



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/119

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 10, 2015.
2. The Determination found that Elite had contravened Part 3, sections 17, 18, 21 and 27, Part 4, section 40, Part 5, sections 45 and Part 7, section 58 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of David Cheung (“Mr. Cheung”) and ordered Elite to pay wages to Mr. Cheung in the amount of \$15,530.13 and to pay administrative penalties in the amount of \$4,000.00. The total amount of the Determination is \$19,530.13.
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 9, 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 requested and 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”) 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 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 and any evidence allowed by the Tribunal to be included with the appeal and considered. 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. Cheung 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. Cheung worked for Elite for a period from January 6, 2014, to August 21, 2014;
 - 3. Mr. Cheung filed a complaint in February 2015 alleging that he had not been paid all wages owed to him for a period from April 30, 2014, to August 21, 2014;
 - 4. The Director conducted a complaint hearing, although the material does not indicate the date of that hearing;
 - 5. Mr. Cheung 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 documents or evidence in response to Mr. Cheung's evidence and submissions;
 - 7. The Determination was issued on July 10, 2015;
 - 8. The time limited for filing an appeal expired on August 17, 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 law by finding Mr. Cheung was an employee of Elite. Elite says Mr. Cheung was a sub-contractor. Elite does not deny it owes Mr. Cheung money and says it will pay \$500 a month until the amount owed is paid.
15. On the request for an extension, Elite says it didn't fully understand what the documents were and had to find someone to translate them. By the time a translation was done, the appeal deadline had passed; subsequently they sent their appeal to a wrong email address.

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 more than three weeks late. The explanation provided by Elite is that some unspecified documents needed to be translated and by the time that was done the appeal period had expired. The delay caused by seeking translation was apparently compounded by the appeal being sent to a wrong email address. I do not find the reasons provided for the late filing of the appeal are reasonable.

20. Elite is responsible for ensuring it understands the Determination and its legal ramifications. The obligation to ensure timely filing of an appeal is on the person seeking to appeal, in this case Elite. That obligation, by necessity, includes acquiring an understanding of the requirements for filing an appeal in a timely way. It is apparent Elite failed to do this.
21. If Elite had been diligent, it would have seen that the Determination contains information indicating the last day for delivering an appeal and that such appeal must be delivered to the Tribunal. That information is prominently displayed on the Determination. It would have seen 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, again prominently displayed, provides further notice that the Appeal Form must be delivered to the Tribunal and contains an encouragement to a party completing the Appeal Form to “read the Guide to the Appeal Form” that is provided with the it.
22. 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. This deficiency and the failure to account for it suggest there was not a genuine intention to appeal the Determination.
23. 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.
24. The appeal in this case is very weak.
25. 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 may 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.
26. On its face, this appeal does nothing more than baldly assert Mr. Cheung was not an employee of Elite but a sub-contractor. Elite makes this assertion without a providing a single argument, based either in law or in fact, why their position is correct and the Director was wrong.
27. There is no merit to the challenges made by Elite for at least two reasons. First, there is no indication in any of the material in the “record” that Elite ever raised a question of the status of Mr. Cheung during the complaint process. Elite provided no evidence of the nature of its relationship with Mr. Cheung. To give effect to this argument 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 cooperate or 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 participate in the complaint process. This failure compels a finding that they may not now seek to challenge the Determination by seeking to make a case they should have attempted to make in the complaint

process. Simply put, if Elite believed Mr. Cheung was not an employee, it should have submitted this argument, along with any supporting evidence, to the Director during the complaint process.

28. Second, and in any event, the burden of showing error of law is on Elite and they have fallen far short of meeting this burden. There is nothing in the “record”, as indicated above, and nothing in their appeal that might indicate Mr. Cheung was not an employee of Elite applying the definitions of “employer” and “employee” under the *Act* to the circumstances of Mr. Cheung’s employment.
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 10, 2015, be confirmed in the amount of \$19,530.13, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal