

An appeal

- by -

Empire Consulting Group of Companies Inc.
(“Empire”)

- 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.: 2016A/121

DATE OF DECISION: October 19, 2016

DECISION

SUBMISSIONS

Inderjeet Tiwana

on behalf of Empire Consulting Group of Companies Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Empire Consulting Group of Companies Inc. (“*Empire*”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “*Director*”) on July 21, 2016.
2. The Determination found that Empire had contravened Part 3, sections 18 (wages) and 21 (deductions); Part 4, section 40 (overtime); Part 4, section 46 (statutory holiday); Part 7, section 58 (vacation pay); and Part 8, section 63 (compensation for length of service) of the *Act* in respect of the employment of Ryan Cooper, Kimberley Langton, Raymond Lau, Nicholas Man, Nimrat Narula and Danny Ngo (the “*Complainants*”) and ordered Empire to pay the *Complainants* wages in the amount of \$38,076.34 including accrued interest and to pay administrative penalties in the amount of \$4,500.00 for contraventions of sections 16, 17, 18, 21, 27, 40, 46, 58 and 63 of the *Act*.
3. Empire has appealed the Determination on all available grounds of appeal in section 112(1), namely, the director erred in law and failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was being made.
4. A form of appeal was received by the Tribunal on September 1, 2016, by an email from Mr. Tiwana time stamped 12:42 a.m. I note the email included Empire’s Appeal Form and also Mr. Tiwana’s earlier email of August 29, 2016, wherein he submitted an appeal of the S. 96 Determination against him. I point this out so that there is no confusion that Empire’s appeal was indeed filed outside of the statutory time limits set out in subsection 112(3) of the *Act*. More particularly, Empire’s appeal was due on August 29, 2016, but was filed, three (3) days later. I also note that Empire’s appeal did not include a copy of the Director’s written reasons for the Determination (the “*Reasons*”) nor Empire’s reasons and argument supporting each of its grounds for appeal, which are statutory requirements for inclusion with an appeal: see subsections 112(2)(a)(i) and (i.1) of the *Act*.
5. On September 6, 2016, however, the Tribunal received emails from Mr. Tiwana dated September 5, 2016, and time stamped 3:19 a.m.; 3:27 a.m., 3:45 a.m. and 3:49 a.m. containing Mr. Tiwana’s submissions, documents including the Determination and the *Reasons*.
6. On September 9, 2016, the Tribunal, by letter, notified the parties that it had received an appeal of the Determination by Empire “dated August 29, 2016”. As indicated previously, the Appeal Form of Empire was received by the Tribunal on September 1, 2016. It was attached to Mr. Tiwana’s email of the same date time and stamped 12:42 a.m. I also note that the said email of Mr. Tiwana is also stamped “RECEIVED” by the Tribunal on September 1, 2016.
7. In the same correspondence, the Tribunal notes that Empire has requested the Tribunal extend the deadline to file the appeal. The correspondence also includes a request to the Director to produce the section 112(5) “record” (the “*record*”), notifies the other parties among other things, that no submissions were being sought

from them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed.

8. On September 15, 2016, the “record” was provided by the Director to the Tribunal. A copy of the same was sent to Empire on September 16, 2016, and Empire was given the opportunity to object to its completeness. Empire has not objected to the completeness of the “record” and the Tribunal accepts it as complete.
9. On October 6, 2016, the Tribunal notified the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed.
10. Consistent with notices contained in correspondence from the Tribunal dated September 9, 2016, and October 6, 2016, I have reviewed the appeal, the appeal submissions and the “record”. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess this appeal based solely on the Determination, the Appeal Form, the submissions of Mr. Tiwana on behalf of Empire, my review of the “record” that was before the Director when the Determination was being made. Under section 114 of the *Act*, the Tribunal has the discretion to dismiss all or part of an appeal without a hearing of any kind, for any of the reasons listed in subsection 114(1). If I decide that all or part of the appeal should not be dismissed under subsection 114(1), the Complainants will, and the Director may be invited to file further submissions.

ISSUE

11. The issue at this stage is whether this appeal should be dismissed under subsection 114(1) of the *Act*.

THE FACTS

12. The relevant facts relating to the issue under consideration in this appeal are as follows:
 - (a) Empire is a company duly incorporated under the laws of British Columbia on June 30, 2012, with Mr. Tiwana listed as its sole Director and Officer.
 - (b) Empire operates a merchant terminal leasing and credit card registration sales business.
 - (c) All of the Complainants worked as sales representatives and corporate trainers for Empire between October 23, 2014, and June 13, 2015.
 - (d) The Complainants filed their complaints between July 13 and 28, 2015, within the time period allowed under the *Act*, alleging that Empire contravened the *Act* by making false representations about the terms of their employment and their rate of pay; failed to pay commissions, regular wages, overtime, statutory holiday pay and compensation for length of service; made improper deductions from their wages; and caused them to pay for some of Empire’s business costs (the Complainants’)
 - (e) The delegate of the Director conducted an investigation into the Complaints.
 - (f) Based on my review of the Reasons for the Determination and the voluminous “record”, the Complainants provided evidence on their own behalf during the investigation of the Complaints and Mr. Tiwana provided evidence on behalf of Empire. Mr. Tiwana also submitted notarized statements of two witnesses whom the delegate, after much concerted effort, was able to speak with and obtain their evidence.
 - (g) The issues the delegate considered during the investigation were two-fold, namely:

- a. Were the Complainants employees of Empire?
- b. Does Empire owe the Complainants wages?
- (h) The Determination was issued on July 21, 2016.
- (i) With respect to the question of the status of the Complainants, the Reasons indicate the delegate considered the evidence of both parties in the context of the definitions of “employee”, “employer” and “work” in the *Act* as well as the objectives of the *Act* and concluded that the Complainants were employees of Empire for the purposes of the *Act*. Empire’s appeal does not dispute this finding in the Determination.
- (j) Having concluded the Complainants were employees of Empire, the delegate considered the evidence of the parties on the issues raised in the Complaints and went on to make the Determination that Empire breached sections 18 (wages), 40 (overtime), 46 (statutory holiday pay), 58 (annual vacation pay), 21 (deductions) and 63 (compensation for length of service) of the *Act* in respect of the employment of the Complainants.
- (k) The time limit for filing an appeal expired on August 29, 2016.
- (l) The Appeal Information contained in the Determination expressly provides “should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 p.m. on August 29, 2016”.
- (m) By email dated September 1, 2016, time stamped 12:42 a.m., Mr. Tiwana sent Empire’s incomplete appeal to the Tribunal. The appeal included Empire’s Appeal Form and Mr. Tiwana’s request for an extension of time to “submit documents and evidence”, the contents of which are discussed under the heading “Submissions of Empire” below.
- (n) On September 6, 2016, the Tribunal received three (3) emails dated September 5, 2016, time stamped 3:19 a.m., 3:27 a.m. and 3:45 a.m. from Mr. Tiwana contained Empire’s written submissions in support of its appeal and its documents including the Determination and the Reasons.

SUBMISSIONS OF EMPIRE

13. With respect to Empire’s request for an extension of time “to submit documents and evidence”, I note Mr. Tiwana states in his September 1, 2016, email to the Tribunal that his understanding of the appeal process was that he was required to submit the Appeal Form and then he would be contacted in the future to “interview in person” or a date would be set for him “to submit appeal information” or to “speak to someone at the tribunal on future steps that will be needed”. He adds that it was only on August 28 that he discovered he had to “submit all evidence for an appeal at this time.” In the circumstances, he states he requires an extension until September 5, 2016, to file Empire’s “documents and evidence”. As indicated above, the Tribunal subsequently, on September 6, 2016, received Empire’s “documents and evidence” by way of three separate emails from Mr. Tiwana discussed below.
14. In his first email, dated September 5, 2016, and time stamped 3:19 a.m., Mr. Tiwana submits a string of emails between him and Tommy Dolan (“Mr. Dolan”) of an organization called Merchant Services. In these emails, Mr. Tiwana appears to inquire whether two of the Complainants, Danny Ngo (“Mr. Ngo”) and Nimrat Narula (“Mr. Narula”) applied for work with Mr. Dolan’s organization. In his response email to Mr. Tiwana dated June 5, 2015; Mr. Dolan states that “I just got word that Danny Ngo reached out to us yesterday”. Mr. Dolan further states that “we will not sign him without approval from you”.

15. In his second email to the Tribunal dated September 5, 2016, and time stamped 3:27 a.m., Mr. Tiwana attaches a string of emails between him and Deepika Shahani (“Ms. Shahani”) of an organization named Northern Leasing. These email exchanges do not seem to be complete and there seems to be content that appears to be missing or redacted. However, in Ms. Shahani’s email of January 6, 2016, in response to Mr. Tiwana’s earlier email, she seems to suggest that Mr. Ngo is making sales for them “on avg. 5 – 10”. As stated previously, there seems to be some content missing in the email exchanges between Mr. Tiwana and Ms. Shahani.
16. Both of the above emails are relied on by Mr. Tiwana to argue that Mr. Ngo violated his employment agreement with Empire. He states that Mr. Ngo was not to “compete or use our clients” and that Empire’s “suspicions of [Mr. Ngo] taking employees away from Empire and using Empire’s clients was accurate”. He submits that Empire suffered damages of “over \$100,000.00” as a result of Mr. Ngo taking Empire’s clients and staff and teaming up with Empire’s staff to launch an employment standards claim against Empire.
17. In his third email dated September 5 and time stamped 3:45 a.m., he disputes the delegate’s specific findings or a conclusion of fact with respect to wages paid to Mr. Narula and Mr. Cooper but submits the payments made to the other three Complainants are correct.
18. He states that most companies pay commissions to their employees once per month and seems to suggest that it was, therefore, fine for Empire to also have done the same when it did that.
19. He then goes on to explain that certain sales were not completed by Mr. Narula and Mr. Ryan or they did not submit proper documentation for them and therefore they were not owed commissions for those sales.
20. He also disputes the delegate’s findings of fact that certain deductions were made from Mr. Narula’s paycheck. He states no deductions were made. This is contrary to the delegate’s findings in the Reasons; at page R46 that Mr. Narula is owed \$250 for improper deductions made from his pay cheque in the pay period ending May 31, 2015. Similarly the delegate found improper deductions were made from Mr. Cooper’s pay cheque in the amount of \$500 and Mr. Man’s pay cheque for \$250. These deductions relate to cancellation fees by customers these Complainants sold to. More particularly, customers sometimes have to pay for cancelling terminals with their existing providers when they make purchases through the Complainants. Mr. Tiwana says that cancellation fee “is not the standard business expense for [E]mpire”. Reimbursement of cancellation fee to customer is deducted from the commissions earned by the Complainants. Mr. Tiwana disputes the delegate’s conclusion that this practice of Empire is contrary to section 21 of the *Act*.
21. Mr. Tiwana also argues that Mr. Ngo and Mr. Narula’s “claims should be adjusted” because of the “6 month limit” in section 80 of the *Act*.
22. Mr. Tiwana also disputes the delegate’s conclusion of fact, at page R55 of the Reasons, that Mr. Ngo’s employment was terminated by Empire, without cause and without notice or pay in lieu of notice, on June 5, 2015, contrary to section 63 of the *Act*. In the Reasons, the delegate notes that Mr. Ngo’s evidence was preferable to Mr. Tiwana’s that his employment was terminated because Mr. Tiwana suspected him of contacting Empire’s leasing companies in order to determine the amount Empire charged customers for the sales he made. Mr. Tiwana, now, presents his email exchanges with other companies’ representatives, namely, Mr. Dolan and Ms. Shahani, to argue that Mr. Ngo breached his agreement with Empire by competing with Empire and using Empire’s clients. Ms. Shahani’s email exchange is dated January 6, 2016, and it suggests that Mr. Ngo is making sales for them “on avg. 5 – 10”. Mr. Dolan’s email, on the other hand, states that Mr. Ngo was not hired by them but he reached out to his organization. It is not clear whether Mr. Tiwana is presenting this evidence now to argue that if Mr. Ngo’s employment was terminated by Empire then it was

for cause. He is however, challenging the veracity of Mr. Ngo's evidence and his credibility stating that Mr. Ngo was lying when he stated "to employment standards he did not contact the companies he did and he only contacted them for pricing information".

ANALYSIS

23. In section 2(d), the *Act* states that one of its purposes is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". Consistent with this purpose, the *Act*, in section 112(3), imposes a deadline to ensure that appeals are dealt with efficiently. In this case, the appellant, Empire, filed its incomplete appeal on September 1, 2016, about three (3) days after the expiry of the appeal deadline set out in the Determination.
24. With its late filed Appeal Form, Empire's Director, Mr. Tiwana, requested an extension of time "to submit [its] documents and evidence". As set out by the Tribunal in *Metty M. Tang* (BC EST # D211/96), the Tribunal has discretion, under section 109(1)(b), to extend time limits for filing an appeal but "such extensions should not be granted as a matter of course" but only "where there are compelling reasons to do so". The burden is on the appellant to show why the appeal period should be extended: see also *Re Wright*, BC EST # D132/97.
25. In *Re Niemisto* (BC EST # D099/96), the Tribunal set out a principled approach to the exercise of its discretion requiring the following criteria to be satisfied before an extension may be granted:
- 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 are not exhaustive.
27. The explanation provided by Mr. Tiwana for the late filing is that he understood the appeal process was that he had to submit the Appeal Form and then he would be contacted in the future to "interview in person" or a date would be set for him "to submit appeal information" or to "speak to someone at the tribunal on future steps that will be needed".
28. I find Mr. Tiwana's reasons for the late filing of Empire's appeal not reasonable. It is the appellant's obligation to ensure that it understands the requirements for filing an appeal in a timely fashion. Ignorance of the law is not a "compelling reason" to extend the time period for filing Empire's appeal.
29. Empire and Mr. Tiwana were clearly not diligent in reading the Determination document carefully. The Determination expressly sets out, at page 3, under a bolded heading "**Appeal Information**" the following direction:

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 p.m. on August 29, 2016."

30. Further, in a box, prominently displayed at the top of the Appeal Form, it states that the Appeal Form must be delivered to the Tribunal and it encourages appellants to “[p]lease read the Guide to the Appeal Form before completing this form. The Guide explains what you need to write in each section of the Appeal Form.”
31. I also note that the late appeal, when filed on September 1, 2016, by email, was deficient. Contrary to subsections 112(2)(a)(i) and (i.1) of the *Act*, the Reasons for and argument supporting the grounds of appeal was not submitted with the appeal. Mr. Tiwana submitted them later and the Tribunal received them on September 6, 2016.
32. While the relatively short delay in the late filing of the appeal, Reasons and the arguments supporting the grounds of appeal, will not unduly prejudice the respondents nor affect the granting of an extension, I am not convinced that there is a strong *prima facie* case in favour of the Empire based on the appeal submissions of Empire. An assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed, but it requires the Tribunal to consider the relative strength of the grounds for appeal 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.
33. In this case, as noted previously, Empire appeals on all three grounds of appeal, namely, the director erred in law and failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made.
34. I do not find any evidence in the “record” or the appeal submissions of Mr. Tiwana that would provide any foundation for either the error of law or the natural justice grounds of appeal.
35. I also do not find there is any “new evidence” within the meaning of the conjunctive, four-part, test established by the Tribunal in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.* (BC EST # D171/03) for admitting evidence on appeal. The evidence in email exchanges between Mr. Dolan and Mr. Tiwana or the latter and Ms. Shahani, is evidence that could have, with the exercise of due diligence, have been discovered and presented to the Director during the investigation of the Complaints and prior to the Determination being made. The emails in question predate the Determination by 6 months or more. In the circumstances, the purported new evidence fails on the first of the four part tests. Therefore, I dismiss the new evidence ground of appeal.
36. Having said this, I find that Empire’s appeal is primarily based on a challenge to the Director’s findings or conclusions of fact which I have delineated under the heading “Submissions of Empire” above. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law. In *Britco Structures Ltd.* (BC EST # D260/03), the Tribunal stated 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. I do not find Empire or Mr. Tiwana to have shown that the Director’s findings in this case are perverse or inexplicable. To the contrary, I find ample foundation in the evidence contained in the Record for the Director to have reached the conclusions of fact made in the Determination.

37. In sum, not only do I find that there is no compelling basis for me to grant an extension of time for Empire to file its appeal but, based on my assessment of the appeal submission, I find it has no prospect of succeeding and I dismiss it under section 114(1)(f) of the *Act*.

ORDER

38. Pursuant to section 115 of the *Act*, I order the Determination dated July 21, 2016, be confirmed together with any interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal