

An appeal

- by -

Aximech Technologies Corp.
(“Aximech”)

- 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/129

DATE OF DECISION: December 12, 2014

DECISION

SUBMISSIONS

Ryan Bracewell on behalf of Aximech Technologies Corp.
Alicia L. Glaicar counsel for Aximech Technologies Corp.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Aximech Technologies Corp. (“Aximech”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 13, 2014.
2. The Determination found that Aximech had contravened Part 3, sections 18 and 27 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) in respect of the employment of Christopher Gonzales (“Mr. Gonzales”) and ordered Aximech to pay Mr. Gonzales wages in the amount of \$2,468.90 and to pay administrative penalties under section 29 of the *Regulation* in the amount of \$1,500.00. The total amount of the Determination is \$3,968.90
3. Aximech has grounded its appeal in error of law by the Director in making the Determination and in evidence becoming available that was not available when the Determination was being made.
4. The appeal was delivered to the Tribunal on September 24, 2014, two days after the expiry of the statutory appeal period. Aximech seeks to have the Tribunal grant an extension of the appeal period.
5. In correspondence dated October 10, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Aximech, who has been given the opportunity to object to its completeness. On November 4, 2014, Alicia L. Glaicar (“Ms. Glaicar”) communicated with the Tribunal on behalf of Aximech expressing concerns with the completeness of the “record”. She submitted the “record” ought to include all of the time sheets for the period Mr. Gonzales worked for Aximech and text messages between Ryan Bracewell (“Mr. Bracewell”), the owner of Aximech, and Mr. Gonzales. On November 10, 2014, the Director responded, stating the documents referred to in the November 4 correspondence were not before the Director at the time the Determination was made. In a response delivered to the Tribunal on November 25, 2014, Mr. Bracewell appears to have abandoned his position about the completeness of the “record”, but submits several of the text messages that were alluded to in the submission concerning the contents of the “record”.
7. Based on the material and submissions provided to me, I accept the documents referred to in the submission from Ms. Glaicar were not “before the director at the time the determination” was made. In this circumstance, the *Act* does not require those documents to be included in the “record”: see section 112(5) of the *Act*. Accordingly, I accept the position of the Director and find the “record” to be complete.

8. 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, the written submission filed with the appeal by Aximech and my review of the material that was before the Director when the Determination was being made. Under section 114(1) 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 that subsection, 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 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) of the *Act*, Mr. Gonzales will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed. In this case, I am looking at whether the statutory appeal period should be extended or if there is a reasonable prospect the appeal will succeed.

ISSUE

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

THE FACTS

11. During the relevant period, Aximech operated a mechanical business. Mr. Gonzales was employed as a front office manager from April 28, 2014, to June 18, 2014, at a rate of \$16.00 an hour.
12. When the business was closed in mid-June 2014, Mr. Gonzales filed a complaint that, apart from \$1,000.00 he received in May 2014, Aximech had failed to pay him any wages for his employment.
13. Mr. Gonzales kept no record of his hours of work but estimated he regularly worked over 40 hours each week of his employment. That estimate was adjusted based on documents submitted to the Director from Aximech during the complaint process. These documents comprised a “Career Focus Wage Reimbursement Claim” and a timesheet for a period between June 2 and June 27, 2014, which recorded no hours worked between June 2 and 6, 2014, and 31 hours worked between June 9 and 13, 2014.
14. The Director relied on these documents, and applied the requirements of section 34 of the *Act* to some days in the period, in finding that Mr. Gonzales had worked a total of 207.8 hours for Aximech.

ARGUMENT

15. There are two parts to the arguments made in this appeal. The first part goes to the request for an extension of the appeal period. The second part addresses the merits of the Determination on the chosen grounds of appeal.
16. On the first part, Mr. Bracewell, on behalf of Aximech, argues he was confused by there being two Determinations issued within days of each other, a Determination against the company and a Determination against him personally. He says he only realized there were separate Determinations while working on the appeal of latter Determination.
17. On the merits, Aximech submits the Director erred in deciding the number of hours worked by Mr. Gonzales. Aximech alleges the hours claimed by Mr. Gonzales and/or recorded in the documents provided to the Director are “fraudulent and inaccurate” and the Director erred in law by using this evidence. Aximech claims the Director was asked to have Mr. Gonzales provide more information but the Director advised that more information from Mr. Gonzales would not be of much assistance in determining the actual hours he worked. Aximech says the documents it was able to locate and submit to the Director – on which the Director relied – were created by Mr. Gonzales and found by the Director to be “falsified based on inaccuracies and Mr. Gonzales admitting . . . about claiming full hours on days he never worked”. Aximech says the Director erred in law by awarding wages for days not worked, by acting without evidence and by acting on a view of the facts that could not be reasonably entertained.
18. Some additional documents have been submitted with the appeal. Aximech submits these documents and possibly other documents, some of which are said to be in Mr. Gonzales’ possession, should be added to the evidence and that all of the evidence should be re-examined.

ANALYSIS

19. I shall first address the request for an extension of the appeal period.
20. 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.

21. 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.

22. 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.

23. In considering the above criteria in the circumstances of this case, I note first that the delay is not a lengthy one – two days. I find the explanation given for the delay is not unreasonable and is credible.

24. The material confirms a *bona fides* intention on the part of Mr. Bracewell to appeal both the corporate and the personal Determinations and the Director appears to have been made aware of that intention within the appeal period.

25. The prejudice to Mr. Gonzales by extending the appeal period clearly operates against an extension of time. Aximech has gone out of business and, based on its assertions that the doors have been closed and its assets seized, there is only a small chance that whatever wages are owed to Mr. Gonzales (which Aximech admits) will ever be paid by Aximech. This circumstance indicates efforts to obtain some of Mr. Gonzales’ wages should be allowed to proceed expeditiously.

26. Finally, I am not satisfied there is a strong *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.

27. In this case, there are two principles that are immediately apparent.

28. First, the Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

29. In this appeal, Aximech alleges the Director accepted and relied on evidence he knew to be “fraudulent and inaccurate”, but has provided no evidence that would establish this allegation. Aximech kept no payroll records. The documents substantially relied on by the Director in making the finding of hours worked by Mr. Gonzales were provided by Aximech without any caveat being placed on their accuracy or reliability.

30. Second, the grounds of appeal listed in section 112 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 Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact

are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

31. 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.
32. I am not persuaded the Director made an error in law in dealing with the evidence.
33. There is no basis for the assertion the evidence was “fraudulent”, although it was, in places, found by the Director to be “inaccurate”. In those areas, the Director identified and addressed the inaccuracies and resolved them on the evidence. I find no error of law was made by the Director in handling the conflicting evidence. I note here that the Director did not accept all of the hours of work claimed by Mr. Gonzales and also provided reasons for not accepting those hours claimed.
34. It is clear from the “record” there was some evidence detailing the number of hours worked by Mr. Gonzales. It was not “perfect” evidence, but the responsibility for keeping a record of daily hours worked by an employee, which could have provided the best evidence, belonged to Aximech: see section 28 of the *Act*. Aximech can hardly complain that the Director relied on the next best evidence when Aximech failed to meet its statutory obligation. In any event, I am satisfied the Director performed a conscientious analysis of the available evidence, making findings that were adequately supported by the material and reasoned in the Determination.
35. The appeal on this point reflects nothing more than a disagreement by Aximech with the findings made by the Director on the hours worked. No error of law has been shown.
36. Aximech seeks to include additional evidence in this appeal, as well as having the Tribunal seek out and compel the addition of unspecified evidence that Mr. Gonzales may have.
37. In respect of this ground of appeal, commonly described as the “new evidence” ground of appeal, the Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal.

38. The evidence sought to be admitted into this appeal does not remotely resemble the kind of evidence that would be considered as acceptable. The “new evidence” sought to be introduced in this appeal was reasonably capable of being provided during the complaint process and is not *shown* to be credible or probative. In short, it does not satisfy several of the conditions necessary to be allowed and considered as “new evidence” under that ground of appeal. The suggestion that the Tribunal should attempt to ferret out and compel evidence that Mr. Gonzales may or may not have, allow other additional evidence and re-examine the complaint ignores entirely the purposes and objectives of the *Act* and the nature of the appeal process.
39. Because of the absence of a strong *prima facie* case on appeal, I deny the extension of the appeal period and dismiss this appeal under section 114(1)(b). Even if I were to allow an extension of the appeal period, I would dismiss this appeal under section 114(1)(f) as there is no reasonable prospect it will succeed.

ORDER

40. Pursuant to section 115 of the *Act*, I order the Determination dated August 13, 2014, be confirmed in the amount of \$3,968.90, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal