

An appeal

- by -

PNY Enterprises Inc. carrying on business as Shell Canada
(the “Company”)

- 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)

PANEL: Allison Tremblay

FILE No.: 2018A/87

DATE OF DECISION: November 7, 2018

DECISION

SUBMISSIONS

Ranjeet Gosal

on behalf of PNY Enterprises Inc. carrying on business as Shell Canada

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), PNY Enterprises Inc. carrying on business as Shell Canada (the “Company”) filed an appeal of a Determination (the “Determination”) issued by Michael Thompson, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on July 6, 2018. In the Determination, the Delegate found that the Company contravened sections 27 (wage statements), 40 (overtime), and 63 (compensation for length of service) of the ESA with respect to its employee Gurinder Benipal (“Mr. Benipal”) and ordered it to pay \$14,440.07 in wages and interest and \$1,500 in administrative penalties under section 29 of the *Employment Standards Regulation* (the “Regulation”).
2. The Company seeks to vary the Determination, alleging that the Delegate erred in law.
3. The Company filed its complete appeal after the expiration of the time limit to appeal and so also applies for an extension of the statutory appeal period pursuant to section 109(1)(b) of the ESA:
 - 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 or applying for reconsideration even though the period has expired;
4. The section 112(5) record (the “Record”) was provided to the Tribunal by the Director and a copy was delivered to the Company and Mr. Benipal. The Tribunal received no submissions as to the completeness of the Record and so accepts the Record as complete.
5. I find that the issues raised in this appeal may be addressed without seeking submissions from the parties.

ISSUE

6. Has the Company established grounds for an extension of the statutory time period for requesting an appeal?

ARGUMENT

7. Ranjeet Gosal (“Ms. Gosal”) is a Director of the Company and provided submissions on its behalf. Ms. Gosal operates several locations as a franchisee. She advised that during the appeal period, the

Company went through a significant transition with the franchisor involving closing existing locations in the Kamloops, B.C. area and opening new locations in the Abbotsford, B.C. area. Ms. Gosal says that this entailed a lot of work and so was unable to locate the necessary supporting information or complete the written argument in support of the appeal. Ms. Gosal enclosed documents confirming the business transactions. Ms. Gosal sought an extension to September 21, 2018, to provide all the information necessary for the appeal.

8. Ms. Gosal provided the Company's reasons for the appeal to the Tribunal on September 21, 2018. The Company sets out three concerns with the Determination:
- (1) that the Delegate erroneously concluded that Mr. Benipal was an employee rather than a manager within the meaning of the *Regulation*, sections 1(1) and 34(f);
 - (2) that the Delegate made a factual finding not available to him on the available evidence in calculating the wages the Company owed to Mr. Benipal; and
 - (3) that the Delegate incorrectly concluded that Mr. Benipal was terminated without just cause and so entitled to compensation for length of service.

THE FACTS AND ANALYSIS

9. The statutory deadline to appeal ended on August 13, 2018. The Tribunal received the request for an extension on August 10, 2018. In the request, the Company's representative sought an extension to September 21, 2018, more than doubling the section 112(3) appeal period for a determination served by registered mail.
10. The Tribunal has established criteria for requests to extend the statutory appeal period in *Re Niemisto*, BC EST # D099/96:
- 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
 - iv) there is a strong *prima facie* case in favour of the appellant.

The above criteria are not intended to constitute an exhaustive list.

11. I am satisfied that the Company had a genuine and ongoing *bona fide* intention to appeal as demonstrated by the Company's request for an extension that was filed within the appeal period. The parties received notice of that intention from the Tribunal.

12. I am further satisfied that the respondent employee will not be unduly prejudiced by the granting of an extension. The Company has not sought suspension of the Determination and a delay of a few weeks

would not make a difference to Mr. Benipal's ability to respond to the appeal in the circumstances of this case.

Explanation of the need for the extension

13. The Company's representative says that she was unable to perfect the appeal because of competing business demands. In essence, this is an argument that the Company was too busy to file an appeal.
14. As the Tribunal stated in *Re Peace River Building Products*, BC EST # RD268/01, a decision to prioritize other matters is not a ground for extension of the *ESA's* time limits. Parties are statutorily obligated to attend to appeals in a timely manner, even if doing so is onerous or difficult.
15. I find that the Company has failed to provide a reasonable and credible explanation of its failure to perfect the appeal within the time limit mandated by the *ESA*.

Strong prima facie case

16. To be successful on this application, the Company must further demonstrate that it has a strong likelihood of success in the appeal. I conclude that the Company has failed to establish a strong *prima facie* case.
17. With respect to the Company's argument that Mr. Benipal was a manager, the Company says that Mr. Benipal's job title was Manager, that his wage rate was consistent with him having a managerial role, and that he made various changes to staffing levels without approval of others, arranging for other employees to cover his shifts, and asking another employee to perform certain duties in his absence.
18. As articulated in *Re J.P. Metal Masters 2000 Inc.*, BC EST # RD137/05, the fact that a person holds a managerial title is not sufficient to establish that a person is a manager as defined by the *Regulation*. It is the person's managerial authority, that is, the ability to exercise independently the power to hire, fire, direct, evaluate, and discipline employees that is relevant.
19. In this case, the Delegate considered the correct legal test and concluded, based on the evidence presented to him, that Mr. Benipal was not a manager. While Mr. Benipal did exercise some managerial functions beginning in September including scheduling and coaching, he did not perform other managerial duties such as hiring and firing. Further, the Company's only witness at the hearing, Ms. Gosal, conceded that Mr. Benipal likely was not a manager as defined by the *Regulation*.
20. The Company next argues that the Delegate erred in relying on Mr. Benipal's evidence of his hours worked rather than the Company's records. With respect to this issue, the Delegate noted discrepancies in the Company's evidence and determined that some of the Company's evidence appeared to have been altered prior to the hearing. This is a factual finding that was open to the Delegate. The Delegate was entitled to prefer the evidence provided by Mr. Benipal.
21. Finally, the Company argues that it did not terminate Mr. Benipal but rather that Mr. Benipal quit on November 11, 2017. The Company says that on November 8, 2017, it called Mr. Benipal in for a disciplinary meeting and that Mr. Benipal did not attend the meeting but instead sent the Company a

demand for unpaid wages. On this point, the Delegate found that the Company unilaterally altered the terms of Mr. Benipal's employment when it removed him from the schedule on November 8, 2017, and this constituted termination on November 8, 2017, pursuant to section 66 of the *ESA*. This was supported by evidence that a new employee was performing Mr. Benipal's duties on November 8, 2017. The Delegate also held that the Company may have had reason to discipline Mr. Benipal but did not have just cause to terminate his employment. This conclusion is not disputed by the Company.

22. The Company points to some new evidence with respect to Mr. Benipal's intentions to travel to India to get married as part of the reason it needed to meet with Mr. Benipal before putting him back on the schedule. This was not new evidence that was unavailable at the time of the hearing. An appeal is not a venue for parties to present evidence that was available at the time of the hearing but was not presented. Parties are expected to make their best case before the Delegate.
23. The Delegate's reasons reference the correct law and are based on reasonable assessments of the best available evidence presented at the hearing. I find that the arguments the Company presents do not disclose a strong *prima facie* case for appeal.

Conclusion re extension of time limits

24. In absence of a reasonable explanation of a need for the extension and absence of a strong *prima facie* case, I decline to extend the time limits under section 109(1)(b) of the *ESA*.

ORDER

25. The application to extend time limits to appeal is denied. Pursuant to section 115 of the *ESA*, I order the Determination, dated July 6, 2018, be confirmed in the amount of \$15,940.07, together with any interest that has accrued under section 88 of the *ESA*.

Allison Tremblay
Member
Employment Standards Tribunal