



An appeal

- by -

Belong Plumbing and Heating Ltd.
("Belong")

– 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)

and

An application for suspension

- by -

Belong Plumbing and Heating Ltd.
("Belong")

– of a Determination issued by –

The Director of Employment Standards
(the "Director")

Pursuant to section 113 of the
Employment Standards Act R.S.B.C. 1996, C. 113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2010A/135 & 2010A/136

DATE OF DECISION: December 6, 2010

DECISION

SUBMISSIONS

Wayne Belong	on behalf of Belong Plumbing and Heating Ltd.
Robert Lafreniere	on his own behalf
Ravi Sandhu	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Belong Plumbing and Heating Ltd., (“Belong”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued June 15, 2010.
2. Robert Lafreniere filed a complaint alleging that Belong contravened the *Act* by failing to pay him regular wages, annual vacation pay, statutory holiday pay and compensation for length of service.
3. A delegate of the Director held a hearing into Mr. Lafreniere’s complaint on May 13, 2010. Mr. Lafreniere appeared on his own behalf, no one appeared for Belong. An officer of the Branch called Belong to inquire as to whether or not a representative would be appearing at the hearing. No one responded. The delegate determined that Belong had notice of the hearing and the hearing proceeded in Belong’s absence.
4. Following the hearing, the Director’s delegate determined that Mr. Lafreniere was an employee of Belong and that Belong had contravened Sections 17, 18, 21, 45 and 58 of the *Act* in failing to pay him wages, statutory holiday pay, annual vacation pay and compensation for length of service. The delegate determined that Mr. Lafreniere was entitled to \$10,682.53 in wages and interest. The Director imposed a \$1,500 penalty on Belong for three contraventions, pursuant to section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”).
5. Mr. Belong contends that he did not appear at the hearing because he was “misled” into believing that “nothing would come from it”. He says that evidence has become available that was not available at the time the Determination was being made. He submits that Mr. Lafreniere worked with him as a sub-contractor until he quit and that he was not an employee. Mr. Belong says that he now needs to have his “side” heard and sought a suspension of the Determination until the appeal is decided.
6. Belong filed an appeal of the Determination on September 30, 2010. Pursuant to section 112 of the *Act*, Belong’s appeal was to have been filed within 30 days of the date of service (if served by registered mail) or within 21 days of being personally served. Belong’s appeal period expired July 23, 2010.
7. This decision addresses the timeliness of Belong’s appeal as well as the suspension application.
8. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal’s *Rules of Practise 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). Although Mr. Belong seeks, in effect, an oral hearing to have “his side of the story heard”, as the essence of the matter before me is whether or not his appeal was filed on time, I find no reason to hold an

oral hearing. That issue can be determined on the documents in the record. Therefore, this appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUE

9. Whether or not the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal to proceed even though the time period for seeking an appeal has expired.

FACTS AND ARGUMENT

10. At the hearing before the delegate, Mr. Lafreniere said that he and Mr. Belong met while working together for a plumbing company. After Mr. Belong left to start his own company, he asked Mr. Lafreniere to work for him. Mr. Lafreniere agreed, and in addition to performing plumbing work, did some maintenance work. They agreed his wage would be \$50 per hour for plumbing tasks and \$30 per hour for maintenance work. Much of the work Mr. Lafreniere performed was for a housing society with which Belong had a maintenance contract. Each day after work, Mr. Lafreniere entered his daily hours as well as the type of work he performed on an Excel spreadsheet. Mr. Lafreniere said he was not paid at all for some pay periods and less than what he believed he had earned on others. Belong deducted 25% from Mr. Lafreniere’s wages each pay period, which was to reflect statutory remittances such as CPP and EI. However, Mr. Lafreniere said that he was never given any wage statements and the deductions were never remitted to Revenue Canada.
11. On his last day of employment, Mr. Lafreniere was working at the Housing complex along with another Belong employee who was Mr. Belong’s son. Mr. Belong arrived and was upset at the length of time it had taken to perform the work. Mr. Lafreniere told Mr. Belong that the work was taking much longer than expected because he had to redo much of the work done by Mr. Belong’s son. Mr. Lafreniere said that Mr. Belong told him that his services were no longer needed.
12. Mr. Lafreniere said that he repeatedly asked Mr. Belong for his outstanding wages. Mr. Belong first said that he would pay him after he reviewed his hours and then told Mr. Lafreniere that if he filed a complaint, he would not be paid anything until he was told to. Finally, Mr. Belong told Mr. Lafreniere that he was an independent contractor, not an employee, and was thus not entitled to what he was claiming.
13. Mr. Lafreniere said that he was never paid statutory holiday pay, vacation pay or compensation for length of service.
14. Mr. Lafreniere provided the delegate with his Excel spreadsheet containing his hours of work, a copy of his last paycheque and copies of email correspondence between him and Mr. Belong. Those emails corroborated Mr. Lafreniere’s oral evidence.
15. Mr. Lafreniere told the delegate that he did not provide plumbing or maintenance services to anyone else because Mr. Belong told him that he could not do so. Mr. Belong also told Mr. Lafreniere, on a daily basis, what work had to be done and set his hours of work. Although Mr. Lafreniere had some of his own hand tools, Mr. Belong provided him with all of the larger tools and all materials he needed for the job.
16. The delegate found Mr. Lafreniere to be a credible witness. Based on that evidence, the delegate determined that Mr. Lafreniere was an employee of Belong based on the *Act’s* definition of an employee. The delegate concluded that Mr. Lafreniere was engaged in activities that were normally performed by an employee on Belong’s behalf. He noted that Mr. Belong had control and direction of Mr. Lafreniere’s work activities and provided all the necessary materials.

17. The delegate found Mr. Lafreniere's records of his hours of work to be credible. Based on those records as well as the emails between the parties, the delegate determined that Mr. Lafreniere was entitled to wages. After reviewing Mr. Lafreniere's hours of work and paycheques, he found Belong had made statutory deductions from Mr. Lafreniere's pay. However, as there was no evidence Belong had remitted that money to the Canada Revenue Agency, the delegate concluded that Belong had contravened section 21 of the *Act* in making unauthorized deductions from Mr. Lafreniere's pay. The delegate determined that Mr. Lafreniere was entitled to regular wages in the amount of \$8,367.25, representing the difference between what Mr. Lafreniere had earned and what he had been paid.
18. The delegate found that Belong had contravened section 17 of the *Act* in not paying Mr. Lafreniere all wages earned in several pay periods within the time period provided. He also determined that Belong had contravened section 18 of the *Act* in failing to pay Mr. Lafreniere all wages owing within 48 hours of terminating his employment.
19. The delegate also found that Belong had failed to pay Mr. Lafreniere statutory holiday pay in the amount of \$454.24, in contravention of section 45 of the *Act* and vacation pay in the amount of \$781.60 in contravention of section 58 of the *Act*.
20. Finally, the delegate noted that the employer had the burden of demonstrating that Mr. Lafreniere's employment was terminated for just cause. In the absence of such evidence, the delegate determined that Belong contravened section 63 of the *Act* in failing to discharge this burden and that Mr. Lafreniere was entitled to compensation for length of service in the amount of \$993.13.
21. Mr. Belong seeks an extension of time in which to file the appeal. He says that he has been "somewhat lost over the last 5-6 weeks over [the Determination] not knowing what to do". He says that he is "sorry that I didn't follow more closely to how important this was and sometime (sic) that will never happen again".
22. The Director's delegate says that Mr. Belong sets out no good reason why he could not have met the appeal deadline. The delegate says that Mr. Belong was apparently advised to ignore both the complaint and the Branch's efforts to resolve it. The delegate submits that that this is not a good reason for missing the appeal deadline. The delegate contends that Mr. Belong was aware of the complaint, the complaint hearing and the Determination that followed it and had every opportunity to appear and present his evidence.
23. The delegate further submits that there was an unreasonable delay in filing the appeal, as it was filed two months after the appeal deadline. The delegate says that Mr. Belong did not notify anyone that he was intending to appeal the Determination and that he was not aware of Belong's intention to appeal.
24. Finally, the delegate submits that Belong does not have a strong *prima facie* case on appeal.
25. The delegate also opposes Belong's suspension request. The delegate says that Mr. Belong has provided no reason why the Determination should be suspended and that it would be both inconsistent with the purposes of the *Act* and unfair for Mr. Lafreniere to continue to wait for wages he earned while employed by Belong to grant a suspension.
26. Mr. Lafreniere also opposes Belong's application to file a late appeal. He says Mr. Belong has provided no good reason why the appeal was not filed within the deadline. Mr. Lafreniere says that Mr. Belong simply ignored the information from the Branch and that he ought not now be granted the opportunity to file an appeal.

ANALYSIS

27. The time limits set out in section 112 are in keeping with section 2(d) of the *Act* which provides that the legislation is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
28. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
29. 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.
30. These criteria are not exhaustive.
31. I am not persuaded that there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit. Indeed, Belong provides no explanation for failing to request an appeal within the statutory time limit other than that he was “misled” into failing to respond. Mr. Belong does not say who he was misled by or when. In my view, this is neither a reasonable nor credible explanation for his failure to file an appeal within the statutory time period.
32. There is no evidence that Belong had a genuine, ongoing *bona fide* intention to file an appeal of the Determination. In fact, the evidence is quite the opposite. Mr. Belong suggests that he simply ignored it, believing that the Determination was unimportant. There is also no evidence that either Mr. Lafreniere or the delegate were aware that Mr. Belong intended to file an appeal.
33. I am also unable to find that there is a strong *prima facie* case in Belong’s favour. Although Belong suggests there is new evidence he wishes to put forward on appeal, the evidence before me establishes that Mr. Belong had knowledge of both Mr. Lafreniere’s claim as well as the hearing before the delegate. He chose not to appear. Having failed to provide the delegate with any contrary information during the hearing of this matter, it is not now open to him to provide new evidence, new or otherwise.
34. Mr. Lafreniere is owed wages in excess of \$10,000.00. Although he has not expressly said so, I infer that he will be prejudiced, perhaps unduly, by the granting of an extension.
35. Furthermore, the test of whether or not an individual is an employee is a legal test. The delegate assessed the evidence before him in light of the *Act*’s definition of employee and employer. Having regard to the record, I find that the delegate’s conclusion on this issue was supportable on the evidence before him and thus find no *prima facie* case in support of the ground of appeal.
36. I decline to grant the application for an extension of time in which to file an appeal. I also decline to suspend the Determination.

ORDER

37. Pursuant to section 109(1)(a) of the *Act*, I deny Belong's application to extend the time for filing an appeal.

Carol L. Roberts
Member
Employment Standards Tribunal