

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Joel West
("Mr. West")

- 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.: 2020/152

DATE OF DECISION: February 2, 2021

DECISION

SUBMISSIONS

Joel West on his own behalf carrying on business as Above & Beyond Rope Access

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Joel West carrying on business as Above & Beyond Rope Access (“Mr. West”) of a determination issued by Shane O’Grady, a delegate of the Director of Employment Standards (the “Director”), on January 21, 2020 (the “Determination”).
2. The Determination found Mr. West had contravened Part 3, sections 18, 27, and 28 and Part 7, section 58 of the *ESA* in respect of the employment of Lisa Chuang (“Mrs. Chuang”) and ordered Mr. West to pay Mrs. Chuang wages in the amount of \$1,326.11, an amount that included regular wages, annual vacation pay, and interest under section 88 of the *ESA*. The Director imposed administrative penalties for the four contraventions of the *ESA* in the amount of \$2,000.00. The total amount of the Determination is \$3,326.11.
3. Mr. West has appealed the Determination on the ground the Director failed to comply with principles of natural justice in making the Determination.
4. The appeal was delivered to the Tribunal on November 6, 2020, more than eight months after the expiry of the statutory time limit set out in section 112(3) of the *ESA*. Additional information was required from Mr. West before the appeal could be processed. That information was provided November 23, 2020.
5. Mr. West has applied under section 109(1) (b) of the *ESA* for an extension of the appeal time period for appeal.
6. In correspondence dated November 30, 2020, the Tribunal, among other things, acknowledged having received the appeal and the request to extend the appeal period, requested the section 112(5) record (the “record”) from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
7. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. West and Mrs. Chuang. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it 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 submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and any material that is accepted as new, or additional, evidence.

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 has some presumptive merit and should not be dismissed under section 114(1), the Director and Mrs. Chuang 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 Mr. West should be granted an extension of the statutory time period for filing an appeal and whether there is any reasonable prospect the appeal can succeed.

ISSUE

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

THE FACTS

11. Mr. West is a sole proprietor operating a window cleaning business operating under the name Above & Beyond Rope Access.
12. Mrs. Chuang filed a complaint alleging Mr. West had contravened the *ESA* by failing to pay regular wages and annual vacation pay.
13. Mrs. Chuang worked for Mr. West from October 23 to November 10, 2019. The Director found her wage rate to be \$40.00 an hour.
14. The Director conducted an investigation on the complaint. The record indicates the Director communicated by e-mail with Mr. West. There were several communications that passed between Mr. West and the Director between December 18, 2019, and January 21, 2020. These communications provided Mr. West with notice that Mrs. Chuang had filed a complaint under the *ESA*, provided Mr. West

with all of the material submitted by Mrs. Chuang in support of her claims, provided an opportunity for Mr. West to state his case and to respond to the claims made and provided Mr. West with a copy of the Determination.

15. Included in the communications is an e-mail from the Director to Mr. West on January 9, 2020, which contained the following:

The Determination will be sent to you by registered mail. I should note, the registered mail previously sent to you (Notice and Demand) was returned to my office by Canada Post with a note indicating delivery was not possible at the address provided. Per the BC Online corporate registry search, the following address was noted for Joel West carrying on business as Above & Beyond Rope Access:

[address omitted in this decision]

Please confirm the above address is the correct mailing address for Joel West carrying on business as Above & Beyond Rope Access. If this address is not correct, please provide an alternative mailing address.

16. There was a follow-up communication from Mr. West on January 9, 2020, but it was not responsive to the question of the mailing address for Mr. West.
17. The Determination was issued January 21, 2020, and was sent by registered mail to the address shown for the business in the corporate registry, as well as being e-mailed to Mr. West at the e-mail address through which he had been communicating with the Director from Mid-December 2019 to January 9, 2020.
18. The statutory time period for an appeal under the *ESA* expired on February 28, 2020.
19. In the initial appeal filing, on November 6, 2020, the appeal submission was missing required information, which was not delivered to the Tribunal until November 23, 2020.

ARGUMENT

20. In his request for an extension of the statutory appeal period, Mr. West says he was “not aware of process until money was taken out of my account” [*sic*]. He says the “Determination was sent to address that I haven’t lived at for over 10 years.” [*sic*]
21. In respect of the merits of the Determination, Mr. West submits, “all employees are on a piece work pay bases [*sic*]. \$40.00 hrly . . . we pay \$25.00 hrly for non-piece”.

ANALYSIS

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 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.

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:
- 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 (*i.e.*, the employer or employee), 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.
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. In this case, the record shows Mr. West was notified of the complaint in December 2019 and that there was considerable discussion and exchange of information between Mr. West and the Director.
26. The delay is substantial; there is nothing in the explanation for not requesting an appeal within the statutory time limit that is remotely reasonable and credible.
27. Mr. West received a copy of the Determination by e-mail. The failure to have previous correspondence delivered to the registered corporate address for the business was raised by the Director in a communication with Mr. West and he was asked to correct any error with the address. He did not. Section 122(1) of the *ESA* allows service to be made by registered mail to the last known address of the recipient. The address on record in the corporate registry qualifies as the last known address for Mr. West. Section 122(2) deems service to have been made 8 days after it is deposited with Canada Post.
28. The explanation provided by Mr. West indicates he formed no intention to appeal the Determination until the Director apparently executed on the order to pay by removing money from the Mr. West’s account.
29. When considering the *prima facie* strength of the case presented by Mr. West in this appeal 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.

30. My conclusion on this criterion 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.
31. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which 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.
32. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
33. 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.
34. While Mr. West has grounded his appeal in natural justice, there are no natural justice concerns raised in the making of the Determination. On the face of the material and information contained in the record, Mr. West was provided with the opportunity required by principles of natural justice to present his position to the Director. Mr. West has provided no objectively acceptable evidence showing otherwise.
35. In respect of the merits of the appeal, Mr. West does nothing more than dispute the wage rate the Director found for Mrs. Chuang during her employment. It is clear from the appeal submission that what Mr. West actually seeks is to have the Tribunal change a finding of fact made by the Director on the wage rate for Mrs. Chuang during her employment. That type of argument raises a question of whether the Director made an “error of law” on the facts.
36. 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.
37. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual

conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Mr. West is required to show the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

38. The finding of the Director on the wage rate for Mrs. Chuang was a finding of fact, simpliciter, and there is nothing in the appeal that would indicate Mr. West would succeed in meeting the burden on him of showing that finding was an error of law. The finding was firmly supported in the evidence, was reasonable and was well reasoned.
39. I find nothing in the appeal that demonstrates Mr. West has a strong *prima facie* case.
40. An extension of the appeal period is denied.
41. Additionally, for the reasons given above, the appeal has no reasonable prospect of succeeding and, even if the appeal period was extended, would be dismissed on that basis. The appeal does not remotely warrant finding there was any reviewable error in the Determination.
42. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to the appeal.
43. In sum, the appeal is dismissed under section 114(1) (b) and (f) of the *ESA*.

ORDER

44. Pursuant to section 115 of the *ESA*, I order the Determination dated January 21, 2020, be confirmed in the amount of \$3,326.11, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal