

An appeal

- by -

Randall William Haberland also known as Randy William Haberland, carrying on
business as Haberland Timber Industries
(“Haberland”)

- 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: Carol L. Roberts

FILE No.: 2015A/152

DATE OF DECISION: December 29, 2015

DECISION

SUBMISSIONS

Randy Haberland on his own behalf, also known as Randy William Haberland, carrying on business as Haberland Timber Industries

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Randall William Haberland also known as Randy William Haberland, carrying on business as Haberland Timber Industries (“Haberland”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on July 22, 2015. In that Determination, the Director found that Haberland had contravened sections 18 and 58 of the *Act* in failing to pay its former employee, Jamieson C. Nauffts (“Mr. Nauffts”), wages and annual vacation pay. The Director ordered Haberland to pay \$4,006.25 in wages, annual vacation pay and interest. The Director also imposed an administrative penalty in the amount of \$500 for the contravention, for a total amount owing of \$4,506.25.
2. Haberland appeals the Determination contending that the delegate erred in law and failed to observe principles of natural justice in making the Determination. Haberland says that evidence has become available that was not available at the time the Determination was made. Haberland also seeks an extension of time in which to file the appeal.
3. This decision is based on the appeal submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, as well as the Determination.

FACTS AND ARGUMENT

4. On August 7, 2014, Mr. Nauffts filed a complaint with the Employment Standards Branch alleging that Haberland had not paid him for work performed between January 13 and February 12, 2014. On January 29, 2015, a delegate of the Director sent a registered letter to Haberland notifying Haberland that the hearing of Mr. Nauffts complaint would be held on March 3, 2015. At the same time, the delegate issued a Demand for Employer records. Canada Post tracking information indicates that Haberland refused the correspondence. The correspondence was also sent to Haberland by e-mail, and received.
5. As noted above, the Determination found Mr. Nauffts entitled to wages. The Determination indicated that a person named in the Determination could make a written request for reasons for the Determination, and that any such request had to be made within seven days of being served with the Determination, or eight days after the Determination was mailed. That date was August 5, 2015.
6. The deadline for filing an appeal of the Determination was 4:30 p.m. on August 31, 2015. The Determination also noted that the Determination could be filed in the Supreme Court and collection proceedings could be commenced without further notice.
7. On November 13, 2015, the Director notified Haberland that it intended to commence collection proceedings and that Haberland could avoid collection action by paying \$4,527.78 (the Determination amount plus subsequent interest). The Director further indicated that failure to pay the full, or a substantial amount, of the Determination would result in collection action without further notice.

8. Mr. Haberland's appeal, which was filed November 17, 2015, states that, after the "meeting" with a Branch officer, Mr. Haberland was under the understanding that Mr. Nauffts "confessed to getting paid \$1350 cash" and to theft. Mr. Haberland also denied there was any agreement between Haberland and Mr. Nauffts regarding Mr. Nauffts' remuneration.
9. Mr. Haberland also sets out the following reasons for his appeal:

I would have shown up if I knew this was going forward but he confussed to being paid and steeling so I thought it was over.

I also feel that the proceeding officer did not thourly steady the documents that Cole submated or she could of seen the diffentance in his statement and time sheet.

I feel because I was not there to repersent myself it was just prossess and stamped.

[reproduced as written]

10. Mr. Haberland explained that he separated from his spouse in September 2014 and that although his e-mail address changed, he did not think to check it. He also said that he moved to camp where he is living full time. Although a portion of Mr. Haberland's appeal consists of an e-mail to the Tribunal, he states that he does not know how to use a computer. Mr. Haberland also says that the Determination, which he did not receive until November 16, 2015, was made solely on Mr. Nauffts' evidence and that he would like the opportunity to present his side of the story.

ANALYSIS

11. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
12. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
13. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those are that the party seeking an extension must satisfy the Tribunal that:
- 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.
14. These criteria are not exhaustive.

15. Furthermore, extensions will only be granted where there are compelling reasons present (*Moen and Sagh Contracting Ltd.*, BC EST # D298/96).
16. I am not persuaded that an extension of time should be granted.
17. There is no question Mr. Haberland was aware of the complaint. Although he says he rarely checks his computer, the record indicates that he was notified of a hearing into the complaint both by e-mail and registered mail. The e-mail was delivered but the registered letter was refused. The hearing notice set out the potential consequences of a failure to appear at the hearing.
18. Mr. Haberland provides no explanation why he would have refused a registered letter from the Employment Standards Branch apart from suggesting that he had by then moved into a location “in the bush.” He does not say how he receives mail nor does he say why, after attending some sort of a process at the Branch office in Nanaimo, he made no attempt to determine the result of that process, even by checking his email. I note that Mr. Haberland filed his appeal only after he received the Director’s notice of collection proceedings, which was sent by mail.
19. Not only does the record, and Mr. Haberland’s submission, indicate that Mr. Haberland had no ongoing or *bona fide* intention to appeal the Determination, he also apparently had no intention of participating in the process. For that reason, I am not persuaded there is a strong *prima facie* case to be made on appeal.
20. As Mr. Haberland did not request written reasons for the Determination, I have no evidence before me as to how the delegate arrived at her conclusion. However, as Mr. Haberland agreed that he did not appear at the hearing, I infer that the decision was made on Mr. Naufft’s uncontradicted evidence and the absence of any evidence from Mr. Haberland.
21. An appeal is not an opportunity to provide evidence that should have been presented to the Director at first instance. (see *Tri-west Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97).
22. The application for an extension of time in which to appeal the Determination is denied.

ORDER

23. Pursuant to section 115(1)(a) I Order that the Determination, dated July 22, 2015, be confirmed in the amount of \$4,506.25 together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal