

An appeal

- by -

Janell Wilkin
(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.: 2020/002

DATE OF DECISION: May 6, 2020

DECISION

OVERVIEW

1. Alexandra Hammond (the “Employee”) filed a complaint with the Employment Standards Branch against Janell Wilkin (the “Appellant”). The Employee alleged that the Appellant, with whom she had previously been employed, had failed to pay her amounts owed for regular wages, overtime, statutory holiday pay, and vacation pay.
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 overtime wages, statutory holiday pay, and annual vacation pay, together with interest accrued thereon. In addition, the Director assessed administrative penalties in the sum of \$4,000.00. The Director concluded that the total amount payable by the Appellant was \$9,001.54.
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 January 6, 2020.
4. On January 6, 2020, the Appellant delivered an incomplete appeal submission to the office of this Tribunal and requested an extension to the statutory deadline for filing an appeal.
5. Having reviewed the Determination, the Appellant’s 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

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

FACTS

7. On or about November 1, 2018, the Employee began work for the Appellant as a domestic and a child care provider. This employment relationship came to an end on March 29, 2019, when the Employee resigned.
8. On April 29, 2019, the Employee filed a complaint with the Employment Standards Branch (the “Complaint”). The Employee alleged that the Appellant had failed to pay to the Employee all sums owing pursuant to the employment relationship. The Employee alleged that the Appellant had failed to pay all sums owing for regular wages, overtime wages, annual vacation pay, and statutory holiday pay, and had improperly deducted from wages an amount for room and board. The Employee alleged that she was owed \$3,234.83.
9. The Director sent a registered letter and an email to the Appellant advising her that a Complaint Hearing would be held at 9:00 a.m. on November 20, 2019, by teleconference and requesting that the Appellant submit employer records by no later than October 23, 2019. On October 24, 2019, the Appellant

requested an extension to the deadline to submit employer records and was granted an extension to October 30, 2019. On October 30, the Appellant submitted some employer records and a written submission.

10. At one minute before 9:00 a.m. on November 20, 2019, the Appellant advised the Director by email that she was not able to attend the teleconference hearing. By email response, the Director advised the Appellant that she would have to dial in to the teleconference if she wished to request an adjournment to the hearing. The Appellant did not dial in to the teleconference, and the Director proceeded with the hearing. The Director took the evidence of the Appellant, and examined the documents presented by both the Employee and the Appellant, together with the written submissions that had been tendered by the Appellant.
11. On November 29, 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 overtime wages, statutory holiday pay, annual vacation pay, and interest, together with administrative penalties, in a total amount of \$9,001.54.
12. The Director found that there was no written employment agreement between the Employee and the Appellant. The Director found that the Appellant did not provide the Employee with wage statements and did not maintain records of the hours worked by the Employee.
13. The Director examined the Employee's evidence as to hours worked and amounts paid to her and examined the Appellant's records regarding wages paid to the Employee. The Director undertook a calculation of the amounts that should have been paid to the Employee during the employment relationship and deducted those amounts that the Appellant was permitted to deduct. The Director concluded that the Appellant had not paid all wages owing to the Employee, including amounts for overtime, statutory holiday pay, and vacation pay. The Director concluded that the Employee was owed a total of \$4,876.47, plus accrued interest.
14. The Director found that the Appellant had breached a number of provisions of the *ESA*. The Appellant had failed to pay outstanding wages owed to the Employee, contrary to section 18 of the *ESA*. The Appellant had breached section 21 of the *ESA* by making an unauthorized deduction for room and board. The Appellant had breached section 27 of the *ESA* by failing to provide the Employee with wage statements on each pay day. The Appellant had failed to maintain payroll records for the Employee, contrary to section 28 of the *ESA*. The Appellant had failed to pay overtime wages to the Employee, contrary to section 40 of the *ESA*. Contrary to section 45 of the *ESA*, the Appellant had failed to pay the Employee statutory holiday pay. Contrary to section 58 of the *ESA*, the Appellant had failed to pay the Employee vacation pay. The Appellant had failed to register the Employee as a domestic, contrary to section 13 of the *Employment Standards Regulation*. For these various breaches of the *ESA*, the Director assessed administrative penalties in the sum of \$4,000.00.
15. On January 6, 2020, the deadline for doing so, the Appellant purported to file an appeal of the Determination but did not supply all of the materials required.
16. The Tribunal contacted the Appellant by telephone and by email, and advised her that the appeal submission was incomplete, as it consisted only of an appeal form and a one-page document requesting

a one-month extension of the statutory appeal period. The Tribunal instructed the Appellant to submit a copy of the Determination and the Delegate's Reasons for the Determination, before 4:30 p.m. on January 6, 2020. The Appellant did not submit these materials by the specified time.

17. On January 10, 2020, the Tribunal again contacted the Appellant and instructed her to submit a copy of the Determination and the Reasons for the Determination, by no later than 4:30 p.m. on January 17, 2020.
18. On January 21, 2020, the Appellant submitted a copy of the Determination and the Reasons for the Determination and explained that she had "not been in the office for over a week and a half due to illness (and snow)".
19. The Appellant was then given until February 6, 2020, to file written reasons and argument in support of her appeal. On February 6, 2020, the Appellant presented a written submission, including a website link to Alberta Employment Standards requirements. The Tribunal afforded the Appellant additional time to submit a copy of the Alberta information, but the Appellant did not do so.

ANALYSIS

20. 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.
21. In the present case, the Director sent the Determination to the Appellant by registered mail on November 29, 2019. Pursuant to section 122 of the *ESA*, service of a Determination in this manner is deemed to be effective 8 days after sending.
22. 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 January 6, 2020.
23. On January 6, 2020, the Appellant delivered an appeal form to the office of the Tribunal, together with a covering letter requesting an extension to the statutory appeal deadline. In the covering letter the Appellant explained that after receiving the Determination she had been dealing with the Employment Standards Branch, and "became exceedingly busy and subsequently was away for the holidays."
24. The Tribunal afforded the Appellant until January 17, 2020, to file the balance of the materials required in support of the appeal. The Appellant did not provide the additional materials until January 21, 2020, explaining that she had "not been in the office for over a week and a half due to illness (and snow)." The Appellant was then afforded until February 6, 2020, to provide written reasons and argument in support of her appeal.
25. 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.

26. 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.

27. The Appellant's explanation for failing to file a complete appeal within the statutory time limit was that she "became exceedingly busy and subsequently was away for the holidays." I do not find that this constitutes a reasonable and credible explanation for this failure.

28. As to the other of the *Niemisto* criteria, the Appellant has supplied nothing that would suggest that she 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.

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

30. 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.

31. 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.

32. In her 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. 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 #D 050/96)

35. The Appellant has provided nothing in support of her position that the Director failed to apply the principles of natural justice in making the Determination.

36. I find that the Director afforded sufficient opportunities to the Appellant to know the case against her and the right to present her evidence. The Director conducted a hearing, after affording the Appellant an opportunity to participate, and an opportunity to request an adjournment. When the Appellant neither attended the hearing nor requested an adjournment, the Director proceeded with the hearing, carefully weighed all of the evidence presented by both parties, 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. 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*).

39. 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.

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 any of the criteria set out in *Niemisto, supra*.
41. In the circumstances, I decline to exercise my discretion to grant an extension.

ORDER

42. 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