

An appeal

- by -

Micky Transport Ltd.
("Micky Transport")

- 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.: 2014A/140

DATE OF DECISION: December 9, 2014

DECISION

SUBMISSIONS

Karen Sandhu

on behalf of MickyTransport Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Micky Transport Ltd. (“MickyTransport”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 27, 2014.
2. The Determination found that Micky Transport had contravened Part 3, section 18 of the *Act* and sections 37.3 and 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Serguie Gouchtine, Davinder Sandhu, Chang Rong Cai and Gurbinder Khatra (“the complainants”) and ordered Micky Transport to pay wages to the complainants in the amount of \$6,250.36 and to pay administrative penalties in the amount of \$1,500.00. The total amount of the Determination is \$7,750.36.
3. Micky Transport has filed this appeal on the ground the Director erred in law. Micky Transport seeks to have the Determination cancelled.
4. The appeal was delivered to the Tribunal on October 6, 2014, the last day of the appeal period set out in the Determination and in subsection 112(3) of the *Act*. The appeal did not, as required by subsection 112(2), include a copy of the Director’s written reasons for the Determination nor did it include written reasons and argument for the appeal.
5. On October 20, 2014, the Tribunal informed Micky Transport the appeal was incomplete and advised Micky Transport the *Act* and the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) required the written reasons for the Determination to be delivered to the Tribunal within the appeal period. The Tribunal informed Micky Transport the appeal was late and that it was required to seek an extension of the appeal period. The Tribunal provided Micky Transport with a deadline of October 24, 2014, to perfect the appeal and request an extension of time. In response to this correspondence, the Tribunal received a very brief submission, which is reproduced below.
6. On October 29, 2014, the Tribunal notified the parties that an appeal had been received from Micky Transport, requested production of the section 112(5) “record” (the “record”) from the Director and notified the 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 and a copy was sent to Micky Transport, who was advised of their right to object to the completeness of the “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
8. Consistent with the October 29, 2014, notice, I have reviewed the appeal, including the attachments submitted by Micky Transport, and the “record”.
9. 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 and 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 period;*
 - (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 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.*

10. I am deciding whether Micky Transport should be granted an extension of the appeal period or if the appeal should be dismissed. If satisfied the appeal should not be dismissed under section 114(1), the complainants will, and the Director may, be invited to file further submissions. On the other hand, if it is decided an extension of the time period should not be granted or if it is found to be appropriate that the appeal not be allowed to proceed, it will be dismissed under section 114(1) of the *Act*.

ISSUE

11. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS AND ARGUMENT

12. The facts relating to the issue of timeliness are as follows:
1. The Determination was issued, without reasons, on August 27, 2014;
 2. The Determination indicated, in bold copy, that written reasons for the Determination could be requested and that such request must be delivered to an office of the Employment Standards Branch by September 11, 2014;
 3. The Determination contained appeal information that stated, among other things, an appeal “must include a copy of the Director’s written reasons for the Determination”;
 4. The appeal information also stated that the time limit for filing an appeal under the *Act* expired on October 6, 2014;
 5. On October 6, 2014, the Tribunal received an incomplete appeal from Micky Transport;
 6. The form of appeal consisted of:
 - a completed and signed Appeal Form;
 - a letter to Kevin D’Souza (a delegate of the Director);

- a certificate of incorporation for Micky Transport Ltd.;
 - a letter from the Registrar of Companies certifying copies of documents filed with the Registrar;
 - Notice of Articles for Micky Transport Ltd.; and
 - a copy of the Determination.
7. The body of the letter to Mr. D'Souza reads:
- We have been receiving Employment Standards letters demanding cash for Davinder Sandhu, Gurbinder Khatra, Serguie Gouchtine and Chang Rong Cai. Micky Transport Ltd. has been out of business for a few years. These people have never worked for Micky Transport Ltd. Please check references that they have provided for their work place. If this is not resolved by Tuesday September 9, 2014, we will take a legal action at the court.
- On page 1 you have stated Gurbinder Khatra, and on page 3 you have stated Gurbinder Sandhu. Please check your facts and correct your statement.
8. Below the body of the letter are three lines under a heading: "Written Reasons for Determination", which state:
- Davinder Sandhu, Gurbinder Khattrra, Serguie Gouchtine and Chang Rong Cai never worked for Micky Transport Ltd.
- Kevin D'Souza does not have the right facts and made errors with names in the Determination
9. Although the Appeal Form indicated otherwise, the appeal did not, as required by section 112(2) (i.1), include a copy of the written reasons for the Determination;
10. On October 9, 2014, the Tribunal contacted Karen Sandhu ("Ms. Sandhu"), who had filed the appeal on behalf of Micky Transport, and informed her of the deficiency in the appeal and of the requirement to obtain written reasons for the Determination;
11. Following that discussion, Ms. Sandhu, identifying herself in the document as "former president of Micky Transport Ltd.", delivered the following:
- STATING GROUNDS FOR THE APPEAL;**
- Reasons for appeal: The Director of Employment Standards erred in law**
- We have been receiving Employment Standards letters demanding cash for Davinder Sandhu, Gurbinder Khattrra, Serguie Gouchtine, and Chang Rong Cai. None of the names listed have ever worked for Micky Transport LTD. We have no applications on their names. We wrote this letter to Kevin D'Souza on the 7th of September, 2014, and have not yet **received any response whatsoever**. Mr. D'Souza does not have the right facts and made errors in the determination as well. On page 1 he has stated Gurbinder Khaytra, and on page 3 he has stated Gurbinder Sandhu, and thus does not have the right facts.
12. In the October 9, 2014, letter, the Tribunal also requested Ms. Sandhu to follow up with the Employment Standards Branch regarding the request for written reasons;
13. The Tribunal advised Ms. Sandhu that she needed to file the written reasons for the Determination and to provide reasons for filing the appeal late by October 24, 2014;
14. On October 24, 2014 the Tribunal received a fax from Ms. Sandhu, headed "Reason for the Determination", saying:

We have not yet received any response from Kevin D'Souza. I tried several times to call him and I had even left a voicemail today. He has not responded therefore we have no reason(s) for the determination.

ANALYSIS

13. The *Act* imposes an appeal deadline to ensure appeals are dealt with promptly: 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.
14. 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:
 - i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and ongoing *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.
15. 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.
16. For the following reasons, the request to extend the appeal period is denied.
17. First, although the initial attempt at filing an appeal of the Determination was made on October 6, 2014, within the appeal period, Micky Transport failed to comply with the statutory requirements for filing an appeal set out in section 112(2) of the *Act*. No good reason has been provided for failing to file a proper appeal within the time allowed in the *Act*. In fact, on examination of the information provided by Micky Transport in their appeal, I find no reason at all has been given.
18. Second, I find the efforts made by Micky Transport to obtain the reasons for the Determination to have been less than adequate. While this failing is not a significant factor in my view it speaks to the *bona fides* of Micky Transport’s intention to appeal the Determination.
19. Third, I am 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.

20. In this case, the relevant principles would include the burden on a party in an appeal to show, on clear and cogent evidence, the Director committed an error of law in the Determination. The appeal is devoid of the necessary evidence to satisfy that burden. Micky Transport has provided no reasons in the appeal for alleging there is an error of law and has made no argument on the merits of its appeal.
21. As well, it appears from an examination of the “record” that Micky Transport failed to respond to the Demand for Employer Records, except to deny such records existed, and, generally, failed or refused to participate in any meaningful way in the complaint process. To allow this matter to proceed would be inconsistent with the objects and purposes of the *Act* and fly in the face of the long standing approach by the Tribunal to such attempts in similar circumstances: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
22. For the above reasons, I find Micky Transport should not be given an extension of the appeal period.
23. As well, I find there is no reason provided in the appeal for considering if the Director erred in law in making the Determination; I am not persuaded there is any reasonable prospect this appeal can succeed.
24. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
25. The appeal is dismissed.

ORDER

26. Pursuant to section 115 of the *Act*, I order the Determination dated August 27, 2014, be confirmed in the amount of \$7,750.36, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal