

An appeal

- by -

David Merriott  
(“Merriott”)

- 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.:** 2013A/12

**DATE OF DECISION:** April 19, 2013

## DECISION

### SUBMISSIONS

David Merriott

on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) David Merriott (“Merriott”) has filed an appeal of a Determination issued by a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) on March 12, 2010.
2. The Determination and associated Reasons for the Determination held that at the material times Merriott was an employee of Brunswick Jettors Ltd. (“BJL”), was entitled to statutory holiday pay, annual vacation pay, return of unauthorized deductions and accrued interest totalling \$2,747.13. He was not entitled to compensation for length of service because he had quit his employment.
3. Merriott worked as a scuba diver for BJL from June 2007 to July 2009. BJL operates a specialized dive-cleaning service for the aquaculture industry. It performs underwater cleaning of aquaculture equipment using divers and high pressure washing systems; allowing equipment to be cleaned without it being removed from the water. During his employment some safety and health issues emerged as a result of practices and policies of BJL. WorkSafe BC was involved in investigating complaints and directing orders to BJL in respect of its operations.
4. Merriott’s appeal was filed with the Tribunal on March 1, 2013; almost three years after the Determination was issued. Pursuant to section 112(3) of the *Act* the appeal of the Determination should have been filed within 30 days after the date of service if served by registered mail or within 21 days after the date of service if personally served or served under section 122(3) of the *Act*. The Determination stated that an “appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on April 19, 2010.”
5. Merriott states the reason for the late filing of his appeal is that a WorkSafe BC Worker Complaint of Discriminatory Action Decision had just become available. It is dated February 8, 2013. In that decision the Investigations Legal Officer, in spite of being aware of the finding by the Director in March 2010 that Merriott had quit, decided under the provisions of the *Workers Compensation Act* and its regulations that Merriott was constructively dismissed when he refused to perform unsafe work and was entitled to compensation for lost wages. The amount of compensation will be determined once Merriott has provided certain required information to the Investigations Legal Officer within 30 days of the decision.
6. The Investigations Legal Officer stated in part: “The worker [Merriott] submits that he is in disagreement with the Director’s decision on the issue [of quitting or being terminated] and that he considered appealing it. However, he did not proceed with an appeal and he felt “it was not my argument with the Employment Standards that I was fired” but rather that he was an employee and not a contractor.” The Officer states further “I am not bound in any way by the Director’s decision and note that he relies on section 66 of the *Employment Standards Act* which is not applicable in these circumstances.”
7. In a statement attached to his appeal before the Tribunal Merriott states “I thought about appealing the Employment Standards Determination at the time it was given to me but I thought it would be more appropriate to wait for the Worksafe BC Determination to be available before moving forward with it.”

8. I have before me Merriott's Appeal Form and submission, the Determination, the Reasons for the Determination, and the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.
9. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find the matters raised in this appeal can be decided from the Employer's written submissions, the Determination, and the material on the section 112(5) "record".

## ISSUE

10. Should the Tribunal exercise its discretion under section 109 and extend the appeal period as set out in section 112(3) of the *Act*?

## THE FACTS AND ANALYSIS

11. Section 109(1)(b) of the *Act* grants 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.
12. The Tribunal's general discretionary authority was considered in *Niemisto and the Director of Employment Standards*, BC EST # D099/96, and the following principles were established for the guidance of the Tribunal.
  - (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?
13. The above principles are not intended to constitute an exhaustive list. In any particular appeal certain other, perhaps unique, factors might be considered.
14. Merriott has commenced a number of proceedings against his previous employer BJJ including those under the *Act* and the *Workers Compensation Act*. It appears he also raised some deduction from salary issues with Canada Revenue Agency.
15. While Merriott may be entitled to take a multiplicity of proceedings there are usually certain time-limited and procedural requirements under each process that must be adhered to. It is clear to me from the statements made by Merriott before the Investigations Legal Officer and in the accompanying materials to his Appeal filed March 1, 2013, that he considered taking these appeal proceedings earlier under the *Act* but decided against it in favour of proceeding under Workers Compensation legislation. I do not consider this to be a reasonable or credible explanation for the long delay and failure to request an appeal within the statutory time limit; not do I believe there has been a genuine and on-going *bona fide* intention to appeal the Determination.

Nor is there any evidence that the respondent employer or the Director were aware of Merriott's intention to appeal.

16. Further, it is clear from reading both the Reasons for Determination and the WorkSafe BC Worker Complaint of Discriminatory Action Decision that the evidence before each of the decision-makers was substantially different. Each of them dealt with the analysis and application of different legislation and considered legal issues tailored by the legislation. Mr. Merriott's appeal describes the WorkSafe BC decision as "new evidence". What he is really seeking is to have that decision replace the Determination almost three years earlier by the Director as it specifically relates to whether he quit or was terminated. There is no legal basis for replacing the earlier employment standards determination with the WorkSafe BC decision. Hence I also determine that no strong *prima facie* case has been raised by Merriott to support his application.
17. If Merriott provides the requested information to the Investigations Legal Officer under the *Workers Compensation Act* and regulations it appears he will be entitled to compensation for length of service under that Act. There should be no need to pursue an appeal under the *Employment Standards Act*. Merriott's motivation to do so seems to be his ongoing desire to build as many cases against his former employer as he can; waiting until what he considers is the right time to pursue an appeal.
18. Finally, if the appeal application did proceed it is clear to me that the employer (respondent) would be prejudiced having to defend itself again on the quit versus termination issue at such a late date.
19. In all the circumstances I am not prepared to exercise my discretion to extend the time for filing an appeal.

### **ORDER**

20. I Order that Merriott's request to extend the time period for requesting an appeal be denied.

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**Robert C.P. Walker**  
**Member**  
**Employment Standards Tribunal**