

An appeal

- by -

William Holt, a Director or Officer of
Nobility Environmental Software Systems Inc.
("Holt")

- 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.: 2006A/123 and 2006A/126

DATE OF DECISION: December 18, 2006

DECISION

SUBMISSIONS

Gary R. Fraser, Lang Michener	on behalf of William Holt
Victor Lee	on behalf of the Director of Employment Standards
Chris Clibbon	on his own behalf

OVERVIEW

1. This is an appeal by William Holt pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards (“the Director”) issued October 7, 2005, and an application for a suspension of the Determination pursuant to Section 113.
2. Christopher Clibbon filed a complaint against Nobility Environmental Software Systems Inc. (“N.E.S.S.”), alleging that N.E.S.S. had breached the *Act* by failing to pay regular wages.
3. The Director’s delegate investigated the complaint, and on November 8, 2004, issued a Determination in which he determined that N.E.S.S. had breached the *Act*, and finding that Mr. Clibbon was entitled to wages and interest in the total amount of \$18,667.82.
4. Kenneth Strong, a Director and the sole shareholder of N.E.S.S., appealed the Determination. The Tribunal dismissed the appeal on March 18, 2005. (BC EST #D035/05)
5. When N.E.S.S. did not settle the Determination, the delegate issued a Determination against Mr. Holt pursuant to section 96 of the *Act*. The delegate noted that the Determination was sent to N.E.S.S., with copies to the registered and records office, and to Mr. Holt, the Director and Officer of N.E.S.S. The delegate noted that Mr. Clibbon’s wages were earned between October 15, 2002 and April 9, 2003, and that Mr. Holt was a Director or Officer of N.E.S.S. during that time.
6. The delegate found Mr. Holt personally liable for two month’s unpaid wages, in the total amount of \$11,786.67, plus interest.
7. Mr. Holt’s appeal was filed with the Tribunal on October 24, 2006. In his appeal, Mr. Holt contends that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
8. Pursuant to section 112 of the *Act*, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Mr. Holt’s appeal period expired November 14, 2005.
9. These reasons address only the timeliness of Mr. Holt’s appeal, and whether the Determination should be suspended pursuant to s. 113.

10. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

11. Whether the Tribunal should 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.

ARGUMENT

12. Counsel for Mr. Holt argues that the delegate failed to observe the principles of natural justice in concluding that Mr. Holt was a director of N.E.S.S. at the material times, and provided new evidence that purportedly supports Mr. Holt’s assertions.
13. Mr. Holt’s counsel submits that Mr. Holt did not receive a copy of the October 7, 2005 Determination because he had moved to another address in November 2004. He submits that Mr. Holt first became aware of the Determination when he was advised by a Royal Bank employee that an attachment order had been placed on his bank account.
14. Mr. Holt’s counsel says, in essence, that Mr. Holt took all necessary steps to resign as a Director and Officer of N.E.S.S. on July 1, 2001, and that he communicated all the relevant information to the delegate between March and July, 2006.
15. With respect to the suspension application, counsel for Mr. Holt submits that Mr. Holt ought not be required to deposit any money with the Director pending the outcome of the appeal. He says that Mr. Holt is retired and has limited financial means. He contends that requiring a deposit of any amount would present a significant hardship to Mr. Holt.
16. The director’s delegate enclosed the record relating to both the determination and the appeal, and took no position on Mr. Holt’s application for an extension of time or the suspension request.
17. Mr. Clibbon expressed the view that the extension and suspension requests ought not be granted.

ANALYSIS

18. 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 15 days of service, if served by registered mail, or 8 days after service, if served personally.

19. Section 113 (1) provides that a person who appeals a determination may request the tribunal to suspend the effect of the determination.
- (2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either
- (a) the total amount, if any, required to be paid under the determination, or
- (b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.

Extension of time

20. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
21. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
22. 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.
23. These criteria are not exhaustive.
24. I am persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit. Mr. Holt's statutory declaration, accompanied by transfer and moving documentation, indicates that he moved from the address contained in the BC Company Registry in November, 2004. I accept Mr. Holt's evidence that he first became aware of the October 7, 2005 Determination in February, 2006, when he was advised by a Royal Bank employee that his account had been the subject of an attachment order.
25. In March and July of 2006, Mr. Holt advised the delegate, by way of a series of registered letters, that he was not a Director, and had not been for some time, and provided the delegate with what he considered to be relevant documentation. While this is not evidence of an intention to appeal the Determination, it clearly evidences a dispute with the conclusion reached by the delegate.

26. There is no evidence Mr. Clibbon has been made aware of Mr. Holt's dispute of the delegate's conclusions. While I find that Mr. Clibbon has been prejudiced by not receiving wages that the Tribunal has confirmed are owed to him, I am not persuaded that he will be any further prejudiced by granting an extension of the time to appeal the Determination.
27. Finally, I find that there is a *prima facie* case in Mr. Holt's favour.
28. There is some evidence that Mr. Holt made genuine attempts to resign as a Director/Officer of N.E.S.S. in 2001, prior to the date Mr. Clibbon's wages were earned. If those efforts are deemed to be sufficient, Mr. Holt's would succeed on appeal.

Suspension application

29. In considering the suspension application, the Tribunal considers the perspectives of both the employer and the employee. Although the amount of the Determination is not significant, it is not inconsequential to either party; it is for that reason that Mr. Holt seeks a suspension order.
30. The Tribunal will not suspend the effect of a Determination in circumstances where the grounds of appeal are frivolous or have little apparent merit. However, it will suspend where there is some merit. (*Tricom Services Inc.* BC EST #D420/97, *TNL Paving Ltd.* BC EST #D397/99, and *Fetchomatic.Com Online Inc. and Fetchomatic Global Internet Inc.* BC EST #D550/01).
31. As I have decided above, I find that Mr. Holt has made out a *prima facie* case, and that his appeal has some merit. Therefore, I will issue an Order suspending the effect of the Determination. However, it remains at issue whether a smaller amount of the Order should be deposited, or whether the entire amount should be suspended.
32. Although Mr. Holt says that depositing any amount would be a hardship, he does not say that he is in financial difficulty. Given however, that he is currently retired, I find it appropriate that the entire amount be suspended pending the decision on Mr. Holt's appeal.

ORDER

33. Pursuant to section 109(1)(a) of the *Act*, I allow Mr. Holt's application to extend the time for filing an appeal. Pursuant to section 113(2) of the *Act*, I order that the Determination be suspended until the Tribunal hears and decides on the merits of the appeal of the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal