



An appeal

- by -

Elite Furniture Ltd.
(“Elite”)

- 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.: 2015A/117

DATE OF DECISION: November 5, 2015

DECISION

SUBMISSIONS

Derek Liu

on behalf of Elite Furniture Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Elite Furniture Ltd. (“Elite”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 21, 2015.
2. The Determination found that Elite had contravened Part 3, sections 17, 18 and 27, Part 4, section 40, Part 5, sections 45 and 46 and Part 7, section 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Bobby Chi Keung So (“Mr. So”) and ordered Elite to pay wages to Mr. So in the amount of \$30,881.47 and to pay administrative penalties in the amount of \$4,000.00. The total amount of the Determination is \$34,881.47.
3. This appeal is grounded in an assertion that the Director erred in law. Elite seeks to have the Tribunal vary the Determination or remit it back to the Director.
4. A form of appeal was received by the Tribunal on September 10, 2015. It had been filed outside of the statutory time limit set out in subsection 112(3) of the *Act* and did not include a copy of the Director’s written reasons for the Determination, which is a statutory requirement for inclusion with an appeal: see subsection 112(2)(a)(i.1) of the *Act*.
5. On September 15, 2015, the Tribunal informed Elite the appeal was incomplete and requested Elite to provide a copy of the Director’s written reasons for the Determination. The correspondence provided Elite with a deadline of September 29, 2015, for the required item to be delivered to the Tribunal. That deadline was not met.
6. The correspondence also included a request to the Director to produce the section 112(5) “record” (the “record”) and notified the other parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
7. The “record” was provided by the Director to the Tribunal. A copy has been delivered to Elite and it has been given the opportunity to object to its completeness. Elite has not objected to the completeness of the “record” and the Tribunal accepts it as complete.
8. On October 19, 2015, the Tribunal notified the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed.
9. Consistent with notice contained in the correspondence from the Tribunal dated September 15, 2015, and October 19, 2015, I have reviewed the appeal, the appeal submission and the “record”.
10. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal, my review of the “record” that was

before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1), which states:

- 114** (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
- (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*
 - (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - (f) *there is no reasonable prospect that the appeal will succeed;*
 - (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
 - (h) *one or more of the requirements of section 112(2) have not been met.*

11. I am deciding whether Elite should be granted an extension of the appeal period or whether the appeal should be dismissed under any, or all, of sections 114(1)(b), (f), and (h). If I decide all or part of the appeal should not be dismissed under section 114(1), Mr. So and the Director will be invited to file further submissions. On the other hand, if I am satisfied the appeal period should not be extended or that the appeal has no reasonable prospect of succeeding, it will be dismissed under section 114(1) of the *Act*.

ISSUE

12. The issue at this stage is whether this appeal should be dismissed under section 114(1) of the *Act*.

THE FACTS

13. The facts relating to the issue under consideration are as follows:
- 1. Elite operates a custom furniture making and installation business in Burnaby BC;
 - 2. Mr. So worked for Elite for a period from 2008 to August 2014;
 - 3. Mr. So filed a complaint in February 2015 that he had not been paid all wages owed to him for a period from February 27, 2014, to August 17, 2014;
 - 4. The Director conducted a complaint hearing, although the material does not indicate the date of that hearing;
 - 5. Mr. So attended and provided evidence and made submissions to the Director at the complaint hearing;
 - 6. Apparently, a representative, or representatives, of Elite attended the complaint hearing but did not provide evidence or respond to Mr. So's evidence;
 - 7. The Determination was issued on July 21, 2015;
 - 8. The time limited for filing an appeal expired on August 28, 2015

9. The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal on or before the expiry of the appeal period;
10. An incomplete appeal was filed with the Tribunal on September 10, 2015.

ARGUMENT

14. Elite submits the Director made an error in calculating Mr. So's hours and wages. Elite says the wage rate is wrong and the hours of work have been exaggerated by Mr. So and are also wrong. Elite says it was unable to pay Mr. So all of his wages because the client on a large job had not paid Elite.
15. On the request for an extension, Elite says it had e-mailed the appeal to the delegate of the Director responsible for making the Determination and then re-directed it to the Tribunal after being told it had been sent to the wrong person.

ANALYSIS

16. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: see 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.

17. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:
 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 and on-going *bona fide* intention to appeal the Determination;
 3. the respondent party (*i.e.*, the employer or employee), as well the Director, must have 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.
18. 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. The Tribunal has required "compelling reasons": *Re Wright*, BC EST # D132/97.
19. This appeal has been filed approximately two weeks late, which is not an overly long delay. The explanation provided by Elite is that it just got emailed to the wrong person and place. Notwithstanding the relatively short delay, I do not accept that the reasons provided for the late filing of the appeal are reasonable.

20. The Determination contains information indicating the last day for delivering an appeal and that it must be delivered to the Tribunal. That information is prominently displayed on the Determination. The web site for the Tribunal is provided as a source for acquiring information on how to appeal. Also, the top of the Appeal Form, provides further notice that the Appeal Form must be delivered to the Tribunal, again prominently displayed, and contains an encouragement to a party completing the Appeal Form to “read the Guide to the Appeal Form” that is provided with it. One would have to be very careless or completely disinterested in ensuring the correctness of an appeal to miss the filing requirements and statutory obligations.
21. Even when delivered to the Tribunal, the appeal was deficient. It did not include a copy of the reasons for Determination, which is a statutory requirement set out in paragraph 112(2)(a)(i.1) of the *Act*. No explanation has been provided for failing to seek the reasons for Determination and a deadline for providing the reasons has passed without any response from Elite. This deficiency and the failure to account for it suggest Elite lacked a genuine intention to appeal the Determination.
22. One of the other considerations for deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I am completely satisfied there is no *prima facie* case raised in this appeal. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it does require consideration of the relative strength of the grounds for appeal chosen against long standing principles that apply in the context of those grounds. As noted by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11:
- . . . [this] inquiry [into whether there is a *prima facie* case] flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.
23. The appeal in this case is very weak.
24. I also note that the presumptive merits of an appeal, listed in section 114(1)(f) of the *Act* as whether there is a reasonable prospect of the appeal succeeding, stands as a distinct consideration on which an appeal can be dismissed under section 114, which is set out above in its entirety. In this respect, I am totally convinced there is no merit to the appeal, which is grounded in error of law.
25. On its face, this appeal does nothing more than express disagreement with findings of fact made by the Director and the conclusions reached from those findings; it seeks to have the Tribunal vary those findings and conclusions. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.
26. I find no merit to the challenges made by Elite for at least two reasons. First, as indicated above, the Tribunal has no authority to consider an appeal based simply on a dispute with findings of fact absent a demonstrated error of law. Second, I find there is no error of law in the Determination. It was entirely reasonable and appropriate for the Director to rely on the evidence provided by Mr. So during the complaint process, particularly in the absence of any active participation by Elite or evidence submitted in the complaint hearing. An analysis of the findings in this case tested against the material in the “record” shows there is nothing perverse or inexplicable in the findings made; they are rational and firmly grounded in the evidence provided at the complaint hearing.

27. As well, to the extent Elite relies on material that was not provided during the complaint process, this is the very sort of material the Tribunal has refused to allow to be advanced in an appeal. It is apparent that all of this material existed at the time the Determination was being made. If Elite believed this material was important, it should have been provided to the Director at the complaint hearing.
28. Also, to allow this “evidence” to be considered, or indeed to allow this appeal to proceed at all, would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to participate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Elite failed to present any case during the complaint process. This failure compels a finding that they may not now seek to challenge the Determination by seeking to make a case that could have been made had they decided to participate in the process.
29. Finally, this appeal has not met one of the requirements of section 112(2) of the *Act* and can be dismissed on that basis.
30. In sum, the request by Elite for an extension of the time limited for appeal is denied. As well, an assessment of this appeal shows it has no prospect of succeeding and the appeal does not meet one of the requirements of section 112(2). The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
31. I dismiss the appeal and confirm the Determination.

ORDER

32. Pursuant to section 115 of the *Act*, I order the Determination dated July 21, 2015, be confirmed in the amount of \$34,881.47, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal