



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Mark Yen Yim  
(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:** Ryan Goldvine

**FILE No.:** 2020/168

**DATE OF DECISION:** June 4, 2021

## DECISION

### SUBMISSIONS

Mark Yen Yim on his own behalf

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Mark Yen Yim (the “Complainant” or “Appellant” in this appeal) of a determination made by Leah Reinheimer, a delegate of the Director of Employment Standards (the “Director”), on November 18, 2020 (the “Determination”).
2. The Determination found that Les Croissants D’Olivier Ltd., carrying on business as Olivier’s Breads (the “Employer”), had just cause to terminate the Appellant’s employment when it did so on November 8, 2019.
3. The Appellant has appealed the Determination on the grounds that the Director failed to comply with principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made.
4. Although the request for appeal was provided to the Tribunal on December 14, 2020, before the date established as the statutory appeal deadline, the Appellant provided limited submissions at the time of filing, and instead requested an extension to March 5, 2021 under section 109(1)(b) of the ESA for an extension to complete the appeal.
5. In correspondence dated December 21, 2020, the Tribunal, among other things, acknowledged having received the appeal and the request to extend the appeal period and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
6. The Tribunal also directed the Appellant to provide written reasons and arguments by no later than March 5, 2021; however, the Tribunal also identified that it would be up to this Panel to determine whether such an extension would be permitted.
7. Further documents and submissions were then received by the Tribunal from the Appellant on March 2, 3, 8, and 22, and on April 21, 2021.
8. The Appellant also requested an oral hearing. I have reviewed the file and considered the Appellant’s request. As credibility is not essential to the disposition of this appeal and no oral evidence is otherwise required, I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, 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 the Employer 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 the Appellant 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(S)**

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

### **THE DETERMINATION**

11. The issue before the Director was whether the Complainant was entitled to compensation for length of service.
12. The director's delegate (the "Delegate") determined, based on all of the evidence before her, that the Complainant's conduct on October 10, 2019 was aggressive, unsafe, and reckless, and sufficient to constitute just cause for the termination of the Complainant's employment. The Delegate based this conclusion on the conclusions reached by WorkSafeBC and the decision by the RCMP to not proceed with any further investigation of the Complainant's allegations of assault, as well as on interviews with the Employer, with all identified witnesses, and with the Complainant, as well as on all of the documentary and video evidence before her.
13. The Delegate reviewed all of the video records provided and concluded, consistently with the RCMP and WorkSafeBC, that the Complainant was, in fact, the aggressor in the altercation that occurred on October 10, 2019.

14. The Delegate also accepted the Employer's explanation for the delay in terminating the Complainant's employment based on not having fully appreciated the seriousness of the incident until WorksafeBC and the RCMP had investigated, and the Employer was then also able to review all of the video footage of the incident and complete its review and investigation.

### **ARGUMENT(S)**

15. Upon filing the Appeal request in December 2020, the Appellant indicated the reason for needing more time to be limited English language ability. The request also indicated that an expert had confirmed that the video footage had been tampered with.
16. Although further submissions and documents were received by the Tribunal on March 2, 3, 8, and 22, and on April 21, 2021, none of these submissions or documents reference any assistance sought or received to support the Appellant's assertion that language or translation assistance was obtained, or necessary.
17. In addition, although the Appellant indicates that an expert had confirmed that the video footage had been tampered with, no such supporting evidence was provided to the Tribunal.

### **ANALYSIS**

18. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt with 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.

19. 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.
20. 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.

21. As indicated above, although the Appellant indicated his intention to appeal in a timely fashion, the initial submission requested an extension to March 5, 2021 to provide fulsome reasons and argument, and any related evidence. The submissions received in March and April, however, make no further reference to the extension request, and in fact included further submissions after the March 5<sup>th</sup> date, also without reference to the extension requested, or its passing.
22. On this basis alone I would be prepared to reject the Appellant’s request for an extension of time for filing the present appeal. Even if I had been prepared to accept that the Appellant’s language barriers, and intention to provide further evidence relating to the video evidence of the incident, constituted a reasonable and credible explanation for the extension of time requested, the fact that no further supporting evidence was provided mitigates against allowing the extension.
23. When considering the *prima facie* strength of the case presented by the Appellant 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.
24. 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.
25. 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.
26. 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.
27. The Appellant seeks to overturn the Determination under subsections 112 (1) (b) and (c).
28. With respect to the Appellant’s assertion that the Director failed to observe the principles of natural justice, it appears this assertion is based on assertions that the Delegate accepted the Employer’s reasons and evidence, which the Appellant characterizes as “lies”.
29. On the face of the material and information contained in the record, the Appellant was provided with the opportunity required by principles of natural justice to present their position to the Director. Although the Appellant expresses dissatisfaction in the result, and alleges a failure to consider the witness

statements provided, it is clear from the Determination that all avenues of inquiry raised by the Appellant were explored.

30. The Appellant also asserts as a ground of appeal that evidence has become available that was not available at the time the Determination was made. Although the Appellant continues to assert that the video footage was doctored or tampered with, this is not a new allegation, as he claims to have raised this with the RCMP, and raised this on numerous occasions with the Delegate. In addition, although the Appellant claims to have sought the advice of an expert who confirmed the alleged tampering, neither the Delegate nor this Panel have been provided with any such evidence.
31. The Appellant's submissions, on their face, instead appear to be an attempt to reargue the case that was already decided by the Delegate, with the addition of further alternate reasons the Appellant believes their employment was terminated without severance.
32. Accordingly, I am able to conclude that the extension requested to the statutory appeal period should not be allowed. This is both because no reasonable or credible explanation has been provided for the failure to meet the statutory appeal period, and because no further information has been provided to support a *prima facie* case in favour of the Appellant.
33. Although I have concluded that the extension of time is not appropriate, I nevertheless address the fact that this is not a case in which the statutory appeal period was missed entirely, as is the case in many other appeals that have been brought before this Tribunal. In this case, the Appellant did, in fact, submit the Appeal form, along with some documentation and a brief submission, within the statutory appeal period.
34. Accordingly, I am compelled to review those submissions to determine whether they alone might warrant a continuation of this proceeding.
35. On December 14, 2020, the Appellant emailed the Tribunal with the Appeal form, a brief email submission, a handwritten submission, two further typewritten submissions, documents relating to the file format of certain video clips, and medical notes relating to the Appellant's fitness to work.
36. The Appellant's submissions consist of three main themes: that the co-worker was equally at fault for the altercation; that the video footage was tampered with and does not show that Appellant was injured prior to the altercation or that the Appellant's supervisor(s) assaulted the Appellant; and that the Appellant was directed to return to work after the incident before the Appellant's employment was terminated.
37. Having reviewed the Determination in detail, I am able to find that all of these assertions were canvassed and reviewed by the Delegate. The Delegate determined that the video evidence clearly demonstrates the Appellant's repeated efforts to aggressively engage with the co-worker, requiring physical restraint from the supervisor, and found that this was sufficient conduct on its own, to warrant cause for termination, particularly given the warnings that had been provided by the Employer following previous interactions with the same co-worker in July of that same year. The Delegate also considered and rejected the relevance of the Appellant's assertions of having been injured at work prior to the altercation.

38. The Delegate also considered and was unable to accept the Appellant's assertions relating to tampering with the video clips. The Delegate did not accept the Appellant's assertion that the fact of "different codecs" was in itself evidence of tampering, but also confirmed that even though the Appellant states that certain scenes are missing, the video that was provided was sufficient to demonstrate conduct supporting a finding of just cause for termination.
39. The Delegate also considered the apparent inconsistency between the Employer's requests that the Appellant return to work in the days following the incident and the subsequent termination of the Appellant's employment, and accepted that the delay was not unreasonable while the Employer fully reviewed and investigated the events of October 10, 2019, including the video evidence of the altercation.
40. Having reviewed the record, including the video evidence of the altercation, I find no reason to interfere with the findings of the Delegate.
41. Based on all of the foregoing, having rejected the Appellant's request for an extension to the statutory appeal period, and considering the submissions that were made in a timely fashion, I am nevertheless able to conclude that this Appeal should be dismissed under section 114(1)(f) on the basis that there is no reasonable prospect that the appeal will succeed.

#### **ORDER**

42. The Appellant's request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b).
43. Further to this, the Appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period.
44. In the alternative, to the extent that submissions received within the statutory appeal period may be viewed as complete, the Appeal is nevertheless dismissed under section 114(1)(f) as disclosing no reasonable prospect of success.
45. The Determination dated November 18, 2020 finding that the Appellant is not entitled to compensation for length of service is hereby affirmed.

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**Ryan Goldvine**  
**Member**  
**Employment Standards Tribunal**