

An appeal

- by -

Adams Lake Towing Ltd.  
(“ALT”)

- 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:** David B. Stevenson

**FILE No.:** 2016A/153

**DATE OF DECISION:** December 20, 2016

## DECISION

### SUBMISSIONS

Andrew Walker

on behalf of Adams Lake Towing Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Adams Lake Towing Ltd. (“ALT”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 27, 2016.
2. The Determination found ALT had contravened Part 8, section 63 of the *Act* in respect of the employment of Jhonathon Powell (“Mr. Powell”) and ordered ALT to pay Mr. Powell wages in the amount of \$1,145.79, an amount that included concomitant vacation pay and interest under section 88 of the *Act*. The Director imposed an administrative penalty for the contravention of the *Act* in the amount of \$500.00. The Director also found ALT had contravened section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and imposed another administrative penalty for that contravention in the amount of \$500.00. The total amount of the Determination is \$2,145.79.
3. ALT has appealed the Determination, alleging the Director failed to observe principles of natural justice in making the Determination.
4. The appeal was delivered to the Tribunal on October 31, 2016, almost eight weeks after the time period for filing an appeal of the Determination had expired. ATL has applied under section 109 of the *Act* for an extension of the appeal time period.
5. In correspondence dated November 4, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to ALT. It has been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*

- (a) *the appeal is not within the jurisdiction of the tribunal;*
- (b) *the appeal was not filed within the applicable time limit;*
- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*

- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Powell will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether ALT should be granted an extension of the statutory time period for filing an appeal, or if the appeal should be dismissed as untimely, and whether there is any reasonable prospect the appeal can succeed.

### **ISSUE**

9. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *Act*.

### **THE FACTS**

10. ALT operates a barge company. Mr. Powell was employed by ALT as a deckhand and welder from November 10, 2014, to October 30, 2015.
11. Mr. Powell had worked for ALT on and off for ten years, with his most recent period of employment with ALT being full time employment from November 2014 to October 2015. In October 2015, he was laid off, without written notice or compensation in lieu of notice. He was not contacted to return to work with ALT until May 2016 – seven months after the lay off.
12. In April 2016, Mr. Powell filed a complaint seeking length of service compensation. The complaint was timely.
13. There was, apparently, an unsuccessful attempt to mediate a resolution of the complaint, following which the Director decided to conduct a complaint hearing.
14. A package containing a Notice of Hearing and a Demand for Employer Records was sent to ALT by registered mail on May 31, 2016. The package was sent to two different addresses of ALT, including the address shown as the address of the registered and records office in the corporate records of ALT. The Notice of Hearing and Demand for Employer Records were also sent by e-mail to an address provided to the Director by Robin Young (“Mr. Young”), the principal and sole director for ALT. The address to which the registered mail was sent and the e-mail address are the same as those provided by ALT on the Appeal Form as the postal address and e-mail address for ALT.
15. The two pieces of registered mail were unclaimed and ultimately returned to the Director, one on June 22, 2016, and the other on July 8, 2016

16. In the record, there is reference to a telephone communication between the Director and Mr. Young on May 31, 2016, which indicates Mr. Young was advised a complaint hearing had been scheduled for July 19, 2016, commencing at 9:00 am, and provides log-in information allowing for attendance by telephone conference call at the complaint hearing. The e-mail also states a Demand for Employer Records was being issued. It invites Mr. Young to contact the Director if he has any questions or concerns.
17. ALT was not in attendance on the date and at the time set for commencement of the complaint hearing. The Determination outlines an unsuccessful effort to communicate with Mr. Young by telephone at that time, during which a voicemail message was left providing information for dialing into the telephone conference and giving Mr. Young a thirty-minute period to respond.
18. There was no response from Mr. Young or any other person representing ALT and the complaint hearing proceeded.
19. Mr. Powell gave evidence that was accepted by the Director.
20. The Director found Mr. Powell had been laid off for a period greater than 13 weeks in a 20 week period, was consequently deemed to be terminated and was entitled to length of service compensation in the amount shown in the Determination. The Director issued two administrative penalties, one for a contravention of section 63 of the *Act* and the other for failure to comply with a requirement of the *Regulation*.
21. The statutory time period for an appeal under the *Act* expired on September 6, 2016.

## ARGUMENT

22. ALT submits the Director failed to observe principles of natural justice in making the Determination. This allegation is based on the assertion by ALT that the Director failed to ensure it received the Notice of Hearing.
23. ALT says the Director was asked not to send correspondence by registered mail, but by regular mail, and did not comply with this request. ALT contends that, as a result, the package was never received and ALT was denied knowledge of the hearing date and of the opportunity to attend the hearing and present its case.
24. In respect of the request for an extension of the statutory time period for filing an appeal, ALT similarly argues it did not receive a copy of the Determination, although it concedes the Director advised it in an e-mail dated September 7, 2016 of the results of the complaint hearing and the monies owing as a consequence and, on September 19, 2016, delivered a further e-mail to ALT giving it notice the outstanding amount would be referred out for collection.

## ANALYSIS

25. The *Act* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *Act* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with 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.

26. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
- 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.
27. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
28. In this case, I find the delay to be unacceptable and the explanation for that delay to be totally incredulous.
29. On its own admission, ALT was aware on September 7, 2016, that a Determination had been issued against it and had received another communication on September 19, 2016, advising of possible debt collection, but apparently did not feel compelled to do anything until this appeal was filed on October 31, 2016.
30. Based on those facts, there is simply no reasonable explanation for ALT’s failure to file an appeal for almost eight weeks after the appeal period had expired and it strongly suggests ALT had not formulated any intention to appeal the Determination until, at least, it was advised of possible collection proceedings.
31. While not necessary for the purpose of reaching a conclusion on the request for an extension of the appeal period, for the sake of completeness I will comment on the *prima facie* strength of the case presented by ALT in this appeal. When considering this criterion in a request for an extension of the time period for filing an appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.
32. I find there is absolutely no merit to the appeal.
33. This appeal is grounded solely in the contention by ALT that it was unaware of the date and time set for the complaint hearing, that the fault for that lies with the Director and as a result of the Director’s failing, it was denied the opportunity to present its position on Mr. Powell’s complaint.
34. I categorically reject that contention.
35. The entire circumstance leading to the complaint hearing smacks of a conscious effort by Mr. Young to avoid having ALT face a hearing on the complaint. Even if ALT and Mr. Young were unaware of the presence of the registered mail packages (which I do not accept), Mr. Young does not deny receiving the May 31, 2016, e-mail containing notice of the complaint hearing date and log in instructions. Nor does Mr. Young deny the

telephone conversation with the Director on May 31, 2016, a record of which has been provided by the Director.

36. Even though receipt of the May 31 e-mail was not acknowledged, it is highly probable it was received by ALT and Mr. Young. I am reinforced in this conclusion by the presence of another e-mail included in the record that was sent by the Director to the same e-mail address on May 5, 2016, attaching 3 complaint and information forms from Mr. Powell. There is no doubt this e-mail and the attachments were received by ALT and Mr. Young, as a mediation of Mr. Powell's complaint was later attempted.
37. While it is not necessary for the purpose of disposing of this appeal, since I find ALT had actual knowledge of the hearing date and simply chose not to attend, section 122 of the *Act* deems documents sent by registered mail to a person's last known address to have been delivered 8 days after the registered mail has been deposited in a Canada Post Office.
38. The effect of that provision is that the registered mail sent to ALT was, for the purposes of the *Act*, considered to be delivered. By operation of statute, the Notice of Hearing and the Demand for Employer Records were delivered to ALT.
39. The consequence of finding ALT was aware of the complaint hearing and refused or failed to attend mitigates heavily against any attempt on the part of ALT and Mr. Young to re-visit the complaint under the principle established by the Tribunal in *Tri West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, that an employer cannot fail or refuse to participate in the complaint process and then seek to make the case on appeal that should have and could have been presented to the Director during the course of the complaint process.
40. That is exactly what this appeal seeks to do. Even in the absence of the unacceptable delay in filing the appeal, on an application of the above principle, the appeal would not be accepted or considered.
41. Based on the above, the request for an extension of the time limited for appeal is denied. The appeal on its face is devoid of merit. It has no reasonable prospect of succeeding. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (b) and (f) of the *Act*.

## ORDER

42. Pursuant to section 115 of the *Act*, I order the Determination dated July 27, 2016, be confirmed in the amount of \$2,145.79, together with any interest that has accrued under section 88 of the *Act*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**