

Citation: Adora Beauty Supply Inc. (Re)
2020 BCEST 65

An appeal

- by -

Adora Beauty Supply Inc. (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.: 2020/019

DATE OF DECISION: June 11, 2020

DECISION

OVERVIEW

1. Yen Kim Hua (the “Employee”) filed a complaint with the Employment Standards Branch against Adora Beauty Supply Inc. (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 commission 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 regular wages, 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 \$3,500.00. The Director concluded that the total amount payable by the Appellant was \$4,727.53.
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 27, 2020.
4. On January 27, 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 deny the Appellant’s request for an extension to the deadline for filing the appeal. My reasons follow.

ISSUE

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

FACTS

7. The Appellant is a corporation engaged in the business of the sale of beauty products.
8. On or about June 20, 2018, the Employee began work for the Appellant. The employment relationship came to an end on January 2, 2019.
9. On March 27, 2019, the Employee filed a complaint with the Employment Standards Branch (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 Appellant had failed to pay sums owing for regular wages, overtime wages, annual vacation pay, and statutory holiday pay, as well as sums for commissions on sales of goods. The Employee alleged that she was owed \$4,255.00.
10. On September 17, 2019, the Director sent the Appellant a registered letter and an email advising her that a Complaint Hearing would be held at 9:00 a.m on October 22, 2019 by teleconference, and requesting

that the Appellant submit all records upon which it intended to rely by no later than October 2, 2019. The deadline for submission of records was later extended to October 4, 2019. The Appellant submitted some of its records on October 4, 2019, and the Complaint Hearing was conducted on October 22, 2019. Evidence was provided by the Employee, the Appellant, and several witnesses. Subsequent to the hearing, the Appellant produced additional records, which were considered by the Delegate.

11. In the oral hearing, the Director had concerns about the credibility of the evidence of the Appellant and preferred the evidence of the Employee where there were conflicts in the evidence.
12. 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. The Director concluded that the Appellant had not paid all wages owing to the Employee, including amounts for overtime, commissions on sales, statutory holiday pay, and vacation pay. The Director concluded that the Employee was owed a total of \$1,182.73, plus accrued interest.
13. 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 s.17 and s.18 of the *ESA*. The Appellant had breached s.27 of the *ESA* by failing to provide the Employee with wage statements on each pay day, as required by the *ESA*. The Appellant had failed to pay overtime wages to the Employee, contrary to s.40 of the *ESA*. Contrary to s.45 of the *ESA*, the Appellant had failed to pay the Employee statutory holiday pay. The Appellant had failed to produce all employer records, contrary to s.46 of the *Employment Standards Regulation*. For these various breaches of the *ESA*, the Director assessed administrative penalties in the sum of \$3,500.00.
14. On December 18, 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 \$4,727.53. The Director advised the Appellant that the deadline to appeal from the Determination was January 27, 2020.
15. On January 7, 2020, the Director issued a separate Determination, as against Alyssa Mai Phuong Tran, a director of the Appellant corporation. The Director advised that the deadline for filing an appeal of that Determination was February 14, 2020. An appeal of that Determination is not before me.
16. On January 27, 2020, the deadline for filing an appeal, the Appellant filed an incomplete appeal with this Tribunal and requested an extension of the appeal deadline to April 15, 2020. The Appellant did not deliver a copy of the Determination and the Reasons for its issuance, and not provide reasons or argument in support of its request for an extension to the deadline for filing the appeal.
17. The Tribunal contacted the Appellant by telephone and advised that the appeal submission was incomplete.
18. The Tribunal granted the Appellant until February 14, 2020, to supply the balance of the materials necessary for the appeal. On February 14 and 18, 2020, the Appellant submitted a copy of the

Determination and the Reasons for the Determination, together with a substantial quantity of additional documents.

19. Included with the Appellant's February 14, 2020, submission was an email of the same date which stated that the Appellant "would like to extend the appeal day because I need more time to repair [sic] everything. I worked by myself so need a lots [sic] of time ahead to do the paper work."
20. Also included in the Appellant's submission was a document entitled "Summary of the Issue", which I presume is the Appellant's argument in support of its request for an extension to the deadline for filing this appeal. In this document, the Appellant sets out the following arguments:
 - a. The "judgment" is "faulty and one-sided". The Employee was fully paid all sums for statutory holiday pay. The Employee was overpaid in respect of lunch breaks. The Appellant did not agree to pay commissions to the Employee;
 - b. The Appellant was a new business and "had many trouble issues from internals [sic] partnership, debts, and lack of management skills"; and
 - c. The Appellant suffered from serious financial difficulties.

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 December 18, 2019. Pursuant to s.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 January 27, 2020.
24. On January 27, 2020, the Appellant delivered an incomplete appeal to the office of the Tribunal with a request for an extension to the appeal period to April 15, 2020.
25. On February 3, 2020, the Tribunal requested that the Appellant provide a copy of the Determination, the written reasons for the Determination, and reasons for the Appellant's request for an extension to the appeal period. The Appellant provided, on February 14 and 18, 2020, the Determination, reasons for requesting an extension to the appeal period, and other supporting documents. On February 27, 2020, the Tribunal acknowledged the appeal and granted the Appellant until April 15, 2020, to provide the Tribunal with any additional documents in support of the appeal. The Appellant provided the Tribunal with no further documents.

26. 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.

27. 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.

28. The Appellant's explanation for requesting an extension to the statutory time limit was that the Appellant needed "more time to repair [sic] everything. I worked by myself so need a lots [sic] of time ahead to do the paper work."

29. I am not satisfied that the Appellant's submission constitutes a reasonable and credible explanation in support of an extension to the deadline.

30. As to the other of the *Niemisto* criteria, the Appellant has supplied nothing to demonstrate 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.

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

32. 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.

33. In her appeal, the only ground of appeal advanced by the Appellant is that new evidence has become available that was not available at the time that the Determination was issued.

34. In *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST #D141/03, this Tribunal stated that a broad view should be taken of an appellant's choice of grounds of appeal, particularly when that choice is made by persons untrained in the law. The Tribunal should not simply adjudicate based upon the "box" on the Appeal Form that has been checked off by the Appellant. In keeping with that guidance, I will not limit my examination to the single ground cited by the Appellant but will examine whether the Appellant's submissions give rise to any of the statutorily permitted grounds of appeal.

35. Other than its allegation that the Determination is "faulty and one-sided", the Appellant has not suggested that the Director committed an error of law in issuing the Determination in this case. On the face of the Determination, and from a review of the Record and the additional materials supplied by the Appellant, and in the absence of any specific submission by the Appellant, I do not find that the Director committed an error of law in the Determination.

36. 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).

37. 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 a hearing and afforded both the Employee and the Appellant the opportunity to present evidence, including the evidence of witnesses. Following the hearing, carefully weighed all of the evidence presented by both parties, and rendered a reasonable Determination based upon that evidence. Consequently, 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.

38. The Appellant contends that there is new evidence now available that was not available at the time that the Director issued the Determination in this matter. While the Appellant submitted a substantial quantity of documentation with this appeal, all of that material formed part of the Record that was before the Director at the time the Determination was issued. The Appellant has tendered no new material and has not identified any new evidence that has now come to light. I do not find that there is a strong *prima facie* case that there is new evidence available that was not available at the time that the Determination was issued.

CONCLUSION

39. 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*).
40. 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.
41. 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*.
42. In the circumstances, I decline to exercise my discretion to grant an extension.

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