

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Dr. Eli Rosenberg Inc. carrying on business as Pulse Cardiac Centre  
(the “Company”)

- 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:** Jonathan Chapnick

**FILE NO.:** 2022/210

**DATE OF DECISION:** February 22, 2023

## DECISION

### SUBMISSIONS

Eli Rosenberg

on behalf of Dr. Eli Rosenberg Inc. carrying on business  
as Pulse Cardiac Centre

### OVERVIEW

1. Dr. Eli Rosenberg Inc. carrying on business as Pulse Cardiac Centre (the “Company”) operates a cardiology practice in Vancouver. Eli Rosenberg is the Company’s sole director and officer. Frances (Debra) Rice (the “Employee”) was employed by the Company as a medical office assistant. On December 10, 2020, the Company terminated the Employee. Four days later, on December 14, the Employee filed a complaint (the “Complaint”) to the Director of Employment Standards (the “Director”) alleging the Company had violated the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [ESA].
2. A delegate of the Director, Sarah Vander Veen (the “Adjudicative Delegate”), adjudicated the Complaint and issued a determination with written reasons on June 2, 2022 (the “Determination”). The Adjudicative Delegate found that the Company had violated the ESA and the *Employment Standards Regulation*, B.C. Reg. 396/95 [Regulation] and ordered the Company to pay the Employee \$1,184.91 in wages and interest. The delegate also ordered the Company to pay two \$500 administrative penalties for its violations of the ESA and the Regulation. The deadline for appealing the Determination was June 27, 2022.
3. On December 13, 2022, the Company appealed the Determination to this Tribunal and asked the Tribunal to extend the appeal period deadline from June 27, 2022, to December 13, 2022. In his written submissions for the Company, Dr. Rosenberg disputes the Adjudicative Delegate’s imposition of the two \$500 administrative penalties, citing two grounds of appeal: error of law and breach of natural justice. In support of the Company’s extension request, Dr. Rosenberg says the Company did not receive the Determination until August 29, 2022.
4. In light of my analysis below, I have not found it necessary to seek submissions from the Employee or the Adjudicative Delegate. For the reasons that follow, I find the Company has not put forward a strong case on the merits of its appeal and has not provided compelling reasons for its extension request. The extension request is therefore denied, and the appeal is dismissed.

### THE DETERMINATION

5. The primary issue before the Adjudicative Delegate was whether the Company owed the Employee regular wages and vacation pay. The Employee alleged she was owed regular wages for her final pay period at the Company. She also claimed the Company owed her vacation pay. The Company, on the other hand, said it paid the Employee all regular wages owing for her final pay period on December 11, 2020. The Company also disputed the Employee’s claims regarding vacation pay.
6. In the Determination, the Adjudicative Delegate summarized the information provided by each party and made several findings. The Adjudicative Delegate found that the Employee earned \$1,284 in regular

wages in her final pay period, but was only paid \$1,140 for that period, and was therefore owed the difference, which amounted to \$144 in regular wages. Similarly, the Adjudicative Delegate found that the Employee was entitled to \$2,246.92 in vacation pay, but was only paid \$1,248, and was therefore owed the difference, which amounted to \$998.92 in vacation pay.

7. Having found that the Company had fallen short of paying all wages owed to the Employee, the Adjudicative Delegate determined that the Company had violated section 18 of the *ESA*, which requires an employer to “pay all wages owing to an employee within 48 hours after the employer terminates the employment.” The Adjudicative Delegate imposed a \$500 administrative penalty for this violation.
8. The Adjudicative Delegate also imposed a second administrative penalty. She explained that the delegate who initially investigated the Complaint (the “Investigative Delegate”) had issued a demand for payroll records to the Company on November 29, 2021, which included a requirement that the Company produce a record of the hours worked by the Employee on each day of her employment. The Adjudicative Delegate found that the Company failed to produce the record of hours worked and that this violated section 46 of the *Regulation*, which states that a person who is ordered to provide records to the Director must do so as and when required. The Adjudicative Delegate imposed a \$500 penalty for this violation.

### THE SECTION 96 DECISION

9. In the case before me, Dr. Rosenberg is appealing the Determination on behalf of the Company. This is not the first time he has filed an appeal in relation to the outcome of the Complaint.
10. Additional background regarding the present case is set out in a separate decision by another member of this Tribunal: see *Eli Rosenberg*, 2022 BCEST 67 [**Section 96 Decision**]. The Section 96 Decision describes a previous appeal filed by Dr. Rosenberg on his own behalf – not on behalf of the Company. That case related to an August 5, 2022 decision of the Director, which concluded that Dr. Rosenberg was a director and officer of the Company and was personally liable under section 96 of the *ESA* for the \$1,184.91 in wages and interest owed by the Company to the Employee under the Determination. The Tribunal dismissed Dr. Rosenberg’s personal appeal on October 28, 2022.

### ISSUE

11. The Company filed the present appeal more than five months late. The time period for filing an appeal of the Determination ended at 4:30 pm on June 27, 2022; the Company filed its appeal on December 13, 2022. Under section 114(1)(b) of the *ESA*, the Tribunal can dismiss an appeal because it was not filed within the applicable time limit. On the other hand, section 109(1)(b) of the *ESA* empowers the Tribunal to extend the time period for filing an appeal even though the period has expired.
12. The Company has asked the Tribunal to extend the appeal period deadline from June 27, 2022, to December 13, 2022. If I were to grant this extension, the Company’s appeal would be timely, which would open the door to the Tribunal making a decision on the merits of the appeal. In a case like this one, the onus is on the appellant to show the Tribunal that the appeal period should be extended: *Tang*, BC EST #D211/96. Therefore, the issue before me is whether the Company has established that the Tribunal should extend the time period for filing an appeal of the Determination even though the period has long expired.

13. In deciding this issue, I have considered the Company's December 13, 2022 appeal submission, comprising the appeal form and Dr. Rosenberg's written arguments and supporting evidence for the Company, and other documents and materials (the "Appeal Submission"). I have also considered the record that was before the Adjudicative Delegate at the time of the Determination (the "Record"). In the discussion below, I do not refer to all of the information and submissions I have considered. Rather, I only recount the portions on which I have relied to reach my decision.

## ANALYSIS

14. In the Appeal Submission, Dr. Rosenberg, on behalf of the Company, provides a brief explanation for the Company's request for an extension of the appeal period deadline. He says the Company did not receive the Determination until August 29, 2022, which was several weeks after the expiry of the appeal period on June 27, 2022. For the purposes of this decision, I accept this explanation to be true. However, it is not sufficient to justify the lengthy extension requested by the Company.
15. The Tribunal does not grant extension requests as a matter of course; there must be "compelling reasons" for the extension request, and it is up to the appellant to establish that the extension is warranted: *Patara Holdings Ltd. carrying on business as Best Western Canadian Lodge and/or Canadian Lodge*, BC EST #RD053/08 [**Patara**]. In considering whether to grant an extension request, the Tribunal considers the following non-exhaustive list of factors:
- (a) Is there a reasonable and credible explanation for the appellant's failure to meet the appeal period deadline?
  - (b) Has there been an ongoing, genuine intention, on the part of the appellant, to appeal to the Determination?
  - (c) Were the respondent (in this case, the Employee) and the Director made aware of the appellant's intention to appeal?
  - (d) Will the respondent be unduly prejudiced if the Tribunal grants the extension request?
  - (e) Does the appellant have a strong case that might succeed? (This factor is traditionally expressed as an inquiry into whether there is a "strong *prima facie* case" in favour of the appellant; however, I prefer to use the simpler language of "a strong case that might succeed"): *John Curry*, 2021 BCEST 92 at para. 74 (aff'd 2022 BCEST 2). See *Niemisto*, BC EST #D099/96; *Patara*; *C.G. Motorsports Inc.*, BC EST # RD110/12.
16. For the following reasons, I find that these factors favour against granting the Company's extension request.
17. First, while Dr. Rosenberg has offered an explanation for the Company's failure to file an appeal of the Determination before August 29, 2022, he has not explained why the Company failed to file the appeal before December 13, 2022. The Record indicates that the Company received the Determination by email on August 29. Under the *ESA*, a person who is served a determination by email is deemed to receive it three days after it is transmitted and then is subject to a 21-day time period for filing an appeal: *ESA*, ss. 114 and 122. I have no reason to conclude that the Company could not have filed its appeal within such a time period. There is no explanation for Dr. Rosenberg's decision to file a timely appeal regarding his

personal liability under s. 96 of the *ESA*, but not to appeal the Determination against the Company until several months later. Even after the Tribunal issued the Section 96 Decision on October 28, 2022, an additional six weeks passed before the Company filed its appeal of the Determination. This delay, too, is unexplained.

18. Second, there is no indication in the Appeal Submission or the Record of an ongoing, genuine intention, on the part of the Company, to appeal the Determination. But even if the Company genuinely intended to appeal the Determination, and even if the Employee and the Director were made aware of the Company's intention and would not be unduly prejudiced if I granted the Company's extension request, I still would not be compelled to do so, because the Company has not put forward a strong case that might succeed on the merits. The Company's failure to put forward a strong case is the determinative factor in my assessment of whether to grant its extension request.
19. In considering whether an appellant has a strong case that might succeed, the Tribunal's task is to assess the appeal's merit on its face, given the grounds of appeal advanced by the appellant and the established principles related to those grounds: see *Craftsman Collision (1981) Ltd.*, BC EST # D030/10 at para. 29 and *Kendall Jefferson Treadway*, 2019 BCEST 18 at para. 26 (aff'd 2019 BCEST 32). In the present case, Dr. Rosenberg advances two grounds of appeal in the Appeal Submission. He says the Adjudicative Delegate not only erred in law but also failed to observe the principles of natural justice in making the Determination. I will address each ground of appeal in turn.

**A. Error of law: *ESA*, s. 112(1)(a).**

20. Under section 112(1)(a) of the *ESA*, a person can appeal a determination to the Tribunal on the ground that "the director erred in law." The error of law ground of appeal centres on questions of legal analysis and reasoning. In deciding whether a delegate of the Director erred in law, the Tribunal considers whether the delegate misinterpreted or misapplied a section of the *ESA* or an applicable principle of law, acted without evidence or on an unreasonable view of the facts, or adopted an analysis or exercised a discretion in a way that was wrong in principle: see, e.g., *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willows Farm*, BC EST # D161/05; *C. Keay Investments Ltd. c.o.b. as Ocean Trailer*, 2018 BCEST 5. The onus is on the appellant to address these considerations and establish, on a balance of probabilities, that the delegate erred in law. The Company, in its Appeal Submission, has not done so.
21. The Appeal Submission does not speak directly to any of the factors for establishing an error of law. Instead, Dr. Rosenberg's written arguments and supporting evidence for the Company target the Adjudicative Delegate's findings of fact. Dr. Rosenberg argues that the Employee "was in fact paid" on December 11, 2020, which was within 48 hours of her termination, and so the Company did not contravene s. 18 of the *ESA* and should not have to pay the first \$500 administrative penalty. Similarly, Dr. Rosenberg disputes the Adjudicative Delegate's finding that the Company failed to provide records to the Director in contravention of s. 46 of the *Regulation*.
22. The Appeal Submission effectively invites me to reassess the Adjudicative Delegate's findings of fact, which is not an assessment the Tribunal is typically permitted to undertake: *516400 B.C. Ltd.*, 2022 BCEST 73. Questions of fact are only reviewable by the Tribunal under the error of law ground of appeal in situations where the appellant shows that the delegate has committed a "palpable or overriding error." This is a stringent standard, which involves establishing that the delegate's findings of fact or related

inferences are inadequately supported by the evidence, such that there is “no rational basis” for the delegate’s findings and so they are “perverse or inexplicable”: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 38; see also *3 Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13 and *Meher Trucking Ltd.*, 2019 BCEST 138. The factual issues raised in the Appeal Submission do not meet this stringent standard.

23. In her findings and analysis in the Determination, the Adjudicative Delegate specifically referred to the Employee’s December 11, 2020, wage statement and accepted that the Employer paid the Employee the amount of regular wages indicated in that final statement. However, on the evidence, she calculated that this amount was less than the Employee was owed. Similarly, the Adjudicative Delegate accepted that the Employer paid the Employee vacation pay (including the amount of vacation pay indicated in the final wage statement), but she calculated that the Employer owed more. In the Appeal Submission, Dr. Rosenberg does not dispute the Adjudicative Delegate’s calculations or the findings on which she based her calculations. He simply argues that the Employee “did in fact receive the paycheque on ... December 11, 2020,” and he reasons that this demonstrates “that section 18 of the Act was not contravened.” I reject this reasoning. Section 18 of the *ESA* states that an employer “must pay **all** wages owing to an employee” after the employee is terminated [emphasis added]. In the present case, the Adjudicative Delegate found that the Company paid the Employee *some*, but not *all*, of the wages owed to her. Given this finding, the Adjudicative Delegate concluded that the Company violated the *ESA* rule that required the Company to pay the Employee all of the wages owed to her. There is nothing before me that suggests the Adjudicative Delegate’s findings and conclusions were perverse or inexplicable.
24. Nor is there anything before me that establishes a palpable or overriding error in the Adjudicative Delegate’s finding that the Company failed to provide to the Director a record of the hours worked by the Employee on each day of her employment. On the contrary, this finding is supported by the information in the Record and confirmed by Dr. Rosenberg’s admission in the Appeal Submission that he provided the Director with all the payroll records he had in a timely way, but “**was unable to produce a full record of the hours [the Employee] worked each day during her employment** because [the Employee] never submitted her hours” [emphasis added]. Even if it is true that the Employee failed to submit her hours worked, this does not necessarily excuse the Company from its obligations to keep those records under s. 28(1)(d) of the *ESA* and provide them to the Director under s. 85(1)(f) of the *ESA* and s. 46 of the *Regulation*. Compliance with s. 28 of the *ESA* was the Company’s responsibility, not the responsibility of the Employee. I therefore find that the Adjudicative Delegate’s findings and conclusions regarding the Company’s failure to produce a record of the hours worked by the Employee had a rational basis and were adequately supported by the evidence.
25. In light of the above, I see no error of law in the Adjudicative Delegate’s order in the Determination that the Company pay two \$500 administrative penalties. Having reached rational and supportable conclusions that the Company violated section 18 of the *ESA* and section 46 of the *Regulation*, the Adjudicative Delegate had no discretion as to whether to impose two \$500 administrative penalties; those penalties were mandatory: see *ESA*, s. 98 and *Regulation* s. 29; see also *Marana Management Services Inc. operating as Brother’s Restaurant*, BC EST # D160/04. There was no misinterpretation or misapplication of the *ESA* or applicable legal principles in the Adjudicative Delegate’s imposition of the two fines.

26. In sum, then, I find that the Company has not advanced a strong case that might succeed on the error of law ground of appeal.

**B. Natural justice: *ESA*, s. 112(1)(b).**

27. The second ground of appeal identified in the Appeal Submission relates to whether the process in coming to the Determination was fair. Under section 112(1)(b) of the *ESA*, a person can appeal to the Tribunal on the ground that the Director or their delegates failed to observe the principles of natural justice in making a determination. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker: *CCON Recon Inc. and CCON Metals Inc.*, 2022 BCEST 26 at para. 62.

28. I appreciate that Dr. Rosenberg disagrees with the Adjudicative Delegate's imposition of the two \$500 administrative penalties on the Company. However, nowhere in the Appeal Submission is there any discernible evidence or argument regarding the general issue of procedural fairness or the specific questions that arise under s. 112(1)(b). Although Dr. Rosenberg selected the natural justice ground of appeal in the appeal form and listed it on the first page of his written argument for the Company, he made no further reference to the natural justice ground (or the error of law ground) in his submissions and did not address or discernably challenge the fairness of the complaint, investigation, and determination processes.

29. I recognize that Dr. Rosenberg (like most other appellants who come before the Tribunal) is not a lawyer and the Company was not represented by legal counsel in these proceedings. Accordingly, I have taken a large and liberal view of the Appeal Submission to determine whether the Company has advanced a strong case that might succeed on the natural justice ground of appeal. I find that it has not. I am unable to discern any explanation as to why Dr. Rosenberg selected this ground of appeal or how the ground is met in the Company's circumstances. The Company has not shown me that it has a strong case that might succeed on the natural justice ground of appeal.

30. Given my findings regarding the two grounds of appeal advanced by the Company, in my assessment the Company's appeal lacks merit on its face and is unlikely to succeed. Moreover, as I have discussed above, while the Company offered an explanation for its failure to file an appeal before August 29, 2022, it has not explained its failure to appeal the Determination before December 13, 2022. I therefore find that the Company has not provided compelling reasons for its extension request and has not met its onus to establish that the appeal period in this case should be extended.

31. For all of the above reasons, the Company's extension request is denied, and the appeal is dismissed under s. 114(1)(b) of the *ESA*.

**ORDER**

32. Pursuant to section 115(1) of the *ESA*, the Determination is confirmed.

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**Jonathan Chapnick**  
**Member**  
**Employment Standards Tribunal**