Employment Standards TRIBUNAL

Citation: Three S Environmental Ltd. (Re)
2021 BCEST 88

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Three S Environmental Ltd.
(“Three S”)

- 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.: 2021/067

DATE OF DECISION: November 08, 2021

DECISION

SUBMISSIONS

David Wilkinson	on behalf of Three S Environmental Ltd.
Israel Chafetz, Q.C.	counsel for Three S Environmental Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the *"ESA"*) by Three S Environmental Ltd. ("Three S") of a Determination issued by Megan Roberts, a delegate of the Director of Employment Standards (the "Director"), on June 22, 2021. The date for delivering an appeal of the Determination to the Tribunal was July 30, 2021.

2. The Determination found Three S had contravened Part 3, sections 17 and 18, and Part 4, section 40 of the *ESA* in respect of the employment of Sam Habibi Parsa ("Mr. Parsa"), Corlan Williams ("Mr. Williams") and Mohammad Totonchi ("Mr. Totonchi") (collectively, the "complainants"), and ordered Three S to pay wages to the complainants in the amount of $9,518.76, an amount which included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $1,500.00. The total amount of the Determination is $11,018.76.

3. Three S filed an appeal of the Determination on July 30, 2021, raising all of the available grounds of appeal listed in subsection 112(1) of the *ESA*. The appeal sought an extension of time to August 31, 2021. Three S explained the extension was required to allow Three S "to gather the documents and to prove [their] records and actions are within the ESA guidelines and regulation". In its accompanying submission, Three S identified several matters that it sought to have addressed in the appeal.

4. On August 6, 2021, the Tribunal acknowledged receipt of the appeal and extension request, which among other things, included a requirement for Three S to provide the Tribunal with any additional documents in support of the appeal no later than the end of the working day on August 31, 2021.

5. On August 25, 2021, the Tribunal received correspondence from legal counsel for Three S, advising he had just been retained to represent Three S on the appeal and requested an extension to September 30, 2021 to file a submission on the appeal. This correspondence was followed by an e-mail from David Wilkinson ("Mr. Wilkinson"), the owner and sole director of Three S, also requesting a further extension. This communication was subsumed in the request from counsel for Three S.

6. In correspondence dated August 30, 2021, the Tribunal acknowledged the request from counsel for Three S and granted a further extension, to the requested date, to "provide the Tribunal with any additional documents in support of the appeal", reiterating this extension was not an extension of the statutory appeal period.

7. In correspondence dated September 10, 2021, the Tribunal, among other things, indicated the section 112(5) record ("the record") had been received from the Director and, except for Mr. Williams who had

not given the Tribunal his current contact information, provided the record to the parties, and offered an opportunity to object to the completeness of the record.

8. There have been no objections to the completeness of the record, and I accept it as being complete.

9. On September 29, 2021, the Tribunal received a submission filed on behalf of Three S by legal counsel which provided a submission on the requested extension of time to file an appeal of the Determination and a submission on the merits of the appeal.

10. Accompanying the latter submission were several documents that had not been submitted to the Director during the investigation and which Three S submitted were relevant to the merits of the appeal.

11. 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 the 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 additional material allowed to be added to the appeal. Under subsection 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 the 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 that 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.*

12. If satisfied the appeal or parts of it has some presumptive merit and should not be dismissed under subsection 114(1), the Director and the complainants will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in subsection 114(1), it is liable to be dismissed. In this case, I am looking at whether the request to extend the statutory appeal period should be allowed or dismissed under subsection 114(1)(b). In this context, I am primarily assessing the relative strength of the appeal and also whether it has any reasonable prospect of succeeding.

ISSUE

13. The issue in this appeal is whether the request to extend the statutory appeal period should be granted, and the appeal allowed to proceed, or be dismissed under subsection 114(1) of the *ESA*.

THE FACTS

14. Three S provides curbside recycling pick-up and driving services for Halton Recycling Ltd. carrying on business as Emterra Environmental, a waste collection and recycling service in North Vancouver, BC. At the time the complaints were filed, Mr. Parsa and Mr. Williams were former employees and Mr. Totonchi was still a current employee of Three S. The wages each complainant was paid varied, but each was paid a flat daily rate per day.

15. Mr. Parsa and Mr. Williams filed complaints under the *ESA* alleging Three S had contravened the *ESA* by failing to pay regular wages and/or overtime wages. Mr. Totonchi filed his complaint alleging Three S had contravened the ESA by failing to pay overtime wages. The Director initiated an investigation under section 76(2) of the *ESA* on whether Mr. Totonchi was owed wages.

16. The Director commenced the investigation of the complaints on May 12, 2021 and issued the Determination and the reasons for Determination on June 22, 2021. The Director issued preliminary findings relating to the complainants on June 8, 2021, which was sent to Mr. Wilkinson at two e-mail addresses he had provided for communicating with him. In the preliminary findings, the Director states:

> ***. . . my preliminary finding is that the Complainants do <u>not</u> meet the definition of short haul truck driver.*** (italics, emphasis and bolding included in original)

17. The preliminary findings letter also included preliminary calculations of the wages owed to each of the complainants. The overtime calculations were based on section 40 of the *ESA*.

18. In that document, the Director added:

> If you wish to dispute the . . . preliminary findings, please provide all evidence and supporting documentation to me . . . **by 1:00pm on June 16, 2021** (bolding in original)

19. The above facts, and the steps that followed the issuance of the preliminary findings letter to Three S, are set out in more detail on pages R4 – R5 of the Determination. In short, Mr. Wilkinson did not dispute any of the preliminary findings and had no further communication with the Director until June 21, 2021.

20. The complainants said they were employed by Three S to collect curbside recycling and drive a recycling truck. Each was paid a flat rate based on a 10-hour day, with no overtime being paid until after 10 hours worked. During the investigation, Mr. Wilkinson told the Director that the complainants' pay was a daily rate based on 10 hours a day, 8 hours paid at straight time and 2 hours paid at 1 ½ times the hourly rate.

THE DETERMINATION

21. The issues identified by the Director in the Determination were whether any of the complainants were owed regular and/or overtime wages.

22. All parties were provided the opportunity to present their positions to the Director.

23. On the above issues, the Director made the following findings:

1. Two of the complainants were owed regular wages;
2. The Director found each of the complainants were owed overtime wages.

   Included in this finding is the conclusion of the Director that the complainants were not employed as short haul truck drivers, as that term is defined in the *Employment Standards Regulation* (the *"Regulation"*). In reaching this finding, the Director noted the *ESA* is remedial legislation providing minimum benefits and standards for employees and as such should be given a sufficiently large and liberal interpretation that best ensures its purpose and intent and extends its entitlements and protection to as many employees as possible.

   The Director stated that persons seeking to rely on provisions that exempt some employees from the minimum standards have the onus of showing such exemption applies and found Three S had not satisfied that onus. The reasons for that finding are set out on page R6 of the Determination and include: the absence of any evidence indicating the complainants were required to have a special class of driver's licence or *National Safety Code* certification to perform the work; that Three S did not provide any evidence or argument that the complainants were employed as short haul drivers or that their work fell within section 37.3 of the *Regulation*; that while the complainants acknowledged they drove recycling trucks for Emterra Environmental, they also gave evidence that a substantial portion of their shifts were spent outside the vehicle picking up and manually unloading curbside blue bins, leading the Director to find the work of picking up and unloading blue bins was far beyond being an incidental ancillary duty and comprised the bulk of the work the complainants performed; and Three S did not dispute the preliminary finding that the complainants were not short haul truck drivers.
3. The Director calculated the wages owing to each of the complainants and detailed those calculations in the Determination.

24. The Director found Three S had committed three contraventions of the *ESA* and imposed administrative penalties for those contraventions.

ARGUMENTS

The Extension Request

25. By way of background, the *ESA* imposes a 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.

26. The extension request filed with Appeal Form received by the Tribunal on July 30, 2021, was predominantly based on a professed unfamiliarity and confusion with the process. The extension request filed on behalf of Three S with the Tribunal on August 25, 2021, was based on unfortunate personal circumstances affecting Mr. Wilkinson at the time, the recent retention of legal counsel to represent Three S in the appeal, and the likely difficulty getting the necessary input and records to assemble an appeal submission without Mr. Wilkinson's direct involvement.

The Merits of the Appeal

27. Three S has raised all of the available grounds of appeal.

28. In the submission from Mr. Wilkinson that accompanied the Appeal Form, which I only summarize here, Three S sets out the following as matters to be considered in the appeal:

- The Director may have been misguided by the complainants, who likely did not provide all the facts to the Director;
- The Director did not understand the business and was misled by the complainants' incomplete information;
- The facts provided by Three S were misunderstood/ignored/overridden;
- The Director "switched twice" between finding the complainants were, or were not, short haul drivers, creating much confusion for Three S;
- The complainants were short haul truck drivers;
- Drivers have worked under the terms provided by Three S for 13 months without complaint;
- The wage calculations done by the Director are inaccurate – apart from being based on an eight-hour day – because they do not take into account unpaid lunch break deduction, do not include days when Three S has no record showing the complainant worked, do not recognize that a three-hour training period was extended to a full days' pay for one of the complainants, and do not account for occasions when one of the complainants was overpaid for the day; and
- Three S has records and documents that support their position the complainants should have been considered short haul drivers.

29. The submission from Mr. Wilkinson referred to carrier records and pre and post trip records for the complainants as documents Three S sought an extension to collect and produce.

30. On September 29, 2021, the Tribunal received a submission on the appeal from counsel for Three S (the "supplementary submission").

31. I consider this submission to be supplementary and additional to that filed on behalf of Three S by Mr. Wilkinson on July 30, 2021.

32. As it relates to the merits of the appeal, the supplementary submission primarily focuses on the error of law ground of appeal and the ground of appeal in subsection 112(1)(c), that evidence has come available

that was not available when the Determination was being made – colloquially described as the "new evidence" ground of appeal.

33. As in the initial submission, the supplementary submission contends the Director erred in law in finding the Complainants were not short haul truck drivers, as that term is defined in the *Regulation*, and seeks to support that argument with documents and information that was not provided to the Director during the investigation. Counsel for Three S contends the central question is, "the extent of driving required for the job" or, expressed another way in the argument, "the amount of driving during a standard 10 hour shift": para 4, supplementary submission. Whether or not I accept that contention, the "issue", as expressed, is predominantly a factual one. I do not read the supplementary submission as arguing the complainants would meet the definition of short haul truck drivers based on the finding made by the Director of the work performed by them during a shift.

34. The supplementary submission from counsel for Three S includes several documents, some of which are those described in the July 30, 2021 submission, and form the basis for the "new evidence" ground of appeal. The following documents have been submitted with the supplementary submission:

   i. a list of persons employed by Three S as drivers and swampers as of June 2021;
   ii. an offer of employment sample letter for the position of swamper;
   iii. the first page of the hiring package for swampers;
   iv. a time study of how long it takes to complete a typical residential route on a daily basis;
   v. inspection reports for vehicles driven by the complainants; and
   vi. a list of the routes serviced by Three S.

35. Three S does not contend the above information is new and could not have been provided to the Director during the investigation, but argues it is appropriate to allow and consider this material because "[t]here was no clear direction from the Delegate in the investigation that the real issue was the status of the driver". This contention is repeated later in the statement that the "documentation [provided] in this appeal was not given to the Delegate because it was not the issue that formed the basis of the inquiry": supplementary submission paras. 12 and 14.

36. Three S also argues that as a matter of natural justice, the content of the drivers' work was only "tangential" to the main inquiry, which was whether the daily rate included overtime, and Three S did not focus on that aspect of the case, because the Director was not focused on that question. This argument appears to be the sum and substance of the "natural justice" ground of appeal.

37. This decision will address the arguments raised in both the initial and supplementary submissions filed on behalf of Three S.

ANALYSIS

The Extension Request

38. 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.

39. 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.

40. While this case involves a request in the submission from Mr. Wilkinson to extend the appeal period that was made before the appeal period expired, the considerations are substantially the same. The request for a second extension of the appeal period was made after the statutory appeal period had expired.

41. I am not persuaded the explanation given by Mr. Wilkinson for not meeting the statutory appeal period is reasonable and credible. The preliminary findings made by the Director and conveyed to Mr. Wilkinson on June 8, 2021 could not, in my view, be more clear that the Director did not consider the complainants to be short haul truck drivers under the *Regulation* and that the calculation of wages owed was based on the provisions of section 40 of the *ESA*. Mr. Wilkinson did not take the opportunity provided in the preliminary findings letter to dispute any aspect of it. The record shows the final discussion between Mr. Wilkinson and the Director on June 21, 2021 did not suggest any confusion on the part of Mr. Wilkinson. The preliminary findings were reviewed; Mr. Wilkinson's concern, as expressed in the record, was whether he could get the money from Emterra Environmental to voluntarily resolve the claims. Three S has not challenged the content of the record.

42. The fact that Mr. Wilkinson sought legal assistance more than three weeks after the appeal period expired and that legal counsel requested an extension in order to assemble information and documents and prepare an appeal submission does not make his request "reasonable and credible".

43. There is nothing in the record that suggests Three S had an ongoing intention to appeal the Determination; there is reference in the record to Mr. Wilkinson expressing the opinion that Emterra Environmental might want to appeal the Determination. On the facts, this criterion mitigates against an extension of the appeal period.

44. Three S has not argued the complainants would not be prejudiced by the delay occasioned by an extension of the appeal period. This criterion is neutral.

45. The last factor is whether there is a strong *prima facie* case in favour of Three S. When considering the *prima facie* strength of the case presented by Three S 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.

The Merits of the Appeal

46. 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.*

47. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker or to correct perceived deficiencies in the responses provided during the investigation. An appeal is an error correction process, with the burden in an appeal being on an appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

New Evidence

48. Three S relies on the new evidence ground of appeal.

49. 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 subsections 2(b) and (d) of the *ESA*.

50. Three S seeks to have several documents added to the record and considered in the appeal.

51. I do not accept the material provided as satisfying the conditions for accepting them as "new evidence", for several reasons.

52. First, as Three S has acknowledged, the proposed evidence is not "new"; it comprises documents that existed when the investigation was being conducted and, if relevant, could – and should – have been provided to the Director during the complaint process. I find there is no satisfactory reason for the failure by Three S to provide this information to the Director.

53. Specifically, I reject the contention that these documents should be allowed because "[t]here was no clear direction from the Delegate in the investigation that the real issue was the status of the driver." On this point, I refer what was said to above. In sum, the preliminary findings letter clearly states that whether the complainants met the definition of "short haul truck driver" was an issue of "significant dispute", sets out the preliminary finding on that area of dispute – that the complainants do **not** meet the definition of short haul truck drivers – indicates their overtime entitlement was calculated on the provisions of section 40 of the *ESA* and provides the opportunity to dispute the preliminary findings.

54. Second, the relevance of these documents to the issue of whether the complainants fell within the definition of short haul truck driver is marginal at best. There is nothing in these documents which establishes, from a legal or statutory policy perspective, that persons who drive a curbside recycling truck and assist in collecting curbside recycling are short haul truck drivers. Any conclusion about whether an employee meets the definition in a regulatory exclusion depends on a total characterization of that person's duties. Whether a person performs duties to a degree that brings them within the exclusionary definition is predominantly a question of fact. The "new evidence" simply glosses over the work performed by the complainants, with virtually no acknowledgement of the evidence provided by the complainants and accepted by the Director.

55. Third, in light of the foregoing, I do not find this information to be particularly "probative", in the sense of being capable of resulting in a different conclusion than what is found in the Determination as it is not sufficiently complete or comprehensive to be determinative of the question of status.

56. Based on my decision to refuse to accept the documents provided as "new evidence", I find the argument made by Three S on the *prima facie* strength of their appeal must be addressed on the facts found in the Determination, which was that the work performed by the complainants did not place them within the definition of short haul truck driver in the *Regulation*.

57. Absent "new evidence" on which to ground the arguments provided in the supplementary submission, the substance of the appeal appears to be nothing more than a challenge to findings of fact made by the Director, which as examined under the error of law analysis, might be found to be an error of law.

Error of Law

58. 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.

59. There are some elements of the appeal that, at least inferentially, invoke elements of error of law arising from an error in the interpretation and application of provisions of the legislation or adopting a method of assessment which is wrong in principle. I do not find, however, any error of law in this respect in the conclusion of the Director on whether the complainants fell with the regulatory exclusion that applies to short haul truck drivers. The Director correctly identifies the operative policies and principles when interpreting and applying legislative provisions that exclude employees from minimum statutory protections and entitlements.

60. The Director correctly identified and gave effect to the following interpretive principles: that regulatory exclusions from minimum entitlements are narrowly construed; and the burden of establishing the factual and legal basis for the exclusion lies with the person asserting it. The Tribunal has adopted and consistently affirmed those principles on the interpretive question that was addressed in this case: see *Zack Anthony*, BC EST # RD123/17, at paras. 38 – 42.

61. The Director found Three S did not provide any argument or evidence that the complainants were employed as short haul truck drivers or that section 37.3 of the *Regulation* applied to them. There is no error in that statement. There is, in fact, nothing in any of the material relating to these complaints that demonstrates Three S is an employer to whom section 37.3 applies or that section 37.3 applied to the employment of the complainants at all.

62. The findings being challenged in this appeal are findings of fact about the work performed by the complainants.

63. It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

64. The Tribunal has held that findings of fact are reviewable as errors of law under prongs (3) and (4) of the *Gemex* test above: that is, if they are based on no evidence, or on a view of the facts which could not reasonably be entertained. The Tribunal has noted that the test for establishing an error of law on this basis is stringent, citing the reformulation of the third and fourth *Gemex* factors found in *Delsom Estates Ltd. v. British Columbia (Assessor of Area No. 11- Richmond/Delta)*, [2000] B.C.J. No. 331 (S.C.) at para. 18:

> . . . that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" . . .

65. The submissions made by Three S do not present a significant case for challenging the findings of fact made by the Director as errors of law. To reiterate, disagreement with findings of fact and inferences drawn therefrom does not provide a ground for appeal under section 112 of the *ESA* unless an error of law on the facts can be shown.

66. I find the facts provided supported the conclusion reached. There is no apparent merit to any argument that the Director committed a reviewable error on the facts. There was evidence from the complainants on which it was both logical and reasonable for the Director to find they were not short haul truck drivers. On the evidence before the Director, it cannot be argued that such findings were perverse or inexplicable.

Natural Justice

67. Simply put, there is no legal or factual basis for this ground of appeal. 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. I find nothing in the appeal that would support a finding the Director failed to comply with principles of natural justice. Three S was provided with the opportunity required by section 77 of the *ESA* and the principles of natural justice to to know the case they had to meet, present their position, including providing evidence to support that position, and to respond to the positions presented by the complainants and the evidence provided by them to support those positions.

68. As indicated above, an appeal is an error correction process, with the burden of showing an error on one of the three statutory grounds of appeal being on the appellant. Three S has not shown there is a strong *prima facie* case in its favour.

69. The failure of Three S to satisfy most of the criteria that would justify an extension of the appeal period is fatal to their request, and it is denied.

70. Absent an extension of the appeal period, the appeal is dismissed as being out of time.

71. I add that even if the appeal period was extended, the appeal has no reasonable prospect of succeeding and would be dismissed on that basis. On a review of the Determination, the record and the submissions that have been made by Three S touching on the merits of their case, I find nothing in the appeal that warrants finding there was any reviewable error in the Determination. The purposes and objects of the *ESA* would not be served by seeking further submissions or by requiring the other parties to respond to it.

ORDER

72. Pursuant to section 115 of the *ESA*, I order the Determination dated June 22, 2021, be confirmed in the amount of $11,018.76 together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal