Citation: Zameen Sabet (Re)
2024 BCEST 21

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Zameen Sabet
("Mx. Sabet")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Shafik Bhalloo, K.C.

FILE NO.: 2023/175

DATE OF DECISION: March 11, 2024

DECISION

SUBMISSIONS

Andreea Micu — on behalf of Mx. Sabet

OVERVIEW

1. This is an appeal by Zameen Sabet ("Mx. Sabet") of a decision of the Director of Employment Standards ("Director") issued on October 5, 2023 ("Determination").

2. On May 18, 2021, Mx. Sabet filed a complaint under section 74 of the *Employment Standards Act* ("*ESA*") with the Director alleging that Ma Institute of Yoga and Wellness Inc. carrying on business as Ma Yoga ("Ma Yoga") contravened the *ESA* by failing to pay regular wages, statutory holiday pay, vacation pay and compensation for length of service ("Complaint").

3. The Director followed a two-step process in investigating the Complaint and making the Determination. One delegate of the Director ("investigative delegate") corresponded with the parties and gathered information and evidence. Once that process was completed, the investigative delegate prepared a report dated March 15, 2022 ("Investigation Report"), summarizing the results of the investigation and sent it to the parties for review and comment.

4. The parties were afforded an opportunity to respond to the Investigation Report and they did. Subsequently, the Investigation Report and the parties' responses and documents were forwarded to a second delegate ("adjudicative delegate") who assumed responsibility for reviewing it and issuing the Determination pursuant to section 81 of the *ESA*.

5. In the Determination, the adjudicative delegate found that the *ESA* does not apply to Mx. Sabet and no further action would be taken in respect of the Complaint.

6. On November 14, 2023, Mx. Sabet, by email, through their legal advocate, Andreea Micu ("Ms. Micu"), filed an appeal of the Determination on the sole statutory ground that the Director erred in law in making the Determination.

7. On November 22, 2023, the Tribunal emailed Mx. Sabet's legal advocate to advise, among other things, that the appeal was not filed by the appeal deadline and requested Mx. Sabet to provide the Tribunal with their request to extend the appeal period and reasons why they were unable to provide the complete appeal to the Tribunal before the expiry of the appeal period. The email from the Tribunal explains that the Determination was served by email and mail on Mx. Sabet. The Determination indicates that if served by email, the appeal period expiry date is October 30, 2023, and if served by mail the appeal period expiry date is November 14, 2023. On November 14, 2023, at 4:24 p.m., the Tribunal received the first email of Ms. Micu attaching Mx. Sabet's arguments. On the same date, at 4:35 p.m. the Tribunal received Ms. Micu's second email containing the Appeal Form and a copy of the Determination and the Reasons for the Determination.

8. On December 6, 2023, Ms. Micu, among other things, submitted Mx. Sabet's reasons for the late submission.

9. On December 12, 2023, the Tribunal corresponded with all the parties informing them that it had received Mx. Sabet's appeal of the Determination including their request to extend the statutory appeal period. The Tribunal informed Ma Yoga and the Director that at this time a submission on the request to extend the statutory period and on the merits of the appeal is not requested. In the same correspondence, the Tribunal informed the Director to provide the section 112(5) "record" ("Record").

10. On January 4, 2024, the Director provided the Tribunal with the Record.

11. On January 10, 2024, a copy of the Record was sent by the Tribunal to the parties, and both parties were provided an opportunity to object to its completeness. Neither party objected to the completeness of the Record and the Tribunal accepts it as complete.

12. On January 26, 2024, the Tribunal informed the parties that a panel has been assigned to decide the appeal, and that if the Panel determines all or part of the appeal should be dismissed the Panel will issue a decision. If the appeal is not dismissed, the Tribunal will seek submissions from Ma Yoga and the Director on the merits of the appeal.

13. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I find it is unnecessary to seek submissions on the merits from Ma Yoga or the Director.

14. My decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions submitted on behalf of Mx. Sabet, the Determination and the Reasons for the Determination ("Reasons").

ISSUES

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

THE DETERMINATION AND THE REASONS

16. The Reasons show that the adjudicative delegate considered a single issue, namely: Is Mx. Sabet an 'employee' as defined under section 1 of the *ESA*? While, in her response to the Investigation Report on behalf of Mx. Sabet, Ms. Micu pointed out that there were several issues being addressed in Mx. Sabet's human rights complaint against Ma Yoga, the adjudicative delegate properly declined to address those issues in the Determination because she lacked authority under the *ESA* to address them.

17. By way of a preamble to her findings and analysis in the Determination, the adjudicative delegate notes that as the parties each had an opportunity to review and respond to the evidence collected during the investigation, she accepted the Investigation Report as an accurate reflection of the parties' evidence and positions regarding the penultimate issue in the Determination - i.e., whether Mx. Sabet was in an employment relationship with Ma Yoga. She also states that although she has reviewed all the evidence provided to her, she will only refer to the evidence that is necessary to reach the required findings and to apply the relevant legislation.

18. Having said this, the adjudicative delegate notes that Ma Yoga operates a yoga institute and Mx. Sabet worked as a yoga teacher for Ma Yoga. She also notes that the parties agreed that Mx. Sabet had a previous relationship with Brahmanda Yoga that closed its operations in June 2019. Subsequently, Mx. Sabet began a working relationship with Ma Yoga in January 2020 that ended on January 5, 2021. While Mx. Sabet contended that their working relationship from Brahmanda Yoga to Ma Yoga was continuous, the adjudicative delegate found otherwise stating that Mx. Sabet's working relationships with the two were discrete and separate from one another. She found the two businesses were separate legal entities even if both had same directors and officers. Brahmanda Yoga closed in June 2019 and Mx. Sabet started working with Ma Yoga in January 2020.

19. Having said this, the adjudicative delegate notes that any complaint against Brahmanda Yoga would have had to have been filed on or before December 2019. Since Mx. Sabet filed their Complaint on May 18, 2021, it was filed in time to consider their relationship with Ma Yoga only and that is the focus of the adjudicative delegate's Reasons and related Determination.

20. In considering the question of the nature of Mx. Sabet's relationship with Ma Yoga, the adjudicative delegate notes that there must be an employment relationship for the *ESA* to apply and that Ma Yoga's treatment or characterization of Mx. Sabet as an independent contractor does not prevent a finding that Mx. Sabet was an employee for the purposes of the *ESA*.

21. The adjudicative delegate then considers the definitions of "Employee," "Employer," and "Worker" under the *ESA* noting that the *ESA* is remedial legislation intended to ensure that employees receive at least minimum standards. She also observes that the relationship of the parties must consider the purposes of the *ESA* noting that section 2 of the *ESA* provides for the protection of employees through minimum standards of employment. She also adds that an interpretation that extends that protection is to be preferred over one that does not and under section 4 of the *ESA*, any agreement to waive the requirements of the *ESA* is not enforceable and has no effect.

22. The adjudicative delegate also observes that while the definitions found in the *ESA* are central to the inquiry about the nature of Mx. Sabet's relationship with Ma Yoga, it is necessary to analyse the entire relationship between the parties to determine whether Mx. Sabet was an employee. In that regard, she notes that it is useful to consider the question: "whose business is it?" To decide that question, she states that factors in addition to those set out in the definitions can be helpful. These factors may include the level of control exercised by Ma Yoga over Mx. Sabet; level of autonomy Mx. Sabet had over their work; how Mx. Sabet's pay is set; whether there is an opportunity for profit or loss in the performance of the tasks; whether Mx. Sabet was in business for themselves; and whether Mx. Sabet is providing similar services to other parties.

23. In concluding that Mx. Sabet was in business for themselves under the name Zameen Yoga and their relationship with Ma Yoga was one of independent contractor and not within the jurisdiction of the *ESA*, the adjudicative delegate relies on the following findings of facts and presents the following reasons:

- To be paid for their work, Mx. Sabet created and submitted invoices to Ma Yoga for each class or workshop they taught.
- The invoices for payment submitted by Mx. Sabet to Ma Yoga include the business name "Zameen Yoga" and Mx. Sabet's legal name before Mx. Sabet underwent a legal name change).

- The invoices provide a description of the type of class taught by Mx. Sabet and the rate for the class taught.
- Mx. Sabet was paid a flat rate for the classes they taught. While Mx. Sabet contended that their rate of pay was an hourly rate, the invoices they produced indicate the rate of pay as "class pay" and did not contain any calculations regarding the number of hours worked by Mx. Sabet. This suggests that their pay was flat rate per class.
- A flat rate of pay indicates that Mx. Sabet had the opportunity to create efficiencies in their work. There is no evidence that Mx. Sabet was required to arrive at a certain time in advance of their class or stay later after completing their class. They had discretion as to how much time they spent planning the yoga lesson in advance of the class starting.
- Mx. Sabet had autonomy and control over the work they performed. They had the ability to turn down substituting classes, they provided their availability for teaching classes, cancelled classes as they saw fit without approval from Ma Yoga, took ownership of the Queer Yoga class specifically stating, "my Queer Yoga class" and possibly train any teacher who would substitute for them in the Queer Yoga class.
- On January 7, 2021, Ma Yoga received an email ("January 7 Email") from a client requesting a refund for the punch pass they purchased. The client said in their email that they had purchased a punch pass to attend Queer Yoga through livestream after asking Mx. Sabet when such accommodations would be made available during the pandemic. The client said they were never a student of Ma Yoga but a student of Mx. Sabet and Queer Yoga and that is why they bought the punch pass. They wanted their monies back if attending Queer Yoga through livestream is not an option.
- When Mx. Sabet discussed Facebook page or posters for the Queer Yoga class, they stated "If I was teaching Queer Yoga under my name Zameen Yoga, at some community centre."
- The January 7 Email discussed Queer Yoga advertising and invoices which supported Ma Yoga's contention that Mx. Sabet had their own business under the name Zameen Yoga.
- The January 7 Email also showed that Mx. Sabet likely represented themselves as Zameen Yoga to a client.
- Mx. Sabet alleged they performed work at Ma Yoga – front desk work, cleaning duties and installed a coat rack – which was not billed on the Zameen Yoga invoices. According to the adjudicative delegate, if such work was performed by Mx. Sabet, it was not performed in the capacity of an "employee." Further, according to the adjudicative delegate, Mx. Sabet did not provide evidence that Ma Yoga hired them to perform the said work. Conversely, Ma Yoga provided its schedule along with witnesses that showed it was unlikely that Mx. Sabet worked on those days they claim to have worked at the front desk and performed cleaning duties. Mx. Sabet did not have classes scheduled on those days and the witnesses assert that they were not at the yoga studio on those days.
- As for installing a coat rack, while Mx. Sabet submitted a witness statement that indicates that they helped with installing a coat rack at Ma Yoga on February 24, 2019, and that they attended a class in March 2019, according to the adjudicating delegate, these dates are outside the wage recovery period and prior to the operation of Ma Yoga. Even if the dates were in 2020, the acts of staying after a class to assist with coat installation or cleaning up

after one's class is finished is not sufficient to show an employment relationship, according to the adjudicative delegate. If such work was performed by Mx. Sabet, the adjudicative delegate says that it was in the capacity of a volunteer whose own business, Zameen Yoga, benefited from Ma Yoga's premises being clean and well appointed.

- While Ma Yoga operates a yoga studio and yoga instructors are integral to the latter's business, based on the evidence provided by both parties, Mx. Sabet was not integral to Ma Yoga's business. They were not the only yoga instructor teaching at the studio and Ma Yoga was able to operate without them as evidenced by Mx. Sabet's ability to cancel their class without Ma Yoga's approval.

SUBMISSIONS OF MX. SABET

24. Ms. Micu, on behalf of Mx. Sabet, presents two written submissions, namely: (i) in support of Mx. Sabet's application for an extension of the appeal period and (ii) on the merits of Mx. Sabet's appeal. I have carefully reviewed both submissions and will only summarize them briefly under separate headings below.

(i) *Submissions in support of the extension of the appeal period*

25. Ms. Micu says that Mx. Sabet was not able to get in touch with her organization, the Worker Solidarity Network ("WSN"), right away to request support with the outcome of their Complaint because Mx. Sabet was dealing with a file at the Human Rights Tribunal and was unable to get a hold of their lawyer and had to find new representation.

26. Ms. Micu says that Mx. Sabet "reached out to WSN for support on their determination" but does not indicate the date when they reached out. She says that during this period WSN was performing a data transfer, and some communications got lost.

27. She adds that Mx. Sabet reached out to WSN again, and got in touch with her on November 7, over email. The two of them then arranged for a phone call on Friday, November 10 at 1:00 p.m. but she was unable to work that day as she took a sick day. She says no other staff at WSN was able to support Mx. Sabet with their issue, and the two of them tried their best to meet as soon as possible which was not until November 14, 2023, at 1:00 pm. She states that while WSN does not typically provide support with appeals of Employment Standards determinations currently, due to the short timeline and their previous knowledge of Mx. Sabet's ESB complaint, WSN agreed to support Mx. Sabet in their appeal.

28. Ms. Micu says she then prepared submissions for the appeal and sent them to Mx. Sabet for their approval and thereafter, submitted Mx. Sabet's Appeal to the Tribunal at 4:23 p.m. on November 14, 2023. After she sent the Appeal, she says she again verified all of the documents were submitted and discovered 2 documents were not attached. She particularly struggled with the Appeal Form that would not attach and says she downloaded and filled out that form separately and submitted them with the Determination by email to the Tribunal at 4:34 p.m. She states the delay is only 4 minutes in duration and would not be prejudicial to either party.

(ii) ***Submissions on the merits of the appeal***

29. While I do not reiterate verbatim all the submissions of Ms. Micu under this heading, I have read them carefully and I find them to be in the nature of a dispute with the adjudicative delegate's findings of facts as discussed under the heading Analysis below. However, I will summarize the submissions below.

30. Ms. Micu contends that the adjudicative delegate erred in law in misapplying the four-fold and integration tests or applied them inconsistently with the purposes of the *ESA* in concluding that the *ESA* does not apply to Mx. Sabet. In support of the said contentions, she submits as follows:

- The adjudicative delegate's findings are inconsistent with and unsupported by the evidence. She explains that while the investigating delegate considered that Mx. Sabet submitted "invoices" to the employer for the hours worked, she failed to consider the evidence that Mx. Sabet did so under the direction Ma Yoga. She says Mx. Sabet having never been in the position to write an invoice, or a pay stub before, just wrote down what they felt best described the document.
- The January 7 Email from a client to Ma Yoga wherein the former represented that they preferred to attend Mx. Sabet's classes over other classes should not be fatal to Mx. Sabet's Complaint. The client subsequently submitted a written statement explaining that they had intended to communicate that the only reason they attended Ma Yoga was for Mx. Sabet's classes.
- The adjudicative delegate failed to consider Mx. Sabet's evidence regarding the Facebook message mentioned in the Reasons. While Ma Yoga submitted part of the message containing "Zameen Yoga," Mx. Sabet submitted the same message in its complete form, which shows that they said: "if I was working for myself, I would do this, but since I am not, I'm coming to you for help."
- "It does not appear as though the [adjudicative delegate] considered credible and relevant evidence that Mx. Sabet submitted on the very issues they relied on to make their decision, and that they made their decision without considering the important relevant evidence above."
- The adjudicative delegate erred in law in determining that Mx. Sabet did not perform "work" as defined in the *ESA* in relation to the work Mx. Sabet performed at the front desk, cleaning work and assisting with the installing of the coat rack. It is not necessary for Ma Yoga to have hired Mx. Sabet for any specific tasks for it to be considered work for the purposes of *ESA.* If they simply performed work for another (Ma Yoga), it is "work" under the *ESA*.
- The adjudicative delegate's interpretation of what constitutes work under the *ESA* allows an employer to easily evade the *ESA's* requirements by simply not writing them down, an outcome that is inconsistent with the purposes of the *ESA*.
- The adjudicative delegate failed to properly apply the four-fold test in *671122 Ontario Ltd. v. Sagaz Industries Canada Ltd.,* [2001] SCC 59. The adjudicative delegate largely or disproportionately relied upon the control factor to the exclusion of other factors like ownership of tools, chance of profit and risk of loss in determining Mx. Sabet's status in their relationship with Ma Yoga.

- The adjudicative delegate failed to consider Ma Yoga's control over Mx. Sabet's pay rate, their ownership of the location and tools, the risk for loss or profit, and that Mx. Sabet taught Ma Yoga's clients, and not their own.
- Mx. Sabet "being paid wages, and having no costs associated with their position, carried no risk of loss, and, having been paid only wages, at a rate set by Ma Yoga, did not have the capability or opportunity to share in any profits."
- "Ma Yoga owned the studio, the clients, and the classes."
- Although Mx. Sabet had some flexibility around their working hours, the adjudicative delegate failed to balance this finding with other factors indicating control, and against the other factors in the four-fold test.
- Teaching classes at a yoga studio is work that a reasonable person would expect an employee of a yoga studio to perform.
- The adjudicative delegate should have considered evidence that clients sign up on Ma Yoga's website, where one can read Ma Yoga referring to them as "our classes" and "our pricing guide" in reaching a conclusion about the ownership of the business and clients.
- The adjudicative delegate does not make mention of the fact that Ma Yoga owns the studio, space, scheduling software and other tools necessary to manage clients and teach classes.
- "[S]ome flexibility" that Mx. Sabet had in their working hours is not enough to exclude a worker from the protections of the *ESA*.
- Mx. Sabet had no say over prices, did not control the profit levels, commissions, or the variance in the number of sales. Ma Yoga controlled the business.
- The correspondence between Mx. Sabet and Ma Yoga the adjudicative delegate relies upon in her determination of the status of Mx. Sabet in their relationship with Ma Yoga does not show any evidence that Mx. Sabet owns their own business.
- A "holistic" view of the relationship shows, on a balance of probabilities, that Ma Yoga owns the business.
- The adjudicative delegate erred in law by applying the integration test incorrectly in her assessment of Mx. Sabet's status as an employee or independent contractor and she erred in finding that they were not integral to Ma Yoga's business because they are not the only yoga teacher employed there.
- The adjudicative delegate's focus should have been on the role of the worker and the nature of their work, rather than the number of employees in the business, otherwise an employer may be able to evade responsibilities under the *ESA* simply by hiring more than one person to fulfill a role.
- A yoga teacher is integral to a business which, at its core, offers yoga classes taught by those teachers and the adjudicative delegate did not appear to consider factors such as the work Mx. Sabet performed was work that was normally performed by an employee.
- There was no finite contract between the parties - Mx. Sabet was employed by Ma Yoga on a continuous basis.

31. Ms. Micu asks the Tribunal to return the matter to the Director to issue a new determination that "appropriately considers the parties' working relationship in a way which is correct and consistent with the purpose of the Employment Standards Act."

ANALYSIS

32. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was being made.

33. Section 114 (1) of the *ESA* provides that 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.

34. An appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, with the burden in an appeal being on the appellant, Mx. Sabet in this case, to demonstrate, on a balance of probabilities, that the Director made a reviewable error under one of the statutory grounds. As previously indicated, Mx. Sabet has checked off a single ground of appeal in the Appeal Form, namely, the Director erred in law in making the Determination. However, there is a preliminary issue in this appeal, namely, Mx. Sabet's failure to file their appeal within the statutory appeal period. I will first address this question below as this failure allows me to dispose of this appeal pursuant to section 114(1)(b) of the *ESA*.

Failure to file the appeal within the statutory appeal period

35. The *ESA* imposes a deadline on appeals to ensure they are dealt with promptly: see section 2(d).

36. Section 112(2) and (3) of the *ESA* provides:

(2) A person who wishes to appeal a determination to the tribunal under subsection (1) must, *within the appeal period established under subsection (3)* (emphasis added),

(a) deliver to the office of the tribunal

(i) a written request specifying the grounds on which the appeal is based under subsection (1),

(i.1) a copy of the director's written reasons for the determination, and,

(ii) payment of the appeal fee, if any, prescribed by regulation, and

(b) deliver a copy of the request under paragraph (a) (i) to the director.

(3) The appeal period referred to in subsection (2) is the *period that starts on the date the determination was served under section 122 and ends 30 days after that date* (emphasis added).

37. The appeal period is 30 days after the date of service, whether the person was served by registered mail, regular mail, electronic mail, fax machine, or by personal service.

38. Section 122 provides:

122 (1) A determination… 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,

(b) transmitted by email to the person's last known email address according to the records of the director,

…

(2) If service is by *ordinary mail* or registered mail, then the determination … *is deemed to have been served 8 days after it is mailed* (emphasis added).

(3) *If service is by email* or fax, then the determination … *is deemed to have been served 3 days after it is transmitted* (emphasis added).

39. In the present case, the Determination was made on October 5, 2023, and the Director sent the same to Mx. Sabet's legal advocate, Ms. Micu, by email and regular mail on the same date.

40. The Determination expressly indicates that if served *by email*, the appeal period expiry date is October 30, 2023, and if served *by mail* the appeal period expiry date is November 14, 2023. If served by more than one method, it states "the longest appeal period applies for delivery to the Employment Standards Tribunal." The Director of Employment Standards has no authority under the *ESA* to extend (or shorten) an appeal period (see *1050417 B.C. Ltd. and Jared Dale Penner (Re),* 2024 BCEST 13). The authority rests solely with the Tribunal under section 109(1)(b). As soon as Mx. Sabet was lawfully served - whether by email or by mail to their legal advocate's email or office address at WSN – sections 122(2) and (3) were triggered. Having said that, the fact that a party may have been misinformed about the applicable appeal deadline could certainly be considered in determining whether an appeal period should be extended under section 109(1)(b) (see *1050417 B.C. Ltd. and Jared Dale Penner, supra*).

41. Ms. Micu sent a first email attaching Mx. Sabet's reasons and arguments for the appeal to the Tribunal on November 14, 2023, at 4:24 p.m.

42. Ms. Micu's second email to the Tribunal containing the Appeal Form, the Determination and the Reasons for the Determination was sent at 4:35 p.m. and is considered received by the Tribunal the next business day on November 15, 2023, as it was sent after 4:30 p.m.

43. As the reasons for the Determination were delivered to the Tribunal on November 15, 2023, Mx. Sabet's complete appeal was not filed before the expiry of the appeal period. Accordingly, I find that the appeal was filed after the expiry of the appeal period – whether deemed service is calculated based on mail or email delivery.

44. However, the *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal delineated 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.

45. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re 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 ongoing *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e*., the employer or employee) as well as 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.

46. The above criteria are not exhaustive, but they have been considered and applied by the Tribunal, time and again. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time.

47. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.

48. Based on my review of all the evidence and having regard to the criteria delineated in *Re Niemisto,* I am not persuaded that there are compelling reasons in this case to grant an extension of the appeal period. My reasons follow.

49. First, I am not persuaded that there is a reasonable and credible explanation for Mx. Sabet's failure to request an appeal within the "longest period" – 4:30 p.m. on November 14, 2023 – delineated in the Determination. I do not find that Mx. Sabet dealing with their human rights file and having to find new representation for that complaint is sufficient justification for the delay, albeit a short one, in filing their *ESA* appeal.

50. It is not evident in Ms. Micu's submissions when, after she or WSN received the Determination by email and/or regular mail, the same was sent by her or WSN to Mx. Sabet. Ms. Micu notes in her submissions that Mx. Sabet "reached out to WSN for support on their determination" but does not indicate the date when they reached out. She says that during this period WSN was performing a data transfer, and some communications got lost. Again, she does not identify when this occurred precisely.

51. I also note that Ms. Micu says that Mx. Sabet reached out to WSN again, and got in touch with her on November 7, over email. She does not include that email. She states, the two of them then arranged for a phone call on Friday, November 10 at 1:00 p.m. but she was unable to work that day as she took a sick day. The two of them then met on November 14, 2023, at 1:00 pm, which is about 3.5 hours before the expiry of the appeal period set out in the Determination. One would think that given the impending deadline, Mx. Sabet and her legal advocate or WSN would have acted with haste to file the appeal earlier.

52. Overall, I do not find there is a reasonable and credible explanation for Mx. Sabet's failure to request an appeal by 4:30 p.m. on November 14, 2023. I should point out that while I am cognizant that the delay was very short and while it factors in my consideration of Mx. Sabet's application to extend the appeal period, it is not determinative in my decision on whether to extend the appeal period.

53. Second, while I am not completely persuaded that there has been a genuine and *ongoing* bona fide intention to appeal the Determination this factor is not determinative in my decision on whether to extend the appeal period.

54. Third, Mx. Sabet has not adduced any evidence to show that the Director or Ma Yoga were aware of their intention to appeal.

55. Fourth, with respect to the question of whether granting an extension of the appeal period to Mx. Sabet will unduly prejudice Ma Yoga, as indicated, the delay here is very short in this case. However, there is always prejudice to the beneficiary of a determination where the Tribunal grants an extension. Having said this, this factor is also not determinative in my decision on whether to extend the appeal period.

56. The determinative factor for me is the last one, namely, whether there is a strong *prima facie* case in favour of Mx. Sabet. I find there is not. I will elaborate on this conclusion below because my findings on this criterion also lead me to conclude that there is no reasonable prospect that the appeal will succeed (even if I were to grant an extension of the appeal period).

Error of law

57. As indicated previously, the Tribunal has consistently held that an appeal is not simply another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the appellant to persuade the Tribunal that there is an error in the determination under one of the statutory grounds of review in section 112(1).

58. Section 112(1) does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

59. As indicated, Mx. Sabet appeals the Determination on the sole ground that the adjudicative delegate erred in law in making the Determination. More particularly, they contend that the adjudicative delegate erred in law in concluding that Mx. Sabet was an independent contractor and not in an employment relationship with Ma Yoga.

60. The Tribunal has adopted the following definition of "error of law" in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. A misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the Assessment Act];
2. A misapplication of an applicable principle of general law;
3. Acting without any evidence;
4. Acting on a view of the facts which could not reasonably be entertained; and
5. Adopting a method of assessment which is wrong in principle.

61. The question of whether a person is an employee under the *ESA* is a question of mixed fact and law and requires application of the facts as found to the relevant legal principles relating to those provisions. The Tribunal has often said that a decision by the Director on a question of mixed fact and law requires deference. In *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.,* [1997] 1 S.C.R. 748, the Supreme Court explained that: "[q]uestions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests." A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error: see *Microb Resources Inc. (Re),* 2020 BCEST 93.

62. Having said this, an individual's status under the *ESA* is determined by an application of the provisions of the *ESA*. Common law tests for employment developed by the courts are subordinate to the definitions contained in the *ESA*. In *Kimberley Dawn Kopchuk*, BC EST # D049/05 (Reconsideration denied BC EST # RD114/05), the panel explained this succinctly as follows: The common law tests of employment status are subordinate to the statutory definitions (*Christopher Sin,* BC EST #D015/96), and have become less helpful as the nature of employment has evolved (*Kelsy Trigg*, BC EST #D040/03). As a result, the overriding test is found in the statutory definitions: that is, whether the complainant "performed work normally performed by an employee" or "performed work for another" (*Web Reflex Internet Inc*., BC EST #D026/05). Despite the limitations of the common law tests, the factors identified in them may also provide a useful framework for analyzing the issue. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc*., 2001 SCC 59 (CanLii), [2001] 2 S.C.R. 983, in the context of the issue of vicarious liability, the Supreme Court of Canada rejected the notion that there is a single, conclusive test that can universally be applied to determine whether a person is an employee or an independent contractor. Instead, the Court held, at paras. 47-48:

> The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the

> worker's opportunity for profit in the performance of his or her own tasks. It bears repeating that the above factors constitute a non-exhaustive list and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

63. In Mx. Sabet's case, I find that the Delegate correctly identified the legal framework within which the questions of whether a person is an employee under the *ESA* is assessed: see pages R4 of the Reasons with relevant parts reproduced in paragraphs 21 and 22 above. The facts and factors considered by the adjudicative delegate, at pages R4 and R7 of the Reasons, on the balance support the finding of the adjudicative delegate that Mx. Sabet was an independent contractor and not in an employment relationship with Ma Yoga. This Tribunal is not able to interfere with that finding. As indicated by the Tribunal in *Richard Place (Re)*, 2020 BCEST 10:

> Provided the established principles have been applied, a conclusion on whether a person is an employee under the *ESA* is a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, … a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal [in Gemex, supra]. This question of whether the Director committed an error of law on the facts, framed in the words used in the definition of error of law, is whether the Director acted without evidence or acted on a view of the facts which could not reasonably be entertained (emphasis added).

64. Based on my review of the adjudicative delegate's reasons, she appears to have preferred the evidence and arguments of Ma Yoga over Mx. Sabet's. While Ms. Micu says that the adjudicative delegate "only considered control in their analysis of the parties' working relationship," I disagree with her. I have summarized the evidence the adjudicative delegate considered in making her decision in paragraph 23 above and I will not reiterate that evidence hear except to say that *control* is not the only factor she considered in the parties' relationship. I do, however, think that the adjudicative delegate could have more orderly or methodically considered the factors in *Sagaz* in her analysis including, for example, whether the worker provides their own equipment or tools to carry out the work (which factor perhaps favours Mx. Sabet's contention that they were an employee). However, overall, I am not able to conclude the adjudicative delegate *acted without any evidence* or on *a view of facts which could not be reasonably entertained* in concluding that Mx. Sabet was an independent contractor and not in an employment relationship with Ma Yoga (see *Richard Place (Re), supra)*. I am also *unable* to conclude that the adjudicative delegate's findings on the facts were *perverse or inconsistent with the evidence*. Accordingly, I find the adjudicative delegate did not commit an error of law in concluding that Mx. Sabet is not an employee of Ma Yoga.

65. Having said this, I find that this is a case where the appellant, Mx. Sabet, is rearguing their case before the appeal Tribunal, based, to some extent, on the same evidence presented in the investigation of the Complaint, with a view to obtaining a more favorable outcome. The Tribunal has repeatedly said that an appeal is not a forum for the unsuccessful party to have a second chance to advance arguments already advanced in the investigation stage and properly rejected in the determination. As indicated by the Tribunal in *Chilcotin Holidays Ltd*., BC EST # D139/00:

> The purpose of an appeal is not simply to allow an aggrieved party a second chance to argue the same case that was argued unsuccessfully to the Director during the investigation. A party

> appealing a Determination must show it is wrong, in fact or in law. In the context of an appeal based on an alleged error on the facts or the conclusion to be drawn from the facts, a party saying, in effect: "I don't disagree that these are the facts and that the Director had all these facts, but I disagree with the result", will not be successful. The Tribunal is not a forum for second guessing the work of the Director.

66. I find Mx. Sabet's appeal is substantially a challenge to the findings of facts or conclusions drawn by the adjudicative delegate from the facts adduced by the parties in the investigation of the Complaint. As indicated previously, the grounds of appeal in section 112(1) of the *ESA* do not provide for an appeal based on errors of fact. The Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd*., *supra*.

67. In the circumstances, I dismiss Mx. Sabet's application for an extension of the appeal period. I find that the purposes and objects of the *ESA* in section 2 are not served by requiring the other parties to respond to it, particularly as I find the appeal has no reasonable prospect of succeeding.

ORDER

68. Pursuant to subsection 114(1)(b) and (f) of the *ESA*, this appeal is summarily dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination dated October 5, 2023, is confirmed as issued.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal

Notice: Paragraph 7 of this version of the reasons for decision has been amended in accordance with the corrigendum issued by the Tribunal on March 13, 2024. The first sentence in paragraph 7 has been corrected as follows: **"**On November 22, 2023, the Tribunal emailed Mx. Sabet's legal advocate to advise, among other things, that the appeal was not filed by the appeal deadline and requested Mx. Sabet to provide the Tribunal with their request to extend the appeal period and reasons why they were unable to provide the complete appeal to the Tribunal before the expiry of the appeal period."