Employment Standards TRIBUNAL

An appeal

- by -

Canadian Access and Door Systems Inc.
("Canadian Access")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2014A/141

DATE OF DECISION: December 12, 2014

DECISION

SUBMISSIONS

Dean Carman on behalf of Canadian Access and Door Systems Inc.

INTRODUCTION

1. On August 8, 2014, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*") pursuant to which Canadian Access and Door Systems Inc. ("Canadian Access") was ordered to pay a total amount of $8,198.45 to two former employees (the "complainants"). Further, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against Canadian Access based on its contravention of section 18 of the *Act* (failure to pay wages on termination of employment).

2. The Determination was properly served on Canadian Access under section 122 by registered mail delivered to its registered and records office. In addition, the Determination was delivered by registered mail to Dean Carman who is a director and officer (president) of Canadian Access at the address recorded in the B.C. Corporate Registry as his mailing address.

3. The Determination contained the following notice in a text box at the top of the third and final page of the Determination (**boldface** text in original notice):

> **Appeal Information**
>
> Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on September 15, 2014.
>
> The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

4. Canadian Access filed an appeal of the Determination with the Tribunal on October 14, 2014, approximately one month after the appeal period expired. Accordingly, Canadian Access now applies for an extension of the appeal period under subsection 109(1)(b) of the *Act*: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal even though the period has expired".

5. In evaluating the present application I have reviewed the appeal documents filed by Canadian Access (including its Appeal Form and submissions regarding the merits of its appeal), the Determination and the accompanying "Reasons for the Determination" (the "delegate's reasons"), and the subsection 112(5) "record" (261 pages) that was before the delegate when she issued the Determination.

6. I am not prepared to grant the application to extend the appeal period. My reasons for refusing the application now follow.

FINDINGS AND ANALYSIS

7. As noted above, Canadian Access did not file its appeal with the Tribunal until October 14, 2014. Canadian Access provided the following explanation for its late appeal:

> …We did submit our documents on time via fax to the Director of Employment Standards however did not see that the documents are also to be sent to a different fax or email the Tribunal to also review [*sic*]. It for this reason [*sic*] I formally request an extension of the appeal period to permit us the opportunity to properly submit to the Tribunal via this email. Attached are all documents for the Appeal along with a transmission report for our original submission to the Director of Employment Standards. This was indeed an oversight and we apologise for this delay.

8. The Determination was issued out of the Employment Standards Branch's office in Langley and at the bottom of the first page of the Determination, the Langley office's address, telephone and fax numbers are listed. Canadian Access did not send its appeal documents to the Langley office; rather, it faxed the documents to the Director's Victoria headquarters. The documents were faxed on September 15, 2014 (i.e., the final day for filing an appeal) at about 12:40 PM.

9. The Tribunal will consider a number of factors when deciding to exercise its discretion to hear a late appeal on its merits. Among other considerations, the applicant must: i) provide a credible explanation for why the appeal was not filed within the statutory time limit; ii) demonstrate an ongoing *bona fide* intention to appeal and iii) have made this intention known to the Director and to the other respondent parties; iv) show that no party has been prejudiced by the applicant's failure to file a timely appeal; and v) that the appeal is, on its face, presumptively meritorious (see *Niemisto*, BC EST # D099/96).

10. Although the delay in this case – about one month – is not particularly lengthy, the applicant's explanation is, in my view, problematic. Essentially, Canadian Access's explanation for failing to file a timely appeal is that it was extraordinarily careless in ensuring that the appeal was filed in the correct forum. I must assume that Canadian Access read the notice set out in the "Appeal Information" box (see above) found at page 3 of the Determination because it did file its appeal documents with the Director by the deadline set out in the notice (albeit on the very last day of the appeal period). However, the notice clearly states that an appeal of the Determination must be filed with the Tribunal and, as well, directs the reader to the Tribunal's website and telephone number. If one visits the website, on the home page there is a button denoted "Appeals" which takes the reader to further pages that clearly explain how the appeal process works. The notice contained in the Determination does not in any fashion indicate that an appeal must be filed with the Director's office – the Tribunal is the only entity identified in the notice.

11. I am prepared to accept that Canadian Access has demonstrated a genuine ongoing intention to appeal and that, in light of the relatively short delay in this case, that no party would be unduly prejudiced if I were to extend the appeal period. However, this appeal is, on its face, wholly unmeritorious and thus has no prospect of succeeding.

12. The two unpaid wage complaints arose from an aborted merger between Canadian Access and another company, Cutting Edge Security Systems Inc. ("Cutting Edge"). In January 2011, the two firms entered into an "Agreement in Principle" to merge the two businesses; in effect, it appears that the intent was for Cutting Edge's business operations to be carried on by Canadian Access. In addition, Canadian Access would offer continuing employment to some Cutting Edge employees including the two complainants each of whom received written employment offer letters from Canadian Access setting out their proposed compensation and other employment terms. In each case, their employment was to commence as of February 1, 2011, and

the two complainants accepted the employment offers, signed the employment contracts, and returned them to Canadian Access.

13. The two complainants completed "TD1 forms" and as of February 1, 2011, commenced working using Canadian Access vehicles and wearing Canadian Access work shirts. The proposed merger quickly fell apart and by the end of February 2011 it was clear that it would not proceed. The delegate found that the complainants were Canadian Access employees, and entitled to be paid by that firm, for the period from February 1 - 22, 2011. Canadian Access's position regarding the complainants' unpaid wages is recounted in the delegate's reasons (at page R4) as follows:

> [The complainants] were taking direction from both companies during the period in question. Consequently, [Canadian Access] argues the Complainants should be paid by [Canadian Access] for the work they did for [Canadian Access], and they should be paid by [Cutting Edge] for the work they did for [Cutting Edge]

14. The delegate made the following findings (at pages R5 - R6)

> The undisputed facts support the finding that [the complainants] were employees of [Canadian Access] effective February 1, 2011. [Canadian Access] made written offers of employment which the Complainants accepted…[Canadian Access] acted in a manner consistent with employing both Complainants. [Canadian Access] provided the tools, supplies and equipment necessary to do their work. …
>
> While the Complainants continued to perform work in relation to clients of [Cutting Edge], this was done with the agreement of [Canadian Access]. It was a decision made by [Canadian Access] to ensure a smooth transition of these clients to [Canadian Access] which would ultimately benefit [Canadian Access]. The collapse of the merger resulted in a dispute between [Canadian Access] and [Cutting Edge] over payment from clients for the work completed during the merger/transition period. This dispute is not material to determining whether an employment relationship existed between [Canadian Access] and the Complainants. …
>
> … I find the Complainants were employed by [Canadian Access] for the period of February 1 to 22, 2011.

15. As noted above, Canadian Access asserts that the delegate erred in law in making the Determination. In its submissions appended to its Appeal Form, Canadian Access says that certain of the delegate's findings "are in fact true, however their interpretation and how they apply is where the error in law and its application is uncovered". In particular, Canadian Access concedes that it made written employment offers to the complainants that were, in turn, accepted and that "it acted in a manner consistent with that of an employer by providing tools, supplies & equipment during the period in question". Canadian Access also concedes that it "provided direction to the complainants, at least in relation to work done for [Canadian Access] clients".

16. However, Canadian Access says that the employment offers were "invalid" because each contained a condition precedent to the effect that the employment offers were conditional on a "final agreement" being concluded between the two companies with respect to the merger and the assignment of contracts and contract lists. This argument misses the point that the two complainants actually undertook work for Canadian Access during the period in question and, at least by reasonable implication, it must be accepted that Canadian Access either waived or simply did not enforce its right to refuse to employ the complainants.

17. In my view, there was a large body of evidence before the delegate that allowed her to reasonably conclude that the two complainants were Canadian Access employees during the period from February 1 - 22, 2011. A finding of fact can constitute an error of law but only if there is no evidentiary foundation for it; clearly, the delegate had before her ample evidence to support her finding that the complainants were Canadian Access

employees during the period in question. Canadian Access's position that the delegate erred in law is not tenable and its appeal has no reasonable prospect of succeeding.

18. While it may be the case that, during the period in question, the complainants were also employed by Cutting Edge, that fact, standing alone is not particularly material. A person may be employed by two or more separate employers at the same time in relation to the same work in which case all employers are jointly and severally liable to that person: *Bagby v. Gustavson International Drilling Co. Ltd.*, 1980 ABCA 227; *Sinclair v. Dover Engineering Services Ltd.*, 1988 CanLII 3358 (B.C.C.A.); *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538 (Ont. C.A.). If Canadian Access feels that it is entitled to some form of indemnity from Cutting Edge relating to its unpaid wage obligations to the two complainants – under the terms of the failed merger agreement, or on some other basis – that is a matter that it will have to pursue in the civil courts.

19. Given that Canadian Access has not adequately and credibly explained why it failed to file a timely appeal and, additionally, that its appeal appears, on its face, to lack any merit, I do not think it appropriate to grant an order extending the appeal period in this case.

ORDER

20. Canadian Access's application to extend the appeal period is refused. Pursuant to subsections 114(1)(b) and (f) of the *Act*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued in the amount of $8,698.45 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal