

Citation: MFH International Enterprises Incorporated and Yan Zhang (Re)
2023 BCEST 84

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

MFH International Enterprises Incorporated and Yan Zhang

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/056

DATE OF DECISION: October 6, 2023

DECISION

SUBMISSIONS

Yan Zhang on his own behalf and on behalf of MFH International Enterprises Incorporated

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by MFH International Enterprises Incorporated (“MFH”) and by Yan Zhang, officer of MFH (“Mr. Zhang”) (collectively, “appellants”), of a determination made by Dawn Sissons, a delegate (“adjudicative delegate”) of the Director of Employment Standards (“Director”), on January 11, 2023 (“Determination”). I note that although Mr. Zhang has been recognized by the Tribunal as an appellant, his position is the same as MFH’s on all aspects of the appeal. I also note in the Determination, the Director did not find Mr. Zhang personally liable for the amounts found owing in the Determination.
2. The Determination found that MFH owed the complainant, Shuo Yao (Elva) He (“Complainant”) wages, overtime, statutory holiday pay, vacation pay and compensation for length of service in the amount of \$8,969.51, plus accrued interest, and imposed mandatory administrative penalties in the amount of \$2,000.00 against MFH.
3. MFH appeals on the basis that the Director failed to observe the principles of natural justice in making the Determination.
4. In addition, MFH requests an extension of time for filing the appeal on the basis that Mr. Zhang claims he was out of town and did not receive the Determination in a timely fashion.
5. The deadline for filing an appeal was February 21, 2023. The appeal form requesting the extension was filed on April 28, 2023, and perfected on July 11, 2023.
6. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made.
7. Under section 114(1) of the *ESA*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;

- (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect that the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of section 112 (2) have not been met.
8. If satisfied that the appeal meets any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the appellants should be granted an extension of the statutory time period for filing an appeal and whether there is any reasonable prospect the appeal can succeed.
9. For the reasons that follow, I decline to grant the appellants' request for an extension and dismiss the appeal under section 114(1)(b).

ISSUES

10. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

11. The following issues were before the Director in deciding the Determination:
- a. Was the Complainant paid commissions, and if so, does section 37.14 of the Employment Standards Regulation apply to her?
 - b. Is the Complainant owed regular wages, and if so, how much?
 - c. Is the Complainant owed overtime wages, and if so, how much?
 - d. Is the Complainant owed vacation pay, and if so, how much?
 - e. Is the Complainant owed outstanding commissions, and if so, how much?
 - f. Is the Complainant entitled to statutory holiday pay, and if so, how much?
 - g. Did [MFH] make unauthorized deductions from the Complainant's wages? and
 - h. Is the Complainant entitled to compensation for length of service, and if so, how much?
12. The Complainant was terminated from her employment, allegedly for cause, on the basis that she was observed on video sleeping on the job, and at the time, MFH alleges up to \$4,000 worth of merchandise was stolen. In the absence of the video evidence claimed to have been relied on by MFH, the adjudicative delegate did not accept that MFH had just cause to terminate the Complainant.

13. After reviewing the evidence provided by the parties, the adjudicative delegate determined that the Complainant was owed the following amounts:
- a. Wages in the amount of \$3,976.03;
 - b. Overtime in the amount of \$1,751.10;
 - c. Statutory holiday pay in the amount of \$918.70;
 - d. Annual vacation pay in the amount of \$1,727.29; and
 - e. Compensation for length of service in the amount of \$596.36.
14. In addition to the above, and accrued interest in the amount of \$654.36, the adjudicative delegate also imposed mandatory administrative penalties totalling \$2,000.00 for contraventions of sections 17, 18, 40, and 46 of the *ESA*.

ARGUMENTS

15. MFH seeks an extension of time to file the Appeal on the basis that Mr. Zhang claims he did not receive the Determination, either by mail or email, and claims he first learned of the Determination when his bank manager told him his bank account was frozen. Mr. Zhang also claims that at the time the Determination was mailed, he was not available at the address on record.
16. While the appeal form indicates that the appeal is being made on the basis that the Director failed to observe the principles of natural justice, the submissions received by the Tribunal on June 30, 2023, for the most part focuses on disputing several of the factual findings made by the Director.
17. MFH disputes that the Complainant is entitled to overtime or statutory holiday pay. MFH also disputes some of the calculations made by the adjudicative delegate on the basis that their own calculations were made by professional accountants who are unlikely to make errors.
18. In addition, MFH asserts that employees are entitled to a 2-hour break each day, and as a result disputes the overtime calculations.
19. MFH disputes the adjudicative delegate's reliance on 6% as the rate of commission as they say other factors including sales performance may affect the amount of commission an employee is entitled to.
20. MFH denies that the Complainant should be entitled to any vacation pay as they assert that vacation pay was included in her regular wages.
21. Finally, MFH describes the video relied on for the basis to terminate the Complainant's employment and asserts that "[i]t is reasonable to believe that she was asleep on the couch during the shoplifting incident, and we terminated her for just cause."

ANALYSIS

22. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt with promptly: see section 2(d). The *ESA* allows an 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 the time limit 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. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96 ("*Niemisto*"). The following criteria must be satisfied to grant an extension:
- 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 (*i.e.*, the employer or employee), 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.
24. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.
25. I note first, that on June 29, 2022, the Investigation Report prepared by the investigating delegate was sent to MFH and to Mr. Zhang by email, as well as by mail to all three addresses of record indicated in the BC Corporate Registry. The section 112(5) record ("*Record*") does not indicate any submissions were received from either MFH or Mr. Zhang after the Investigation Report was issued.
26. The Determination also on its face indicates it was sent by email, as well as by mail to the registered records office of MFH. The Determination also indicates it was sent to a residential address also listed in the Corporate Registry.
27. The *ESA* provides that a determination 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, or
 - b. transmitted by email to the person's last known email address according to the records of the director.

ESA, section 122(1)

28. While Mr. Zhang indicates he did not receive the Determination, either by mail or email, there is no evidence before me of the efforts he made to learn of the Determination. Mr. Zhang also does not suggest that either of the addresses were incorrect. While I accept that Mr. Zhang may have been out of town, I

find it more likely than not that after learning of the freeze on his bank accounts, he searched for and located either the physical or electronic version of the Determination and proceeded to seek leave to appeal.

29. I also note that the later time limit for filing the appeal, with respect to service by mail, was February 21, 2023, 41 calendar days after the Determination was issued, which accounts for the exigencies of the postal service. Mr. Zhang then submitted notice of his intention to appeal on April 27, 2023, (received by the Tribunal on April 28, 2023) seeking an extension to June 30, 2023, to file his appeal, significantly longer than the *ESA* provides for an appeal period in any event. Mr. Zhang provides no basis for requiring such a lengthy period of time to prepare and submit his appeal.
30. Accordingly, I find the appellants have not satisfied the first of the *Niemisto* criteria, having failed to provide a reasonable or credible justification for not requesting an appeal within the statutory time limit.
31. This notwithstanding, I am also not persuaded that there is a strong *prima facie* case in favour of the appeal.
32. The onus is on an appellant to demonstrate a failure to adhere to the principles of natural justice. While Mr. Zhang has provided no basis for such an assertion, I have nevertheless reviewed the Record of the Director and I find there is nothing in the Record that would remotely suggest an infringement of the appellants' natural justice rights by either the investigative delegate during the investigation of the Complaint or by the adjudicative delegate in making the Determination. To the contrary, there is substantial evidence that the appellants were amply afforded opportunity to participate in the investigation of the Complaint and to respond to the evidence adduced by the Complainant and contained in the Investigation Report.
33. Instead, the appellants seek to dispute several of the factual findings made in the Determination but does not assert that they were made without evidence, nor do the appellants appear to suggest they were denied the opportunity to fully and fairly respond to the Complaint. For example, while the appellants suggest in the appeal that the Director failed to consider that employees were provided with two hours of uninterrupted breaks during each shift, there is no evidence this assertion was put forward to the investigating delegate, either during the investigation, or after receipt of the investigation report. In fact, on the face of the Record, it appears Mr. Zhang first sought to persuade the investigating delegate that the Complainant never worked more than eight hours in a shift, which was rejected based on the evidence.
34. Further, while the appellants again seek to rely on the assertion that they had video evidence to substantiate that the Complainant was sleeping on the job while thefts occurred, this assertion was rejected in the Determination as MFH failed or refused to provide a copy of the video.
35. With respect to any calculations the appellants asserts are incorrect, the appellants have not provided evidence to refute the calculations, but only suggests that their professional accountants would not have erred, and the Tribunal should contact the accountant directly.
36. Although the appellants say vacation pay was included in the Complainant's wage calculations, there is no evidence, either in the Record, or provided with this appeal, to support this contention.

37. Accordingly, I find the appellants have not met their onus to provide compelling reasons for an extension to the statutory appeal period, nor demonstrated that there is a *prima facie* case in favour of the appellants.

38. For these reasons, I decline to exercise my discretion to extend the statutory appeal period.

ORDER

39. The appellants' request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b).

40. Further to this, the appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period.

41. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed along with whatever further interest has accrued pursuant to section 88 of the *ESA*.

Ryan Goldvine
Member
Employment Standards Tribunal