

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Jacquelyn Neidert

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Richard Grounds

**FILE No.:** 2022/200

**DATE OF DECISION:** March 21, 2023

## DECISION

### SUBMISSIONS

Jacquelyn Neidert on her own behalf

### OVERVIEW

1. This is an appeal by Jacquelyn Neidert (the “Appellant” or “Complainant”) of a determination issued by Michael Thompson, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), dated September 7, 2022 (the “Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (the “ESA”).
2. In the Determination, the Delegate concluded that the Appellant’s employer, B S T Management Ltd. (the “Employer”), had contravened sections 40 and 58 of the *ESA* by failing to pay overtime and annual vacation pay to the Appellant. The Delegate concluded that the Employer had not made any substantial and unilateral changes to the Appellant’s employment and that the Appellant had resigned her employment.
3. The Appellant submits that the Director erred in law in and failed to observe the principles of natural justice in making the Determination.
4. The Determination was sent to the Appellant by email on September 7, 2022, so the deadline to submit an appeal was October 3, 2022. The Appellant did not submit the appeal until November 25, 2022 and requests an extension of time to file the appeal on the basis that she did not receive the Determination.
5. I have considered the Determination, the reasons for the Determination, the Appellant’s appeal submission and the *ESA* section 112(5) record (the “Record”). Submissions were not requested from the Employer or the Director.
6. For the following reasons, the Appellant’s request for an extension of time to file the appeal is denied.

### ISSUES

7. The issue to be decided in this appeal is whether to grant an extension of time to file the appeal.

### THE INVESTIGATION AND DETERMINATION

8. The Complainant worked for the Employer as an Accounts Receivable Manager. On February 4, 2020, the Complainant went on medical leave and, on February 26, 2020, the Complainant accepted that her employment had been terminated by the Employer. On April 8, 2020, the Complainant made a complaint to the Employment Standards Branch for wages owed including overtime, unauthorized deductions (for sick days that were later changed to vacation days) and for compensation for length of service. The complaint proceeded to an investigation.

9. On November 5, 2021, a delegate of the Director (the "Investigating Delegate") sent the Complainant and the Employer a preliminary assessment outlining the following: the Complainant was not a manager and was owed overtime wages; the Complainant was not permitted to use sick days for other purposes; and although the initial employment agreement was that she would be required to pay 50% of the cost of her benefits, the Employer paid 100% of the cost of her benefits for two years which became part of her compensation, and when the Employer informed her on February 26, 2020 that it would no longer pay 100% of her benefits, this was a substantial change without reasonable notice amounting to deemed termination.
10. The Investigating Delegate exchanged numerous emails with the Complainant at the same email address where the Determination was subsequently sent to her on September 7, 2022. Legal counsel for the Employer responded to the preliminary inquiry and submitted that: the Complainant was not owed overtime because she was a manager and she never submitted a request for overtime; it agreed with the decision that the Complainant was not entitled to use sick days to substitute it for another category of leave; and the Complainant was never entitled to 100% of her benefits being paid and this mistake was only discovered after the Complainant went on medical leave in February 2020.
11. The Investigating Delegate cross-disclosed the information received from the Complainant and the Employer. Part of the information included that the Complainant made a complaint under the *Canada Labour Code* for non-payment of overtime, but the complaint was rejected because it did not fall within its jurisdiction, and also that the Complainant had made an unsuccessful complaint to WorkSafe BC for bullying and harassment.
12. On December 31, 2021, the Investigating Delegate sent an Investigation Report to the Complainant and the Employer. The Investigation Report identified the following questions to be answered:
  1. Does the complaint fall within the jurisdiction of the [ESA]?
  2. If yes, was the Complainant a manager?
  3. If the Complainant was not a manager, is she owed overtime wages?
  4. Is the Complainant owed vacation pay?
  5. Did the Complainant quit her employment? If yes, did the Employer substantially alter a condition of the Complainant's employment?
  6. Is the Complainant owed compensation for length of service?
13. In the Investigation Report, the Investigating Delegate reviewed the agreed upon facts including: the Complainant's employment details; that the Complainant provided a doctor's note to the Employer on February 4, 2020 stating that she could not work due to illness; that the Employer sent the Complainant an email on February 26, 2020 informing her that it had erroneously been paying 100% of the Complainant's benefits for two years but she would have to start paying 50% of her benefits or be removed from the group benefit plan effective March 1, 2020; and that the Complainant emailed the Employer on February 26, 2020 accepting its repudiation of her employment contract.
14. The Investigation Report summarized the information from both the Complainant and the Employer including: information related to the Complainant's changing duties and responsibilities; the

Complainant's sick days versus vacation days; the Complainant's hours of work; the Employer's contribution to the Complainant's benefits; and the Complainant's end of employment. The Investigation Report also includes a list of documents obtained for the investigation.

15. The Delegate reviewed the Investigation Report and the Employer's response to it and on September 7, 2022, completed the Determination and, after concluding the preliminary matter that the *ESA* has jurisdiction over the complaint, identified the following issues:
  1. Was the Complainant a manager and therefore not entitled to overtime wages?
  2. Did BST impermissibly reduce the Complainant's vacation entitlement due to her taking sick days?
  3. Did BST substantially alter the terms of the Complainant's employment such that it should be deemed to have terminated her employment?
16. The Delegate concluded the following: by November 2019, the Complainant was no longer performing primarily supervisory or directive duties and was not a manager; the Complainant was owed overtime based on the Complainant's time records; the Complainant was not entitled to use sick time when she was not actually sick and, although the Employer changed these days to vacation, the Complainant had been paid her entire vacation entitlement, which exceeded the minimum requirements set by the *ESA*; the Complainant filed a complaint with WorkSafe BC for bullying and harassment but her claim was rejected; the Complainant was not required to bear an unreasonable workload toward the end of her employment; the Complainant's primary duties had never been managerial; the payment of 100% of the Complainant's benefits was an error which the Employer was entitled to correct; and the timing of the Complainant's letter, which was two hours after being informed about the benefit payment issue, strongly suggested that this was the catalyst for her resignation.
17. The Delegate determined that the Complainant was entitled to overtime in the amount of \$456.70, annual vacation pay in the amount of \$27.40 and interest in the amount of \$33.21 for a total of \$517.31 for wages payable. The Determination was sent to the Appellant by email on September 7, 2022. The deadline to file an appeal of the Determination sent by email was 4:30 pm on October 3, 2022.

## **ARGUMENTS**

18. The Appellant emailed the appeal to the Tribunal on November 25, 2022. The Appellant requested an extension of time to file the appeal on the basis the Determination had been sent by email but she had never received the email. The Appellant submitted that she was not aware of the Determination until November 24, 2022, when she received the cheque for wages owed to her, which prompted her to contact the Delegate who informed her of the September 7, 2022, Determination.
19. The Appellant appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
20. The Appellant submits that she was told by WorkSafe BC that it is hard to claim for mental health through WorkSafe, but WorkSafe never stated that a hostile environment was unfounded. The Appellant submits that she was told by the Canada Labour Program that she should have appealed the jurisdiction issue, but it was too late to appeal at that point.

21. The Appellant disagreed with the Delegate’s statement that she (the Appellant) characterized the Employer’s February 26, 2020 communication as requiring her to pay the outstanding missed benefits contribution within four days, when it was clear that the Employer was asking her to make her 50% contribution moving forward. The Appellant submits that there was no payroll error.
22. The Appellant disagrees with the Delegate’s finding that her primary duties were never managerial. The Appellant submits that the increase in her workload was not reflected in her overtime hours because she stopped working so much when it was not appreciated. The Appellant submits that the repayment of her benefits issue was not the catalyst for her resignation but that it was because her doctor told her to leave because it was not a healthy environment for her.
23. The Appellant submits that the investigation was not “full and proper” and the Determination is “incorrect”. The Appellant submits that, although her pay and title remained the same, the change in her job duties from management to clerk was a substantial change to the terms of her employment.

## ANALYSIS

### *Extension of statutory appeal period*

24. The Appellant has requested an extension of time to the statutory appeal period to file her appeal. The Appellant was sent the Determination by email on September 7, 2022 and the deadline to appeal was October 3, 2022. The Appellant submits that she did not receive the Determination. The Appellant submitted her appeal on November 25, 2022, after receiving the cheque for the wages payable to her on November 24, 2022.
25. The Director’s Record includes confirmation that the Determination was sent to the same email address that the Investigating Delegate had corresponded with the Appellant during the investigation. The Director’s Record also includes confirmation that the email was delivered to the Appellant’s email address “but no delivery notification was sent by the destination server”.
26. Section 114(1)(b) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal if the appeal was not filed within the applicable time limit. There is no automatic right to an extension of the time limit to appeal. In *Niemisto* (BC EST #D099/96), the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:
  1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  2. there has been a genuine and on-going *bona fide* intention to appeal the Determination;
  3. the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this 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.

27. The Appellant's explanation for not filing the appeal within the statutory time limit is that she did not receive the Determination that was sent by email on September 7, 2022. The Appellant explained that she checked her junk folder and inbox folders but could not locate the email. The Appellant uses Gmail which by default deletes emails after 30 days so it is possible the email went to her spam folder and was automatically deleted before she saw it.<sup>1</sup> Upon learning of the Determination on November 24, 2022, the Appellant submitted her appeal the following day and the Director would have been informed of the appeal after the appeal was filed.
28. The issue relating to the request for an extension of time is not substantively related to the merits of the Determination and there would be no undue prejudice by granting an extension. These initial factors do not weigh heavily in favour of denying or granting an extension of time to appeal. The deciding factor relates to the merits of the Appellant's appeal submissions which inform whether or not there is a strong *prima facie* case in favour of the Appellant.
29. The Appellant's submissions about what she was told by WorkSafe BC and the Canada Labour Program are not pertinent for the purposes of the appeal. Although the Appellant disagrees with the Delegate's comment about the Appellant's characterization of the repayment of benefits issue, the Delegate correctly understood that the Employer was asking her to make her 50% contribution going forward. The Appellant's primary submissions are in the nature of disagreement with the findings of the Delegate including relating to whether there was a payroll error resulting in the Employer paying 100% of the Complainant's benefits, whether the Complainant was a manager and whether there had been a substantial change to the terms of her employment.
30. The role of the Tribunal is not to re-weigh the evidence and decide the merits of an original complaint, but instead to determine whether the Director erred in law or failed to observe the principles of natural justice in making the Determination.

#### *Error of Law*

31. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.
32. The Delegate identified the applicable sections of the *ESA* that applied to the complaint. The Investigating Delegate gathered a substantial amount of evidence during the investigation including from the Appellant and from the Employer related to the issues raised in the complaint, i.e. related to the Complainant's

---

<sup>1</sup> <https://support.google.com/mail/thread/8164575/how-to-stop-the-deletion-of-emails-after-30-days?hl=en>, accessed on March 12, 2023.

leave from work for medical reasons, the complaints to WorkSafe BC and the Canada Labour Program, the Complainant's work hours and duties, and the 50% versus 100% benefit contribution issue. The Director's Record is comprised of 329 pages of information.

33. The Delegate provided detailed reasons for the findings in the Determination including relating to whether or not the Appellant was a manager, whether the Employer reduced the Appellant's vacation entitlement and whether or not the Employer substantially altered the terms of the Appellant's employment. The Delegate relied on evidence gathered for the investigation in making the findings in the Determination.
34. The Appellant disagrees with the Delegate's findings but does not provide any substantive submission about how the Delegate engaged in an error of law in making the findings. The Appellant does not explain how the investigation was not full or proper.
35. There is no reasonable basis to find that the Delegate engaged in any of the acts outlined in *Gemex*. I am satisfied that the Delegate did not commit an error of law in making the Determination.

#### *Failure to Observe the Principles of Natural Justice*

36. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.
37. As noted above, the Appellant submits that the investigation was not full or proper but does not explain why this was the case. The Appellant was informed of the issues and was provided with an opportunity to provide information for her complaint. The Delegate provided detailed reasons where he considered the evidence from both parties.
38. An objective review of the Delegate's reasons does not support that he was not impartial or that he was biased against the Appellant. In addition, the circumstances do not support that there was a reasonable apprehension of bias on the part of the Delegate against the Appellant.
39. I am satisfied that the Delegate did not fail to observe the principles of natural justice in making the Determination.

#### *Conclusion regarding extension of statutory appeal period*

40. As noted above, the deciding factor related to the Appellant's request to extend the statutory appeal period is whether or not there is a strong *prima facie* case in favour of the Appellant. The Appellant disagrees with the findings made in the Determination but there is no reasonable basis to find that the Director erred in law or failed to observe the principles of natural justice in making the Determination. Accordingly, there is not a strong *prima facie* case in favour of the Appellant.
41. I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

**ORDER**

42. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1)(a) of the *ESA*.

---

**Richard Grounds**  
**Member**  
**Employment Standards Tribunal**