



An appeal

- by -

Soane Puamau
(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: James F. Maxwell

FILE NO.: 2018A/79

DATE OF DECISION: August 27, 2018

DECISION

SUBMISSIONS

Soane Puamau on his own behalf

OVERVIEW

1. On October 20, 2017, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) pursuant to section 79 of the *Employment Standards Act* (the “ESA”) in which Soane Puamau (the “Appellant”) was ordered to pay Melaia Tubuna (the “Complainant”) the aggregate sum of \$32,188.60, representing unpaid regular and overtime wages, statutory holiday pay, vacation pay, compensation for length of service, unauthorized deductions, and accrued interest. The Appellant was also ordered to pay \$2,500.00 in administrative penalties.
2. On July 9, 2018, the Appellant filed an appeal of the Determination. On July 17, 19, and 30, the Appellant tendered further submissions in support of his appeal.
3. The deadline for the filing of an appeal of the Determination was November 27, 2017. In light of the fact that the appeal was filed late, the Appellant also seeks an extension of time under section 109(1)(b) of the *ESA*.
4. In his appeal, the Appellant requests that the Tribunal cancel the Determination, pursuant to section 112(1)(c) of the *ESA*, on the basis that evidence has become available that was not available at the time the Determination was being made.
5. Having reviewed the Determination, the Appellant’s submissions filed with the appeal, and the record of proceedings received from the Director’s delegate on July 20, 2018, I conclude that this appeal must be dismissed pursuant to section 114(1)(b) of the *ESA*.

ISSUE

6. Is the Appellant entitled to an extension to the time for filing an appeal of the Determination?

FACTS

7. The Complainant filed her complaint (the “Complaint”) against the Appellant on July 24, 2017, within the time period contemplated by the *ESA* for doing so. In the materials accompanying her Complaint, the Complainant alleged that she performed work for the Appellant and his wife during the period from August 2016 to February 2017. The Complainant alleged that the Appellant had failed to pay her regular wages, overtime, statutory holiday pay, vacation pay, and compensation for length of service, and made improper deductions from amounts owing to her.
8. The Director attempted, unsuccessfully, to contact the Appellant by telephone to investigate the Complaint. The Director then scheduled a Hearing of the Complaint for October 12, 2017, and

attempted to deliver to the Appellant a Notice of Complaint Hearing and Demand for Employer Records by registered mail. When the Director determined that the Notice of Complaint Hearing and Demand for Employer Records had not been collected from the Post Office by the Appellant, the Director sent these materials again, this time by regular mail.

9. The Director proceeded with the Hearing on October 12, despite the absence of the Appellant. The Complainant provided evidence, orally and by deposition, at the Hearing.
10. Based upon the evidence provided at the Hearing, the Director concluded that the Complainant had performed work for the Appellant, and that the Appellant had been the Complainant's employer. The Director issued a Determination, dated October 20, 2017, in which the Director found that the Appellant owed the sum of \$32,188.60 to the Complainant. The Director further imposed administrative penalties of \$2,500.00.
11. The Director served the Determination on the Appellant by registered mail, on October 20, 2017.
12. The deadline for filing an appeal of the Determination was November 27, 2017.
13. On May 23, 2018, the Appellant allegedly sent a letter to the Director, stating that the Appellant had never employed the Complainant, and requesting a new hearing.
14. On July 9, 2018, the Appellant filed an Appeal with the Tribunal. On July 17, 19, and 30, the Appellant tendered additional materials in support of his Appeal. In his appeal materials, the Appellant requested an extension to the deadline for filing the Appeal, pursuant to section 109(1)(b) of the *ESA*.

ANALYSIS

15. The Legislature has established a limitation on the time period for appealing a Determination issued pursuant to section 79 of the *ESA*. The relevant time periods are set out in section 112(3) of the *ESA*. A person served with a Determination has 30 days from the date of service of a Determination in which to file an appeal if, as in this case, the Determination was served by registered mail. In the case of service by registered mail, section 122 of the *ESA* provides that service is deemed effective 8 days after the Determination was deposited in a Canada Post Office.
16. In the present case, the Director sent the Determination by registered mail on October 20, 2017. Service was deemed effective, pursuant to the *ESA*, on October 28, 2017. The deadline for filing the appeal was November 27, 2017.
17. In *Re: Niemisto* (BC EST # D099/96), the Tribunal identified a non-exhaustive list of criteria that should be considered when an applicant seeks an extension to the deadline for filing an appeal. The Tribunal can consider other criteria than those listed, and the criteria need not all be satisfied for an extension to be granted. The criteria identified in *Re: Niemisto* include that:
 - 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.

18. The Appellant contends in his appeal materials that he was in Fiji in October 2017, and was not aware that a hearing was being conducted by the Director. The Appellant further contends that his illness, surgery, and recovery in early 2018 prevented him from filing his appeal.
19. The Appellant's materials appear to confirm that, indeed, the Appellant was in Fiji from August 5, 2017, to January 16, 2018. The Appellant's materials appear to corroborate that the Appellant was hospitalized from February 8, 2018, to March 5, 2018.
20. Because the Appellant was out of the country at the time that the Director sent the original Notice of Hearing by registered mail, it is possible that the Appellant knew nothing of the proceedings. Neither the Appellant nor anyone on his behalf picked up the registered mail package from the Post Office. However, the Director also forwarded these materials to the Appellant by regular mail.
21. Following the Hearing, the Director attempted to deliver the Determination by registered mail. This package was apparently not picked up by the Appellant or anyone acting on his behalf.
22. The Appellant has provided no evidence as to the date that he became aware of the Complaint and the Determination.
23. It is conceivable that, following his return to Canada in January 2018, the Appellant still did not become aware of the Complaint or the subsequent proceedings. Certainly it is the case that the Appellant took no steps to contact the Director or to file an appeal during the period between the Appellant's arrival in Canada and his hospitalization. The Appellant also took no steps in this regard in the weeks following his discharge from hospital.
24. On March 29, 2018, the Director served, by registered mail, a Demand Notice upon the Appellant's bank. While it is not clear when the Appellant became aware of this Demand Notice, it is clear that he had become aware of the Complaint, the Hearing, and the Determination by May 23, 2018, when he sent a letter to the Director requesting a new hearing. Thereafter, the Appellant did not take further action with respect to these matters until he filed the within appeal on July 9, 2018.
25. If I take a very generous view of the facts and accept that the Appellant was not aware of the Complaint, the Hearing, and the Determination until May 23, 2018, I must then assess whether the Appellant had a reasonable and credible explanation for failing to file his appeal until July 9, 2018; that between May 23 and July 9 he demonstrated a genuine and ongoing *bona fide* intention to appeal the Determination; and that he made the Director and the Complainant aware of that intention.
26. There is nothing before me that amounts to a reasonable and credible explanation for the further delay in filing the appeal after May 23, and no evidence that the Appellant demonstrated and communicated

an ongoing intention to appeal. I am unable to conclude that the Appellant has satisfied these criteria of the *Niemisto* test for an extension of the appeal period.

27. Another of the *Niemisto* criteria which may justify granting an extension to the period for filing an appeal is the question of whether the Appellant can demonstrate that there is a strong *prima facie* case in his favour. To show that he has a strong *prima facie* case the Appellant must establish that there is a strong likelihood that, on appeal, he will ultimately be successful.
28. Pursuant to section 112(1) of the *ESA*, an appellant 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.
29. The Tribunal will take a large and liberal view of the ground cited by the Appellant in the Appeal Form, and will consider whether the reason for the appeal falls within one of the permissible grounds.
30. In the present case, while the Appellant has indicated that the basis for his appeal is that new evidence has become available that was not available at the time of the Determination, the substance of the Appellant's position appears to be that the Director erred in concluding that the Complainant performed work for the Appellant.
31. The Complainant deposed and testified that, at the request of the Appellant and his wife, she became a caregiver for the Appellant's wife. The Director found that the work the Complainant performed satisfied the definition of "work" in the *ESA*, and that the Appellant satisfied the definition of "employer" in the *ESA*.
32. The Appellant's materials filed with his appeal contain inconsistent allegations with respect to the events which led to the Complainant providing care for the Appellant's wife. The Appellant contends, in his letter of May 23, 2018, that he suggested to the Complainant that her help with the care of his wife "would be greatly appreciated". In the material accompanying his July 9 Appeal submission, the Appellant does not deny that the Complainant provided care for his wife, but merely contends that there had been no agreement that the Complainant should be paid.
33. The Appellant's arguments do not displace the conclusion that the Complainant performed work for the Appellant and his wife. Based upon this, I cannot find that the Appellant meets the *Niemisto* requirement of showing a strong *prima facie* case.
34. In my view, none of the threshold *Niemisto* requirements have been met, and the Appellant's onus to justify an extension of the time to file his appeal has not been discharged. I therefore decline to exercise my discretion under section 109(1)(b) of the *ESA*.

35. Section 114(1)(b) of the *ESA* provides that I may dismiss an appeal if it was not filed within the applicable time limit.

ORDER

36. I dismiss this appeal under section 114(1)(b) of the *ESA*, and confirm the Determination under section 115(1)(a).

James F. Maxwell
Member
Employment Standards Tribunal