

An appeal

- by -

Richard Mann
(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.: 2019/175

DATE OF DECISION: December 12, 2019

DECISION

FACTS

1. The Appellant herein, Richard Mann (the “Appellant”), filed a complaint (the “Complaint”) with the Employment Standards Branch on December 20, 2018. The Complaint alleged that at the end of the Appellant’s employment with Da Lee Holdings (“Da Lee”), Da Lee had failed to pay him all of the wages and holiday pay to which he was entitled, contrary to the provisions of the *Employment Standards Act* (the “ESA”). The Appellant sought the sum of \$416.00.
2. On August 16, 2019, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) following a hearing into the matters raised in the Complaint. In the Determination, the Director held that the Appellant had been paid all of the sums to which he was entitled.
3. Upon being served with the Determination, the Appellant was informed that the deadline for the filing, with this Tribunal, of any appeal of the Determination was September 23, 2019.
4. On September 23, 2019, the Appellant delivered what appeared to be an appeal of the Determination to the office of the Employment Standards Branch. The Appellant did not, at that time, deliver a copy of the appeal to this Tribunal.
5. The Appellant was informed by this Tribunal that he had incorrectly sent this appeal to the Employment Standards Branch and was given the opportunity to file his appeal with this Tribunal, with an explanation for filing beyond the deadline date.
6. On October 7, 2019, the Appellant filed with this Tribunal an appeal of the Determination.
7. The Appellant formally requested an extension to the statutory appeal period and provided a reason for the late filing of the appeal.

ISSUE

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

ANALYSIS

9. The Legislature has established a limitation on the time period for appealing a determination. 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 the determination was served by registered mail.
10. In the present case, the Director sent the Determination to the Appellant by registered mail on August 16, 2019. Pursuant to section 122 of the *ESA*, service of a determination in this manner is deemed to be effective 8 days after sending.

11. The letter accompanying the Determination advised the Appellant as follows:

Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on September 23, 2019.

The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal’s website at www.bcest.bc.ca or by phone at (604) 775-3512. [emphasis in original]
12. On September 23, 2019, the Appellant incorrectly delivered his appeal to the office of the Employment Standards Branch. The Appellant subsequently submitted his appeal to this Tribunal on October 7, 2019, 14 days after the deadline for doing so.
13. The Appellant has acknowledged that his appeal has been filed late and has requested an extension to the statutory appeal period.
14. Section 109(1)(b) of the *ESA* provides that the Tribunal may exercise a discretion to extend the deadline to file an appeal notwithstanding that the statutory time period has expired. In *Niemisto* (BC EST # D099/96), the Tribunal defined criteria that must be satisfied by an appellant for that discretion to be exercised. These criteria include:
 - 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 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.
15. In *Re: Gary Tam* (BC EST # D093/11), the Tribunal noted that the burden falls upon the appellant to demonstrate that there is a compelling reason to grant an extension:

The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

Section 109(1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
16. I turn first to the question of whether the Appellant has provided a reasonable and credible explanation for failing to file this appeal within the time limit.
17. In the present case, the Appellant’s reason for failing to file this Appeal within the statutory period is that “on September 23, 2019 [the appellant] mistakenly [sic] faxed the appeal to the Employment Standards Branch instead of the Employment Standards Tribunal”.

18. The Appellant has provided no explanation as to how he failed to understand that his appeal was to be delivered to this Tribunal, despite clear and express instructions that accompanied the Determination when it was served upon him. Nevertheless, I am prepared to accept that the Appellant simply made an honest error in his choice of fax number for delivery of the appeal and accept that the Appellant has provided a reasonable and credible explanation for failing to deliver his appeal within the statutory time limit.
19. Turning to the next of the *Niemisto* criteria, I accept that the Appellant had a genuine and ongoing *bona fide* to appeal, demonstrated by his initial attempt to file the appeal, and his subsequent delivery of the appeal to this Tribunal.
20. The Appellant has provided no evidence that either Da Lee or the Director had been made aware of his intention to appeal the Determination. In light of the fact that the appeal was sent to the office of the Employment Standards Branch, I could accept that the Director had been made aware of the Appellant's intention to appeal, but there is nothing before me to suggest that Da Lee had been made aware of that intention. There is nothing before me to suggest that once the Appellant learned of his error in delivering the appeal to the wrong office, he alerted Da Lee to his intention to correct that mistake by delivering the appeal to this Tribunal.
21. The Appellant has not provided any evidence or argument suggesting that either the Director or Da Lee will not be unduly prejudiced by the granting of an extension to the appeal period.
22. I turn now to the question of whether there is a strong *prima facie* case in favour of the appellant.
23. In *Re: C.G. Motorsports Inc.*, BC EST # RD110/12 at para. 28, the Tribunal accepted that it is necessary to undertake some examination of the merits of an appeal, in order to determine whether there is a strong *prima facie* case in favour of an Appellant:
- ... to the extent necessary to determine whether there is a “strong *prima facie* case” the Tribunal will examine the merits of the appeal. ... An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.
24. Section 112(1) of the *ESA* provides that a person may appeal a determination on one or more of 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.
25. In the present case, the Appellant cites the first two of these grounds as bases upon which the Determination should be referred back to the Director. I will examine these two bases in turn.

(i) Did the Director err in law in making the Determination?

26. This Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;
 3. acting without any evidence;
 4. acting on a view of the facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
27. Appended to the Appellant’s appeal is a list of, respectively, nine and three bullet points that appear to supply the basis for this appeal. The nine bullet points correspond directly to select paragraphs of the Determination. The three subsequent bullet points appear to be general references to the evidence set out in the Determination.
28. None of the Appellant’s twelve bullet points alleges that the Director misinterpreted or misapplied either legislation or a general principle of law or alleges that the Director adopted an assessment that was wrong in principle.
29. The Appellant does not allege that the Director acted without any evidence. The fact is that in the Determination the Director expressly examined the evidence of the parties and preferred the evidence of the witnesses for Da Lee over the evidence provided by the Appellant. A number of the Appellant’s bullet point arguments are irrelevant to the issues in the Complaint. The remainder of the twelve bullet points simply challenge the Director’s interpretation of the evidence presented in the hearing.
30. I do not find that the Director acted on a view of the facts that could not reasonably be entertained. In fact, I find that the Director’s conclusions, on the evidence, were eminently reasonable. I do not find any of the Appellant’s bullet point arguments to be compelling.
31. I do not find that there is a strong *prima facie* case that the Director erred in law in making the Determination.

(ii) Did the Director fail to observe the principles of natural justice in making the Determination?

32. In his appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.
33. The onus is on the Appellant to show that the Director breached the principles of natural justice.
34. The Appellant has presented no specific arguments as to how the Director allegedly failed to observe the principles of natural justice in making the Determination.

35. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST # D050/96)

36. I do not find anything in the Appellant's submissions that supports the contention that the Director failed to apply the principles of natural justice in reaching the Determination. I find that the Director afforded sufficient opportunities to the Appellant to know the case against him and the right to present his evidence. The Director conducted a hearing in which both the Appellant and Da Lee gave oral evidence and were afforded rights of cross-examination. The Director carefully weighed all of the evidence, and rendered a reasonable Determination based upon that evidence.

37. I do not find that there is a strong *prima facie* case that the Director failed to observe the principles of natural justice in making the Determination.

CONCLUSION

38. It is incumbent upon an appellant to file an appeal as required by the provisions of the *ESA*, and within the stipulated time period.

39. The time limits for filing an appeal were implemented to provide for fair and efficient procedures for resolving disputes, and to promote the fair treatment of both employers and employees (Section 2 of the *ESA*).

40. I may exercise a discretion to extend the deadline for the filing of an appeal where I am satisfied that certain criteria have been met. In the present case, I do not find that the Appellant has satisfied the criteria set out in *Niemisto*. While I have found that the Appellant has presented a reasonable and credible explanation for failing to deliver the appeal to this Tribunal within the statutory time period, and demonstrated an intention to file an appeal, the Appellant has not satisfied the other *Niemisto* criteria.

41. In the circumstances, I decline to exercise my discretion to grant an extension.

42. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the parties or the Director if the Tribunal decides that the appeal does not meet certain criteria. 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

43. Having reviewed the Determination and the Appellant's submissions filed with the appeal, I conclude that this appeal must be dismissed pursuant to section 114(1)(b) of the *ESA*, and I confirm the Determination pursuant to section 115(1)(a).

James F. Maxwell
Member
Employment Standards Tribunal