



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Lakhbir Kaur Dosanjh carrying on business as Grace Painting
(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: James F. Maxwell

FILE No.: 2021/091

DATE OF DECISION: January 26, 2022

DECISION

SUBMISSIONS

Lakhbir Kaur Dosanjh

on her own behalf

OVERVIEW

1. Lakhbir Kaur Dosanjh carrying on business as Grace Painting (the “Appellant”) has filed an appeal of a determination dated April 29, 2021 (the “Determination”), issued by a delegate of the Director of Employment Standards (the “Director”), pursuant to the *Employment Standards Act* (the “ESA”). The Director held that the Appellant had breached sections 17, 18, 27, 28, 40, 45, 58 and 63 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “Regulation”) in its treatment of Sarwan Aulakh (the “Employee”). The Director held that the Appellant was liable to pay the sum of \$6,986.48 to the Employee, and assessed administrative penalties in the sum of \$4,500.00. The Appellant appeals the whole of the Determination.

ISSUE

2. The following issue arises in this appeal:
 - Is the Appellant entitled to an extension to the time for filing an appeal of the Determination?

FACTS

3. The Appellant is a sole proprietorship carrying on business as a painting service in Surrey, British Columbia.
4. The Employee was employed by the Appellant between June 6, 2017 and October 10, 2019, at which time his employment was terminated. There is disagreement between the Employee and the Employer as to who effected the termination of the Employee’s employment.
5. On October 31, 2019, the Employee filed a complaint with the Employment Standards Branch (the “Complaint”). The Complaint alleged that the Employee had not been paid all sums owing for regular wages as required pursuant to the provisions of the *ESA*, and that \$8,890.05 was owing.
6. The Director notified the Appellant of the Complaint, and commenced an investigation of the facts surrounding the Employee’s allegations.
7. The Director undertook a British Columbia Registry search, and confirmed that the Appellant is a Sole Proprietorship with a Registered Business Address at 7758 127 Street, Surrey, British Columbia. The Director issued a Demand for Records, sending it by Registered Mail to the Appellant at her Registered Business Address, and to a residential address.
8. The Director contacted the Appellant by telephone, and conducted an interview. Thereafter, the Director engaged in ongoing communication with a representative of the Appellant. The Director also interviewed the Employee, and examined records supplied by both the Employee and the Appellant.

9. On March 25, 2021, the Director issued a preliminary Investigation Report, providing it to both the Employee and the representative of the Appellant, by email.
10. On April 29, 2021, the Director issued the Determination. In the Determination, the Director found that the Appellant had paid the employee only sporadically. Because of inconsistencies in the Appellant's evidence regarding hours worked by the Employee, and amounts paid to the Employee, the Director preferred the Employee's evidence. On that evidence, the Director found that the Appellant had not fully paid the Employee. The Director held that the Employee was entitled to further payment of the sum of \$3,027.50 in regular wages and overtime. The Employee was also entitled to be paid the sum of \$444.00 for statutory holiday pay, the sum of \$2,677.34 in vacation pay, and the sum of \$660.00 in compensation for length of service. The Director held that the Appellant had breached sections 17, 18, 27, 28, 40, 45, 58 and 63 of the *ESA* and section 46 of the *Regulation*, and assessed administrative penalties in the sum of \$4,500.00.
11. The Director attempted to effect service of the Determination on the Appellant by sending the Determination by Registered Mail to the Appellant's Registered Business Address.
12. The Determination stated that the deadline for the filing of any appeal of the Determination was June 1, 2021.
13. The Appellant did not collect the registered mail containing the Determination.
14. On October 19, 2021, the Appellant filed the within appeal.
15. In her appeal, the Appellant requested that the appeal period be extended to November 30, 2021, and stated that the Appellant did not receive the Determination until September 1, 2021 (the Appellant did not state how she came into possession of the Determination, given that it had not been collected from the Post Office).
16. The Appellant asserted that she did not file this appeal within the statutory appeal period because:
 - i) the Appellant had not used the Registered Business Address for almost 13 years;
 - ii) the Appellant's email "had stopped working efficiently"; and
 - iii) the Appellant was not aware that the Determination had been made until after the expiry of the statutory appeal period.
17. The Appellant did not explain why the appeal was not filed for a further 6 weeks after the Determination came into the Appellant's possession.

ANALYSIS

18. The Legislature has established a limitation on the time period for appealing a determination. The relevant time periods are set out in section 112(3) of the *ESA*. A person served with a determination has 30 days from the date of service of a determination in which to file an appeal if the determination is served by registered mail.

19. In the present case, the Director sent the Determination by registered mail on April 29, 2021. The Determination afforded the Appellant until June 1, 2021 to appeal.
20. The Appellant submitted her appeal October 19, 2021, 20 weeks after the deadline for doing so and, on the Appellant's own evidence, 6 weeks after coming into possession of the Determination.
21. Section 109(1)(b) of the *ESA* provides that the Tribunal may exercise a discretion to extend the deadline to file an appeal notwithstanding that the statutory appeal period has expired. In *Niemisto* (BC EST # D099/96), the Tribunal defined criteria that must be satisfied by an appellant for that discretion to be exercised. These criteria include:
 - 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 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.
22. In *Re: Gary Tam* (BC EST # D093/11), the Tribunal noted that the burden falls upon the appellant to demonstrate that there is a compelling reason to grant an extension:

The *Act* allows the 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 time limits 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. I turn first to the question of whether the Appellant has provided a reasonable and credible explanation for failing to file this appeal within the time limit.
24. In the present case, the Appellant asserts that she did not receive the Determination until 4 months after it had been issued, and 3 months after the expiry of the appeal period. The Appellant offered no explanation as to how she came into possession of the Determination, but I am satisfied, on the Appellant's own evidence, that she had received it by September 1, 2021. The Appellant has provided no explanation for failing to file the appeal, or even for failing to contact either the Director or the Tribunal, until a further 6 weeks had elapsed.
25. The time limits for filing an appeal were implemented to provide for fair and efficient procedures for resolving disputes, and to promote the fair treatment of both employers and employees (section 2 of the *ESA*). Absent any explanation for the Appellant's failure to take steps to file the appeal for 6 weeks after coming into possession of the Determination, or taking any other steps to manifest an intention to file an appeal, I am not convinced that I should exercise my discretion to extend the appeal deadline.

26. Having found that the Appellant has failed to satisfy the first of the *Niemisto* requirements, I need not examine the other criteria.
27. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the parties or the Director if the Tribunal decides that the appeal does not meet certain criteria. Section 114(1)(b) of the *ESA* provides that I may dismiss an appeal if it was not filed within the applicable time limit.
28. The Appellant has not satisfied the burden upon her to provide a compelling reason why an extension should be granted. In the circumstances, I decline to exercise my discretion to grant an extension.

ORDER

29. Having reviewed the Determination, the Record, and the Appellant's submissions filed with the appeal, I conclude that this appeal must be dismissed pursuant to section 114(1)(b) of the *ESA*, and confirm the Determination pursuant to section 115(1)(a) of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal