

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Angela Hill
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE No.: 2022/130

DATE OF DECISION: December 19, 2022

DECISION

SUBMISSIONS

Angela Hill on her own behalf as a former director of 1090917 B.C. Ltd., carrying on business as W. Restaurant

Michael Thompson delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Angela Hill (the “Appellant”), former director of 1090917 B.C. Ltd., carrying on business as W Restaurant (the “Employer”), of a determination made by Sarah Vander Veen, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director), on April 22, 2022 (the “Determination”).
2. The Determination found that the complainant, Kerri Ross (the “Complainant”), was owed compensation for length of service (“CLOS”) along with vacation pay and imposed a mandatory \$500 fine for the contravention.
3. The Appellant appeals on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. In addition, the Appellant requests an extension for the filing of the appeal on the basis that she claims neither she nor her husband received a copy of the Determination.
5. The deadline for filing an appeal was May 30, 2022. The Appeal was received by the Employment Standards Tribunal on August 5, 2022.
6. Unable to dispose of the matter on the basis of the materials initially filed, I sought submissions from the parties both on the request for extension, and on the merits of the appeal.
7. The Tribunal received submissions from the Director on October 4, 2022. Although the Appellant was given until October 28, 2022, to provide a response to the Director’s submissions, she did not provide any further submissions.
8. 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 the submissions received from the Director.
9. 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.

10. If satisfied that the appeal meets 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.

11. For the reasons that follow, I decline to grant the Appellant's request for an extension and dismiss the appeal under section 114(1)(b).

ISSUE

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

THE DETERMINATION

13. The issue before the Director was whether the Complainant was entitled to CLOS.

14. The Complainant last worked for the Employer on March 19, 2020. During the investigation, Ms. Hill took the position that she had given the Complainant notice, on or about January 6, 2020, that her employment would end at the end of March 2020.

15. The Appellant sold the business to a new owner, Ms. Wong, who took the position before the Director that the Complainant had only been temporarily laid off in March and elected to sever her own employment by declining to be recalled to work in June 2020.

16. The Delegate determined that the Complainant's employment ended earlier than the end of March, and relied on section 63(6) of the *ESA* to determine that the notice the Appellant gave was null and void. The Delegate determined that the Complainant was entitled to CLOS which crystallized on her last day of employment, March 19, 2020.

17. The Delegate determined that the Complainant was entitled to CLOS in the amount of \$2,520, plus a corresponding amount for vacation pay. The Delegate also imposed a \$500 mandatory administrative penalty.

ARGUMENTS

18. The Appellant seeks an extension of the statutory appeal period to August 6, 2022, because she “[d]id not receive original Determination letter.” The Appellant indicates that although the Canada Post record shows the letter was signed for, she asserts that “only 2 people live in our house. My husband and I, neither of us signed for anything and believe it may have been delivered to wrong address.”
19. The Appellant says she asked for a photo of the signature on file with Canada Post, but one was not provided to her, either by Canada Post or the Employment Standards Branch.
20. Regarding the merits of the Complaint, the Appellant asserts the Director erred in law, and failed to observe the principles of natural justice.
21. The Appellant submits that the shutdown of her business was caused by the COVID-19 pandemic, and the Complainant’s receipt of CERB benefits should have offset any severance that might have been owing.

ANALYSIS

22. 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.
23. 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.
24. 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.

25. Failure to receive a copy of the Determination may very well be a reasonable explanation for the failure to request an appeal within the statutory time limit. This is the reason measures are in place to ensure delivery, including the use of registered mail.
26. As the Record originally provided to the parties, and to myself, did not include a reproduction of the signature, but only the record from Canada Post showing the letter had been signed for on May 6, 2022, I sought further submissions from the parties.
27. In response, a delegate of the Director, Michael Thompson (the “Responding Delegate”), provided a copy of the signature record from Canada Post and asked that it now form part of the Record. Mr. Thompson notes that the new Canada Post record indicates the Determination was signed for by “angela” and bears a signature not dissimilar to other examples of the Appellant’s signature contained within the Record.
28. Although the Appellant had until October 28, 2022, to respond to the submissions of the Responding Delegate, no further submissions were received.
29. I accept that the Determination was signed for by someone using the name Angela, and that the signature bears some resemblance to those provided elsewhere in the Record. These findings are inconsistent with the Appellant’s assertion that she did not receive a copy of the Determination. As I have already noted, the Appellant has not provided any further explanation for filing a late appeal. Accordingly, I find that no credible explanation has been provided for the failure to request an appeal within the statutory time limit.
30. I note as well that although other delivery records were not included, the Record demonstrates that copies of the Determination were also sent to the Employer’s registered and records office, and what appears to be the operating address of the restaurant.
31. Accordingly, I decline to exercise my discretion to extend the statutory appeal period.

ORDER

32. The Appellant’s request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b).
33. Further to this, the Appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period. Accordingly, pursuant to section 115(1)(a), the Determination is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal

Notice: Paragraph 2 of this version of the reasons for decision has been amended in accordance with the corrigendum issued by the Tribunal on December 20, 2022. Paragraph 2 has been corrected as follows: "The Determination found that the complainant, Kerri Ross (the "Complainant"), was owed compensation for length of service ("CLOS") along with vacation pay and imposed a mandatory \$500 fine for the contravention."