

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

CWF Global Services Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko
SUBMISSIONS: Dale Spaven, on behalf of CWF Global Services Ltd.
FILE NUMBER: 2024/045
DATE OF DECISION: August 15, 2024

DECISION

OVERVIEW

1. CWF Global Services Ltd. (“Appellant”) appeals a determination issued on November 14, 2023 (“Determination”), by a delegate (“Delegate”) of the Director of Employment Standards (“Director”).
2. The Determination held the Appellant had contravened the *Employment Standards Act (ESA)* and ordered the Appellant to pay Michael Logan (“Employee”) wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, and interest totaling \$65,407.21. The Determination also levied administrative penalties totaling \$1,000 for a total amount payable of \$66,407.21.
3. The Appellant appeals on the ground that new evidence has become available that was not available at the time the Determination was being made.

BACKGROUND

4. The Appellant is a British Columbia corporation that operates a welding and fabrication business in Ladysmith, B.C., which falls within the jurisdiction of the *ESA*.
5. The Employee worked as a welder with the Appellant from September 2016 to April 2022. The Employee stopped working for the Appellant on or about April 7, 2022, as the Appellant had not paid the Employee since October 10, 2021.
6. The Appellant and the Employee agreed the Employee was owed wages for the period October 10, 2021, to April 9, 2022. The Appellant and the Employee also agreed on the applicable rate of pay and the hours of work performed. However, the Appellant and the Employee were unable to agree on the exact amount of wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, and interest that was owed to the Employee.
7. The Employee subsequently filed a complaint under section 74 of the *ESA* alleging the Appellant had contravened the *ESA* by failing to pay the Employee wages and compensation for length of service.
8. A delegate of the Director (“Investigative Delegate”) followed up with the parties and requested evidence and submissions from each side about their respective positions. The Investigative Delegate communicated with the parties and their representatives and received statements and evidence on the issues raised in the complaint.
9. The Investigative Delegate prepared a report for the Appellant and the Employee dated September 29, 2023, summarizing the information provided by the Employee and the Appellant’s representative including a list of relevant records and documents (“Investigation Report”).
10. The Appellant and the Employee were requested to review the Investigation Report carefully and provide further information and clarification.

11. The Investigation Report and evidence from the parties were submitted to the Delegate for a determination.
12. The Delegate issued the Determination dated November 14, 2023.
13. The Determination considered the evidence and the law and held the Appellant owed the Employee wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, and interest totaling \$65,407.21. The Determination also levied administrative penalties totaling \$1,000 for a total amount payable of \$66,407.21.
14. The Appellant appealed the Determination.
15. The Appellant's representative submits the appeal documentation was submitted in error to the wrong email address.
16. The Appellant's representative submits they did not realize the error until later when they became concerned that the appeal "was taking a long time."
17. The Appellant requests the Tribunal extend the time to appeal the Determination.

ARGUMENTS

18. The Appellant submits on the Appeal Form that there is new evidence that has become available since the time the Determination was being made.
19. The Appellant sets out submissions and evidence in support of the Appellant's appeal.
20. The Appellant submits there are errors in the amounts owing to the Employee. The Appellant submits the Determination erred in finding the Employee was entitled to receive compensation for length of service. The Appellant's representative submits on the appeal that the Employee was employed at one or more construction sites and was therefore not entitled to compensation for length of service pursuant to section 65(1) of the *ESA*. The Appellant's representative submits the Employer "has always had multiple job sites" and "is a contractor with many sites who should not pay severance." The Appellant submits the Determination was in error in the calculation of interest owing. The Appellant submits interest should be calculated on the "outstanding net amounts and not the gross."
21. The Appellant's representative submits the administrative penalty should be removed as the Employee knowingly took contracts from competitors.
22. In sum, the Appellant submits the calculation of wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, accrued interest, and administrative penalties is incorrect and the Determination should be reduced or set aside.

ANALYSIS

23. These reasons are based on the written submissions of the Appellant, the Determination, and the section 112(5) record ("Record").

24. On receiving the Appellant's appeal, the Director provided the Tribunal, the Appellant, and the Employee with the Record for purposes of the appeal. The Tribunal requested submissions on the completeness of the Record from the parties. As the Tribunal did not receive any objections to the completeness of the Record from the parties, the Tribunal accepts the Record as complete.

Appeal of Determination

25. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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 being made.

26. An appeal is limited to the grounds set out in the *ESA* and an appellant has the onus to show that the appeal meets one or more of the specified grounds. An appeal is not another new hearing of the case, nor is it meant to be an opportunity to resubmit an appellant's facts and arguments and 'try again.'

Application to Extend Time

27. As set out above, the Appellant's representative submits the appeal documentation was submitted in error to the wrong email address.
28. The Appellant's representative submits they did not realize the error until later when they became concerned that the appeal "was taking a long time."
29. The Appellant requests the Tribunal extend the time to appeal the Determination.
30. The *ESA* establishes a limit on the time period to appeal a determination. The relevant time periods are set out in section 112(3) of the *ESA*.
31. The Tribunal's authority to extend the time period for an appeal is set out in section 109(1)(b) of the *ESA*. Decisions of the Tribunal make it clear extensions are not granted as a matter of course, but should only be granted for compelling reasons. The burden is on an appellant to demonstrate that the appeal period should be extended.
32. In determining whether to extend the appeal period, the Tribunal will consider the following main factors:
- a. whether there is a reasonable or credible explanation for the failure to file the completed appeal on time;
 - b. whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;
 - c. whether the respondent party and the Director have been made aware of the intention to appeal;

- d. whether the respondent party will be unduly prejudiced by granting the extension; and,
- e. whether there is a strong *prima facie* case in favour of the appellant.

(see *Niemisto*, BCEST # D099/96)

33. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal considers and weighs all the relevant factors and evidence together in the circumstances (see *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge)*, BC EST # D010/08, reconsideration dismissed BC EST # RD053/08).
34. In this case, the evidence submitted by the Appellant's representative is that the appeal was mistakenly sent to the wrong email address. The Appellant further submits the error was not discovered until months later when the Appellant's representative became concerned that the appeal "was taking a long time." The Appellant also submitted supporting evidence showing the incorrect email address.
35. I have reviewed the Record and considered the Appellant's submissions carefully. I find the Appellant's explanation for not meeting the time requirements is credible. I have considered whether the Appellant should have noticed the error - especially whether there would have been a server notification that the email address was undeliverable - but I find the Appellant's explanation credible. I find the Appellant had a reasonable and credible explanation for failing to file the completed appeal and that there was a genuine and ongoing intent to appeal the Determination. I note there are decisions of the Tribunal that have held that sending the appeal to the wrong address is but one factor to consider in determining whether to extend the time limit (see: *Yang*, 2020 BCEST 39 (extension denied); *Richard Mann*, 2019 BCEST 133 (extension denied where appeal sent to wrong address); *GC's Door Express 2007 Ltd.*, 2018 BCEST 21 (extension denied where appeal sent to wrong address but no *prima facie* case)).
36. There is nothing in the materials that indicates the Director or the Employee were made aware of the intent to appeal. On the issue of prejudice to the Respondent party, in this case the Employee, I find there is prejudice in further delay. The payment of wages is considered fundamental to the employment relationship and the withholding of wages has been said to go to the root of the employment contract and is contrary to section 21 of the *ESA* (see *Anodyne Computers 97 Ltd.*, BC EST # D389/98, upheld on reconsideration BC EST # D545/98; *Alpha Neon Ltd.*, BC EST # D105/11, upheld on reconsideration BC EST # RD032/12; *Health Employers Association of B.C. v B.C. Nurses Union*, 2005 BCCA 343). The failure to pay wages and an employer's deteriorating finances has been found to be prejudicial and detrimental to an employee (see *Maria Klippenstein*, BC EST # D144/05).
37. However, even if I were to give the benefit of doubt to the Appellant and find the previous factors weighed in favour of granting the extension, the evidence is clear that the Appellant does not have a strong *prima facie* case to appeal the Determination. The absence of a strong *prima facie* case has been held to be an important factor as it is considered contrary to the purposes of the *ESA* towards efficient and timely resolution to prolong appeal cases with little merit (see *0388025 BC Ltd. (cob Edgewater Inn)*, BC EST # D019/12; *U.C. Glass*, BC EST # D107/08, *GC's Door Express 2007 Ltd.*, *supra*).

38. As set out above, the Appellant's argument in the appeal focuses on disagreement with the findings of fact and law made by the Delegate in the Determination. Although the Appellant submits there is new evidence that was not available, the Appellant's submissions in this appeal appear to be more of an attempt to re-argue the case that was already decided by the Delegate in the Determination. Further, the Appellant does not appear to provide any additional information that was not available at the time of the investigation and the issuance of the Determination, which is a requirement for new evidence.
39. The Appellant's argument in this appeal appears more an argument about the findings of fact made in the Determination and an attempt to re-argue those findings of fact. The appeal jurisdiction of this Tribunal is circumscribed by the *ESA*, and it is not supposed to be a 're-trial' to rehear arguments and make new findings of fact. I find that the Appellant does not have a strong *prima facie* case for this appeal.
40. I find, in all of the circumstances, the Appellant has not met the burden to show that the statutory appeal period should be extended, and the appeal should be dismissed.

Merits of the appeal

41. Even if I had not dismissed the appeal on the basis of untimeliness, I would have dismissed the appeal on the merits.

New Evidence

42. On the Appeal Form the Appellant alleges that new evidence has become available since the time the Determination was being made.
43. The test that must be met to introduce new evidence on an appeal is clearly established. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03, the Tribunal set out the following requirements for introducing new evidence on appeal:
- (a) the evidence could not reasonably have been discovered and presented to the Director during the investigation or adjudication of the complaint;
 - (b) the evidence must be relevant to a material issue 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 make a difference and lead to a different conclusion in the Determination;

44. Each of the above requirements need to be met by an appellant seeking to submit new evidence. Previous decisions of the Tribunal make it clear that parties are expected to participate in good faith and present all relevant evidence during the initial investigation and determination stage of the complaint. The introduction of new evidence at the appeal stage, that could and should have been introduced previously at the investigation and determination, will generally result in the dismissal of the appeal.

45. The Appellant submits findings of fact made in the Determination are incorrect and should be amended in accordance with the Appellant's appeal submission. The Appellant essentially submits evidence that existed at the time of the investigation and determination of the complaint. I note the Appellant does not submit that the alleged new evidence could not have been discovered or presented during the investigation or determination stage of the complaint.
46. The evidence and arguments submitted by the Appellant do not meet the requirements for new evidence. The Appellant has not shown the alleged new evidence could not reasonably have been found and presented during the investigation and determination stage. Indeed, the Appellant is essentially resubmitting arguments and facts previously made to the Delegate. There is no indication the Appellant could not take part in the investigation nor was prevented or limited in discovering or presenting evidence. The Record in fact shows the Appellant's representative was involved and took part in the investigation.
47. The law is clear that an appellant must meet all the necessary requirements for new evidence. The failure to do so will generally result in dismissal of the appeal (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, *supra*; *Can-Pacific Trading Inc.*, BC EST #D 082/11; *Anthony McInnis* 2020 BCEST 9). It is important for the fair and efficient resolution of complaints under the *ESA* that parties participate fully in good faith during the investigation and adjudication of complaints. It would be contrary to the efficient and fair resolution of complaints under the *ESA* for a party to hold out during the investigation and determination stage and then subsequently continue to present information and evidence on appeal that could and should have been presented earlier (see *Kaiser Stables Ltd.*, 1997 Canlii 25445 (BCEST); *Dunning and Bourque*, 1997 Canlii 25835 (BCEST) limited participation).
48. The Appellant in this case essentially resubmits arguments made during the initial investigation and determination stage and does not submit cogent evidence nor explanation how the evidence could not reasonably have been discovered or presented earlier during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.
49. I would find there is no merit in this ground of appeal, and it is dismissed.

Other grounds

50. It is established law that the Tribunal may take a broad view of an appeal (see *Triple S Transmission Inc, dba Superior Transmissions*, BC EST # D141/03).
51. Even though I have found the Appellant has not demonstrated that there was new evidence, I will also consider the Appellant's submissions on other grounds in the alternative.
52. While not specifically noted on the Appeal Form, the Appellant's submission appears to allege that the Director erred in law in finding the amount of wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, accrued interest, and administrative penalties totaling \$66,407.21 were owed.
53. To show an error of law, the Appellant has the burden to show a material legal error in the decision. Examples of errors of law may include the following: i) a misinterpretation of misapplication of a

section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion inconsistent with established principle (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466).

54. A disagreement with a finding of fact does not amount to an error of law. In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence. The assessment and weighing of evidence is considered a question of fact properly within the purview of the Delegate (see *Britco Structures Ltd.*, BC EST # D260/03; *M.S.I. Delivery Services Ltd.*, BC EST # D051/06, upheld on reconsideration BC EST # RD082/06; *Noor Investments Ltd. (Re)*, 2021 BCEST 50 - calculation of wages owing finding of fact).
55. I have reviewed the Determination and the evidence in the Record and do not find an error of law in the Determination. I have considered the calculation of the amount owing to the Employee for wages, overtime, statutory holiday pay, annual vacation pay, compensation for length of service, accrued interest, and administrative penalties totalling \$66,407.21. I find there is no error of law in the calculation and confirm the amounts. While the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the calculations and conclusions in the Determination. I further note the Appellant and the Employee were in agreement that the Employee was owed wages for the period October 10, 2021, to April 9, 2022, and there was also agreement on the rate of pay and the hours of work performed. As noted in the Determination, the Delegate considered the evidence and made a reasoned decision based on the evidence and the law. It is clearly established in Tribunal decisions that this Tribunal will not re-hear the case, nor will it re-evaluate and re-weigh the evidence and substitute its own view of the same evidence.
56. I have reviewed the finding that the Employee was entitled to compensation for length of service and find that it was reasonable on the facts and the law. The Delegate considered the parties' evidence and submissions on the application of section 63 and the resignation of the Appellant and concluded the exemption set out in section 65(1)(e) of the *ESA* would not apply. The Record shows evidence that the Delegate could rely on to find that the Employee met the statutory requirement for length of service compensation (see: *Heron*, BC EST # D087/08; *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05; *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05, upheld on reconsideration BC EST # RD188/05).
57. I also note the administrative penalties found owing by the Appellant are mandatory in the circumstances (see *537370 B.C. Ltd. (Ponderosa Motor Inn)*, BC EST # D011/06).
58. I find the conclusions in the Determination were supported by evidence and the law and it is not open to this Tribunal to retry the evidence and arguments.
59. In summary, I find the Appellant is, for the most part, rearguing its view of the facts and evidence that have already been properly considered and decided by the Delegate in the Determination. Absent an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate.
60. I find there is no error of law and would dismiss this ground of appeal.

Summary dismissal

61. Section 114(1)(b) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if the appeal was not filed within the applicable time limit.
62. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed.
63. I find the appeal was not filed within the applicable time limit and I also find the Appellant's application to extend the time limit must be dismissed.
64. As set out above, I have also considered the Appellant's grounds of appeal and I also find there is no reasonable prospect the appeal would succeed and dismiss the appeal.

ORDER

65. Pursuant to sections 114(1)(b) and 114(1)(f) of the *ESA*, the appeal is dismissed.
66. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal