



EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Siu Yin Yau
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards

PANEL: John Chesko

FILE No.: 2022/189

DATE OF DECISION: February 23, 2023

DECISION

SUBMISSIONS

Siu Yin Yau on her own behalf

OVERVIEW

1. Siu Yin Yau (the "Appellant") appeals a determination issued on August 11, 2022 (the "Determination"), by a delegate (the "Delegate") of the Director of Employment Standards (the "Director").
2. In the Determination, the Delegate found the Appellant's former employer, S & S Insurance Services Ltd. (the "Employer"), contravened the *Employment Standards Act* (the "ESA") and the *Employment Standards Regulation* (the "Regulation") by failing to pay wages for overtime, vacation pay and accrued interest owing to the Appellant. The Determination also levied mandatory administrative penalties against the Employer for contravening provisions of the *ESA* and the *Regulation*.
3. The Delegate dismissed the Appellant's claim for compensation for length of service, finding the Employer had established just cause under the *ESA*.
4. The Appellant appeals the part of the Determination dismissing the Appellant's claim for compensation for length of service on the ground there is new evidence that was not available at the time of the Determination.
5. The Appellant was late filing the appeal and requests the Tribunal extend the statutory appeal period pursuant to section 109(1)(b) of the *ESA*.

THE DETERMINATION

6. The Determination sets out that the Appellant was employed as an Insurance Advisor from November 1, 2016, to January 7, 2021.
7. The Appellant alleged that the Employer contravened the *ESA* in failing to pay wages for overtime, vacation and compensation for length of service.
8. An investigative delegate investigated the complaint and after providing both sides with the opportunity to present evidence and make submissions, the investigative delegate submitted an investigation report to the parties. The investigative delegate invited responses to the report and both the Appellant, and the Employer provided further information. The investigation report and responses from the parties were submitted to the Delegate for a determination.
9. The Delegate held the Employer failed to pay the Appellant wages for overtime of \$5,152.45 contrary to section 37.14 of the *Regulation*, annual vacation pay of \$630.38 contrary to section 58 of the *ESA*, and accrued interest of \$237.83 pursuant to section 88 of the *ESA*. The Delegate also levied mandatory administrative penalties of \$1,500. In total, the Employer was ordered to pay \$7,520.66.

10. The Determination dismissed the Appellant's claim for compensation for length of service, finding that the Employer had established just cause under the *ESA*.

ARGUMENTS

Request to Extend the Statutory Appeal Period

11. The Determination stated the statutory deadline for filing an appeal was September 6, 2022, if served by e-mail or September 19, 2022, if served by ordinary or registered mail. On September 20, 2022, the Appellant requested information on how to file an appeal after expiry of the appeal period. On the same day, the Tribunal responded and provided information to the Appellant on how to file an appeal and how to request an extension of the appeal period. The Tribunal gave the Appellant a deadline of September 27, 2022, to provide the appeal documents.
12. The Tribunal did not receive any documents from the Appellant by September 27, 2022.
13. On October 4, 2022, the Appellant filed an Appeal Form and requested another extension of the appeal period to November 18, 2022. On the Appeal Form the Appellant stated the reason for requesting the extension was because the Appellant recently had brain surgery.
14. The Tribunal gave the Appellant until November 18, 2022, to file the complete appeal. The Tribunal noted the Appellant had not provided supporting evidence for the requested extension and advised that no further extensions would be allowed absent exceptional circumstances. The Tribunal also advised that the file may be closed without further notice if the Tribunal did not receive the requested documents.
15. The Tribunal did not receive any submissions from the Appellant by the November 18, 2022, deadline.
16. On November 21, 2022, the Tribunal wrote to the parties to advise that the Appellant had not provided the required information to complete the appeal and that the Appellant's appeal file was closed.
17. On November 25, 2022, the Appellant requested a further extension to December 18, 2022. On the Appeal Form the Appellant stated: "I recently had a brain surgery & my mom has been really sick & I am the only one she has."
18. On November 28, 2022, the Appellant provided the Tribunal with her written reasons and argument and supporting documents. On December 6, 2022, the Tribunal contacted the Appellant to request she confirm whether she still required until December 18, 2022, to submit additional documents in support of the appeal. The Appellant did not respond or provide further submissions.
19. On December 10, 2022, the Tribunal reopened the Appellant's appeal file and the matter was assigned to me for adjudication.

The Appeal Argument

20. On the Appeal Form, the Appellant submits there is new evidence that was not available at the time of the Determination. The Appellant appeals the part of the Determination dismissing the Appellant's claim for compensation for length of service.
21. The Appellant submits the Employer's evidence is unreliable and the Appellant's evidence should be preferred. The Appellant alleges the Employer has “made up” the documentation it submitted to the Director. The Appellant submits the allegations in the dismissal letter were unfounded and untruthful and were made up to avoid severance payments. The Appellant alleges she had never seen the performance reviews submitted to the Delegate and her signature on those documents were falsified.
22. The Appellant says she had to chase the Employer to receive her pay cheques and that income tax deductions were inaccurate. The Appellant appears to also allege there are some errors in the calculations of hours worked, including overtime hours. She states she regularly worked overtime.
23. Finally, the Appellant submits the Delegate erred in accepting the evidence of the Employer and finding there was just cause. The Appellant says the Employer never complained about her work and gave her difficult and complex files, which she wouldn't have been assigned if she was incompetent. She says her current employer can attest to her experience and competence. The Appellant disputes some of the facts found by the Delegate and alleges that signatures were forged by the Employer. The Appellant notes that although she “should have provided a more detailed response in a more detailed manner the first time around”, it was difficult for her to deny or refute allegations when she no longer works at the company and cannot access the Employer's files.

ANALYSIS

24. These reasons are based on the written submissions of the Appellant, the Determination, and the Record.

Request to extend the statutory appeal period

25. Subsection 112(3) of the *ESA* establishes time limits to appeal a determination. Under section 109(1)(b) of the *ESA*, the Tribunal may extend the time period for an appeal. Extensions are not granted as a matter of course, but only for compelling reasons with supporting evidence. The burden is on an appellant to demonstrate the appeal period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following factors (see *Niemisto*, BCEST # D099/96):
- a) whether there is a reasonable and credible explanation for the failure to file the completed appeal on time;
 - b) whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;
 - c) whether the respondent party and the Director have been made aware of the intention to appeal;
 - d) whether the respondent party will be unduly prejudiced by granting the extension; and,
 - e) whether there is a strong *prima facie* case in favour of the appellant.

26. This is not an exhaustive checklist of factors. In determining whether to extend the statutory time limit, the Tribunal will consider and weigh all salient factors and evidence together in the circumstances (See *Re Patara Holdings Ltd. (cob Best Western Canadian Lodge and/or Canadian Lodge)*, BC EST # D010/08; reconsideration dismissed BC EST # RD053/08).
27. In this case, the delay in filing the appeal is not a matter of days or even weeks, but stretches out over several months with repeated requests for further extensions.
28. I find the Appellant's explanation for not meeting the time requirements insufficient. The Appellant states she has had brain surgery but does not provide any supporting documentation specifying when the surgery took place and/or her limitations as a result of the surgery. Similarly, the Appellant does not explain how her mother's health condition prevented her from completing the appeal (see *Globe-Time Travel Ltd.*, BC EST # D054/11, and *Sharpe Wysman Inc.*, BC EST # D140/11, four-day extension request denied). I note the October 5, 2022, letter from the Tribunal specifically advised the Appellant to provide supporting evidence for the requested extension.
29. The Appellant's late inquiry about an extension to the appeal period, incomplete submissions, and repeated requests for extensions are some of the factors that weigh against extending the statutory deadline.
30. While there may not be much prejudice to the Employer or the Director if the extension were granted, there is no evidence the Appellant made the Employer or Director aware of an intention to appeal.
31. Although not raised by the Appellant, I have also considered that the statutory time period for filing an appeal was corrected after the original Determination was issued by way of a corrigendum issued by the Director of Employment Standards. I note the error was corrected quickly (by August 25, 2022) and, if anything, could have served as a reminder to file an appeal. As such, I do not find this factor supports extending the statutory deadline for filing an appeal.
32. Reviewing the Appellant's submissions, I find the Appellant does not have a strong *prima facie* case to appeal the Determination. The absence of a strong *prima facie* case is an important factor as it is contrary to the purposes of the *ESA* for efficient and timely resolution to prolong cases with little merit (see *0388025 B.C. Ltd. (cob as Edgewater Inn)*, BC EST # D019/12, and *U.C. Glass Ltd.*, BC EST # D107/08).
33. As set out above, the Appellant's argument in the appeal focuses on her disagreement with the Employer's evidence and the findings of fact made by the Delegate. Although the Appellant submits there is new evidence that was not available, the Appellant's submissions in this appeal are an attempt to re-argue the case. The Appellant does not provide any additional information that was not available to her at the time of the investigation and before the issuance of the Determination.
34. I find, in all of the circumstances, the Appellant has not met the burden to show that the statutory appeal period should be extended, and I therefore dismiss the appeal pursuant to section 114(1)(b).

Merits of the appeal

35. Even if I had not dismissed the appeal on the basis of untimeliness, I would have dismissed the appeal on the merits.
36. On the Appeal Form, the Appellant alleged that there was new evidence not previously available. One of the requirements to introduce new evidence on appeal is that it must not have been available at the investigation or adjudication stage (*Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03). Parties are expected to present all relevant evidence during the investigation and determination of complaints. The Appellant's submission acknowledges that points raised in this appeal could have been submitted 'the first time around' during the investigation. Accordingly, I find the Appellant's submissions do not meet the requirements for new evidence.
37. While not specifically noted on the Appeal Form, the Appellant's submission also appears to allege the Director erred in law in finding that there was just cause for the Appellant's dismissal and dismissing the Appellant's claim for compensation for length of service.
38. To show an error of law, the Appellant has the burden to show a material legal error in the decision. A disagreement with a finding of fact does not amount to an error of law. Examples of errors of law may include: i) a misinterpretation of misapplication of a section of the *ESA*; ii) a misapplication of an applicable principle of general law; iii) acting without any evidence at all; iv) acting on a view of the facts which could not be reasonably entertained; and v) exercising discretion in a fashion that is inconsistent with established principle. (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* 1998 CanLII 6466) In cases where there is some evidence, the Tribunal will generally not re-evaluate the evidence or substitute its own view on the same evidence.
39. I have reviewed the Determination and the evidence in the record carefully and do not find an error of law in the Determination. In the Determination the Delegate applied the correct legal test and the Delegate's findings were supported on the evidence. Although the Appellant may not agree with the Determination, I find there was evidence the Delegate could rely on to make the findings of fact and arrive at the conclusion there was just cause. While the Appellant alleges the documents were falsified, I find that she could have made this argument at the first instance, and she has not provided an explanation about why she failed to do so. Absent new evidence or an error of law as required under section 112(1) of the *ESA*, this Tribunal cannot re-hear the evidence and 'second-guess' the Delegate. Accordingly, I find there is no error of law and would dismiss this ground of appeal.
40. Section 114(1)(f) of the *ESA* provides that at any time after an appeal is filed, the Tribunal may dismiss the appeal if there is no reasonable prospect the appeal will succeed. In this case, I find there is no reasonable prospect the appeal would succeed and had I not dismissed the appeal for untimeliness, I would have dismissed the appeal pursuant to section 114(1)(f).

ORDER

41. Pursuant to section 114(1)(b) and (f) of the *ESA*, the appeal is dismissed.
42. Pursuant to section 115 of the *ESA*, I confirm the Determination, together with any additional interest that has accrued pursuant to section 88 of the *ESA*.

John Chesko
Member
Employment Standards Tribunal