

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

9512608 Canada Inc. carrying on business as Pandora and as Derkar Group
(the “Employer”)

- 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: Jenny Ho

FILE NO.: 2021/066

DATE OF DECISION: October 06, 2021

DECISION

SUBMISSIONS

Arpi Shalemon

on behalf of 9512608 Canada Inc. carrying on business as Pandora and as Derkar Group

OVERVIEW

1. This decision relates to the timeliness of an application made by 9512608 Canada Inc. carrying on business as Pandora and as Derkar Group (the “Employer”) to appeal a determination made by a delegate (the “Delegate”) of the Director of Employment Standards dated June 16, 2021 (the “Determination”).

FACTS

2. The Determination was sent to the Employer on June 16, 2021, by registered mail.
3. The Delegate determined that the Employer owed wages, and accrued interest, in the amount of \$513.95. The Delegate found that the Employer had contravened sections 17, 18, and 63 of the *Employment Standards Act* (“ESA”), and imposed three \$500 administrative penalties for the contraventions. The total amount payable is \$2,013.95.
4. The Employer appeals the Determination on the ground that new evidence has become available, under section 112(1)(c) of the *ESA*.
5. The Employer also requests an extension to the appeal period under section 109(1)(b) of the *ESA*.
6. The appeal deadline, as marked on the Determination, was July 26, 2021.
7. On July 28, 2021, the Employment Standards Tribunal (the “Tribunal”) received a notice to appeal by email from the Employer.
8. On August 3, 2021, at the request of the Tribunal, the Employer submitted a revised Appeal Form and a written request for an extension to the statutory period.
9. On August 27, 2021, the Tribunal forwarded the record, produced pursuant to section 112(5) of the *ESA* (the “record”), to the parties for a submission on its completeness. No objection was made to its completeness, and the Tribunal accepts the record as complete.
10. This decision is based on the appeal submission of the Employer, the Determination, the Appeal Form, and the record.

ISSUE

11. The issue in this case is whether an extension of the time limit to appeal the Determination should be allowed, pursuant to section 109(1)(b) of the *ESA*.

ARGUMENTS

12. In the letter to the Tribunal dated August 3, 2021, the Employer states that they believed the appeal deadline was July 29, 2021. They claimed that the appeal was late due to absences of associates, changes to mall hours, hiring of employees, and lockdown in Ontario. They also claimed that the delay was due to the time it took to recover lost data in a laptop, and the time to convert the files into another format.

ANALYSIS AND REASONS

13. Section 24(1) of the *Administrative Tribunal Act* (“ATA”), states, “a notice of appeal respecting a decision must be filed within 30 days of the decision being appealed, unless the tribunal's enabling Act provides otherwise.”

14. Pursuant to section 109(1)(b) of the *ESA*, the Tribunal may extend the time period for requesting an appeal even though the period has expired. [my emphasis]

15. The Tribunal has established a set of criteria to determine whether to exercise its discretion to extend the statutory period. These criteria are set out in *Niemisto*, BC EST # D099/96. Appellants seeking extensions for filing appeals should satisfy the Tribunal that:

- 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 ongoing 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.

16. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach in considering requests to extend the time limit for filing an appeal:

“...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.” [my emphasis]

17. In the letter to the Tribunal dated August 3, 2021, the Employer states that they had mistakenly believed the deadline to appeal the Determination was July 29, 2021 but fails to provide any reason for the misapprehension.

18. The Employer claims that the delay in filing the appeal was due to associates’ absences, lockdown, hiring of employees, and changes to mall hours. There is no doubt the lockdowns and re-openings due to the pandemic created disruptions to many businesses. However, according to the appeal submission filed by the Employer, the Determination was picked up at the post office by an associate of the Employer on July 7, 2021. It was opened and emailed to the Employer on July 9, 2021. The deadline for filing an appeal was clearly marked in a box on the Determination. The Determination was sent by registered mail to the

Employer's store in Abbotsford, the Employer's registered head office, the Employer's attorney's office, and the two directors' registered offices.

19. The Employer asserts that the time it took to locate the documents caused the delay to appeal. I do not find this assertion convincing given there was ongoing communication between the Delegate and the Employer one month prior to the Determination.
20. The Employer provides a concoction of vague explanations for the delay. For example, the Employer does not provide any detail as to why the documents were only stored in a laptop which crashed, how the documents were recovered, and the length of time it took to recover the documents. The Employer also does not provide reasons for the difficulty in converting the documents into another format.
21. Based on the reasons above, I find that the Employer has not provided the Tribunal with compelling reasons for granting an extension. I would be prepared to refuse the Employer's request for an extension on this basis alone.
22. I am also compelled to assess whether there is a strong *prima facie* case in favour ~~for~~of the Employer.
23. The Employer seeks to appeal the Determination under section 112(1)(c) of the *ESA*.
24. The Employer asserts that: (a) the employee did not qualify for any bonus because sales benchmarks were not achieved; (b) the employee should not be compensated for the length of service because they tried to request the employee's availability on four occasions, and they never terminated her employment; and (c) the employee should not be paid for the hours she spent on training outside of work hours as she was provided with time to complete her training during work hours.
25. The Employer's appeal submission contains more than 300 pages of documents which consist of spreadsheets of sales details, a phone record, and a document prepared by the store manager for the Employer.
26. The spreadsheets show sales details for the months of December 2019, January 2020, and February 2020.
27. The phone record documents the phone call made on June 30, 2020 from the Employer to the employee.
28. The document created by the store manager addresses issues already raised in the Determination.
29. The Tribunal sets out guidance on how to assess appeals under section 112(c) of the *ESA* in *Re Davies et al.*, BC EST # D171/03. The Tribunal established a four-part test as follows:
 - (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - (b) the evidence must be relevant to a material issue arising from the complaint;
 - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and

- (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

30. I find that the summary of the sales was already provided to the Delegate (p. 142 of the record). This was presented to and considered by the Delegate. The Delegate found that the Employer was bound to pay the bonus once it chose to exercise its discretion to do so (p. 20 of the appeal submission).
31. The phone record does not constitute “new evidence.” First, it could have been requested from the phone service provider and submitted to the Delegate. Second, it does not have any probative value to the appeal. The phone record only shows that the Employer did in fact call the employee. The Delegate was aware of the phone call made on June 30, 2020 and this was not in dispute. The employee submitted to the Delegate that she saw a missed call from the Employer on June 30, 2020 (p. 23 of the record). I can find no probative value from the phone record that could lead the Delegate to a different conclusion.
32. The document created by the Employer’s store manager simply reiterates the points raised before the Delegate.
33. Having reviewed the appeal submission, the Determination, and the record, I find that all the assertions made in the Employer’s appeal were reviewed and considered by the Delegate. The evidence submitted in this appeal does not pass the four-part test in *Davies, supra*.
34. As the Employer has failed to demonstrate that there is any relative merit to the ground of appeal under section 112(1)(c) of the *ESA*, I dismiss the appeal pursuant to section 114(1)(f) of the *ESA*.
35. Having found no compelling reason to grant an extension, I deny the request for an extension to the statutory appeal period.

ORDER

36. The appeal is dismissed under section 114(1)(b) and (f) of the *ESA*.
37. The request for an extension to the statutory appeal period under section 109(1)(b) of the *ESA* is denied.
38. The Determination is confirmed, pursuant to section 115(1)(a) of the *ESA*.

Jenny Ho
Member
Employment Standards Tribunal