Employment Standards TRIBUNAL

Citation: Guy Marchand (Re)
2023 BCEST 49

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Guy Marchand

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/038

DATE OF DECISION: June 26, 2023

DECISION

SUBMISSIONS

Guy Marchand — on his own behalf

INTRODUCTION

1. Guy Marchand (the "appellant") appeals a Determination issued by Shannon Corregan, a delegate (the "delegate") of the Director of Employment Standards (the "Director"), on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *Employment Standards Act* – the "*ESA*"). The Determination was issued on December 13, 2022, together with the delegate's "Reasons for the Determination" (the "delegate's reasons").

2. The Determination was issued in relation to an unpaid wage complaint filed in late July 2020, nearly three years ago. The delay involved in adjudicating this complaint is not in keeping with section 2(d) of the *ESA*.

3. By way of the Determination, the appellant was ordered to pay a former employee (the "complainant") $420.90 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied six separate $500 monetary penalties against the appellant based on his contraventions of sections 17, 18, 27, 28 and 34 of the *ESA* and section 46 of the *Employment Standards Regulation*. Thus, the appellant's total liability under the Determination is $3,420.90.

THE TIMELINESS OF THE APPEAL

4. The Determination was served on the appellant, via ordinary mail, to six separate addresses including the appellant's business and residential addresses. Subsections 122(1)(a) and (2) of the *ESA* state:

> 122 (1) A determination or demand, a notice under section 30.1 (2) or a written report referred to in section 78.1 (1) (a) that is required under this Act to be served on a person is deemed to have been served if it is
>
> (a) sent by ordinary mail or registered mail to the person's last known address according to the records of the director…
>
> (2) If service is by ordinary mail or registered mail, then the determination or demand, the notice under section 30.1 (2) or the written report referred to in section 78.1 (1) (a) is deemed to have been served 8 days after it is mailed.
>
> (my underlining)

5. The appellant applies for an extension of the appeal period, although, as will be seen, it is not absolutely clear that this is a late appeal.

6. Section 112(3) of the *ESA* states that an appeal of a determination must be filed with the Tribunal within "30 days after the date of service of the determination, if the person was served by registered mail", or within "21 days after the date of service of the determination, if the person was personally served or

served under section 122(3)" [section 122(3) refers to service by e-mail or fax]. On the face of things, there is no appeal filing deadline where a determination is served by *ordinary* mail.

7. This latter point arises in this case since the appeal deadline, if the determination had been served by registered mail, was January 6, 2023 (this deadline is set out in a text box headed "Appeal Information", on page 4 of the Determination). The appellant did not file his appeal until April 3, 2023 (this appears to have been his first point of communication with the Tribunal) and, as noted above, he now seeks an extension of the appeal period pursuant to section 109(1)(b) of the *ESA*. Accordingly, I will first address the timeliness issue.

The Applicable Appeal Period Where a Determination is Served by Ordinary Mail

8. There is an obvious "gap" in the *ESA* with respect to the service of a determination and the appeal period governing an appeal of that determination. Section 122 clearly permits service by ordinary mail, and this provision also sets out a "deemed service" provision. Although section 122 contemplates several different modes of service other than personal service (ordinary mail, registered mail, e-mail, fax, or any other "prescribed method"), section 112(3) only addresses circumstances where the determination was personally served, or otherwise served by registered mail, e-mail, or fax. Currently, there are no "prescribed methods" of service, other than those modes previously identified.

9. The *Interpretation Act* states that a document may be "delivered" by mail (see section 29), but it does not define how "service" may be effected. As noted above, the *ESA* explicitly permits service of a determination by ordinary mail. Section 8 of the *Interpretation Act* states: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." One of the objects of the *ESA* is the fair and efficient resolution of unpaid wage complaints (see section 2(d)).

10. With these latter principles in mind, I note, first, that service by ordinary mail is explicitly permitted by the *ESA*. Second, a determination served by ordinary mail is deemed to have been served "8 days after it is mailed". Third, section 112 of the *ESA* provides that an appeal of that determination must include certain specified documents (section 112(2)) and, fourth, be filed within a specified time period (section 112(3). Fifth, the appeal periods set out in section 112(3) – within 21 days or 30 days depending on the mode of service – are relatively short, presumably reflecting the Legislature's intention that appeals proceed expeditiously. This latter desideratum is reinforced by section 2(d) of the *ESA* which states that one of the purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of [the *ESA*]".

11. The commencement of the applicable appeal period is triggered by "service" of the determination on the person who may wish to appeal the determination. Since there is no explicit appeal period specified where service was effected by ordinary mail, one might argue that there is *no* appeal period, in which case an appeal filed years, or even decades, after lawful service by ordinary mail would not be a *late* appeal. Presumably, in such circumstances, the Tribunal would be obliged to adjudicate the appeal on its merits even though the determination being appealed was issued and served years earlier. That hardly seems like a fair result for an employee who had their wage entitlement determined years earlier, or for an employer who was found, for example, not to owe any section 63 compensation for length of service. In my view, treating an appeal of a determination that was issued years earlier as a *timely* appeal, simply

because it was served by ordinary mail, is a plainly absurd result. In *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, the Supreme Court of Canada observed, at para. 27:

> … It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to Côté, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

12. Taking into account the above considerations, I find that where a determination is served by ordinary mail, an appeal must be filed within the same time frame applicable to service by registered mail, namely, within 30 days. That being the case, this appeal is, in fact and in law, a late appeal. This is not to say that a late appeal cannot be adjudicated on its merits, only that the Tribunal must first issue a section 109(1)(b) extension order before it can proceed to decide the merits of the appeal. Accordingly, I now turn to the appellant's application to extend the appeal period.

The Section 109(1)(b) Application

13. The appellant filed his appeal, by e-mail, on April 3, 2023, about three months after the applicable appeal period expired. His appeal documents contain the following statements regarding his late appeal:

> 1) I only first found out about about this Determination when my Vancouver TD Bank account got frozen on or around last February 2023 and further more exchanging with Raman Samran [an employment standards officer] on the 24. [*sic*]
>
> 2) I did move out from the adress you had on file without forwarding my mail, but did not change my email adress and <u>did not received any communication regarding a DECISION</u>. [*sic*; underline in original]
>
> 3) Since last December because of serious family related matters (my childreen),I am in a psychological distress and incapacitated to deal with disturbing and stressing matters, take some medications and follow by professional. Just can not find the energy and motivation to adress certain situations that create anxiety. [*sic*]
>
> 4) After that I found out that my new Quebec BMO account was seize last March 28, I pull out the DECISION and carefully studied for the first time. From this, I found out that there where several administrative penalty that are not justified, wrong that are a big injustice. [*sic*]

14. The section 112(5) record shows that the Determination was mailed to an apartment address where the appellant apparently resided, as well as his business address as set out in BC Registry Services records, and on the business's website and promotional materials. The record also shows that there were extensive communications between Employment Standards Branch officers and the appellant both prior and subsequent to the issuance of the Determination. The record further shows that a settlement of the complainant's unpaid wage claim was reached, but that the appellant never provided the necessary funds to the Employment Standards Branch – in this regard he repeatedly (at least six times by my count) told the Branch, as the old adage goes, "the cheque is in the mail". But it never arrived and, eventually, the Determination was issued.

15. The appellant concedes he never updated the Employment Standards Branch regarding his personal mailing address. Nevertheless, the appellant concedes that he actually had the Determination in hand as of February 2023. He says that due to certain stressors in his life, he did not have "the energy and motivation" to file a timely appeal; however, there is absolutely no medical evidence before me that corroborates this assertion. I should also note that the appeal process is neither complex nor burdensome – all that an appellant must do is file an appeal form (readily downloadable from the Tribunal's website; or a written statement setting out the appeal grounds), and a copy of "the written reasons for the determination". The appellant only appears to have been motivated to deal with this matter after the Employment Standards Branch commenced collection proceedings. As is detailed, below, I also consider the appellant's grounds of appeal to be entirely without merit.

16. In my view, the appellant has not provided an adequate explanation that would, taking into account the *Niemisto* factors (see *Niemisto*, BC EST # D099/96), justify an extension of the appeal period. Accordingly, this appeal must be dismissed under section 114(1)(b) of the *ESA*.

THE GROUNDS OF APPEAL

17. Even if I were persuaded that this is a timely appeal, or if not, that an extension of the appeal period should be granted, I would have, in any event, dismissed the appeal as having no reasonable prospect of success (see section 114(1)(f) of the *ESA*). The delegate did not err in law, and the appellant was given a full and fair opportunity, consistent with section 77 of the *ESA*, to respond to the complaint.

18. The appellant, in his appeal documents, says that he is "offering to pay $420.90" to the complainant (the exact amount due her under the Determination), but seeks a reduction in the penalties such that he would only pay a single $500 penalty for a section 18 contravention (i.e., failure to pay wages due following the end of employment). He also seeks the following order: "…immediate release on my BMO account (that is my rent and grocery) **or** return of my money if the fund are already transfert minus the $420.90 and $500.00" [*sic*].

19. Very briefly, the delegate's reasons – which the appellant does not seriously contest as they concern the unpaid wage claim – indicate that the complainant worked for the appellant from mid-June to late July 2020. The delegate calculated that she had a valid unpaid wage claim for 26.50 hours based on a $15.00 per hour wage rate, plus 4% vacation pay.

20. The appellant's fundamental concern does not relate to the unpaid wage determination but, rather, to the six monetary penalties levied against him. The particulars relating to each of these penalties are set out at pages R7-R8 of the delegate's reasons. As noted above, the appellant concedes a section 18 contravention, and the concomitant $500 monetary penalty. However, he contests all of the other penalties.

21. The evidentiary record shows that the appellant failed to pay the complainant her earned wages in accordance with section 17 of the *ESA*. The appellant never provided the complainant with wage statements that complied with section 27. The appellant failed to keep compliant payroll records for the complainant, contrary to section 28. The appellant did not pay the c/038omplainant "minimum daily hours", contrary to section 34 of the *ESA*. Finally, and with respect to section 46 of the *Employment Standards Regulation* (production of payroll records on demand), the section 112(5) record shows that

the appellant failed to produce complete records for the complainant despite a lawful section 85(1)(f) demand to do so. In short, there is nothing in the material before me that would call into question the correctness of the delegate's decision to issue each and every one of the penalties in question.

22. Finally, I have no statutory authority to order the BMO, or the Director, to release or return any monies that may have been garnished or frozen as a result of the enforcement activities the Director has apparently undertaken with respect to the Determination. This aspect of the appeal must be dismissed pursuant to section 114(1)(a) of the *ESA*.

ORDER

23. Pursuant to subsections 114(1)(a), (b) and (f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $3,420.90 together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal