

An appeal

- by -

Laura Elout
(“Elout”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Robert C.P. Walker

FILE No.: 2011A/183

DATE OF DECISION: March 7, 2012

DECISION

SUBMISSIONS

Laura Elout	on her own behalf
Deborah Bromley	on behalf of Ethos Career Management Group Ltd.
Robert D. Krell	on behalf of the Director of Employment Standards

OVERVIEW

1. Laura Elout (“Elout”) appeals pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) against a Determination of the Director of Employment Standards issued November 1, 2011. Ms. Elout originally complained to the Employment Standards Branch that she had been unlawfully terminated by Ethos Career Management Group Ltd. (“Ethos”) without proper cause and should have been paid wages mutually agreed to in the amount of \$3,110.04. The Determination concluded that the *Employments Standards Act* had not been contravened by the employer and, accordingly, no wages were outstanding.
2. Elout’s appeal was filed with the Tribunal on December 16, 2011. Pursuant to section 112 of the *Act* the appeal should have been filed within 15 days after the date of service (if served by registered mail) or within 8 days of being served personally served. The time for filing an appeal expired on December 9, 2011, at 4:30 pm.
3. Elout’s explanation for late filing of the appeal was that she believed she had faxed the appeal on December 9, 2011, by fax machine from her work but on December 15, 2011, when she checked her mailbox she noticed that the fax confirmation sheet of December 9 showed that the earlier fax did not go through. Hence she filed her appeal four working days past the appeal date. The Tribunal requested a copy of the fax transmission form for December 9, 2011, from Elout, but she was unable to produce it; apparently because the information was no longer available from the fax machine because of its age. Elout did not keep a copy of the first fax transmission sheet.
4. The faxed Appeal Form (Form 1) filed by Elout is signed and is dated December 8, 2011. It and associated materials were successfully faxed to the Tribunal on December 16, 2011, at 9:20 am and was apparently hand-delivered the same day. Part of the 14 page filing by Elout contained a two page typed submission to the Employment Standards Tribunal dated December 15, 2011. It appears new material was added to her appeal between December 8 and December 16. Reference was made in the December 15 submission to a number of witnesses who “were ready to give evidence and would like the opportunity to give their evidence to the Employment Standards Tribunal”. A named witness Erik Elout (her spouse) was her “most important witness”. No details of her proposed witnesses’ evidence were provided in her submissions. Again, the Tribunal requested witness statements from Elout; but they were not forthcoming.
5. The Appeal Form (Form 1) indicates the grounds for appeal to be “Evidence has become available that was not available at the time the Determination was being made.” As noted in paragraph 4, an integral part of the “new” evidence submission concerns evidence from Erik Elout. He did not give evidence either personally or by telephone at the August 12, 2011, hearing held by Robert D. Krell, Delegate of the Director of Employment Standards. He was not on Laura Elout’s list of witnesses for that August 12 hearing.

ISSUES

6. When and under what circumstances should the Tribunal extend the appeal periods set out in section 112 of the *Act*?

ARGUMENTS

7. Laura Elout submits that her failure to confirm delivery by fax of her appeal on December 9 is an innocent mistake and that immediately upon her realizing the error she took steps to serve the appeal by fax and hand-delivery.
8. Her second submission concerns her request to introduce new evidence.
9. The Tribunal has reviewed the appeal materials and submissions from all parties. At this point its role is not to make substantive findings as to the full merits of the appeal. It has determined that it is able to make a decision about whether to extend the time to request an appeal time based upon the written materials submitted by all the parties on this appeal.

THE FACTS AND ANALYSIS

10. Section 109(1(b) of the *Act* grants the authority to the Tribunal to extend the time period for requesting an appeal even though the period has expired. No specific criteria are set out in the legislation for the Tribunal to consider as to whether to extend the statutory time to appeal.
11. The Tribunal considered its general discretionary authority in *Niemisto and the Director of Employment Standards*, BC EST # D099/96, and the following principles were established for guidance:
 - (i) is there a reasonable and credible explanation for the failure to request an appeal within the statutory time limit?
 - (ii) has there been a genuine and on-going *bona fide* intention to appeal the Determination?
 - (iii) has the respondent party (i.e. the employer or employee), as well as the Director, been aware of the intention to appeal?
 - (iv) will the respondent party be unduly prejudiced by the granting of the extension? and
 - (v) is there a strong *prima facie* case in favour of the appellant?
12. The above principles do not constitute an exhaustive list. In any particular appeal certain other, perhaps unique, factors might be considered.
13. The Tribunal will exercise its statutory discretion to extend the time for filing an appeal only where there are compelling reasons, and the burden is on the appellant to show that such reasons exist (*Re: Tang*, BC EST # D211/96).
14. I am not satisfied the appellant has met her burden to provide a reasonable and credible explanation for her failure to request an appeal within the statutory time limit. The fact that she submitted supporting materials dated after her alleged Appeal Form date of December 8, 2011, and her failure to produce a fax transmission record for December 9, 2011, do not support her explanation of an innocent mistake.

15. With respect to her argument that new evidence is available (it is not clear what that evidence will be as no details were forthcoming), I find she has not met the Tribunal's test regarding the introduction of new evidence. In *Davies et al (Merilus Technologies Inc.)* BC EST # D171/03 and reiterated in *Chaban*, BC EST # D141/11, the Tribunal commented:

We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in section 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, the evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:

- 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.”

16. As noted, Elout did not provide details of the evidence intended to be relied upon from her husband in spite of the Tribunal's request. Nor was the husband on the list of witnesses she prepared for the August 12 hearing. She recently provided materials to indicate he was not able to attend the hearing personally in August; but at or before that hearing she did not request his evidence be given via telephone; or seek an adjournment in order to have him attend in person on another date. It is likely that the evidence has always been available. And, without details, it is impossible to determine how relevant it might be to a material issue; or whether it could be reasonably capable of belief. It is highly unlikely the Tribunal would exercise its discretion to allow the “new” evidence. Elout has not met her burden of proof to have the “new” evidence considered; let alone have it accepted.
17. The Determination indicates clearly that some of Elout's evidence was not credible. The appellant has not provided any evidence to support an argument that the findings regarding her credibility should be reversed; or that the grounds for the just cause argument made by Ethos should be reversed. Therefore the appellant does not have a strong case that might succeed if an extension were granted.
18. It is not clear to me that Elout had a genuine and on-going intention to appeal the Determination. She appears to have taken numerous other legal proceedings seeking other remedies in respect of her termination and treatment at work. She relies heavily on her failed fax attempt of December 9 as showing her intention. But, as noted above, she has failed in her burden to prove that she did so. Nor has she satisfied me that either the employer or the Director were aware of her intention to appeal. Both of those parties indicated they were unaware of her intention to appeal; and she has not refuted that information.
19. The respondent has indicated that it would not likely cause harm to their case if this appeal period was extended.

20. In summary the Tribunal refuses to exercise its discretion under section 109(1)(b) for the reasons stated above.

ORDER

21. Pursuant to section 109(1)(b) of the *Act*, I Order, that Ms. Elout's request to extend the time period for requesting an appeal be denied.

Robert C.P. Walker
Member
Employment Standards Tribunal