

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Terry Driedger

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2024/026

DATE OF DECISION: May 15, 2024

DECISION

SUBMISSIONS

Terry Driedger on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“*ESA*”), Terry Driedger carrying on business as Blackthorn Timberframe and Blackthorn Contractors (“*Employer*”) filed an appeal of a determination issued by a delegate of the Director of Employment Standards (“*Director*”) on January 12, 2024 (“*Determination*”).
2. On August 8, 2022, Donald Wallis (“*Employee*”) filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay him wages.
3. A delegate of the Director (“*Investigating delegate*”) investigated the Employee’s complaint, and on August 15, 2023, issued an Investigation Report (“*Report*”). Although the Report was provided to the parties for a response, neither party made any additional comments. A second delegate (“*Adjudicating delegate*”) reviewed the information produced during the investigation and the Report before issuing the Determination.
4. The Adjudicating delegate determined that the Employer had contravened sections 17, 18, 34, 40, 45, 46, and 58 of the *ESA* in failing to pay the Employee wages, overtime, annual vacation pay, and statutory holiday pay in the total amount of \$12,235.75, including interest.
5. The Director also imposed seven \$500 administrative penalties for the contraventions of the *ESA* for a total amount owing of \$15,735.75.
6. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employer also says that evidence has become available that was not available at the time the Determination was being made.
7. The Employer’s appeal was filed on February 27, 2024, seven days after the statutory deadline for filing the appeal. The Employer also sought an extension of time in which to make submissions in support of the appeal.
8. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions and the record, I found it unnecessary to seek submissions from the Director or the Employee.
9. This decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made, the appeal submissions, and the Reasons for the Determination.

FACTS

10. The Employer, a sole proprietor, operates a timber frame construction business on Vancouver Island. The Adjudicating delegate determined that the Employee was employed from July 23, 2021, until July 22, 2022, when his employment was terminated.
11. The Adjudicating delegate noted the difficulty the Investigating delegate had in contacting and obtaining information from the Employer during the investigation.
12. At issue before the Adjudicating delegate was whether the Employee was an “employee” as defined in the *ESA*, and whether the Employee was entitled to regular wages, overtime wages, vacation pay, statutory holiday pay, and/or compensation for length of service, and if so, in what amount.
13. The Adjudicating delegate considered the definition of employee in the *ESA* and determined that, based on a consideration of the entire relationship between the parties, that the Employer exercised a level of control and direction over the Employee’s work, provided all the material he used to perform that work, and bore the risk of loss and opportunity to profit typical of an employer. The Adjudicating delegate also found that the Employee’s work was strongly connected to the purpose of the Employer’s business. The Adjudicating delegate concluded that the Employee was an employee for the purposes of the *ESA*.
14. The Adjudicating delegate noted that although the Employer did not provide any payroll records, the Employee provided “various forms of time records” supporting his assertion that he was employed from July 23, 2022, to July 22, 2023. The Adjudicating delegate further noted that when the Investigating delegate provided those records to the Employer, Mr. Driedger acknowledged that he had received them. The Adjudicating delegate determined that the hours recorded did not appear to be “purposely inflated,” and there was nothing in the record to undermine their reliability or validity. The Adjudicating delegate accepted the Employee’s records as the best evidence of his days and hours of work. The Adjudicating delegate also accepted the Employee’s undisputed evidence regarding his rate of pay based on the time records and bank statements showing deposits reflecting his wages. The Adjudicating delegate noted that the Employer paid the Employee irregularly and, on occasion, outside the time periods prescribed by the *ESA*.
15. The Adjudicating delegate further found that the Employee was never paid overtime wages, statutory holiday pay or vacation pay. The Adjudicating delegate calculated the Employee’s wage entitlements based on the Employee’s records.
16. The Adjudicating delegate determined that the Employee was not owed compensation for length of service based on section 65(1)(e) of the *ESA*, which exempts employers whose principal business is construction and who employ employees at one or more construction sites, from paying that compensation.

ANALYSIS

17. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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 that 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.

18. On the Tribunal's Appeal Form, the Employer indicates the appeal is being filed under all three grounds of appeal and seeks an additional 120 days to provide documents in support of the appeal because all his records were temporarily in storage while he was in the process of moving.
19. The Employer also indicated that none of the written reasons and argument supporting each ground of appeal were attached to the appeal form. Attached to the Employer's appeal form were a copy of a February 13, 2024 "Lease Modification Agreement" between the Employer and a Landlord as well as a one-page submission in which the Employer indicated that "more evidence has come to light." I infer that the Employer was unable to access the documentation necessary in support of his appeal because the documents were in a storage facility.
20. On March 11, 2024, the Tribunal's Registrar wrote to the parties acknowledging the Employer's appeal as well as his request for an extension of the appeal period. In that correspondence, the Registrar informed the parties that "the Panel assigned to appeal will also decide the Appellant's request for an extension." The Tribunal's Registrar outlined the documents the Tribunal had received to date as well as communications it had with the Employer.
21. On April 23, 2024, the Tribunal's Registrar wrote to the parties indicating that the Director had confirmed delivery of the section 112 record to them, and asked the parties to provide submissions, no later than May 7, 2024, on the completeness of that record. On May 8, 2024, having received no submissions from any parties, the appeal was assigned to me to decide.
22. The Tribunal exercises its statutory discretion to extend the appeal period only where there are compelling reasons to do so. The burden is on an appellant to show that such reasons exist. (see *Re Tang*, BC EST #D211/96)
23. The Tribunal considers the following criteria in determining whether to grant an extension of the appeal period:
1. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
 2. There was a genuine and ongoing bona fide intention to appeal the Determination;
 3. The respondent party as well as the Director was aware of this intention;
 4. The respondent party will not be unduly prejudiced by the granting of the extension;
 5. There is a strong prima facie case in favour of the appellant.

24. With respect to the first criterion, the Employer has not provided a reasonable explanation for his failure to request the appeal within the appeal period. The Employer has simply stated that he is unable to access the documents in the storage facility, without explaining why the absence of any documents prevented him from filing the appeal within the statutory time period.
25. With respect to the second criterion, there is no evidence in the record before me that the Employer intended to file the appeal prior to the expiry of the appeal period.
26. With respect to the third and fourth criteria, there is no evidence in the record before me that the Employee and the Director were aware of the Employer's intention of filing the appeal. I also note that a 120 day extension of the appeal period would be prejudicial to the Employee.
27. While the first four criteria are not determinative for me on whether or not the Employer should be granted an extension of the appeal period, the final criterion is.
28. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the determination on one of the statutory grounds. The Employer has not submitted any documents, which I infer constitute the "new evidence" nor made any submissions on any of the grounds of appeal.
29. In the absence of any evidence or argument that there is any error in the Determination, I am not persuaded that there is a reasonable prospect that the appeal will succeed. I decline to grant the Employer an extension of time to file the appeal.
30. I dismiss the appeal.

ORDER

31. Pursuant to section 115(1)(a) of the *ESA*, the Determination, dated January 12, 2024, is confirmed in the amount of \$15,735.75, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal