



Citation: J. E. Sellors Services (2018) Ltd. (Re)
2020 BCEST 27

An appeal

- by -

J. E. Sellors Services (2018) Ltd.
(the “Appellant”)

- 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: James F. Maxwell

FILE NO.: 2019/208

DATE OF DECISION: April 6, 2020

DECISION

SUBMISSIONS

Jeremy Sellors

on behalf of J. E. Sellors Services (2018) Ltd.

OVERVIEW

1. Michael Rieveley (the “Employee”) filed a complaint with the Employment Standards Branch as against J. E. Sellors Services (2018) Ltd. (the “Appellant”). The Employee alleged that the Appellant, with whom he had previously been employed, had failed to pay him amounts owed for regular wages, vacation pay, and unauthorized deductions. The Employee alleged that he was owed \$2,227.31.
2. A delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) pursuant to the *Employment Standards Act* (the “ESA”) in which the Director held that the Appellant had breached the ESA and was liable to pay to the Employee sums for wages and annual vacation pay, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of \$1,000.00. The Director concluded that the total amount payable by the Appellant was \$3,266.80.
3. Upon being served with the Determination, the Appellant was informed that the deadline for the filing with this Tribunal of an appeal of the Determination was December 16, 2019.
4. On December 17, 2019, the Appellant delivered what appeared to be an appeal of the Determination to the office of this Tribunal. The Appellant was advised by the Tribunal that the appeal submission was incomplete, as it consisted only of an email cover letter and an appeal form. The email cover letter submitted by the Appellant alleged that the Appellant had been unable to submit the balance of materials due to their excessive size.
5. The Tribunal instructed the Appellant to submit its written reasons for filing this appeal, together with a copy of the Determination, the Reasons for the Determination, and a written request for an extension to the statutory appeal period by no later than December 30, 2019.
6. On December 27, 2019, the Appellant filed with this Tribunal its reasons for the within appeal, a copy of the Determination, the Reasons for the Determination, and a request for an extension to the statutory appeal period.
7. On January 3, 2020, the Tribunal requested that the Appellant submit a credible explanation for failing to file the within appeal within the statutory appeal period, together with written reasons and argument in support of the Appellant’s request for an extension, by no later than January 31, 2020.
8. The Appellant did not submit an explanation for filing late, nor reasons or argument in support of its request for an extension to the appeal period.

9. Having reviewed the Determination, the appeal submissions, and the record of proceedings provided by the Director, I conclude that this appeal must be dismissed pursuant to section 114 of the *ESA*. My reasons follow.

ISSUE

10. Is the appellant entitled to an extension to the time for filing an appeal of the Determination?

FACTS

11. The Appellant is a company engaged in the business of logging. The Employee was engaged for the purpose of driving a truck delivering logs.
12. The relationship between the Employee and the Appellant began November 21, 2018. The relationship came to an end on December 18, 2018.
13. The Employee filed a complaint with the Employment Standards Branch dated February 25, 2019 (the “Complaint”). The complaint alleged that the Appellant had failed to pay to the Employee all sums owing pursuant to the employment relationship. The Employee alleged that the Employer had improperly deducted from wages the amount of overweight adjustments and fines that had been assessed when the Employee’s logging truck exceeded allowable weight limits. The Employee also alleged that the Appellant had failed to pay vacation pay as required by the *ESA*.
14. The Director undertook an investigation into the facts surrounding the Employee’s Complaint.
15. On November 6, 2019, the Director issued the Determination that gives rise to this Appeal. The Director held that the Appellant had breached the *ESA* and was liable to pay sums for wages, annual vacation pay, and interest, together with administrative penalties, in a total amount of \$3,266.80.
16. The Director examined wage statements supplied by the Appellant and considered the Appellant’s argument that it did not actually deduct amounts for overweight adjustments and fines from the Employee’s wages.
17. The Director rejected the Appellant’s position that the overweight adjustments and fines were deducted from the gross earnings for the logging truck before determining the Employee’s wages as a percentage to the earnings of the truck. The Director found that the Appellant had determined the earnings of the truck, applied the percentage to determine the Employee’s wages, and then deducted the full amount of all overweight adjustments and fines from the Employee’s wages.
18. The Director concluded that the manner by which the Appellant assessed all overweight adjustments and fines against the Employee’s wages violated section 21 of the *ESA*. The Director found that the Employee had not authorized the deduction of overweight adjustments and fines from his wages.
19. The Director also found that the Appellant had failed to pay to the Employee, at the time that the Employee resigned, accrued vacation pay as required by the *ESA*.

20. As outlined above, the Appellant purported to file an appeal of the Determination. The appeal was not filed in a timely manner. The Appellant was afforded time to deliver the balance of materials required for the appeal, together with a request for an extension to the statutory appeal period, an explanation for the delay in filing the appeal, and reasons and argument in support of the request for an extension. While the Appellant did request an extension to the statutory appeal period, the Appellant did not provide an explanation for filing late, or reasons and argument in support of its request for an extension.

ANALYSIS

21. 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.
22. In the present case, the Director sent the Determination to the Appellant by registered mail on November 6, 2019. Pursuant to section 122 of the *ESA*, service of a Determination in this manner is deemed to be effective 8 days after sending.
23. 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 December 16, 2019.
24. On December 17, 2019, the Appellant delivered an appeal form to the office of the Tribunal, together with a covering email alleging that the balance of the materials had not been submitted electronically because they were too large.
25. The Tribunal afforded the Appellant until December 30, 2019, to file the balance of the materials required in support of the appeal and to request an extension to the statutory appeal period.
26. While the Appellant did deliver additional materials in support of its appeal on December 27, 2019, and a request for an extension to the statutory appeal period, the Appellant did not supply a credible explanation for failing to file the appeal on time, or reasons or argument in support of its request for an extension.
27. The Tribunal afforded the Appellant until January 31, 2020, to deliver a credible explanation for failing to file the appeal within the statutory appeal period, together with written reasons and argument in support of the Appellant's request for an extension. The Appellant supplied nothing further in support of its request for an extension.
28. 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.

29. 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.

30. The Appellant has supplied no explanation for failing to file this appeal within the time limit. When the Appellant filed the appeal a day after the expiry of the statutory appeal period, it claimed only that it was unable to deliver some materials due to the size of the files. The Appellant provided no explanation as to why it did not file anything prior to the expiry of the statutory appeal period.

31. As to the other of the *Niemisto* criteria, the Appellant has supplied nothing that would suggest that it had a genuine and ongoing *bona fide* intention to appeal the Determination, that the Appellant made the Employee and the Director aware of that intention, or that the Employee would not be prejudiced by the granting of an extension.

32. I turn now to the question of whether there is a strong *prima facie* case in favour of the appellant.

33. 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.

34. 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.

35. In the present case, the Appellant cites the first two of these as grounds in support of this appeal. I will examine these two grounds in turn.

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

36. 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.

37. On December 27, 2019, the Appellant provided the Tribunal a letter which appears to outline the reasons for its appeal. The first reason given by the Appellant alleges that the terms of the employment relationship provided that the Employee agreed to the deduction of overweight fees and fines. The second reason given by the Appellant, relating to the Appellant’s failure to pay vacation pay, is that the Appellant agreed to pay vacation pay only after the within appeal is settled.

38. The Appellant has not specifically alleged, and I do not find, that the Director committed any of the errors of law enumerated in the *Gemex* decision.

39. I find that the Director correctly applied the provisions of the *ESA*, and principles of general law. The Director examined the evidence supplied by the parties, together with the arguments supplied by the Appellant as to the manner of calculation of wages. The Director reached a reasonable conclusion that the Appellant had fully deducted from the Employee’s wages the amounts for overweight adjustments and fines, contrary to the provisions of the *ESA*. The Director’s conclusion as to the amounts owing was entirely reasonable.

40. 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?

41. In its appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.

42. The onus is on the Appellant to show that the Director breached the principles of natural justice.

43. 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).

44. The Appellant has provided nothing in support of its position that the Director failed to apply the principles of natural justice in making the Determination. I find that the Director afforded sufficient opportunities to the Appellant to know the case against it and the right to present its evidence. The Director conducted an investigation, carefully weighed all of the evidence, and rendered a reasonable Determination based upon that evidence.

45. 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

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

47. 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 any of the criteria set out in *Niemisto*. The Appellant was afforded the opportunity to provide an explanation for failing to file the appeal within the appeal period, and reasons why an extension should be granted. The Appellant chose to supply neither.

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

49. 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

50. 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