

An appeal

- by -

Highland Security Group Ltd.

- 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.: 2009A/124 & 2009A/125

DATE OF DECISION: November 18, 2009

DECISION

SUBMISSIONS

Jonas Klippenstein, Director on behalf of Highland Security Group Ltd.

Amanda Clark Welder on behalf of the Director of Employment Standards

OVERVIEW

1. Highland Security Group Ltd. (“Highland”) appeals against two Determinations of the Director of Employment Standards (“the Director”) issued July 15, 2009, pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”).
2. Don Mitchell was employed by Highland as a security guard from March 30, 2009, until he quit on April 27, 2009. Mr. Mitchell filed a complaint alleging that he was owed wages.
3. After investigating Mr. Mitchell’s complaint, the Director’s delegate determined that Highland had contravened Sections 17, 18 and 21 of the *Act* in failing to pay Mr. Mitchell wages and vacation pay and in improperly requiring Mr. Mitchell to pay the employer’s business costs. She concluded that Mr. Mitchell was entitled to wages and interest in the total amount of \$2,727.07. The delegate imposed a \$2,000.00 penalty on Highland for these contraventions, pursuant to section 29(1) of the *Employment Standards Regulation* (“*Regulation*”). In a companion Determination, the delegate determined that Highland had contravened section 46 of the *Regulation* in failing to produce payroll records and imposed a \$500.00 penalty for that contravention.
4. Highland’s ground of appeal is that the delegate failed to observe the principles of natural justice in making the Determinations.
5. Highland’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Highland’s appeal period expired August 24, 2009. Highland seeks an extension of time in which to file the appeals.
6. These reasons address only the timeliness of Highland’s appeals and are based on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. The sole issue on both appeals is whether or not the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeals even though the time period for seeking the appeals has expired.

FACTS

8. After receiving Mr. Mitchell’s complaint, the Director’s delegate contacted Mr. Klippenstein. Mr. Klippenstein confirmed that Mr. Mitchell had worked for Highland and acknowledged that Mr. Mitchell was owed wages. Mr. Klippenstein told the delegate that Mr. Mitchell had not been paid because he had not submitted his time sheet.

9. The delegate scheduled a complaint hearing for June 19, 2009, and advised Mr. Klippenstein that a Complaint Hearing notice and a Demand for Employer records would be sent to him by registered mail. Mr. Klippenstein told the delegate that he no longer resided at the address indicated on the corporate registry and gave her his current mailing address. He also gave the delegate two email addresses. The delegate sent the hearing notice, demand for records, a copy of Mr. Mitchell's complaint and the relevant provisions of the *Act* to Mr. Klippenstein by regular and registered mail as well as by email. Although the registered mail was returned as unclaimed, the regular mail was not returned to the Branch.
10. On May 22, 2009, the delegate advised Mr. Klippenstein by regular, registered and email that the complaint hearing had been cancelled as she had received another complaint from an individual who wished to keep their identity confidential and that she would be conducting an investigation into both complaints.
11. On June 10, 2009, the delegate notified Highland that no records had been received in response to the Demand for Employer Records and that she was considering imposing an administrative penalty for a contravention of section 46 of the *Regulation*. She also provided her preliminary findings and asked Highland for its response no later than June 22, 2009. Once again, the registered mail was returned unclaimed while the regular mail correspondence was not returned.
12. On June 17, 2009, the delegate left Mr. Klippenstein a voice mail message indicating that if he did not respond to her correspondence she would be issuing a decision based solely on the information she received from Mr. Mitchell. Mr. Klippenstein telephoned the delegate later that day and advised her that he had not received any of her correspondence. When she confirmed his mailing address, he told her that his nephew was living at his house and may not have given him the mail and asked that the delegate direct future correspondence to his business address. He again acknowledged that Mr. Mitchell had worked for Highland and that he was owed wages.
13. On June 18, 2009, the delegate sent copies of all previous correspondence and documentation to Mr. Klippenstein at the business address he provided to her as well as to the residential address and the address listed in the corporate registered and records office. She advised him that if she did not receive a response by June 26, 2009, she would issue a determination in Mr. Mitchell's favor. Although all the registered mail was returned unclaimed, the regular mail was not.
14. On June 24, 2009, a representative of Highland's bookkeeping company told the delegate that Mr. Klippenstein had instructed her to submit payroll records relating to the investigation. The bookkeeper advised the delegate that Mr. Mitchell had never been on payroll and she had no records of his hours of work.
15. The delegate considered Mr. Mitchell's evidence, including his calendar outlining his days and hours of work. She noted Mr. Klippenstein's acknowledgement that Mr. Mitchell had been employed by Highland and that he had not been paid any wages. The delegate concluded that Highland had been notified of the complaint and given many opportunities to respond to it.
16. The delegate determined that Mr. Mitchell was entitled to wages in the amount of \$2,262.00 and vacation pay of \$90.48. She also concluded that Mr. Mitchell was entitled to be compensated \$20 per shift for the use of his own vehicle while working at some job sites, pursuant to s. 21 of the *Act*.
17. The delegate imposed three administrative penalties on Highland for its breaches of s. 17 (failing to pay wages within 8 days of the end of a pay period), s. 18 (failing to pay wages within 6 days upon termination of employment where the employee quits) and s. 21 of the *Act*.

18. In a separate Determination, the delegate found Highland in contravention of s. 46 of the *Regulation* and imposed another \$500 administrative penalty for Highland's failure to provide employer records.

ARGUMENT

19. Mr. Klippenstein says that it was impossible for him to attend the "meeting" with Mr. Mitchell because of a peace bond that was in place between them and that he should not be "penalized" for reasons beyond his control.
20. Mr. Klippenstein says that the appeals were filed late because the delegate "said she would deal with this issue on a subsequent day and turned out she was unable to" (sic).
21. The delegate submits that the Tribunal should not extend the time to allow Highland to file its appeal. Although she says she is unaware of what specific issue Mr. Klippenstein is referring to, she denies that she agreed to deal with any issue at a later date.
22. The delegate says that the Determinations were served on Highland on July 16, 2009, and that on August 19, 2009, she had a telephone discussion with Mr. Klippenstein about them. When Mr. Klippenstein told her that he disagreed with her findings, she advised him of his right of appeal.
23. On August 27, 2009, the Director served a Demand Notice on the Canadian Imperial Bank of Commerce in an effort to collect the money determined to be owed in the Determination. On August 28, 2009, Mr. Klippenstein contacted the delegate to discuss the demand and provided the Director with a money order in the full amount of the Determinations. The delegate again advised Mr. Klippenstein that he would have to file an appeal if he disputed the Determinations.
24. When the delegate met with Mr. Klippenstein on September 2, 2009, to discuss an ongoing investigation, Mr. Klippenstein reiterated his disagreement with the Determinations. On September 11, 2009, the delegate advised Mr. Klippenstein that if he did not file an appeal by September 25, 2009, she would disburse the funds to Mr. Mitchell.
25. The delegate says that although she was aware Mr. Klippenstein intended to appeal the Determination, he has provided no good reason why he did not file the appeal within the statutory time period. She denies that he was ever advised that matters in the Determination were subject to further review. She notes that the appeal was not filed until collection action was taken.
26. The delegate further submits that Mr. Klippenstein has provided no evidence supporting a strong case should the appeals be allowed. The delegate says Mr. Mitchell is unaware of the existence of any peace bond. She also notes that Mr. Klippenstein never raised the existence of any peace bond at any time during the investigation.

ANALYSIS

27. 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.
28. These time limits are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

29. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
30. 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.

31. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit.
32. Although Mr. Klippenstein does not say when he received the Determination, I am satisfied he had actual knowledge of the Determination by July 16, 2009, either by email, regular mail or registered mail. He had a telephone conversation with the delegate about the Determination on August 19, 2009, which was within the appeal period. Mr. Klippenstein provides no good reason why he did not file his appeal within the statutory time period. He merely asserts that the delegate “said she would deal with this issue on a subsequent day and turned out she was unable to” without specifying what the issue is or what day he had the conversation with the delegate.
33. Furthermore, I note that Mr. Klippenstein did not file the appeals until after the Director took steps to collect on the Determinations on August 27, 2009, just after the appeal period had expired.
34. Although the delegate was always aware of Mr. Klippenstein’s intention to appeal the Determination, there is no evidence Mr. Mitchell was aware of that intention. However, I am not persuaded that Mr. Klippenstein’s intention was *bona fide*. He made little to no effort to participate in the investigation and although he repeatedly stated he intended to appeal the Determination, did nothing to perfect that appeal even after collection proceedings had commenced.
35. Furthermore, I find no strong *prima facie* case for the appeal. Mr. Klippenstein asserts that the reason he did not participate in the appeal was because of a peace bond between himself and Mr. Mitchell. Mr. Mitchell is apparently unaware of the existence of a peace bond and Mr. Klippenstein did not advise the delegate of that although he had been in regular communication with her throughout the investigation process. If indeed a peace bond exists between the parties, Mr. Klippenstein does not explain why he did not co-operate with the delegate during the investigation process. The evidence is that Highland did not dispute owing Mr. Mitchell wages. Any dispute as to quantum could have been made through written submissions, making Mr. Klippenstein’s personal appearance at any hearing unnecessary.

ORDER

36. Pursuant to section 109(1)(a) of the *Act*, I deny Highland's applications to extend the time for filing the appeals.

Carol L. Roberts
Member
Employment Standards Tribunal