

An appeal

- by -

Edward Chaban carrying on business as Extreme Clean  
(“Mr. Chaban”)

- 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:** Raewyn Brewer

**FILE No.:** 2011A/152

**DATE OF DECISION:** December 23, 2011

## DECISION

### SUBMISSIONS

Edward Chaban	on his own behalf carrying on business as Extreme Clean
Dennis Stead	on his own behalf
Amanda Clark Welder	on behalf of the Director of Employment Standards

### OVERVIEW

1. Dennis Stead (“Mr. Stead”) filed a complaint (the “Complaint”) under Section 74 of the *Employment Standards Act* (the “*Act*”) with the Director of Employment Standards (the “Director”) alleging that his employer, Edward Chaban carrying on business as Extreme Clean (“Mr. Chaban”) contravened the *Act* by failing to pay wages and vacation pay.
2. The delegate of the Director (the “Delegate”) investigated the Complaint and following her investigation issued a determination dated August 15, 2011 (the “Determination”). In the Determination the Delegate determined that Mr. Stead was employed by Mr. Chaban during the relevant period and that Mr. Chaban breached section 18 of the *Act* when he failed to pay Mr. Stead all wages, including vacation pay, within six days after Mr. Stead terminated his employment. According to the Determination, the wages Mr. Chaban owed to Mr. Stead, inclusive of vacation pay and interest, totalled \$781.22.
3. The Delegate also found that Mr. Chaban breached section 28 of the *Act* for failing to maintain payroll records pertaining to Mr. Stead.
4. In addition to ordering Mr. Chaban to pay Mr. Stead the outstanding wages, the Determination also levied two administrative penalties of \$500.00 each in respect of the breaches of sections 18 and 28 of the *Act* by Mr. Chaban.
5. Mr. Chaban has appealed the Determination on three grounds: (1) the Director erred in law; (2) the Director failed to observe the principles of natural justice in making the Determination; and (3) that evidence has become available that was not available at the time the Determination was being made. As a remedy, Mr. Chaban is seeking a cancellation of the Determination.
6. Mr. Chaban’s appeal was filed late. The appeal was required to be delivered to the Employment Standards Tribunal (the “Tribunal”) by 4:30 pm on September 22, 2011. It was in fact received by the Tribunal on October 6, 2011. The reason given by Mr. Chaban for the delay in filing the appeal was he “was away due to family problems and did not receive [his] mail”.
7. Having said this, section 109(1)(b) of the *Act* clothes the Tribunal with the power to extend the deadline for requesting an appeal even though the appeal period has expired. In this decision, the Tribunal will only consider the issue of whether or not it should exercise its discretion and extend the deadline to appeal. If the Tribunal grants Mr. Chaban’s request to extend the deadline to appeal, the Tribunal will afford the parties a full opportunity to respond to the merits of the appeal, although Mr. Chaban and Mr. Stead appear to have made some submissions on the merits already.

## ISSUE

8. The issue to be determined by the Tribunal at this time is: should the Tribunal use its power under section 109(1)(b) of the *Act* and extend the time period for requesting an appeal even though the period has expired?

## FACTS

9. On March 9, 2011, Mr. Stead filed the Complaint under section 74 of the *Act* alleging that Mr. Chaban, carrying on business as Extreme Clean, contravened the *Act* by failing to pay wages and vacation pay for labourer work he performed during the period January 11 to February 12, 2011.
10. The Delegate conducted an investigation and issued a preliminary findings letter on July 27, 2011. This letter was sent to Mr. Chaban by registered mail and email. In that letter the Delegate indicated that it appeared that Mr. Stead was owed \$781.22 in regular wages, overtime and vacation pay. The Delegate also noted that a Demand for Records was issued on May 12, 2011, and that Mr. Chaban had advised the Delegate that no records were available for Mr. Stead because Mr. Chaban did not have any employee information regarding Mr. Stead because he was not Mr. Chaban's employee. As such, Mr. Chaban stated he did not put Mr. Stead on payroll. The Delegate also stated that two administrative penalties of \$500.00 each for the breaches to the *Act* would also be levied.
11. Mr. Chaban and the Delegate exchanged emails on August 5, 2011. The Delegate re-attached the copy of the preliminary findings and stated that any additional written submissions were required by August 10, 2011. The Delegate also stated that "if sufficient evidence is not received to merit a change to the preliminary findings" by August 10, 2011, she would proceed with "issuing a Determination based on the evidence" before her. Mr. Chaban responded and re-stated his position that Mr. Stead was "never actually hired and there fore (sic) was never on payroll".
12. On August 15, 2011, the Delegate issued the Determination in substantially the same form as the preliminary findings letter. In the Determination the Delegate reviewed the written and oral evidence before her with respect to the number of hours worked, the wage rate, whether lunch breaks occurred and the total monetary payments made to Mr. Stead. The Delegate preferred the evidence of Mr. Stead over that of Mr. Chaban, concluding that Mr. Stead worked as a labourer for Extreme Clean a total of 121 hours at \$12.00 per hour between January 11 and February 12, 2011, and that Mr. Stead was entitled to 4 percent vacation pay pursuant to section 58 of the *Act*. Given that the parties agreed that Mr. Chaban had paid \$740.00 cash for work performed during this period, the Delegate found that Mr. Stead was owed a total of \$781.22 including vacation pay and interest.
13. The Delegate also found that Mr. Chaban breached Section 28 of the *Act* for failing to maintain payroll records pertaining to Mr. Stead. Therefore, in addition to ordering Mr. Chaban to pay Mr. Stead the outstanding wages, the Determination also levied two administrative penalties of \$500.00 each in respect of the said breaches of the *Act* by Mr. Chaban.
14. The Determination was sent to Mr. Chaban on August 15, 2011, to two different addresses, both by registered and regular mail. As the documents enclosed with the Director's submissions reflect, the registered mail sent to the address on Marshall Road was returned to sender marked "moved", while the registered mail sent to the Cameron Road address was returned to sender marked "unclaimed". The regular mail sent to Cameron Road was not returned to sender.

15. On October 4, 2011, a letter was sent to Mr. Chaban by email and regular mail to the Cameron Road address notifying him of collections proceedings that would be started against him if payment was not received by October 18, 2011.
16. On October 6, 2011, Mr. Chaban filed a notice to appeal with the Tribunal alleging three grounds of appeal and requesting an extension of the appeal period.

### **SUBMISSIONS OF MR. CHABAN**

17. With respect to the late filing of the appeal, Mr. Chaban's submissions are brief. In his submissions, Mr. Chaban states that he did not receive the Determination until October 5, 2011. In a subsequent email to the Tribunal, Mr. Chaban states that he filed late because he was away due to family troubles and did not receive his mail.
18. While the focus of this appeal is whether to allow Mr. Chaban an extension of time to appeal, I note that the analysis involved in determining this issue requires that I review the substantive submissions of Mr. Chaban. This is because one of the relevant factors in the exercise of my discretion to grant an extension of time to appeal is consideration of whether there is a strong *prima facie* case in favour of the appellant, in this case Mr. Chaban.
19. I have reviewed the substantive submissions of Mr. Chaban very carefully. The majority of the submissions of Mr. Chaban are in the nature of a re-argument of the case and a review of the character of Mr. Stead and his alleged behaviour while working for Mr. Chaban. Mr. Chaban's key arguments can be distilled to the following: (a) Mr. Stead was never legally employed by Mr. Chaban; (b) Mr. Chaban did not keep payroll records because he had no employees; and (c) Extreme Clean was not a business at the time.
20. I can find nothing in Mr. Chaban's appeal that addresses the second ground of appeal that the Director failed to observe the principles of natural justice in making the Determination.
21. Finally, with respect to new evidence that has become available that was not available at the time that the Determination was being made, Mr. Chaban's submissions rest on his personal bank records. According to Mr. Chaban, his personal savings bank account record together with his wife keeping an account of their money shows that Mr. Chaban paid Mr. Stead a total of \$1,280.00, which is \$540 more than he originally indicated to the Director.

### **SUBMISSIONS OF MR. STEAD**

22. I have reviewed the submissions of Mr. Stead and note that Mr. Stead's submissions do not address the issue of the late appeal that I am required to decide. Mr. Stead's submissions appear to be a direct response to a number of statements made by Mr. Chaban in his appeal. I do not find it necessary to review them in further detail here.

### **SUBMISSIONS OF THE DIRECTOR**

23. In response, the Director submits that the Tribunal should deny Mr. Chaban's request for an extension of the appeal period. In support of this submission, the Director argues that on balance the factors used by the Tribunal to determine whether the time for filing an appeal should be extended support the Director's position that Mr. Chaban's request should be denied.

24. First, the Director states that Mr. Chaban’s “decision not to receive his mail does not constitute a compelling reason to grant an extension to the time limit for filing an appeal.” The Director notes that Mr. Chaban did not provide any good reason why he failed to pick up the Determination sent by registered mail or why he did not receive the copy sent by regular mail.
25. Second, the Director submits that Mr. Chaban does not have a strong case that might succeed if the Tribunal grants an extension to the appeal. In particular, the Director notes that Mr. Chaban’s appeal submission is a restatement of the position he put before the Delegate during the investigation. With respect to the first ground of appeal, an error in law, the Director submits that Mr. Chaban does not provide any evidence or argument that the delegate erred in applying the appropriate legal tests or made any findings of fact not supportable based on the evidence before her.
26. As concerns the natural justice ground of appeal, the Director submits that Mr. Chaban does not provide any explanation to support why he marked this on his appeal form. Further, the Director argues that Mr. Chaban knew the case before him and was given the opportunity to reply to it; he was apprised of the relevant evidence, the applicable statutory provisions and legal tests; and, Mr. Chaban’s response was clearly considered.
27. As to the new evidence ground of appeal, the Director submits that the personal bank record evidence put forth by Mr. Chaban in his appeal does not meet the test for admitting new evidence. The Director notes that Mr. Chaban did not provide any reason why this evidence could not have been produced at the time the Determination was being made. Further, without any documentary evidence to corroborate his claim that Mr. Stead was paid more than Mr. Stead claims, the Director states that the evidence does not appear to be credible.
28. With respect to whether Mr. Chaban communicated to the delegate that he intended to appeal the Determination, the Director is unable to comment as the delegate who issued the Determination is currently on leave.
29. Lastly, the Director submits that there is likely no harm arising from granting the extension nor was the appeal filed not long after the appeal period expired.

## ANALYSIS

30. Section 112 of the *Act* is the code for any party wishing to appeal the Director’s determination including the appeal period or time limit for filing an appeal. Subsection 112(3)(a) and (b) provide:
- 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).
31. Section 122 of the *Act* provides:
- 122 (1) A determination ... that is required to be served on a person under this Act is deemed to have been served if
- (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 ... is deemed to be served 8 days after the determination or demand or the notice under section 30.1 (2) is deposited in a Canada Post Office.
32. Section 109(1)(b) of the *Act* sets out the Tribunal's authority to extend the time period for requesting an Appeal under Section 112, and provides:
- 109 (1) In addition to its powers under Section 108 and Part 13, the tribunal may do one or more of the following:
    - (b) extend the time period for requesting an appeal even though the period has expired;
33. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist (*Re: Tang*, BC EST # D211/96).
34. The Tribunal has previously considered some or all of the following factors in determining whether to extend an appeal period (*Niemesto*, BC EST # D099/96):
- a. Is there a good reason why the Appellant (Mr. Chaban) could not meet the deadline?
  - b. Was there an unreasonably long delay in filing the appeal?
  - c. Did the Appellant always intend to appeal the Determination?
  - d. Were the other parties – such as the Respondent (Mr. Stead) and the delegate who wrote the Determination – aware of the intent to appeal?
  - e. Would extending the appeal deadline harm the Respondent's case?
  - f. Does the Appellant have a strong case that might succeed if the Tribunal grants an extension?
35. Having reviewed the submissions of all of the parties in this appeal, I am not satisfied that the time period for Mr. Chaban to request an appeal ought to be extended.
36. First, I am not persuaded that Mr. Chaban has offered a reasonable and credible explanation for the failure to request an appeal within the statutory time limits set out in section 112(3) of the *Act*.
37. The Determination was sent by regular and registered mail to Mr. Chaban at two separate addresses, including the Cameron Road address. The written record adduced by the Director in this appeal contains delivery records of Canada Post evidencing that the registered mail delivery to Mr. Chaban at the Cameron Road address was returned to sender marked "unclaimed". There is no evidence before me to indicate that the Determination sent by regular mail to this address would not have been received by Mr. Chaban. Further, it is clear from the record that the Cameron Road address to which the Determination was mailed was correct. More than one piece of mail was sent to the Cameron Road address, including the letter from the Director dated October 4, 2011, informing Mr. Chaban of impending collections proceedings against him and the Cameron Road address is the one used by Mr. Chaban on his appeal form.
38. Mr. Chaban says that he did not receive the Determination until October 5, 2011, because he was away due to family troubles and did not receive his mail during this period. However, Mr. Chaban does not offer any corroborating evidence to support his position. Further, Mr. Chaban acknowledges that he was aware on

August 10, 2011, that the Determination was pending. The record evidences that Mr. Chaban had received the Delegate's preliminary findings on July 27, 2011, and again on August 5, 2011. These preliminary findings are substantially the same as the Determination and not in Mr. Chaban's favour. There is no indication in the record that Mr. Chaban contacted the Delegate to inform her that he would be away for such an extended period of time and would not be receiving his mail.

39. Thus, I find on the balance of probabilities that Mr. Chaban did receive the Determination in a timely fashion and before the appeal deadline of September 22, 2011. In the alternative, I find that Mr. Chaban actively avoided notification of the Determination by failing to collect his mail and therefore service is deemed to have occurred 8 days after the registered mail was deposited in the Canada Post Office pursuant to section 122(2) of the *Act*.
40. Second, there is no indication in the materials that Mr. Chaban had a genuine and ongoing bona fide intention to appeal the Determination nor is there any indication that Mr. Chaban made any attempts to inform the Director or Mr. Stead of his intention to appeal the Determination at any time. Further, there is no indication in the record that Mr. Chaban contacted the Delegate after the Determination was issued to advise her of his intention to appeal or to inform her that he required more time to file an appeal.
41. Third, in regards to whether there was an unreasonably long delay in filing the appeal and whether extending the appeal would harm Mr. Stead's case, in my view while, *prima facie*, there is no undue prejudice to Mr. Stead in granting the extension of time to appeal and the delay in Mr. Chaban's filing of its appeal is not inordinate, I am mindful of the need for a timely disposition of an appeal. The stated purpose of Section 2(c) of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act". Therefore, in my view, unless there are additional reasons to support an extension of the appeal deadline, I do not think these findings assist Mr. Chaban in his appeal. These are but only two of several factors and not the determinative factors in my decision on issue of the late appeal.
42. Lastly, I must consider whether Mr. Chaban has a strong *prima facie* case which might succeed if I extend the time period for requesting an appeal even though the appeal period has expired. Having reviewed the substantive submissions of Mr. Chaban on the merits of his appeal, I am not persuaded that there is a strong *prima facie* case in Mr. Chaban's favour for the reasons detailed below.
43. The grounds of appeal under the *Act* are limited to the following as set out in section 112(1):
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
- (a) the director erred in law;
- (b) the director failed to observe the principles of natural justice in making the determination;
- (c) evidence has become available that was not available at the time the determination was made.
44. As stated above, Mr. Chaban has appealed on all three grounds.
45. Regarding ground (a) that the Director erred in law, in my view, Mr. Chaban's submissions appear to be a re-argument of his case and a challenge to the Director's findings of fact with a view to obtaining a more favourable decision. The *Act* does not provide for an appeal based on errors of fact and the Tribunal does not consider such appeals unless such findings raise an error of law (*Britco Structures Ltd.*, BC EST #

D260/03). In my view, the Delegate properly interpreted the *Act* and the evidence adduced by the parties during the investigation of the Complaint reasonably supports the Delegate's findings of facts.

46. Ground (b) requires the Director to observe the principles of natural justice in making the Determination. Natural justice requires that a party has an opportunity to know the case against him or her, the right to be heard by an unbiased decision maker who has heard the evidence, and the right to receive reasons for the decision. The onus is on the appellant who has alleged a breach of natural justice to persuade the Tribunal on a balance of probabilities that there was a denial of natural justice (*Re: 607730 B.C. Ltd. operating as English Inn & Resort*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05).
47. I find nothing in Mr. Chaban's materials to support the "natural justice" ground of appeal. It is clear that Mr. Chaban was aware of the investigation, knew the nature of the evidence before the Director, had notice of her conclusions and was provided with all of the relevant evidence in a timely fashion. As discussed above, I find further that Mr. Chaban received notice of the Determination with ample time to file an appeal within the time allowed, or that he actively avoided such notice.
48. The record includes correspondence from Mr. Chaban to the Delegate in which Mr. Chaban made a number of assertions impugning the Delegate's character and questioning her motivations, which may be construed as the basis for a breach of natural justice argument. These are unfounded allegations; I find nothing in the record to support Mr. Chaban's statements. As stated by the Tribunal in *Tournament Inns*, BC EST # D031/10:

It is important for appellants to know, and in this case [Mr. Chaban] that impugning or assailing the character of a delegate and challenging [her] integrity in the adjudication process, whether that process takes the form of an investigation of a complaint or a full blown hearing leading to a determination, is a serious matter and should not be taken lightly. Appellants should be very circumspect about levelling allegations challenging the integrity and character of a delegate when they do not have any evidence or any factual basis to support such challenge.

49. Finally, with respect to the third ground of the appeal, that new evidence is available regarding payments allegedly made to Mr. Stead, I find that that the evidence adduced by Mr. Chaban is unlikely to meet the strict fresh evidence test as articulated by the Tribunal.
50. In *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal set out the following test regarding the ground for "new evidence":

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- (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;
- (b) the evidence must be relevant to a material issue arising from the complaint;

- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (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.

51. The evidence tendered by Mr. Chaban as new evidence are alleged entries in his personal savings bank account and written accounts kept by his wife of the monies paid to Mr. Stead during the relevant time period. According to Mr. Chaban these entries indicate he paid \$540 more to Mr. Stead than Mr. Stead claimed and that the Delegate found in her Determination.
52. However, Mr. Chaban does not provide any reason why this evidence could not have been produced to the Delegate during the course of the investigation. Further, in my view the evidence would have been readily available to Mr. Chaban, as it is his personal bank account and his wife's calculations to this effect. Accordingly I find that this new evidence fails to meet the first condition for the admission of new evidence and accordingly would be unlikely to be considered fresh evidence on an appeal of the merits of the case before the Tribunal.
53. Furthermore, even if the Tribunal did consider the substance of this evidence I note that Mr. Chaban has not produced any documentary evidence to corroborate his claims. I therefore find it unlikely that the Tribunal would find this evidence credible in the sense that it is reasonably capable of belief.
54. In conclusion, I am not satisfied from an analysis of the factors that I find to be most relevant in this case, that an extension of the appeal period should be granted. In my view, Mr. Chaban has not adduced a good reason as to why he could not meet the appeal deadline. On the balance of probabilities, I believe that Mr. Chaban received the Determination in a timely fashion and before the appeal deadline of September 22, 2011, or that he actively avoided such notice. It was not until October 6, 2011, when Mr. Chaban found out that collection proceedings would be commenced did he choose to appeal the Determination. Further, having reviewed the substantive submissions of Mr. Chaban on the merits of his appeal, I am not persuaded that there is a strong *prima facie* case that might succeed if the Tribunal grants an extension to the appeal period.

## **ORDER**

55. Pursuant to Section 109(1)(b) of the *Act*, I deny the application to extend the appeal period.

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**Raewyn Brewer**  
**Member**  
**Employment Standards Tribunal**