

An appeal

- by -

John Klippenstein a Director or Officer of L.O.M. Laboratories Inc.

- 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.: 2005A/122

DATE OF DECISION: September 20, 2005

DECISION

SUBMISSIONS

Kenneth J. Ihas, Petrarois Langford Rush	on behalf of John Klippenstein
Amanda Clark Welder	on behalf of the Director of Employment Standards
Tanya Sedlecek	on her own behalf
Kevin Conway	on his own behalf

OVERVIEW

1. This is an appeal by John Klippenstein pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards ("the Director") issued May 31, 2005.
2. Kevin Conway and Tanya Sedlacek ("the complainants") filed complaints against L.O.M. Laboratories Inc. ("LOM"), claiming unpaid wages and compensation for length of service.
3. The Director's delegate investigated the complaints, and on May 31, 2005, issued a Determination in favour of the complainants. The delegate concluded that the complainants were entitled to wages and interest in the total amount of \$48,521.40. The delegate also imposed administrative penalties in the amount of \$1,000.00.
4. The delegate noted that John Klippenstein and Maria Klippenstein, the directors and officers of LOM had not participated in the investigation and that LOM had ceased operation. Consequently, she also issued Determinations against each of the Klippensteins pursuant to section 96 of the Act. In those decisions, the delegate found each of the Klippensteins personally liable for two month's unpaid wages for each of the employees, in the total amount of \$30,000, plus interest.
5. Mr. Klippenstein's appeal was filed with the Tribunal on July 14, 2005. In his appeal, Mr. Klippenstein contends that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.
6. Mrs. Klippenstein has also appealed the Determination.
7. Pursuant to section 112 of the Act, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. Mr. Klippenstein's appeal period expired July 8, 2005.
8. Mr. Klippenstein also seeks an extension of time in which to file his appeal.
9. These reasons address only the timeliness of Mr. Klippenstein's appeal, and are based on the written submissions of the parties.

ISSUE

10. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

ARGUMENT

11. Counsel for Mr. Klippenstein submits that the delegate erred in law in
- a) concluding that Mr. Conway and Ms. Sedlacek were employees of LOM rather than L.O.M. Medical International Inc., a company registered in the state of Delaware;
 - b) concluding that Mr. Conway and Ms. Sedlack were owed any wages, or wages in the amount determined; and
 - c) finding that Mr. Klippenstein was a director of LOM at the material times.
12. Mr. Klippenstein's counsel further submits that as Mr. Klippenstein did not receive notice of the proceedings, and that, a result of the resignations of the directors, LOM was unable to respond to the complaints.
13. Mr. Klippenstein says that he first learned of the Determination when he received a letter on or about July 7, 2005 relating to the collection of the amounts set out in the Determination. He says that it appears from the delegate's information that the Determination was sent to the wrong address since the postal code was incorrect.
14. Mr. Klippenstein says that the claims relate to "complicated matters relating to ownership of intellectual property and the corporate affairs of [LOM] and [L.O.M.] Medical International" and that due to his financial circumstances he was unable to engage legal counsel to assist him. He says neither he nor his wife were familiar with the procedures and found it difficult and stressful to deal with the situation, and that, even if the documents was in fact sent to the right address, "it is possible as a result of our circumstances at the time that it was misfiled or overlooked".
15. The Director's delegate enclosed the record relating to both the determination and the appeals. She says that Mr. Klippenstein was contacted by telephone at his home, at which time he was advised of the complaints and confirmed his mailing address. She says she sent correspondence to LOM at that mailing address on April 21, 2005 by Xpress Post, and Canada Post confirmed that the correspondence was received. She also says it was sent to by regular mail to Mr. Klippenstein at the same address, and the mail was not returned. The delegate says she received no response to this correspondence from either Mr. Klippenstein, Mrs. Klippenstein or LOM.
16. The delegate says that the corporate determination and director determinations were all issued on May 31, 2005, and mailed by Xpress Post to Mr. Klippenstein at his home address indicated on the BC Company summary, as well as to Mrs. Klippenstein at her home address, which is the same as Mr. Klippenstein's. Copies of all three were also sent to LOM Registered and Records office for LOM, which is the same as the Klippensteins' home address.

17. The delegate further submits that on July 7, 2005, another delegate of the Director sent three separate letters to Mr. Klippenstein, Mrs. Klippenstein and LOM by regular mail advising them that the Director intended to proceed with collections of the determinations if payment was not received by July 18, 2005.
18. On July 12, 2005, Mr. Klippenstein contacted a delegate and advised her that he had received no correspondence other than the collections letter, and would be speaking to a lawyer.
19. The delegate says that the employer was given several opportunities to participate in the investigation. She submits that all of the Xpress post correspondence was confirmed delivered, and none of the regular mail was returned. She further submits that Mr. Klippenstein never indicated any intention to appeal the Determinations within the time limits, and the fact that the appellant may have been busy with other legal proceedings does not justify accepting a late appeal.
20. Mr. Conway and Ms. Sedlacek contend that the appellants are filing a late appeal in an attempt to avoid financial responsibility, and there is no good reason Mr. Klippenstein could not have filed an appeal within the time period provided. They further submit that there is no explanation for the delay, and that the Klippensteins communicated with them earlier in the proceedings that they were aware wages were owed and wanted to settle the outstanding balance through a share issue. The Klippensteins deny this allegation.
21. Mr. Conway and Ms. Sedlacek also say that they believe that granting an extension would prejudice them since they believe the Klippensteins are attempting to sell their property and leave the country. The Klippensteins also deny this allegation. They contend that they have lived in Kelowna for the past 11 years and have no intention to move. While they acknowledge their properties in Kelowna and Calgary are listed for sale, they say they have been listed since last September, well before Mr. Conway and Ms. Sedlacek made their complainants. They say both properties are in foreclosure proceedings.
22. Finally, Mr. Conway and Ms. Sedlacek say that Mr. Klippenstein does not have a strong *prima facie* case, and submit that the extension should not be granted.

ANALYSIS

23. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.
24. These time limits are in keeping with one of the purposes of the Act. Section 2(d) provides that one of the purposes of the Act is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the Act.
25. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
26. 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.

27. These criteria are not exhaustive.

28. I am not persuaded that there is a reasonable and credible explanation for failure to request an appeal within the statutory time limit. The record indicates that the Determination was sent by Xpress Post on May 31, 2005 to Mr. Klippenstein, his wife, LOM and LOM's Registered and Records office, all at the same address. The Canada Post tracking information indicates all mail was successfully delivered. Other correspondence was sent by regular mail and not returned to the Employment Standards Branch. The collections letter was sent, by regular mail, to the same address. Although Mr. Klippenstein contends he was not aware of the Determination, I find that it was received by June 1, 2005, the date Canada Post indicates the document was delivered. I am not persuaded that Mr. Klippenstein's preoccupation with other business matters or his "misfiling or overlooking" of the correspondence constitutes a reasonable and credible explanation for his failure to request an appeal within the statutory time limit, or by July 8, 2005. The evidence is that Mr. Klippenstein had at least one conversation with a delegate, and was aware the investigation was proceeding. As the complainants used the Employment Standards self-help kit without success, Mr. Klippenstein was aware of the complaints. He made no effort to respond or to follow up with the delegate.

29. There is no evidence that Mr. Klippenstein had a genuine, ongoing intention to file an appeal of the Determination until he was notified of the Director's intent to collect on the Determination.

30. I also find that Mr. Conway and Ms. Sedlacek and the Director would be prejudiced if an extension were granted. The amounts owed are significant and Mr. Klippenstein has not paid any of the amounts to the Director in trust pending the disposition of the appeal. Furthermore, the Klippensteins say their properties are subject to foreclosure proceedings and that they have financial difficulties. The Director is likely to have difficulty collecting on the Determinations, which will only be compounded with further delay.

31. Finally, I am unable to find that there is a *prima facie* case in Mr. Klippenstein's favour.

32. Mr. Klippenstein alleges that the delegate erred in law, failed to observe the principles of natural justice, and that evidence has become available that was not available at the time the Determination was being made.

33. With respect to the allegation that the delegate erred in finding the complainants to be employees of LOM International rather than LOM, that allegation is contradicted by the fact that the complainants' paycheques and Record of Employment (ROE) were issued by LOM only.

34. With respect to the allegation that the delegate erred in finding that the complainants were not owed any wages, or wages in the amounts calculated, I find that the evidence before the delegate amply supported the claims.

35. Although the evidence appears to suggest that on May 28, 2004, the BC Securities Commission issued an order that Mr. Klippenstein resign as a director or officer of LOM. A November 30, 2004 BC Company

Summary search indicates the Klippensteins' address was the Registered and Records office of LOM, and that Mr. and Mrs. Klippenstein were Directors and Officers of LOM. If Mr. Klippenstein did resign, that resignation was not registered with the Ministry of Finance, and Mr. Klippenstein provided no evidence to the delegate to show that he had in fact resigned, although he was given numerous opportunities to do so. The evidence suggests that Mr. Klippenstein was a director at the time the wages were earned or should have been paid (s. 96(1) of the Act). I find no *prima facie* case in this respect.

36. There is nothing in the submissions that discloses any evidence supporting the second ground of appeal, and I am not prepared to conclude, on the record, that Mr. Klippenstein did not know about the complainants' allegations or was not given a full opportunity to respond. I find no *prima facie* case in this respect.

37. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

38. Neither Mr. Klippenstein nor his wife participated in the investigation, either on their own behalf or on behalf of LOM despite being given numerous opportunities to do so. The Tribunal has a well established principle that it will not consider new evidence that could have been provided by the employer at the investigation stage (see *Tri-west Tractor Ltd.* BC ESTD# 268/96 and *Kaiser Stables Ltd.* BC EST #D058/97). The appeal does not disclose why this "new" evidence was not provided to the delegate at first instance.

39. I am not persuaded that there is a *prima facie* case in support of any of the grounds of appeal.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal