determination or demand or a notice under section 30.1(2) that is required to be served on a person under this Act is deemed to have been served if

> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand or the notice under section 30.1(2) is deemed to be served 8 days after the determination or demand or notice under section 30.1(2) is deposited in a Canada Post Office.

34. The Determination, in this case, was issued on June 27, 2012, and sent on that very date by registered mail to DHY's business address in Vancouver and to its registered and records office, as well as to its director, Mr. Zheng, whose address appears to be the same as that of DHY's registered and records office.

35. While Mr. Zheng and DHY do not dispute the deadline for DHY to appeal the Determination, namely, August 7, 2012, which is expressly set out on the third page of the Determination, Mr. Zheng indicates that he was away at the time the Determination was sent by registered mail to him and DHY. More particularly, Mr. Zheng states that he was in the Rocky Mountains as a tour guide during a business trip. While he does not share precisely when he left on this business trip nor when he returned, he mentions that he only realized the Determination had been made when he received a final request for payment from the Employment Standards Branch. He is referring to a letter, dated August 23, 2012, from Ms. Booth requesting payment of the outstanding amount under the Determination by August 30, 2012, failing which the Director would pursue collections proceedings.

36. As previously indicated, section 109(1)(b) of the *Act* delineates the Tribunal's authority to extend the time period for requesting an appeal under section 112. It states:

> 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.

37. The Tribunal has discretion to exercise its statutory authority for filing an appeal where there are compelling reasons and the burden, on the balance of probabilities, is on the appellant to show that such reasons exist. The Tribunal in *Re: Tang* (BC EST # D211/96) stated:

> 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.

38. In *Re: Niemisto* (BC EST # D099/96), the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension of time to file an appeal:

> (i) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
>
> (ii) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
>
> (iii) The respondent party (i.e. the employer or employee), as well the Director, must have been made aware of this intention;
>
> (iv) The respondent party will not be unduly prejudiced by the granting of an extension; and
>
> (v) There is a strong *prima facie* case in favour of the appellant.

39. The criteria in *Re: Niemisto, supra*, are not intended to constitute an exhaustive list, nor are they conjunctive in nature (see *Re: Patara Holdings c.o.b. Best Western Canadian Lodge*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08). The Tribunal will consider and weigh those and any other factors it considers relevant and make its decision to, or not to, exercise its discretion to extend the time for filing the appeal based on the totality of all factors it considers.

40. Having said this, I will review each criterion set out in the *Re: Niemisto*, *supra*, as it relates to the facts in the case below.

41. With respect to the first criterion, Mr. Zheng, as a director of DHY, was aware and knew of the Complaint during the investigation stage and participated at the investigation stage by giving evidence on behalf of DHY to the delegate. He knew that the delegate, at the conclusion of the investigation, was going to make a determination. If he was going to be away on a business trip, the onus is on him to inform the delegate that he will be out of town in case a determination is made during his absence. I also note that Mr. Zheng does not indicate when precisely he left on business to the Rocky Mountains or when he returned. However, it was when he received the August 23 letter of the delegate threatening collections proceedings that alerted him that a determination was made against DHY. I do not find there to be a reasonable and credible explanation for DHY's failure to request an appeal within the statutory time limits because I find that DHY and Mr. Zheng were only moved to file DHY's late appeal because of the threat of collections proceedings. In the circumstances, I find that DHY fails on the first criterion in *Re: Niemisto, supra*.

42. With respect to the second criterion, there is absolutely no evidence of a "genuine and on-going *bona fide* intention to appeal" on DHY's part.

43. With respect to the third criterion, DHY did not make the Director, or the Complainant, aware of its intention to appeal the Determination before the late appeal was filed.

44. With respect to the fourth criterion, while a delay of slightly over one month in filing an appeal may not be unduly prejudicial, I am mindful of one of the purposes of the *Act* in section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act".

45. With respect to the final criterion, namely, whether there is a strong *prima facie* case in favour of DHY, it is important to note that except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re: Owolabi c.o.b. Just Beauty*, BC EST # RD193/04). In this case, I find DHY has relied upon two (2) grounds of appeal, namely, the "natural justice" ground of appeal and the "new evidence" ground of appeal. With respect to the former, there is absolutely no evidence whatsoever in the submissions of Mr. Zheng that could remotely be considered as supportive of this ground of appeal. The assertion is nothing more than a bare assertion. My review of the section 112(5) "record" discloses not only that Mr. Zheng, on behalf of DHY, knew of the allegations against DHY and was afforded a full opportunity to respond to those allegations and did so, but he was also sent a copy of the preliminary findings and given a further opportunity to respond. There appears to be no basis for DHY to argue that there has been a breach of natural justice on the part of the delegate in this case.

46. With respect to the new evidence ground of appeal, in the documents Mr. Zheng has attached to DHY's appeal, there is but a single document that does not appear in the section 112(5) "record" of the Director. This document is one that is entitled "Working Record" which purportedly sets out the total time the Complainant worked during the period July 16 to August 4, 2011, and how much he earned in the various capacities in which he worked during this period. However, I am not persuaded that this document would be

accepted as new evidence pursuant to the strict fresh evidence test articulated by the Tribunal in *Re: Davies et al (Merilus Technologies Inc.)* (BC EST # D171/03). In the latter decision, the Tribunal adopted the following four-fold test applied in civil courts for admitting fresh evidence on appeal:

> (a) 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;
>
> (b) The evidence must be relevant to a material issue arising from the complaint;
>
> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) The evidence must have high potential 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.

47. In my view, the document in question, the "Working Record" contains evidence that clearly existed during the investigation of the Complaint and should have been produced to the delegate then. It also appears that this document was created after the Determination. Mr. Zheng does not indicate who created it, when it was created, or why the information in this document (which existed prior to the Determination being made) was not adduced during the investigation of the Complaint. Therefore, I do not find this document would qualify as new evidence based on the first criteria in the four-fold test in *Merilus Technologies, supra.*

48. I also note that Mr. Zheng has provided fresh evidence with respect to a settlement conference in the Small Claims Court pertaining to an action the Complainant commenced against DHY. While I am not certain when exactly the action was commenced and when the settlement conference was held, the evidence of the settlement conference and the goings-on at the settlement conference on a without-prejudice basis, in my view, are irrelevant and lack any probative value. I find that knowledge of those discussions would not have led the Director to a different conclusion on the material issue in this proceeding. Therefore, I do not find the evidence of the settlement conference to be new evidence under the *Re Merilus Technologies* criteria.

49. Having said this, the rest of the submissions of Mr. Zheng constitute no more than a re-argument of submissions he previously made in the investigation of the Complaint and which the delegate fully considered in arriving at her decision. The Tribunal has said on numerous occasions that an appeal is not an opportunity to re-argue a case that has already been made before the delegate. I do not find these submissions would qualify as a strong *prima facie* case that might succeed if I were to grant an extension of time to appeal.

ORDER

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

Shafik Bhalloo
Member
Employment Standards Tribunal