Employment Standards TRIBUNAL

An appeal

- by -

Daniel J. Barker Law Corporation
("Barker LC")

- 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.: 2016A/103

DATE OF DECISION: October 12, 2016

DECISION

SUBMISSIONS

Daniel J. Barker — on behalf of Daniel J. Barker Law Corporation

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Daniel J. Barker Law Corporation ("Barker LC") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on June 24, 2016.

2. The Determination was issued on a complaint by Tyrone Daum ("Mr. Daum"), who alleged he had been an employee of Barker LC and that Barker LC had contravened the *Act* by failing to pay him regular wages, statutory holiday pay, annual vacation pay, and compensation for length of service.

3. The Determination found Mr. Daum was an employee of Barker LC, that Barker LC had contravened Part 3, sections 18 and 28 and that Mr. Daum was owed wages and annual vacation pay in the amount of $221.70. Administrative penalties were imposed on Barker LC in the amount of $1,000.00.

4. This appeal is grounded in an assertion the delegate erred in law in making the Determination. On the Appeal Form, Barker LC indicates it seeks to have the Determination varied to show that Mr. Daum was paid all wages owed. In reality, Barker LC seeks to have the Determination cancelled.

5. The time period for filing an appeal of the Determination expired on August 2, 2016. This appeal was received by the Tribunal on August 3, 2016 – one day after the statutory time period had expired. Barker LC seeks an extension of the statutory appeal period.

6. In correspondence dated August 5, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

7. The section 112(5) record (the "record") has been provided to the Tribunal by the delegate and a copy has been delivered to Barker LC. Barker LC has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been filed and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

8. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the delegate when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *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 any 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 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.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), Mr. Daum and the Director will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the time limit for filing an appeal should be extended and whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue is whether this appeal should be allowed to proceed or dismissed under section 114(1) of the *Act*.

THE FACTS

11. The facts in this appeal have been canvassed in a companion appeal of the Determination brought by Mr. Daum: see *Tyrone Daum*, BC EST # D123/16.

12. It was noted in that decision that the factual background relating to this appeal can be found in both the Determination and in an earlier appeal decision issued by the Tribunal in December 2015: *Daniel J. Barker Law Corporation*, BC EST # D138/15.

13. The focus of this appeal is quite narrow, raising two issues: first, whether the Tribunal should extend the statutory time period for filing an appeal; and second, whether the delegate erred in law in finding Mr. Daum performed work for Barker LC for two hours a day, five days a week, Monday to Friday and, whether, as a consequence of that error, erred in attributing payments made to Mr. Daum evenly over the statutory recovery period.

14. The only essential fact relating to the first issue is that this appeal was delivered to the Tribunal one day after the appeal period expired.

15. On the second question, there are several relevant factual elements to the decision made in the Determination.

16. In his evidence before the delegate, Mr. Daum submitted he worked for Barker LC eight hours a day every business day, 30 minutes each weeknight and for unspecified periods of time each weekend, including long weekends and that Barker LC had agreed to pay him an hourly wage of $45.00 for all hours worked.

17. The delegate did not accept this evidence, finding that while Mr. Daum was "diligent" in attending the Barker LC office during regular business hours, he used the office primarily working on litigation in which he was a party.

18. The delegate did find Mr. Daum performed some work for Barker LC that was not related to his own litigation when he was asked to do so by Mr. Barker. Specifically, the delegate found "on a balance of probabilities that when Mr. Barker had work suitable for him to do for the benefit of [Barker LC], he would instruct Mr. Daum to do it, and Mr. Daum would accept such instructions."

19. No records of days and hours work performed by Mr. Daum for Barker LC were kept by either party. In considering the question of days and hours of work, the delegate noted:

> Neither party provided wholly persuasive evidence regarding the days and hours Mr. Daum worked and considering conflicting testimony and the documents available to me, the best that can be hoped for is a reasoned approximation of the days and hours Mr. Daum worked. (at page R14)

20. Based substantially on the evidence of the nature of the tasks Mr. Daum performed for Barker LC, which "was not really in dispute and was supported by some documents", the delegate found Mr. Daum worked for two hours a day on each business day. While the Determination does not specifically refer to it, two hours represents minimum daily hours for an employee who, in the circumstances here, performs work on any given day – whether it is one minute of work or two hours of work for the employer.

21. The delegate applied minimum wage to the resulting hours to arrive at an amount that represented wages payable during the statutory wage recovery period. Barker LC issued cheques to Mr. Daum during the recovery period in the amount of $1,050.00. Barker LC made some cash payments to Mr. Daum totalling $4,000.00; the dates and amounts of these payments were not recorded. The delegate considered it was appropriate to approximate the cash paid in the recovery period by pro-rating the total cash paid over the entire employment period and applying the pro-rated amount over the recovery period.

ARGUMENT

22. On the request for an extension of the statutory time period, Barker LC submits it is appropriate to grant such extension for the following reasons:

- the delay is not unreasonably long;
- Barker LC has exhibited a genuine intention to appeal the Determination and has advised the other parties of that intention;
- the issue is an important one; and
- Mr. Daum will not be prejudiced by the delay.

23. On the substantive aspect of the appeal, Barker LC submits the delegate erred in law in finding Mr. Daum performed work for Barker LC two hours a day, five days a week. Barker LC says the finding was "wholly unsupported". Barker LC adds that, based on this wrong conclusion, the delegate committed a resulting error of law in calculating the wages payable. Finally, Barker LC submits the delegate erred in law by attributing the payments made to Mr. Daum evenly over the recovery period.

ANALYSIS

24. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an 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 the time limit 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.

25. 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 must 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 on-going *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.

26. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. The Tribunal has required "compelling reasons": *Re Wright*, BC EST # D132/97. There do not appear to be any unique criteria being advanced in this case.

27. This appeal has been filed one day late. That delay is not significant.

28. Barker LC's explanation for the delay is that he erred in failing to include the materials required for the appeal, namely the Appeal Form, a copy of the determination, and the reasons for the determination. I do not find that to be a particularly reasonable explanation; it does not explain why the preparation and filing of the appeal was left to the last day of the appeal period.

29. I am satisfied Barker LC had a genuine and on-going *bona fide* intention to appeal the determination and there is no more prejudice to Mr. Daum by the delay than if the appeal were filed within the appeal period.

30. Three of the first four criteria for granting an extension are satisfied and the fourth does not weigh heavily against an extension of time.

31. The final consideration for deciding whether an appeal period should be extended is the *prima facie* strength of the case on appeal. When considering this criterion, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under this

criterion is not dissimilar to that undertaken in assessing whether the appeal has any reasonable prospect of succeeding.

32. Both of these matters, delay in filing and the prospect of the appeal succeeding, are listed in section 114(1) as reasons why the Tribunal may dismiss an appeal without a hearing of any kind. They are similar and an analysis of the merits and strength of appeal may lead to the same conclusion on both matters.

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law;*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was being made.*

34. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

35. Barker LC asserts the delegate committed errors of law. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

> 1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
> 2. a misapplication of an applicable principle of general law;
> 3. acting without any evidence;
> 4. acting on a view of the facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

36. The grounds of appeal do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent.

37. An analysis of the appeal must recognize and give effect to the finding of the delegate that the evidence provided by both Mr. Barker and Mr. Daum "at times strained credulity" and that "their narratives were largely irreconcilable and discerning fact from fiction was a challenge".

38. Based on the appeal submission, Barker LC does not contend the error of law arises from a misapplication of the *Act* or from a misapplication of an applicable principle of general law. It is grounded in what Barker LC describes as wholly unsupported findings. In other words, Barker LC is challenging the evidentiary findings that led the delegate to the conclusions on days and hours worked and then to the calculation of wages owed and paid in each pay period during the recovery period.

39. There is support for the conclusions made in the Determination that are being challenged in this appeal. With respect, I completely disagree with the contention made by Barker LC that the finding of the delegate

on days and hours of work was "wholly unsupported" and it militates against the arguments being made by Barker LC when it asserts the delegate's conclusions were "wholly unsupported".

40. There was evidence of days and hours worked by Mr. Daum, much of it from Mr. Barker. Clearly, the delegate did not accept all of the evidence provided by either party, finding, as a whole, the evidence provided by the parties was not "wholly persuasive" on the specifics of the days and hours worked, but that does not equate to there being no evidence.

41. In my view it is more accurate to characterize the appeal submission by Barker LC as contending the delegate acted on a view of the facts that could not reasonably be entertained. That test has been restated as follows:

> … that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" … (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta,* [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in *British Columbia (Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272)

42. To the extent it is necessary and relevant to resolve the issue, the burden is on Barker LC to show the challenged conclusions made in the Determination are an error of law in the sense described above and I find he has not met that burden. It is not sufficient to simply say there was "no evidence" of the hours and days worked by Mr. Daum. In order for Barker LC to meet the burden imposed on it, the appeal must show the challenged conclusions of fact made in the Determination were "perverse", in a legal sense. It is insufficient to simply say: "this is wrong" without showing how, as a matter of law, it is wrong. Such a contention merely does what the Tribunal has consistently said cannot be done: challenge findings of fact without demonstrating an error of law.

43. In the circumstances of this case, that requires Barker LC to at least provide a reasonable alternative based on evidence that was accepted by the delegate and which logically excludes the finding made by the delegate. Barker LC has provided no alternative view of the facts that supports his argument that the delegate committed an error of law on the accepted facts.

44. No record of hours and days worked by Mr. Daum were kept by Barker LC. It was its statutory obligation to do so. Where there is a failure to keep proper records which comply with the requirements of section 28, the appropriate test to apply in determining days and hours of work is the "best evidence" rule, which simply means the delegate must make a reasoned decision, based on an evaluation of all the records and evidence which is available, to determine what is the best evidence of the number of days and hours actually worked by the employee. The delegate could have accepted the evidence provided by Mr. Daum of his days and hours worked, except the delegate did not find the evidence of Mr. Daum reliable.

45. There were good and sufficient reasons for finding that evidence unreliable, just as there were good and sufficient reasons for not accepting all of the evidence provided on behalf of Barker LC. In respect of the latter, for example, the delegate rejected the assertion by Mr. Barker that Mr. Daum performed "very little work" for Barker LC, finding "Mr. Barker assigned tasks to him fairly regularly when [Mr. Daum] was in attendance [in the office]". That finding is not challenged. Nor is such a finding unreasonable based on the finding, also not challenged, that Mr. Daum started working for Barker LC in January 2014, at a time corresponding to Mr. Barker's associate leaving the firm and on the evidence that Mr. Daum performed many tasks which, by their nature, would otherwise have been done the associate.

46. In the circumstances, it was reasonable, in fact obligatory, for the delegate to consider and evaluate all of the evidence and the relevant material in the record.

47. The delegate found the best evidence of days and hours of work available was "about the tasks he performed". Barker LC has not shown this approach to the evidence was wrong in principle.

48. A reasonable and objective examination of the Determination and the record demonstrates the delegate's statement that evidence of the tasks performed by Mr. Daum was "not really in dispute and was supported by some documents" is accurate. The description of the work performed, found on page R16 of the Determination and in several areas in the record, is amply supported in the evidence provided in the complaint hearing and in the record.

49. In respect of the delegate's finding on the hours and days worked, again Barker LC acknowledged during the complaint process that Mr. Daum "spent a great deal of time at the offices of Barker & Company": see for example the July 16, 2015, submission to the Employment Standards Branch. As noted above, its position on work performed by Mr. Daum – one not accepted on the evidence of the tasks performed by him – was not about the amount of time he spent in the office, but that during that time Mr. Daum performed "very little work" for Barker LC.

50. The Determination is not perfect; it is an approximation of the days and hours worked. It is not, however, unreasonable in the sense described above. The findings made by the delegate were based on the "best evidence" available and based on that evidence, it was open to the delegate to find Mr. Daum worked five days a week (excepting statutory holiday weeks) and worked two hours a day. No error of law has been shown.

51. The balance of the appeal submission by Barker LC – that the delegate erred in law in finding Mr. Barker was "often not in the office, as he spent random weekdays in Penticton" and in accepting the evidence that "on all or part of approximately 45 working days during the entire period of Daum's "employment" Daum was in court or otherwise engaged outside of the office" – are curious. I can find no reference in the Determination to any such findings or the acceptance of any such evidence. The only comment in the Determination relating to either matter is on page R15, where the delegate specifically rejects an assertion made by Mr. Daum that Mr. Barker "was frequently absent", indicating it was denied by Mr. Barker, uncorroborated and without any objective support.

52. In sum, for the reasons stated above, this appeal is dismissed under section 114(1) of the *Act*. I find the appeal has no reasonable prospect of succeeding. For the same reasons, I find there is not a sufficiently strong *prima facie* case to warrant an extension of the statutory time period. Accordingly, the request for an extension of the time limited for appeal is denied. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it.

ORDER

53. Pursuant to section 115 of the *Act*, I order the Determination dated June 24, 2016, be confirmed in the amount of $1,221.70, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal