



An appeal

- by -

Xiaomin Zhang a.k.a. Demi Zhang
(the “appellant”)

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2018A/29, 2018A/33, and 2018A/34

DATE OF DECISION: August 15, 2018

DECISION

SUBMISSIONS

Xiaomin Zhang on her own behalf

INTRODUCTION

1. On March 16, 2018, Xiaomin Zhang, a.k.a. Demi Zhang (the “appellant”), filed an appeal under subsections 112(1)(a) and (b) of the *Employment Standards Act* (the “ESA”). This appeal concerns three separate, but related, determinations issued against the appellant under subsection 96(1) of the *ESA*: “A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.”
2. In each case, the determinations were issued against the appellant on the basis that she was a director of Hot Street Productions Ltd. (“Hot Street”) when the wages of certain Hot Street employees were earned or should have been paid. The particulars of each determination are set out in the following table:

EST File No.	Date of Determination	No. of employees	Total Amount of Determination	Deadline for filing appeal	Date Appeal Filed
2018A/29	December 12, 2016	3	\$1,862.27	January 19, 2017	March 16, 2018
2018A/33	November 23, 2016	77	\$118,114.59	January 3, 2017	March 16, 2018
2018A/34	December 30, 2016	16	\$51,651.07	February 6, 2017	March 16, 2018

3. The various deadlines for filing an appeal of the determinations, calculated in accordance with section 122 of the *ESA*, were each set out in a text box headed “Appeal Information” found at the bottom of the second page of the determinations. In each case, the appeal was filed long after the applicable appeal period expired. Accordingly, the appellant now seeks to have the appeal periods extended under subsection 109(1)(b) of the *ESA*: “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. In my view, this application to extend the appeal periods is not meritorious and, as such, I am refusing to extend any of the three appeal periods. The determinations must be confirmed as issued. My reasons for reaching that conclusion now follow.

BACKGROUND FACTS

5. During the fall and early winter of 2016, the Director of Employment Standards issued three determinations against Hot Street relating to the same unpaid wages that are now before me in the three section 96 determinations issued against the appellant (the “Corporate Determinations”). The Corporate Determinations were issued in October, November, and December 2016 and were never appealed. Thus, the Corporate Determinations now stand as final orders.
6. The Director of Employment Standards also issued three section 96 determinations, relating to the same unpaid wage claims, against Christopher Brough on the basis that he was a Hot Street director when the employees’ unpaid wages were earned or should have been paid.
7. The section 96 determinations issued against Mr. Brough are essentially identical – and were issued concurrently with – the section 96 determinations that the appellant now wishes to appeal. Mr. Brough appealed all three section 96 determinations issued against him and, in each case, the section 96 determination was confirmed (see *Brough*, BC EST # D039/17, *Brough*, BC EST # D040/17 and *Brough*, BC EST # D041/17, all issued on April 18, 2017).
8. The record before me includes a B.C. Registry Services search that indicates both Mr. Brough and the appellant were recorded as Hot Street directors during the time period when the various Hot Street employees’ unpaid wage claims crystallized. In the appellant’s case, she was a director during the period from December 15, 2015, until she resigned on July 4, 2016 – a Notice of Change of Directors was filed in regard to the appellant on August 25, 2016.
9. The Director of Employment Standards took steps to enforce the employees’ unpaid wage entitlements (see *ESA*, section 91 and 92) against the two Hot Street directors. In the spring of 2017, the Director of Employment Standards filed writs of seizure and sale against the appellant in the New Westminster Registry of the B.C. Supreme Court relating to the employees’ unpaid wages as particularized in the section 96 determinations now before me.
10. It is my understanding that all of the employees’ unpaid wages have now been paid in full. By letter dated December 7, 2017, the Director of Employment Standards advised the appellant’s legal counsel that “the wages outstanding in the Employment Standards file regarding Hot Street Production Ltd. have been paid in full” and accordingly “we will be filing a Notice of Discontinuance in court regarding the Determination[s] against Ms. Zhang [and] this discontinuance will release her of the obligation for wages identified in the Determination[s]”.
11. Of course, whether the employees’ unpaid wages have now been fully collected is a separate matter from the legal correctness of the section 96 determinations now being appealed. As noted, these appeals are late – very late – and thus the appellant requires an extension of the appeal periods before the Tribunal can adjudicate these appeals on their merits.

THE APPLICATION TO EXTEND THE APPEAL PERIODS

12. The appellant says that the determinations should be cancelled because the delegate erred in law and failed to observe the principles of natural justice (subsections 112(1)(a) and (b) of the *ESA*). There is

nothing in the material before me to suggest, even on a *prima facie* basis, that the Director of Employment Standards erred in law or otherwise breached the principles of natural justice in issuing the section 96 determinations against the appellant.

13. In her appeal documents, the appellant claims that she was “simply a hired director of the production” – I understand that Hot Street was a film production company that was the production vehicle for a 2017-released movie shot in Vancouver called “Hot Street”. The appellant was the film’s director and Mr. Brough was the producer.
14. The appellant says that she was never a Hot Street *shareholder* (although this is not relevant to her liability as a corporate *director*) and claimed she is owed wages in the amount of \$300,000. The appellant was seemingly first contacted by the Employment Standards Branch regarding the unpaid wage claims in August 2016 at which time she advised that Mr. Brough “was the person who had a contract with Hot Street” and that he was “responsible for all costs of the film surpassing the original budget (\$1 million CAD), including staff wages and production costs”.
15. The appellant further states:

It was only until September of 2017 my lawyer had contacted me informing me that my name was on the court website and that a determination had been made against me. It had stated that I must pay the wages owing to the cast and crew of the production, and failure to do so would have my private assets processed against my will. [*sic*]
16. The appellant maintains that Mr. Brough should be held fully and solely responsible for the employees’ unpaid wages and that the Employment Standards Branch did not conduct a “proper investigation”. She says that if the section 96 determinations issued against her are not cancelled she will “pursue a lawsuit compensating for my mental and financial losses, along with the damage to my reputation” and that she “will disclose everything that has happened to the public in regards to ESDC’s [*sic*] illegal and racist suspected actions”. With respect to these latter assertions, I am unable to conclude that the Director of Employment Standards proceeded “illegally”, and the allegation that one or more persons in the Employment Standards Branch was motivated by racism is, in my judgment, a wholly specious and improper assertion.

FINDINGS AND ANALYSIS

17. In *Niemisto*, BC EST # D099/96, the Tribunal set out a non-exhaustive list of the factors that should be taken into account when considering an application to extend an appeal period. The relevant factors include:
 - Whether there is a reasonable and credible explanation for the applicant’s failure to file a timely appeal;
 - Has the applicant had a genuine and on-going *bona fide* intention to appeal the determination and was this intention communicated to the Director of Employment Standards and the respondent parties?;
 - Would any party be prejudiced if the appeal period were to be extended?; and
 - Is the appeal presumptively meritorious?

18. *By her own admission*, the appellant was aware of the determinations issued against her in September 2017, but the appeal was not filed until March 16, 2018. The appellant apparently had legal representation in September 2017 and I find it difficult to accept that her counsel would not have advised her about her appeal rights and the need to promptly seek an extension of the appeal periods.
19. The appellant says that since September 2017 “I had been constantly trying to file an appeal” but maintains that she was frustrated in that endeavour by the actions of the Employment Standards Branch. I find this assertion to be extremely disingenuous. The determinations clearly set out, in a text box headed “Appeal Information”, not only the date when an appeal must be filed, but also information concerning how an appeal may be filed as well as contact information for the Tribunal. The appellant says that she does not speak “fluent English” and while that may or may not be true – presumably she drafted her reasons for appeal and they are certainly drafted in comprehensible, if not perfect, English – she did have legal representation who could have assisted her.
20. Although the appellant’s Appeal Form is dated November 28, 2017, it was not filed with the Tribunal until March 16, 2018 – about 3 ½ months later. The appellant has not attempted to explain the discrepancy between the date of the Appeal Form and the date of filing. Either the Appeal Form was improperly backdated, or she completed her Appeal Form and waited several months before finally filing her appeal.
21. I understand that the appellant corresponded with the Tribunal in December 2017 and January 2018 – almost one year after the applicable appeal periods expired – and at that time the Tribunal provided the appellant with information concerning how an appeal may be filed. However, as previously noted, the appellant did not file her appeal until March 16, 2018. On April 10, 2018, the Appellant advised the Tribunal that she did not wish the Tribunal to consider her January 2018 correspondence as forming a part of her appeal materials. Accordingly, I have not considered the January 2018 correspondence in adjudicating this application.
22. The appellant was recorded in the B.C. Corporate Registry as a Hot Street director as and from December 15, 2015 (the incorporation date) and she did not resign her directorship until July 4, 2016 (with a Notice of Change of Directors being filed on August 25, 2016). Thus, she was a director during the time period when the employees’ unpaid wage claims crystallized. The appellant has not raised any of the subsection 96(2) defences, and even if she had done so, there is nothing in the material before me to suggest that any these defences might apply to her situation.
23. There would not appear to be any prejudice to the employees if the appeal periods were extended (since their unpaid wages have now been paid in full). However, given that the appellant has abjectly failed to adequately explain why her appeal was not filed in a timely manner – or, at the very least, not filed in September 2017 when she first learned about the determinations – and that the appeal appears to be entirely without merit, I am not prepared to extend the appeal periods.

ORDER

24. The appellant's application to extend the appeal periods relating to the three section 96 determinations, set out in para. 2 of these reasons, is refused. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, the latter determinations are confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal