Employment Standards TRIBUNAL

An appeal

\- by -

Brody James Harley Peterson carrying on business as Uprise Construction
("Uprise Construction")

\- 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: Shafik Bhalloo

FILE No.: 2012A/122

DATE OF DECISION: December 19, 2012

Employment Standards Tribunal
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DECISION

SUBMISSIONS

Brody James Harley Peterson	on his own behalf carrying on business as Uprise Construction
Jennifer R. Redekop	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the "*Act*") brought by Brody James Harley Peterson carrying on business as Uprise Construction ("Mr. Peterson") of a determination that was issued on June 14, 2012, (the "Determination") by a delegate of the Director of Employment Standards (the "Director").

2. On November 21, 2011, Kenneth Schuler ("Mr. Schuler") filed a complaint under section 74 of the *Act* alleging that Mr. Peterson, carrying on business as Uprise Construction (the "Employer"), contravened the *Act* by failing to pay him wages earned between May 16, 2011, and June 28, 2011, when he worked as a labourer for the Employer (the "Complaint"). Following an investigation, the Director concluded that the Employer contravened sections 18 (wages), 40 (overtime), and 58 (annual vacation pay) of the *Act*. The Director's delegate determined that Mr. Schuler was entitled to wages and accrued interest in the amount of $5,486.78. The Director also imposed three (3) administrative penalties in the amount of $500.00 each for the Employer's contraventions of section 17 and 18 of the *Act*, and section 46 of the *Employment Standards Regulation* (the "*Regulation*").

3. The deadline for filing an appeal of the Determination was July 23, 2012. However, the Employer filed an appeal on October 29, 2012, in excess of three (3) months after the expiry of the appeal date. The Employer, in the Appeal Form, alleges that the Director erred in law and failed to observe the principles of natural justice in making the Determination, and further submits that new evidence has become available that was not available at the time the Determination was being made.

4. By way of remedy, the Employer is seeking the Employment Standards Tribunal (the "Tribunal") to refer the matter back to the Director to reconsider the purported new evidence.

5. This decision will only address the issue of the timeliness of the Employer's appeal and whether the Tribunal should exercise its discretion under section 109(1)(b) and extend the statutory time limit for the Employer to appeal or dismiss it as out of time under Section 114(1)(b).

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated in the *Act* (s. 103), and Rule 8 of the Tribunals *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, the preliminary issue of the timeliness of the Employer's appeal may be adjudicated on the basis of the section 112(5) "record", the Reasons for the Determination (the "Reasons") and the written submissions of the Employer.

ISSUE

7. Should the Tribunal dismiss the appeal under section 114(1)(b) of the *Act* as out of time or exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal to proceed?

THE FACTS AND ARGUMENT

8. The Employer operated a construction business as a sole proprietorship and employed Mr. Schuler as a labourer, from May 16 to June 28, 2011, when Mr. Schuler resigned.

9. As previously indicated, on November 21, 2011, Mr. Schuler filed his Complaint against the Employer claiming regular wages of $5,083.00, overtime wages of $1,690.50, and annual vacation pay of $270.94 for the period May 16 to June 28, 2011.

10. Mr. Schuler indicated that he worked at numerous locations for the Employer and provided photos in support of the Complaint. He also included a copy of his invoice dated July 28, 2011, that he sent to the Employer which details the hours he worked on a daily basis, totalling approximately 270 hours during the said period. He states he tracked his hours on his phone at the end of each day, and he relied on that record to create the invoice of July 28, 2011, he sent to the Employer.

11. Mr. Schuler admitted to receiving a total of $820.00 towards his wages. He also provided a copy of a cheque dated June 6, 2011, for $1,000 issued to him by Mr. Peterson which was dishonoured by the bank. However, subsequently, on September 20, 2011, Mr. Schuler's bank informed him that he had been credited the $1,000.0. In total, Mr. Schuler indicates he received $1,820.00 in wages from the Employer.

12. During the investigation of the Complaint, Mr. Schuler provided the delegate of the Director with a copy of an email he sent to the Employer on July 28, 2011, attaching his invoice and requesting payment of monies owed to him. He also presented an email dated August 15, 2011, in which he contacted Gord Walker ("Mr. Walker"), a contractor at the project where Mr. Schuler worked for the Employer, and made Mr. Walker aware that he had not been paid by the Employer with a view to having Mr. Walker persuade the Employer to pay him the monies he was owed. The delegate, as part of the investigation of the Complaint, spoke with Mr. Walker who, while not recalling any specifics with respect to the hours Mr. Schuler worked or his wage rate, indicated that Mr. Schuler was not his employee.

13. Mr. Schuler provided a computer printout of typed out text messages between himself and Mr. Peterson. The text conversation includes, a text from Mr. Peterson on August 3, 2011, requesting Mr. Schuler to send him, via email, the latter's bill for what was owed to him and further requested Mr. Schuler to provide him his mailing address to send him a cheque. Mr. Schuler obliged and subsequently, on August 4, 2011, Mr. Peterson texted to Mr. Schuler that he had mailed him a cheque. When Mr. Schuler did not receive a cheque in mail, on August 12, 2011, he again texted Mr. Peterson inquiring why he had not received payment, and suggested that he should meet with Mr. Peterson to obtain the cheque from him the next day. Mr. Peterson replied to the text on the same date stating that if Mr. Schuler did not receive the cheque, he could cancel it and provide another one. However, Mr. Peterson did not thereafter respond to Mr. Schuler's follow-up communication to meet up with him. As a result, Mr. Schuler sent a further text message to Mr. Peterson on August 13, 2011, asking him why he was avoiding him. He followed that text with another text to Mr. Peterson on August 30, 2011, inquiring of Mr. Peterson's intentions about the money he was owed. On September 3, 2011, Mr. Schuler texted Mr. Peterson an offer to settle his claim for wages for $2,500. On the same date, Mr. Peterson, in his response stated "Guys who r scared to use saws dont get paid 23 and hour [*sic*]. Im [*sic*] subtracting rent, utilities, moving costs, meals, fuel, and so on".

14. From a review of the section 112 "record" in the appeal, the delegate attempted to contact Mr. Peterson on February 1, 2012, via email and registered mail, sending Mr. Peterson and Uprise Construction a letter containing information about the Complaint, together with a Demand for Employer Records, and asking Mr. Peterson or the Employer to respond to the Demand by February 24, 2012. When the delegate did not receive a response to her correspondence from the Employer, she sent her preliminary findings via registered mail, regular mail, and email to the Employer. The Canada Post tracking sheet, contained in the Director's records in the appeal, shows that the latter correspondence was delivered successfully to the Employer on May 15, 2012.

15. In the Reasons, the delegate notes that Mr. Peterson contacted her after receiving the last correspondence from her. She states his first statement to her was that Mr. Schuler did not work for him. He also stated that he was not using the business name "Uprise Construction" which was many years old. When the delegate inquired about the cheque for $1,000.00 he had given to Mr. Schuler, Mr. Peterson responded, stating that Mr. Schuler did some work for him for about one month, and that he had agreed to pay him some money, but Mr. Schuler had not worked very many hours and that he had been paid in full. Mr. Peterson also indicated that he had records of the hours Mr. Schuler worked and the payments he made to Mr. Schuler. Mr. Peterson also indicated that Mr. Schuler was an employee of Rick Rogerson ("Mr. Rogerson") of RMG Siding and Roofing, and that Mr. Schuler was simply "helping him out a bit". The conversation with the delegate ended with Mr. Peterson advising the delegate that he would read the correspondence from her in detail and would respond by the deadline set out in the correspondence, which deadline was now May 25, 2012. However, the delegate states that she did not hear back from Mr. Peterson again.

16. The delegate, however, did contact Mr. Rogerson whom Mr. Peterson had mentioned to the delegate. Mr. Rogerson, the delegate states, advised her that the Employer was a subcontractor and that he received invoices from the Employer under the name of Uprise Construction. While he was not aware of the specifics of the hours Mr. Schuler worked for the Employer, he did know that Mr. Schuler worked for the Employer because the Employer had spoken to him about Mr. Schuler.

17. When the delegate did not receive any further contact or information, including Employer Records, from Mr. Peterson on May 25, 2012, on June 14, 2012, the delegate made the Determination preferring the evidence of Mr. Schuler, which was, for the most part, uncontested.

18. In the Reasons, the delegate summarizes her efforts to afford the Employer sufficient opportunity to respond to the Complaint as follows:

> The Employer was sent correspondence regarding the complaint, as well as a Demand for Records, on February 1, 2012, via registered mail and e-mail. The Demand for Records required records to be disclosed by February 24, 2012. The registered mail was returned as 'unclaimed' and the Employer later advised that his e-mail account is not used. On May 10, 2012, a letter was sent to the Employer via registered and regular mail, setting out all of the evidence, my preliminary findings based on the evidence and providing a final opportunity of response by May 25, 2012. The letter also included copies of the previous correspondence and requested that if he wished to dispute the preliminary findings, to provide records as set out in the February 1st Demand by no later than May 25, 2012. The Employer received this letter and contacted me and provided the evidence as set out above. He advised that he had not had a chance to look over the letter in detail. During that conversation, I advised the Employer that he should look at the information carefully and if he wished to provide a response to the letter to refute any of the claims, he must do so by May 25, 2012. To date, I have received no further contact from the Employer.

19. In the Employer's appeal submissions, I note that Mr. Peterson is asking for an extension of the appeal period because he states that he "was first served a copy of the determination on October 9, 2012, at

4:11 p.m.". He states that the Determination was faxed to him by an employee of the Employment Standards Branch (the "Branch") and that the Determination was "stamped by the Supreme Court of British Columbia, Kelowna Registry on August 23, 2012". He claims that he received the Determination only after the appeal period had already expired, and had he received it prior to the expiration of the appeal period, he would have been able to file an appeal within the appeal period.

20. With respect to the three (3) grounds of appeal that he raises in his appeal, I note that with respect to the first ground, namely, the error of law ground of appeal, Mr. Peterson states that the Director erred in law "by applying the wrong analysis for determining if the complainant was in fact an employee or an independent contractor" and he goes on to provide submissions on that issue. I have read those submissions fully and do not find it necessary to reiterate those submissions here.

21. With respect to the second ground of appeal, namely, the natural justice ground of appeal, Mr. Peterson submits that he spoke to the delegate during the investigation of the Complaint after he received the delegate's May 10, 2012, letter on May 21, 2012. He states that he asked the delegate for an extension of time to gather all the information that she was requesting because four (4) days was not going to be sufficient for him to respond, but she denied him that extension. He states that he then proceeded to gather the information she had requested and mailed it to her on May 24, 2012, to the address he was advised to mail it. However, he states that the information he mailed was not "used in the investigation" and he was "not informed that the information was not going to be used". He states that he was not aware that the delegate did not receive the information he provided and, therefore, he contends that there has been a breach of natural justice on the delegate's part for failing to consider "evidence critical to the investigation" of the Complaint.

22. With respect to the new evidence ground of appeal, Mr. Peterson has attached a two-and-a-half page letter, unaddressed and unsigned, which he purportedly sent to the delegate on May 24, 2012, by mail, containing his response to the Complaint. He claims that this evidence, since it was not considered previously by the Director, constitutes "new evidence" and should be considered by the Director now.

23. I note that in the Director's record in the appeal, the Determination was sent to the Employer by registered mail on June 14, 2012, to the same Grand Forks, British Columbia address of the Employer as the delegate's May 10, 2012, correspondence to the Employer (which Mr. Peterson acknowledged receiving). I also note that there is a Canada Post tracking sheet which shows that the Determination was successfully delivered to Mr. Peterson on June 15, 2012, at 10:22 a.m., and Mr. Peterson signed for it.

24. I also note that with respect to the May 10, 2012, preliminary findings letter of the delegate sent to the Grand Forks address of the Employer, Mr. Peterson says in his appeal submission that he received the same on May 21, 2012, but the Canada Post tracking sheet in the Director's records shows it was delivered to him successfully on May 15, 2012, at 9:19 a.m. and he signed for it.

ANALYSIS

25. Section 112(3) of the *Act* delineates the appeal period for appealing a determination to the Tribunal. It provides:

> 112 (3) The appeal period referred to in subsection (2) is
>
> (a) 30 days after the date of service of the determination, if the person was served by registered mail, and

> (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).

26. Section 122 of the *Act* provides:

> 122 (1) A determination or demand or a notice under section 30.1(2) that is required to be served on a person under this Act is deemed to have been served if
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> (a) served on the person, or
>
> (b) sent by registered mail to the person's last known address.
>
> (2) If service is by registered mail, the determination or demand or the notice under section 30.1(2) is deemed to be served 8 days after the determination or demand or notice under section 30.1(2) is deposited in a Canada Post Office.

27. In this case, the Determination was issued on June 14, 2012, and sent on that very date via registered mail to the Employer's last known address in Grand Forks, British Columbia. The Determination clearly indicated that the appeal deadline was July 23, 2012, but the Employer appealed the Determination on October 29, 2012, in excess of three (3) months after the expiry of the appeal date.

28. Mr. Peterson is asking for an extension of time to file the appeal of the Determination because he states that he only received the Determination (stamped by the Supreme Court of British Columbia, Kelowna Registry) from the Branch on October 9, 2012.

29. Section 109(1)(b) of the *Act* delineates the Tribunal's authority to extend the time period for requesting an appeal under section 112. This section states:

> 109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:
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> …
>
> (b) extend the time period for requesting an appeal even though the period has expired.

30. While the Tribunal has discretion to exercise its statutory authority for extending the time period for requesting an appeal when the appeal period has expired, the burden is on the appellant seeking an extension of time to show, on a balance of probabilities, that compelling reasons exist before the Tribunal will exercise its discretion under section 109(1)(b). The Tribunal in *Re: Tang* (BC EST # D211/96) stated:

> 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.

31. In *Re: Niemisto* (BC EST # D099/96), the Tribunal delineated the following criteria which the appellant should satisfy in seeking an extension of time to file an appeal:

> (i) There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
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> (ii) There has been a genuine and on-going *bona fide* intention to appeal the Determination;
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> (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.

32. This Tribunal has indicated previously that the criteria in *Re: Niemisto*, *supra*, are not intended to constitute an exhaustive list, nor are they conjunctive in nature. The Tribunal will consider and weigh factors identified in *Re: Niemisto*, *supra*, and other factors it considers relevant, and make its decision to, or not to, exercise its discretion to extend the time for filing the appeal based on the totality of all factors it considers.

33. Having said this, with respect to the first criterion in *Re: Niemisto*, *supra*, I am not persuaded that there is a reasonable and credible explanation for the Employer's failure to request an appeal within the statutory time limits. More particularly, I find that the Determination which the delegate sent by registered mail on June 14, 2012, to the Employer's Grand Forks, British Columbia address (an address to which the delegate previously corresponded with the Employer successfully when she sent the Employer her preliminary findings) was successfully received by the Employer or Mr. Peterson. The Canada Post tracking sheet in the records shows Mr. Peterson received the Determination at 10:22 a.m. on June 15, 2012, and signed for the same. In the circumstances, I do not find Mr. Peterson's submission that he first saw the Determination on October 9, 2012, when the Branch faxed it to him credible. It would appear that the Determination he received on October 9, 2012, from the Branch, which admittedly was stamped by the Supreme Court of British Columbia, Kelowna Registry, was in the context of collection proceedings. In my view, the Employer is not entitled to sit idly or "in the weeds", failing or refusing to cooperate with the delegate during the investigation, only to awaken later, after the expiry of the appeal period, when there is a threat of collections proceedings, to file his appeal. In the circumstances, I find the Employer fails on the first criterion in *Re: Niemisto*, *supra*.

34. With respect to the second criterion in *Re: Niemisto*, *supra*, I do not find there to be any evidence of a genuine and on-going *bona fide* intention on the part of the Employer to appeal the Determination at any time before the expiry of the appeal period.

35. With respect to the third criterion, the Employer has provided no evidence to show that Mr. Schuler, as well as the Director, were made aware of the Employer's intention to appeal the Determination.

36. With respect to the fourth criterion, while a delay of slightly over three (3) months after the expiry of the appeal period to file an appeal may not be inordinate, I am mindful of one of the purposes of the *Act* at section 2(d), namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the] Act".

37. With respect to the final criterion, namely, whether there is a strong *prima facie* case in favour of the Employer, I note that, except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re: Owolabi c.o.b. Just Beauty*, BC EST # RD193/04). Having said this, as previously indicated, the Employer has relied on all three (3) grounds of appeal, namely, the "error of law", the "natural justice" and the "new evidence" grounds of appeal.

38. With respect to the error of law ground of appeal, the Employer's main contention is that the Director erred in law "by applying the wrong analysis for determining if the complainant was in fact an employee or an independent contractor". The Employer now argues that Mr. Schuler was a subcontractor who "worked his own schedule of hours", was paid by the "square footage of siding installed by him" and "did not use any of [the Employer's] tools or equipment while he worked on the job site". I note Mr. Peterson did not provide this evidence during the investigation of the Complaint, nor did he advance the argument that Mr. Schuler was an

independent contractor then. Instead, when Mr. Peterson contacted the delegate during the investigation, he, at first, argued that Mr. Schuler did not work for him and he also denied using the business name Uprise Construction. Only when the delegate mentioned to him of the $1,000 cheque he had provided to Mr. Schuler which was dishonoured, did Mr. Peterson admit that he had paid Mr. Schuler some monies for some limited work. However, he did not argue then that Mr. Schuler was an independent contractor. Instead, he went on to contend that Mr. Schuler was employed on the project by Mr. Rogerson of RMG Siding. Mr. Rogerson, when questioned by the delegate, indicated that the Employer was a subcontractor who invoiced him under the name Uprise Construction, and that Mr. Schuler worked for the Employer on the project. I find it is inappropriate for Mr. Peterson, for the first time, in the late filed appeal, to contend that Mr. Schuler is an independent contractor in business for himself. The time to make that argument was during the investigation of the Complaint and before the Determination was made. An appeal is not the time for an appellant to raise an issue not previously raised during the investigation of the Complaint and the Tribunal is not inclined to consider issues raised for the first time during the appeal. Therefore, as concerns the error of law ground of appeal, I do not find the Employer to have made out a "strong *prima facie* case that might succeed".

39. With respect to the natural justice ground of appeal, I find there is no material evidence or other reasonable basis before the Tribunal to conclude that the delegate failed to make reasonable efforts to give the Employer an opportunity to respond to the investigation and/or failed to consider the evidence of the Employer that was before the delegate before the Determination was made. I do not find believable Mr. Peterson's submission that he mailed his written submission to the delegate on May 24, 2012, before the due date of May 25, 2012. The document or letter he adduces in the appeal that he purportedly mailed to the delegate on May 24, 2012, is undated and unsigned, and there is no indication that it was mailed on that particular day. I also find, relatedly, that he had more than sufficient time to mail to the delegate the information the delegate requested of the Employer in the delegate's correspondence of May 10, 2012. Mr. Peterson states that he only received the May 10, 2012, correspondence on May 21, 2012. However, the May 10, 2012, correspondence was sent to him by registered mail and the Canada Post tracking sheet shows that he received it and signed for it at 9:19 a.m. on May 15, 2012, six (6) days earlier than Mr. Peterson claims. Based on the above finding, I am of the view that Mr. Peterson or the Employer never sent any letter or evidence in response to the delegate's letter of May 10, 2012, at any time. Having said this, I am convinced, on the natural justice ground of appeal, there is not a strong *prima facie* case in favour of the Employer.

40. With respect to the new evidence ground of appeal, I note that the Tribunal in *Re: Davies et al (Merilus Technologies Inc.)* (BC EST # D171/03) adopted the following four-fold test applied in civil courts for admitting fresh evidence on appeal:

> (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) The evidence must be relevant to a material issue arising from the complaint;
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> (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence have led the Director to a different conclusion on the material issue.

41. The criteria delineated above are conjunctive and failure to satisfy a single criterion in the test will result in the Tribunal rejecting fresh evidence on appeal. In this case, the Employer argues, based on his contention that the delegate did not consider the evidence he sent to her for consideration on May 24, 2012, that he is entitled to submit "all of [his] evidence" in the appeal. The evidence he is referring to consists of the two-

and-a half pages of unsigned, undated letter which he purportedly sent to the delegate on May 24, 2012. However, I have concluded that that document, on the balance of probabilities, was not sent to the delegate at any time before the Determination was made, and it is now produced for the first time in the Employer's late-filed appeal. The document contains all evidence that existed during the investigation of the Complaint and could have, with the exercise of due diligence on the part of Mr. Peterson, been presented to the delegate during the investigation or adjudication of the Complaint and prior to the Determination being made. In the circumstances, I do not find that there is a strong *prima facie* case in favour of the Employer as concerns the new evidence ground of appeal either.

42. Having said this, I find that the Employer has failed to discharge its burden to show compelling reasons to persuade this Tribunal to exercise its discretion and extend a time limit for the Employer to file an appeal.

ORDER

43. Pursuant to sections 109(1)(b) and 114(b), I deny the application to extend the time for filing an appeal.

Shafik Bhalloo
Member
Employment Standards Tribunal