



Citation: Raed Eid (Re)
2020 BCEST 46

An appeal

- by -

Raed Eid
("Mr. Eid")

- 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: David B. Stevenson

FILE NO.: 2020/021

DATE OF DECISION: May 15, 2020

DECISION

SUBMISSIONS

Raed Eid on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Raed Eid (“Mr. Eid”) has filed an appeal of a determination issued by Theresa Robertson, a delegate of the Director of Employment Standards (the “Director”) on December 19, 2019 (the “Determination”).
2. The Determination found a complaint made by Mr. Eid against Seehra Pharmacy Ltd. carrying on business as Shopper’s Drug Mart 2231 (“Seehra Pharmacy”) had been resolved and no further action would be taken.
3. This appeal lists all three of the statutory grounds of appeal: error of law by the Director, failure by the Director to observe principles of natural justice in making the Determination and evidence becoming available that was not available when the Determination was being made.
4. The appeal form, appeal submission and some supporting material was delivered to the Tribunal on January 30, 2020, three days after the statutory time period for filing an appeal had expired. Additional material was delivered to the Tribunal on January 31, 2020, and February 10, 2020. Mr. Eid has requested an extension of the statutory appeal period.
5. On March 2, 2020, Mr. Eid added a claim for “business expenses” and travel time to his appeal. No such claim has been made in any complaint filed with the Employment Standards Branch. On March 5, 2020, and April 6, 2020, the Tribunal received additional material relating to this claim.
6. In correspondence dated February 13, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review all or part of the appeal might be dismissed.
7. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Eid and to Seehra Pharmacy. An opportunity has been provided to both parties to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:*
- (a) the appeal is not within the jurisdiction of the tribunal;*
 - (b) the appeal was not filed within the applicable time limit;*
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;*
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
 - (f) there is no reasonable prospect the appeal will succeed;*
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;*
 - (h) one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Seehra Pharmacy will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

10. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

11. Mr. Eid worked for Seehra Pharmacy for three days in June 2019 as a pharmacist at a rate of \$40.00 an hour and was paid \$840.00 for his work. Mr. Eid was mailed a cheque for the full amount of his work on June 19, 2019, three days after the period worked, and the cheque was cashed on July 7, 2019.
12. Mr. Eid filed a complaint with the Employment Standards Branch in November 2019, alleging Seehra Pharmacy had contravened the *ESA* by: failing to provide a wage statement; failing to pay the amounts within the time frame required in the *ESA*; and failing to make legal deductions from the total pay. Mr. Eid sought \$462.00 from Seehra Pharmacy. It is apparent from the Determination and the material in the record that the amount sought did not represent a claim for wages.
13. The Director investigated the complaint and, following an assessment of it, decided the matters to which the *ESA* applied – failing to pay wages within the time provided in the *ESA* and failing to provide a wage statement – would be resolved if Seehra Pharmacy provided Mr. Eid with a wage statement. The Director requested Seehra Pharmacy provide a wage statement, Seehra Pharmacy agreed and provided Mr. Eid with a wage statement.

14. The Director found the other matter in the complaint – the failure to make legal deductions – would not be addressed.
15. In respect of the decision on the first two matters, the Director noted the *ESA* was remedial, that administrative penalties were not intended to be punitive and were typically applied to cases where a determination orders payment of wages an employer has refused to pay. In the circumstances of the claim by Mr. Eid, the Director stated that Seehra Pharmacy had mailed the amount agreed upon for the work done shortly after completion of the three days of work, which Mr. Eid had cashed well before filing his complaint, and that Mr. Eid had received a wage statement from Seehra Pharmacy. The Director found Mr. Eid’s claim for “an additional 55% of his earnings as a remedy” was not supported by any provision in the *ESA* and dismissed it.
16. On the second matter, the Director found there was no provision in the *ESA* requiring employers to make statutory withholdings for Canada Pension, employment insurance and income tax and the issuance of a pay statement had resolved the statutory requirement found in section 27(1)(g) of the *ESA*.
17. The Director exercised the discretion provided in section 76(3)(b) and (i) to cease investigating the complaint.

ARGUMENT

18. The appeal and the supporting appeal submission contain nothing that is relevant to the grounds of appeal upon which it is based. It is unnecessary to outline all elements of the arguments made by Mr. Eid or to attempt to relate them to the chosen grounds of appeal. Much of the appeal submission is nothing more than a rant against the delegate who investigated and decided his complaint, in which Mr. Eid contends the delegate was “incompetent”, acted inappropriately and “supported” the “lies” made by Seehra Pharmacy.
19. Mr. Eid’s appeal submission concludes by contending Seehra Pharmacy “must be fined” for three contraventions.
20. In support of his request for an extension of the statutory appeal period, Mr. Eid seeks to blame the Director for his failure to meet the appeal period, asserting the notice on the Determination setting out the relevant dates for filing an appeal was not in compliance with the requirements of the *ESA*.

ANALYSIS

21. The Tribunal may dismiss an appeal without a hearing if the appeal is not filed within the statutory appeal period: see s. 114(1)(b).
22. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an 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 the time limit for filing an appeal:

Section 109(1)(b) of the *Act* provides the Tribunal with 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.

23. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:
1. there is a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
 2. there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
 3. the responding party and the Director have been made aware of the intention;
 4. the respondent party will not be unduly prejudiced by the granting of an extension; and
 5. there is a strong *prima facie* case in favour of the appellant.
24. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required “compelling reasons” for granting of an extension of time: *Re Wright*, BC EST # D132/97.
25. I am singularly unimpressed by Mr. Eid’s request for an extension of the appeal period.
26. The Determination correctly, and in compliance with the *ESA*, set out the relevant dates for meeting the statutory time period for an appeal.
27. Although the requested extension of time is for a matter of days, there is no explanation for the delay. Mr. Eid’s request only seeks to blame the Director for his failing.
28. The criteria listed at points 2, 3 and 4, above, do not factor significantly into whether an extension ought to be given to Mr. Eid.
29. My finding on the final factor is important.
30. When considering the *prima facie* strength of the case presented by Mr. Eid in a request for an extension of the time period for filing an appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds.
31. My conclusion on this criterion, which is set out below, militates strongly against an extension of the appeal period, as I find the appeal lacks the merit necessary to warrant extending the statutory appeal period.
32. The Tribunal may also dismiss an appeal without a hearing of any sort where the appeal is “*frivolous, vexatious or trivial or gives rise to an abuse of process*”.

33. In the context of the *ESA*, an appeal is frivolous if the appellant can present no rational argument based upon the evidence or law in support of the appeal. A frivolous appeal is defined as “...one in which no justiciable question has been presented and the appeal is readily recognizable as devoid of merit in that there is little prospect that it can ever succeed.”: see *Greg Brewer operating as Smallbone Millwork & Design*, BC EST # D476/98.
34. It is an “*abuse of process*” to misuse the appeal process of the *ESA*. Mr. Eid has had his rights under the *ESA* addressed by the Director. He has no rights under the *ESA* relative to the carrying out of the administrative penalty scheme in the legislation; that responsibility rests solely with the Director. Mr. Eid has no right to demand to have Seehra Pharmacy fined for three contraventions.
35. I find the appeal by Mr. Eid to be frivolous and an abuse of process.
36. Reviewing the Determination, the appeal and the submissions, I find that this appeal is devoid of merit. Mr. Eid has not made any argument nor given any evidence to challenge or controvert the findings made in the Determination. He has simply stated the Determination is based on “lies”. Neither has he challenged the rationale set out in the Determination.
37. When examining the merits of this appeal, the appropriate starting point is the grounds of appeal in the *ESA* and a consideration of the principles developed and applied to appeals generally as they relate to the appeal under consideration. Subsection 112(1) of the *ESA* says:
- 112 (1) *Subject to this section, a person served with a determination may appeal the determination to the tribunal 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.*
38. Mr. Eid alleges the Director erred in law, failed to observe principles of natural justice, and that “new evidence” has come available.
39. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
40. I shall first address the matter of the additional evidence ground of appeal.
41. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different

conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

42. I do not accept this ground of appeal, or the additional evidence, for several reasons.
43. First, nothing in this material is “new”; it was available when the complaint was filed and, if it was relevant, could have been presented to the Director during the complaint process. Second, some of the material attached to the appeal is not evidence. Third, the material provided does not add anything to the information given by Mr. Eid to the Director. Fourth, little of the material is relevant to what was decided by the Director, which was that Mr. Eid’s complaint had been resolved during the complaint process. Fifth, it is not “probative”, in the sense that it is not capable of resulting in a different conclusion than what is found in the Determination.
44. I shall next address the alleged “error of law”. The 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.
45. The sum and substance of the Determination is that those aspects of the complaint which were governed by provisions in the *ESA* were resolved through the complaint process, that no contravention of the *ESA* had been found and no requirement had been imposed, that the purposes of the *ESA* did not justify administrative penalties as a punitive measure on matters which had been resolved without a determination and the imposition of a requirement under section 79 of the *ESA*, and that the Director had discretion to not find a contravention and had discretion to cease investigation the complaint..
46. Mr. Eid has failed to meaningfully address any of the above matters and has failed show there was an error of law by the Director on any of them.
47. At its core, this appeal does no more than disagree with the decision of the Director to reject Mr. Eid’s demand that Seehra Pharmacy be charged with three administrative penalties.
48. To reiterate, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Mr. Eid and he has failed to meet that burden.

49. Mr. Eid has also grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.
50. Mr. Eid has provided no objectively acceptable evidence showing he was denied the procedural protections reflected in section 77 of the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. It is clear from the file that he was afforded the procedural rights reflected in section 77 and captured by natural justice principles.
51. There is simply no basis for this ground of appeal.
52. The appeal has no *prima facie* merit; it does not, in fact, have any merit at all.
53. The requested extension of the statutory appeal period is denied.
54. Additionally, and based on all of the above, I also find this appeal is frivolous, an abuse of process and has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) of the *ESA*.
55. As a final matter, I shall address Mr. Eid's request to add a claim for "business expenses" and travel time to the appeal. The Tribunal has no authority to grant such a request and it is denied. A complaint of a contravention of the *ESA* must be filed to an office of the Employment Standards Branch – see section 74 of the *ESA* – and comply with the requirements of that provision.

ORDER

56. Pursuant to section 115 of the *ESA*, I order the Determination dated December 19, 2019, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal