

An appeal

- by -

Bella C. Saville  
(the “Complainant”)

- 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.:** 2019/185

**DATE OF DECISION:** April 8, 2020

## DECISION

### SUBMISSIONS

Bella C. Saville

on her own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”) Bella C. Saville (the “Complainant”) has filed an appeal of the October 3, 2019 determination (the “Determination”) issued by a delegate (“Delegate”) of the Director of Employment Standards (the “Director”). The Determination found that the Complainant filed her complaint after the expiration of the six-month time limit for complaints set by section 74(3) of the *ESA*. The Delegate did not exercise the discretion to extend the time period, and so dismissed the complaint.
2. According to the Determination, the Complainant was terminated on January 29, 2019, and so had until July 29, 2019, to file her complaint. She filed her complaint on August 12, 2019.
3. The Complainant appeals under the ground of new information not available at the time the Determination was made. I can consider whether the Delegate committed other errors in this case even though the Complainant did not check the other boxes on the Appeal Form (see *Triple S Transmissions Inc.*, BC EST #D141/03). I also find that there are questions of law and of procedural fairness and natural justice that are evident on the face of the information presented by the Complainant in support of her appeal.
4. In deciding this appeal, I have reviewed the Reasons for the Determination, the Record provided by the Delegate under section 112(5) of the *ESA*, and the submissions received.

### ISSUE

5. Did the Delegate err in determining that the complaint was filed out of time?

### ARGUMENT

6. The Complainant argued that while her last day of work was January 29, 2019, she was not terminated by Paladin Security Group Ltd. (the “Employer”) until February 26, 2019. She provided additional documents that showed ongoing communications between herself and the employer, including an acknowledgement of termination dated February 26, 2019, in support of her argument. She did not explain why she did not provide these additional documents to the Delegate.
7. The Complainant argued that she filed her complaint on August 12, 2019: within six months from her termination date of February 26, 2019.
8. Submissions were sought from the employer and the Delegate. Neither provided submissions.
9. The Complainant also requested to amend her complaint to include a demand for unpaid overtime. As the Tribunal is only reviewing the Determination, I will not address this request.

## THE FACTS AND ANALYSIS

10. The Complainant is a former employee of the Employer. She worked as a security guard. In her complaint, she alleged she was wrongfully terminated and sought compensation for length of service under the *ESA*.
11. On January 29, 2019, the Complainant's supervisor observed her with her eyes closed and determined she was sleeping on the job. The Complainant says she was not sleeping, but rather using eye drops that were required following a recent cataract surgery. That was the Complainant's last day worked for the Employer.
12. Sleeping on the job is a terminable offence according to the Employer's policies.
13. The Employer authored a termination letter dated February 1, 2019. The Complainant included with her complaint only the first page of that letter. In her appeal, she included what she alleges was a second page to the letter, which included space for acknowledgement that the Complainant understood she was being terminated. The page is signed by a manager and dated February 26, 2019. The page also indicates the Complainant refused to sign that same date.
14. With her complaint, the Complainant included an email from an Employer representative dated February 12, 2019. In the correspondence an Employer representative asks the Complainant to meet with him at the Employer's head office. The email does not indicate that the Complainant is terminated, but rather appears to be a request for a meeting from a superior to a subordinate.
15. With her complaint, the Complainant included a copy of her Record of Employment dated February 26, 2019.
16. Section 74(3) of the *ESA* refers to the last date of employment, rather than the last day of work (see *Re: Huang*, BC EST # D159/04). I find that there was sufficient information before the Delegate that ought to have led the Delegate to inquire as to the termination date as it would affect whether the complaint was timely.
17. The Record from the Delegate confirms the Delegate determined that the statutory time limit for filing a complaint was six months from January 29, 2019. The Record contains notes from a telephone conversation between the Delegate and the Complainant where the Delegate asks the Complainant why she filed out of time. The Complainant responded that she was ill, was under pressure to find other employment, and was under a misapprehension about the time limit.
18. There are no notes that assist in determining why the Delegate determined that January 29, 2019, was the date that the time to file a complaint began to run, or that the Delegate considered either the February 1, 2019 date on the termination letter, the February 12, 2019 email, or the date on the Record of Employment. There are no notes that the Delegate asked the Complainant the exact date that she was terminated. To the contrary, the notes are clear that the Delegate determined the Complainant was out of time before ever speaking with her.
19. Had the Delegate inquired, the Complainant would have had the opportunity to provide the additional information she had supporting her assertion of a February 26, 2019 termination date.

20. Complainants are required to present all their evidence to the Director at first instance, but they must be provided with a reasonable opportunity to do so. I find the Delegate failed to give the Complainant a reasonable opportunity to present her evidence with respect to her termination date and so breached her right to procedural fairness and natural justice.
21. The Delegate found as a fact that the time period for making a complaint started to run on January 29, 2019. The Tribunal may only review alleged errors of fact if a delegate has committed a palpable and overriding error, that is, that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached that result (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998), 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)*, [2000] BCJ No.331).
22. I find that no reasonable person could conclude that the Complainant was terminated on January 29, 2019. There is no evidence in support of that conclusion in the Record. There is clear agreement that the Complainant's last day worked was January 29, 2019. As noted above, the last day worked and the last day of employment may be different. Based on the termination letter, the earliest the Complainant's last day of employment could have been was February 1, 2019, and there was other available evidence supporting a later termination date.
23. I find that the Delegate erred when determining that the Complainant's time to file started to run on January 29, 2019, and so was out of time to file her complaint.

## **ORDER**

24. Pursuant to section 115(1)(b) of the *ESA*, I order that this matter be referred back to the Director for further investigation in accordance with these reasons for decision.

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**Allison Tremblay**  
**Member**  
**Employment Standards Tribunal**