



Citation: Burt Feng (Re)
2022 BCEST 62

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Burt Feng

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2022/110

DATE OF DECISION: September 27, 2022

DECISION

SUBMISSIONS

Burt Feng on his own behalf

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Burt Feng (the “Complainant” or “Appellant” in this appeal) of a determination made by Mathew Osborn, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on April 12, 2022 (the “Determination”).
2. The Determination found that a portion of the Complaint covering the period of March 19, 2019 to March 19, 2020 was resolved between the parties, and that a portion of the Complaint relating to alleged wages earned or payable prior to March 19, 2019 was beyond the jurisdiction of the Director to collect. Accordingly, the Delegate ceased his investigation pursuant to section 76(3) of the *ESA*.
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.
4. Although the request for appeal was provided to the Tribunal on May 6, 2022, the date established as the statutory appeal deadline, the Appellant provided limited submissions at the time of filing, and instead requested an extension to August 6, 2022 to complete the appeal.
5. 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 submissions 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.

6. 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 Chef Hung Noodle Shop Ltd. (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

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

THE DETERMINATION

8. The Complaint alleged that the Employer failed to pay overtime during the period of the Complainant’s employment from September 2016 to October 2019. During the investigation into the Complaint, the Delegate advised the Complainant that wages were only recoverable under the *ESA* for a period dating back one year prior to the termination of his employment, limiting potential recovery to the period from March 19, 2019 forward.
9. The parties successfully resolved the portion of the Complaint from March 19, 2019 to March 19, 2020, and the Complainant agreed to and accepted the amount of \$3,450.42 (less deductions) as a resolution of that portion of the Complaint.
10. The Complainant did not agree to resolve or withdraw the portion of the Complaint relating to the time period prior to March 19, 2019 on the basis that he was not told of the 12-month recovery limitation, that he was told he did not need to seek outside assistance with respect to the Complaint, and that he did not file the Complaint earlier because he was fearful of losing his job.
11. The Delegate confirmed there was no dispute that the portion of the Complaint falling within the 12-month limit for recovery under section 80(1) of the *ESA* was resolved with the above-noted payment.
12. The Delegate also confirmed that the Complainant’s concerns relating to the earlier portion of the Complaint were immaterial to the fact that the *ESA* limits recovery in this way, and the limit in section 80(1) takes that portion of the Complaint entirely outside of the jurisdiction of the Director.
13. Because there were no outstanding issues in the Complaint that were within the jurisdiction of the Director, the Delegate exercised his discretion under section 76(3) to stop investigating the Complaint.

ARGUMENTS

14. Upon filing the Appeal request in May 2022, the Appellant indicated that he required additional time to collect and prepare the supporting documents, which he indicated to be a complicated process. The Appellant asked for an extension to August 6, 2022.
15. The Appellant indicated that he needed to compile almost three years of documents dating back to September 2016, and that he may need the assistance of an accountant to calculate the overtime he believed to be owing. The Appellant also indicated he may need to retain legal counsel.
16. Although the Appellant provided a number of documents to the Tribunal on August 8, 2022, he did not provide any further submissions relating either to his Appeal or to its late filing.
17. The Appellant did provide an unsolicited email September 20, 2022, however, this email simply appears to describe the documents provided on August 8th. Accordingly, I do not find it necessary to consider its contents, or whether it should be accepted.

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. Turning to the Appellant's reasons for requiring an extension of time, I find that the need to compile documents or review any materials with another individual, without more, does not represent a reasonable or credible explanation for the failure to perfect the appeal in the time frame required.
22. This notwithstanding, even if the Appellant had required this extra time to seek legal and/or financial advice or support, there is no evidence either that he sought nor obtained such advice. The documents provided by the Appellant on August 8, 2022 are most of the very same pay stubs provided by the Appellant to the Delegate during the investigation, but for three pay stubs from early 2017 that are not found in the Record.
23. Further, the Appellant has not provided reasons for his appeal other than the assertion that he is owed compensation for overtime worked prior to March 2018, nor any substantiation of his reasons given for having requested the extension from the May deadline for filing his appeal.
24. 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.
25. The grounds of appeal are statutorily limited to those found in section 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.
26. 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.
27. 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.
28. In the present case, there is nothing on the face of the Determination, or the reasons for Determination that would suggest a failure to observe the principles of natural justice, nor that the Director erred in law (although this ground has not been identified). As I have already noted, none of the documents provided August 8, 2022 appear to be new other than three pay stubs from early 2017, which suffer the same fate as the others falling outside of the jurisdiction of the Director to order compensation for.
29. It is clear from the reasons for Determination that the Appellant did not agree that he should be subject to the 12-month limitation, either because he was not informed of it, or because he was not advised to

seek outside assistance, legal or otherwise; however, the Delegate was aware of these arguments and appropriately dismissed their relevance in the Determination.

30. The amount an employer may be required by a determination to pay is limited by section 80(1) of the *ESA*, which reads as follows:

Limit on amount of wages required to be paid

- 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
- (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment, and
 - (b) in any other case, 12 months before the director first told the employer of the investigation that resulted in the determination,
- plus interest on those wages.

31. There is no dispute that the outstanding overtime wages sought by the Appellant precede this 12-month limitation period, and, accordingly, the Director cannot, by law, order their payment.

32. While the Appellant may well have worked overtime hours for which he was not appropriately compensated, the hours and pay periods he points to occurred earlier than the 12-month limitation set out in section 80.

33. Accordingly, I decline to grant the extension requested for filing the appeal; however, even if I had granted the extension, I find that no reasons or argument were provided to support any of the available grounds of appeal, let alone the ground identified.

ORDER

34. The Appellant's request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b) of the *ESA*.

35. Further to this, the Appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period.

36. 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.

37. The Determination dated April 12, 2022 is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal