

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Larry Leathem

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Ryan Goldvine

**FILE NO.:** 2023/117

**DATE OF DECISION:** January 5, 2024

## DECISION

### SUBMISSIONS

Larry Leathem	on his own behalf
Kieran O Sullivan	on his own behalf
Reena Sharma	delegate of the Director of Employment Standards

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“ESA”) by Larry Leathem of a determination made by Reena Sharma, a delegate (“Delegate”) of the Director of Employment Standards (“Director”), on February 24, 2023 (“Determination”).
2. The Determination found that the complainant, Kieran O Sullivan (“Complainant”), was owed wages, overtime, statutory holiday pay, and annual vacation pay totalling \$11,869.32. The Determination also imposed administrative penalties in the amount of \$1,500.00.
3. The Delegate concluded that Larry Leathem (“Appellant”) and Ricardo Ponce, in partnership, were the employer of the Complainant.
4. The Appellant appeals on the basis that the Director erred in law and failed to observe the principles of natural justice. As well, the Appellant seeks to submit evidence that he says has become available that was not available at the time the Determination was being made.
5. In addition, the Appellant requests an extension for the filing of the appeal on the basis that he claims he did not receive a copy of the Determination because his laptop computer was not working.
6. The deadline for filing an appeal was April 3, 2023. The appeal was received by the Employment Standards Tribunal on August 3, 2023.
7. Unable to dispose of the matter on the basis of the materials initially filed, I sought submissions from the parties both on the request for extension and on the merits of the appeal.
8. The Tribunal received submissions from the Director on November 15, 2023, and from the Complainant on November 16, 2023.
9. The Tribunal did not receive a submission from Ricardo Ponce; and although the Tribunal gave the Appellant until December 6, 2023, to provide a final reply, he did not make any further submissions.
10. At this stage, I am assessing the appeal based solely on the Determination, the reasons for the Determination, the appeal form, the written submission filed with the appeal form, my review of the material that was before the Director when the Determination was being made, and the submissions received from the Director and the Complainant.

11. 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.

12. 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 Appellant should be granted an extension of the statutory appeal period for filing an appeal.

13. For the reasons that follow, I decline to grant the Appellant's request for an extension and dismiss the appeal under section 114(1)(b).

### **ISSUE**

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

### **THE DETERMINATION**

15. The issues before the Director were whether the Complainant was an employee or independent contractor, and, if an employee, what, if any, wages were owing to him.

16. Subsumed within the issue of whether the Complainant was an employee was the issue of the identity of the Complainant's employer.

17. The Delegate determined that the Complainant was an employee and was entitled to wages, vacation pay, statutory holiday pay, and overtime. The Delegate also determined that Supreme Siding Solutions ("Supreme"), an entity through which Mr. Leathem and Mr. Ponce in partnership carried on business, was the Complainant's employer.

18. Although the Appellant denied being in a partnership with Mr. Ponce, the Delegate concluded that he was on the bases that the website for Supreme presented the Appellant and Mr. Ponce as operating the business together, that the Appellant visited worksites and spoke to homeowners on behalf of Supreme, and that the Appellant provided no evidence to refute the existence of a partnership.

## **ARGUMENTS**

19. The Appellant seeks an extension of the statutory appeal period to August 6, 2023, because his laptop was down for several months, and, as a result, he says he was unaware of the Determination until his bank advised him.
20. The Appellant provides submissions that he says support his position that he was not in partnership with Mr. Ponce, and only assisted him from time to time. He says he and Mr. Ponce had a “gentleman’s agreement” to help each other out, but he had no responsibility for the business operations of Supreme.
21. The Appellant also provided a letter, dated August 2, 2023, along with his submission. This letter, on its face, appears to be signed by Mr. Ponce and states that Supreme was his company alone and that the Appellant was not a partner in that undertaking.
22. The Delegate opposes the appeal and says there is no basis to extend the appeal period. The Delegate says the Determination was sent to the Appellant both by regular mail and email, and that neither was returned undelivered. The Delegate points out that the Appellant does not deny having received the Determination by mail, nor does he provide any rationale for not attempting to access his email from another device, if in fact his laptop was not working.
23. This notwithstanding, the Delegate also says the appeal has no merit.
24. The Delegate submits there was no error in law and that the conclusion reached that the Appellant was a partner in Supreme was based on an assessment of all of the evidence before the Director at the time. This evidence includes the admitted agreement that the Appellant and Mr. Ponce would split the profits of the business, that the Appellant agreed he would occasionally oversee or look after the worksite, that he “could have” been the one to hire the Complainant, and that he and Mr. Ponce both advised the Complainant of the termination of his employment.
25. The Delegate says there was no failure to observe the principles of natural justice, and submits that the Appellant has not identified any aspect of the Complaint that he was not afforded the opportunity to properly respond to, nor does he say the reasons for the Determination are lacking in any way.
26. While the Appellant has submitted a letter dated after the Determination in support of his appeal, the Delegate says the information contained in the letter is not new information that would not have been available at the time the Determination was issued.
27. The Delegate points out that while the letter seeks to clarify the relationship between the Appellant and Mr. Ponce, it in fact contradicts the earlier evidence given by Mr. Ponce.

28. In addition, the Delegate submits that an Investigation Report was issued to the parties in advance of the Determination on September 23, 2022. The parties were given until October 7, 2022, to provide any response or further clarification or documents in response. Neither Mr. Ponce nor the Appellant provided any response to the Investigation Report.
29. Further, the Delegate says neither Mr. Ponce nor the Appellant provided any reason why this ‘clarification’ outlined in Mr. Ponce’s letter could not have been provided earlier in the process, either during the initial interviews, or after the Investigation Report was provided to the parties for comment.
30. The Complainant disputes the veracity of the Appellant’s submissions and reaffirms his assertions that the Appellant was the one who provided him with the job offer before he initially started work, and was also the one who terminated his employment.
31. As noted above, although the Appellant was provided an opportunity to make a final reply submission, none was received by the Tribunal.

## ANALYSIS

32. The *ESA* imposes a 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 *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 [*ESA*] 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.
33. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Niemisto*, BC EST # D099/96. 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.
34. 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: *Wright (Advanced Carpet Cleaning)*, BC EST # D132/97.

35. As noted above, although the Appellant claims he was not aware of the Determination because his laptop computer was not working, the Determination was also sent by regular mail to his residence, the address of which he confirmed with the Delegate. The Appellant does not deny receiving the mailed copy. Furthermore, even if the Determination had not been sent by regular mail, the Appellant does not indicate the time frame during which he claims his computer was not working, nor does he describe any other efforts to access his email in other ways.
36. The Appellant was aware that the Complaint was being investigated and had corresponded with the Employment Standards Branch by email previously. Accordingly, it would have been incumbent on him to monitor his email for any developments or further correspondence regarding the Complaint, or to make other arrangements with the Branch if email was not a viable mode of communication for him.
37. This notwithstanding, there must also be a “strong *prima facie* case” in favour of the Appellant.
38. The Tribunal has recognized the following ways in which an “error of law” may be found to have occurred, as set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.)(*Gemex*):
- a. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
  - b. a misapplication of an applicable principle of general law;
  - c. acting without any evidence;
  - d. acting on a view of the facts which could
  - e. not reasonably be entertained; and
  - f. adopting a method of assessment which is wrong in principle.
39. While the Appellant disagrees with the conclusion reached in the Determination as to the existence of a partnership, he does not appear to assert that this conclusion was reached in the absence of any evidence, or on a view of the facts that could not be reasonably entertained.
40. I am satisfied on a review of all of the materials before me that the Delegate considered all of the materials before her and reached a conclusion based on a weighing of the evidence. I am not persuaded anything in the materials before me demonstrates that an error of law occurred.
41. A party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. (Honda North)*, BC EST # D043/99.
42. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an

unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

43. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the Record and in the information submitted to the Tribunal in this appeal, the Appellant was provided with the opportunity required by principles of natural justice to present his position to the Director.
44. I note the Appellant has not pointed to any process elements that have not been followed in the present Complaint, nor does it appear the Appellant was denied the opportunity to know the case against him and he was provided several opportunities to submit any relevant information he may have had.
45. With respect to the “New Evidence” ground of appeal, the Tribunal has set out guidance in *Re Davies et al.*, BC EST # D171/03. The Tribunal established a four-part test as follows:
- a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - b) the evidence must be relevant to a material issue arising from the complaint;
  - c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
46. Although the Appellant has provided a letter dated after the Determination was issued, he has provided no rationale as to why the information contained in the letter could not have been provided before the Determination was issued. The letter does not contain new information, but instead, on its face, appears to contradict some of the evidence that was provided during the investigation into the Complaint.
47. For all of these reasons, I am unable to accept that there are “compelling reasons” for granting an extension of the time limit for filing an appeal in this case.
48. Accordingly, I decline to exercise my discretion to extend the statutory appeal period.

## **ORDER**

49. The Appellant’s request for an extension to the statutory appeal period is denied pursuant to my discretion under section 109(1)(b).
50. Further to this, the appeal is dismissed under section 114(1)(b) as having been filed outside of the statutory appeal period.

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

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**Ryan Goldvine**  
**Member**  
**Employment Standards Tribunal**