



Citation: Victoria Mackie (Re)  
2022 BCEST 27

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Victoria Mackie carrying on business as Happy Home Childcare  
(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:** Maia Tsurumi

**FILE NO.:** 2022/068

**DATE OF DECISION:** May 13, 2022

## DECISION

### SUBMISSIONS

Victoria Mackie on her own behalf carrying on business as Happy Home Childcare

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Victoria Mackie carrying on business as Happy Home Childcare (the “Appellant”) has filed an appeal of a determination (the “Determination”) issued by Reena Sharma, a delegate (the “Adjudicative Delegate”) of the Director of Employment Standards (the “Director”), on November 16, 2021. In the Determination, the Adjudicative Delegate found the Appellant contravened section 21 (deductions) of the *ESA*.
2. The Appellant appeals the Determination on the following grounds: (1) a failure to observe principles of natural justice in making the Determination; and (2) new evidence has become available that was not available at the time the Determination was made. In her original Appeal Form, the Appellant says the Director erred in law, but her revised Appeal Form does not rely on this ground.
3. The Appellant requests an extension to the statutory appeal period under sub-section 109(1)(b) of the *ESA* to April 1, 2022. The statutory appeal deadline was December 10, 2021.
4. For the reasons below, I decline to extend the time to file the appeal and thus dismiss the appeal pursuant to sub-section 114(1)(b) of the *ESA*.
5. This decision is based on the submissions made by the Appellant in the Appeal Forms (original and revised), an unsolicited submission received April 6, 2022, the sub-section 112(5) record (the “Record”), the Determination and the Reasons for the Determination (the “Reasons”).

### ISSUES

6. The issues before the Employment Standards Tribunal (the “Tribunal”) are whether:
  - a. the time period for filing the appeal should be extended pursuant to sub-section 109(1)(b) of the *ESA*; and
  - b. all or part of this appeal should be allowed or dismissed.

### THE DETERMINATION

#### Background

7. The Complainant filed a complaint (the “Complaint”) under section 74 of the *ESA* for unpaid wages. A delegate of the Director (“Investigative Delegate”) investigated the Complaint and issued an investigation report (the “Investigation Report”) on September 21, 2021.

8. The Adjudicative Delegate made the Determination.

Issues in the Determination

9. The issues for the Adjudicative Delegate were: (1) whether the *ESA* did not apply to the Complainant because of section 32 of the *Employment Standards Regulation* (the “*Regulation*”); and (2) if not excluded by section 32, whether the Complainant was owed any wages.

Evidence Relied on in the Determination

10. The Adjudicative Delegate reviewed all the information in the investigation file, including the Investigation Report.

11. The Complainant’s evidence is summarized at length in the Reasons at pp. R2 – R4. In brief, the Complainant told the Investigative Delegate as follows:

- a. she was hired as a childcare provider for the Appellant’s unlicensed family daycare business;
- b. after an interview, the Appellant offered her a position as a “Childcare Provider” at Happy Home Childcare and she set out specific duties related to her business in the offer email;
- c. the wage rate was \$17.00 per hour and the Complainant was to work two, four-hour shifts per week;
- d. the Appellant asked for the Complainant’s resume, certifications and a criminal record check (CRC), which the Complainant provided;
- e. the criminal record check clearance letter did not expire until August 23, 2022;
- f. the Complainant worked by herself on March 2, 2021, for four hours looking after two children who were not the Appellant’s children;
- g. the Complainant quit on March 3, 2021;
- h. at the Appellant’s request, on March 8, 2021, the Complainant invoiced the Appellant \$68.00 for her work on March 2, 2021, but the Appellant did not pay her or otherwise respond to the invoice until the Complainant followed-up on March 16, 2021, following which the Appellant asked to meet her in person the next day;
- i. the Complainant did not meet with the Appellant on March 17, 2021, and sent her a text that day telling the Appellant she was going to file a complaint with the Employment Standards Branch (the “Branch”) and asking the Appellant to pay her \$68.00 in wages; and
- j. the Complainant never consented to the Appellant doing a CRC and written consent is required.

12. The Complaint provided documentary evidence to support her above statements.

13. The Appellant’s evidence is also reviewed in the Reasons (at pp. R4 – R6). She said as follows:

- a. the Appellant at first told the Investigative Delegate the Complainant was hired as a babysitter for the Appellant’s daughter and was job shadowing on March 2, 2021;

- b. the Appellant later said the Complainant worked at most a couple of hours on March 2, 2021, looking after two toddlers at the daycare who were not the Appellant's children;
  - c. the Appellant said the plan was to hire the Complainant after the interview and job shadowing process;
  - d. the Appellant said if she had hired the Complainant, she would have paid her \$17.00 per hour; and
  - e. the Appellant said a CRC was required for any adult working with children at Happy Home Childcare and the Complainant's CRC was outdated and for a different childcare centre and therefore she had to pay \$38.00 for a new CRC.
14. The Appellant submitted a document showing she paid \$28.00 for a CRC for an unnamed person on April 7, 2021.
15. The Appellant largely did not respond to the Investigative Delegate's detailed questions about inconsistencies between her evidence and the Complainant's evidence and inconsistencies in her own evidence.
16. On June 21, 2021, the Appellant sent a cheque to the Branch for \$40.00 made out to the Complainant. The cheque notation said it was "4 hrs-\$28 CRC," payment for the Complainant's four hours of work on March 2, 2021, at \$17.00 per hour, minus \$28.00 for the CRC.
17. In response to the Investigation Report, the Appellant said the payment to the Branch was reasonable because the Complainant did not come and pick up her wages at the Appellant's daycare and the Complainant knew the Appellant was a single mother looking for a babysitter for her daughter.

### The Decision

18. Based on the Complainant's evidence and the documentary evidence confirming the Complainant's evidence, the Adjudicative Delegate concluded the Complainant was not a "sitter," as defined under section 1 of the *Regulation*. She was an employee of a business providing childcare services.
19. Based on the Complainant's evidence, the Adjudicative Delegate determined the Complainant was owed wages for the four hours she worked on March 2, 2021, at a rate of \$17.00 per hour. This amounted to \$68.00.
20. The Adjudicative Delegate said under sub-section 21(1) of the *ESA*, an employer must not directly or indirectly withhold, deduct or require payment from an employee's wages for any reason other than statutory deductions or as otherwise permitted by enactment unless the employee authorizes the deduction in writing: *ESA*, ss. 21 and 22. As there was no evidence the Complainant had made a written assignment of wages for the \$28.00, the Adjudicative Delegate found the Appellant did not pay the Complainant all wages owing to her, as required by section 18 of the *ESA*. The Adjudicative Delegate ordered the Appellant to pay \$28.00, plus \$0.47 in accrued interest, to the Complainant. She also ordered a mandatory penalty of \$500.00 for the contravention of sub-section 21(1).

## ARGUMENTS

21. On the merits of her appeal, the Appellant says that:
- a. the Complainant was paid via a cheque for \$40.00, which was calculated based on wages for four hours at \$17.00 per hour minus \$28.00 for a CRC;
  - b. a new CRC was necessary because the one provided was from 2017 and expired;
  - c. the Complainant lied to the Branch;
  - d. the Appellant never received the Determination;
  - e. the Branch has wrongfully withdrawn \$528.00 from her bank account;
  - f. she is a single mother who struggles a great deal to make ends meet; and
  - g. she was harassed by two Branch staff, one of whom was the Investigative Delegate.
22. Regarding the request for an extension of time to appeal, the Appellant says she never received the Determination. She says she did not receive the Determination by e-mail because she deleted the e-mail account she was using to correspond with the Investigative Delegate. She says she deleted this e-mail account because the Investigative Delegate was invading her privacy and harassing her with threatening e-mails and calling her cell phone repeatedly. She refers to this as “cyber-bullying.”
23. The Appellant also says she did not receive the Determination by mail and has moved twice since she was last in contact with the Investigative Delegate.

## ANALYSIS

24. An appeal is not a re-hearing of the matter and is not another opportunity to give one’s version of the facts. Sub-section 112(1) of the *ESA* provides a person may only appeal a determination on the following grounds:
- a. the director erred in law;
  - b. the director failed to observe the principles of natural justice in making the determination; and/or
  - c. evidence has become available that was not available at the time the determination was being made.
25. The Appellant relies on grounds b. and c. Although her Appeal Forms are somewhat unclear on this point, I will also assume she relies on ground a.

### Issue 1: Should the Time for Filing the Appeal Be Extended?

26. The Determination was issued on November 16, 2021. The statutory appeal deadline was December 10, 2021. The Appellant filed the original Appeal Form on February 14, 2022, requesting an extension of time to file the appeal until April 1, 2022. On March 3, 2022, the Appellant filed a revised Appeal Form.

27. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing appeals from determinations, the time periods established in the *ESA* are not that unusual: *Niemisto*, at p. 3.
28. The framework for determining whether time periods for filing appeals should be extended are set out in the *Niemisto* decision. Appellants seeking extensions for 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.
- Niemisto* at p. 3; see also *Gorenshtein v. British Columbia*, 2013 BCSC 1499 at paras. 28 and 57.
29. This list is not exhaustive. There may be other factors that ought to be considered. Further, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.
30. Based on the *Niemisto* criteria, I deny the Appellant's request to extend the time limits for filing her appeal under sub-section 109(1)(b) of the *ESA*. My reasons are set out below, but in short, the Appellant has not provided a reasonable and credible explanation for the failure to ask for an appeal within the time limits; and does not have a strong *prima facie* case for an appeal.
31. The Appellant says she did not have any notice about the Determination, wages owing and penalty because she never received the Determination by email or mail. I find the Appellant is responsible for the fact she did not know about the Determination until the Branch removed funds from her bank account and so has no reasonable explanation for her failure to request an appeal on time.
32. The Branch served the Determination by email as it was allowed to do: *ESA*, ss. 122(1). However, after receiving the Investigation Report, the Appellant deleted the email account she had used to correspond with the Branch and did not provide an alternate email address. She told the Investigative Delegate several times to stop calling or e-mailing her (Record at pp. 39, 46 – 47). The Investigative Delegate told her if there was someone who could help her with the matter, he was open to working with that person. The Appellant refused his offer. The Appellant, in her appeal submissions, says she deleted her email account so that the Branch would not contact her.
33. Further, the Investigative Delegate repeatedly warned the Appellant during the investigation that once he issued the Investigation Report, it would be provided to a Branch decision maker who would make a determination, and that the decision maker could make a finding she owed wages to the Complainant and if this occurred, the Appellant would also have to pay at least one \$500.00 penalty (Record at pp. 37, 39-40, 43). Then, after he sent the Investigation Report to the Appellant, he told her it would be provided to a Branch decision maker (Record at p. 47). The Appellant received the Investigation Report and so knew

the evidence and case against her, including the fact it did not support her assertion that she could deduct the cost of a CRC from the wages owed to the Complainant. Therefore, before the Appellant cut off communication with the Branch, she knew the Determination would be made. She also knew a possible outcome of the Determination would be a finding she owed wages to the Complainant and would receive a \$500.00 penalty.

34. The Appellant says she was harassed by the Investigative Delegate, and this is why she had to delete her email account and told him to stop calling her. However, she could have asked the Branch to send her the Determination at her residence and could have provided updated addresses as she moved. She did not do so. She could have asked to deal with someone at the Branch other than the Investigative Delegate, but she did not do so. She could have taken the Investigative Delegate up on his offer to have a representative speak with the Branch on her behalf, but she did not do so. In any event, I find the Record shows the Investigative Delegate's attempts to contact her by telephone and email throughout the investigation were very respectful and reasonable.
35. For the same reasons the Appellant did not provide a reasonable and credible explanation for her failure to file a late appeal, it might also be said she did not have a genuine and ongoing *bona fide* intention to appeal the Determination (and correspondingly, the Respondent and Director were not made aware of it). But I find these criteria likely do not apply in the present circumstances where the Appellant did not know about the Determination and so would necessarily never have had any intention with respect to an appeal.
36. The Complainant is the Respondent in the appeal. I do not find the Complainant would be unduly prejudiced if I were to grant the extension. There is prejudice to the Complainant in delaying a decision on whether she can receive her unpaid wages, but given the amount is \$28.00 (plus \$0.47 in interest) and she no longer works for the Appellant, I do not find an almost three-month delay in filing an appeal unduly prejudicial.
37. Finally, I conclude the Appellant does not have a strong *prima facie* case.
38. There was no error of law. Sub-section 21(1) of the *ESA* expressly states an employer must not withhold, deduct or require payment of all or part of an employee's wages for any purpose, except as permitted or required by the *ESA* or any other statute or regulation. There was no requirement in the *ESA*, *Regulation* or any other statute or regulation that allowed the Appellant to deduct the cost of the criminal record check from the wages she owed to the Complainant.
39. There was no breach of principles of natural justice. The Appellant knew the case she had to meet and was given a fair opportunity to respond.
40. There was also no new evidence that was not available at the time the Determination was made that might suggest the appeal could succeed. The Appellant did not submit any new documents in the appeal. She has made substantially the same arguments on appeal as she did during the investigation. The only additional arguments on appeal are the fact the Branch has seized the \$528.00 she owes in wages and penalty from her bank account and that as a single mother of very limited means, she requires the seized funds to care for her child. Even if these assertions were admitted as new evidence, they would not change my conclusion she has no strong *prima facie* case, and the appeal has no reasonable prospect of

success. The Director is allowed to seize a person's assets to satisfy the amount a determination says the person owes: *ESA*, ss. 92(1). The *ESA* and *Regulation* impose mandatory \$500.00 penalties for violations of the *ESA*. The Adjudicative Delegate determined the Appellant violated the *ESA*. Thus, she had to impose the penalty and there was no error of law or breach of natural justice.

Issue 2: Should the appeal be allowed or dismissed?

41. Given my decision above I do not need to answer this question. However, had I granted the extension of time to file the appeal, for the reasons above as to why there is no strong *prima facie* case, I would also have found the appeal had no reasonable prospect of success and dismissed it under sub-section 114(1)(f) of the *ESA*.

*Summary*

42. In summary, I decline to extend the time to file the appeal under sub-section 109(1)(b) and dismiss the appeal under sub-section 114(1)(b) of the *ESA*.

**ORDER**

43. Pursuant to sub-section 115 of the *ESA*, I order the Determination, dated November 16, 2021, confirmed.

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**Maia Tsurumi**  
**Member**  
**Employment Standards Tribunal**