Employment Standards TRIBUNAL

An appeal

- by -

James Melrose
("Mr. Melrose")

- 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:** Marnee Pearce

**FILE No.:** 2017A/6

**DATE OF DECISION:** May 2, 2017

# DECISION

## SUBMISSIONS

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|---|---|
| James Melrose | on his own behalf |
| Alec C. Burke | counsel for Immigrant Services Society of British Columbia |
| Sarah Orr | on behalf of the Director of Employment Standards |

## OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), James Melrose ("Mr. Melrose") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on November 30, 2016.

2. Mr. Melrose had filed a complaint alleging his employer, Immigrant Services Society of British Columbia ("ISS"), had contravened the *Act* by failing to pay regular and overtime wages and failing to maintain accurate payroll records. The Determination found the *Act* had not been contravened, no wages were outstanding, and no further action would be taken.

3. Mr. Melrose has filed an appeal of the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Mr. Melrose seeks to have the Determination changed or varied.

4. The appeal was delivered to the Tribunal on January 10, 2017; the statutory appeal period expired on January 9, 2017. Mr. Melrose has requested an extension of time.

5. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and on January 26, 2017, a copy was emailed to Mr. Melrose allowing him the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.

6. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. I find that the matters raised in this appeal can be decided by the record together with the written submissions of the parties.

## ISSUE

7. Should the Tribunal dismiss the appeal or exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal to proceed?

## THE FACTS

8. Mr. Melrose was employed at ISS since March 6, 2006, as an ESL Instructor at the New Westminster and Richmond locations, with his last actual date worked being June 25, 2015. The March 25, 2014, appointment letter confirmed that Mr. Melrose would be paid for 30 hours per week at the classroom rate of $30.18 per

hour, plus an additional 3 hours at the non-prep rate of $28.29 per hour. Mr. Melrose filed a complaint with the Director claiming regular and overtime wages for hours worked in excess of the terms of the employment contract.

9. The Director conducted an investigation into Mr. Melrose's complaint, instead of a hearing at the discretion of the Director, as Mr. Melrose was unable, for medical reasons, to attend the initial and subsequent date scheduled for a hearing. This investigation was conducted by telephone and correspondence.

10. ISS provided the Director with the payroll records for Mr. Melrose. For the period commencing March 1, 2014, through July 31, 2015, no overtime amounts were approved or recorded.

11. Mr. Melrose was seeking overtime for June 25, 2015, and stated that he was unaware of the policy and procedure manual section requiring that additional hours and overtime required authorization in advance from either a Director or Chief Executive Officer. ISS stated this manual was available at both employment locations and available on-line.

12. Mr. Melrose did not ask for overtime from his direct supervisors, managers or directors in advance of working extra hours on June 25, 2015. This was confirmed by both his supervisors and Mr. Melrose.

13. The Director accepted that ISS had made reasonable efforts to make teachers aware of the policy, and was satisfied that Mr. Melrose knew or should have known about the policy requiring advanced approval for additional hours of work. The Director found the evidence did not support Mr. Melrose contention that he worked extra hours on June 25, 2015, with the implicit approval of ISS. The Director found that ISS had not contravened the *Act* and no wages were owing to Mr. Melrose.

14. The Director sent the Determination to Mr. Melrose by registered mail. The November 30, 2016, cover letter sent with the Determination via registered mail advised Mr. Melrose that if he wished to appeal this Determination, his appeal must be delivered to the Employment Standards Tribunal by 4:30 pm on January 9, 2017.

15. As stated above, the appeal was delivered to the Tribunal on January 10, 2017.

16. The Tribunal requested submissions on the appeal from ISS and the Director on March 3, 2017. Submissions were received from the Director on March 10, 2017. An extension was requested by, and granted to, ISS, with submissions received from ISS on March 31, 2017.

17. By way of letter dated April 3, 2017, Mr. Melrose was given the opportunity to review the submissions received from the Director and ISS; his response was due by 4:00 pm on April 18, 2017. On April 18, 2017, his written response was received by the Tribunal.

18. The facts relating to the issue of the timeliness of the appeal are as follows:

(a) The Determination was issued on November 30, 2016;

(b) The time limit for filing the appeal expired on January 9, 2017;

(c) The Appeal Information contained in the Determination clearly indicates an appeal must be delivered to the Employment Standards Tribunal ("Tribunal") on or before the expiry of the appeal period;

(d) Mr. Melrose's appeal was not delivered to the Tribunal until January 10, 2017.

## ARGUMENT

19. The issue to be addressed is the appeal period extension request by Mr. Melrose.

20. Regarding the request for an extension of time, Mr. Melrose submits that it was his genuine intention to fax his submission within the deadline of January 9, 2017. When faxing the material on January 9, 2017, the fax line was busy and his submission was placed in a queue; if the material was not received until January 10, 2017, this was unintentional.

21. Mr. Melrose argues the Director erred in law by not accepting his claim that ISS owed him regular and overtime wages on June 25, 2015, and by not finding that ISS failed to maintain accurate payroll records.

22. Mr. Melrose submits that the Director failed to observe the principles of natural justice in failing to disclose evidence she found relevant, ignoring his evidence and witnesses, and allowing ISS to add further witnesses without informing the complainant or allowing him to respond. He writes that the Director acted without evidence and a view of the facts that could not be reasonably entertained.

23. Submissions were received from the Director on March 10, 2017. The Director referred to the criteria outlined in *Niemisto* (BC EST # D099/96) wherein the Tribunal outlined a non-exhaustive list of criteria for determining whether an appeal period should be extended. Of the criteria listed, the Director argued that there was no strong *prima facie* case in favour of the appellant, and presented argument on this point.

24. The Director submitted that the investigation was carried out in accordance with the principles of natural justice, and that the decision to cancel the complaint hearing and transition to an investigation process was due to two cancelations of scheduled hearings for medical reasons, and uncertainty regarding the length of adjournment as well as the appellant's failure to indicate what accommodation was required for him to participate in the hearing process.

25. The Director explained that the appellant's witnesses were not called, as on his list of witnesses Mr. Melrose had indicated the witnesses would be able to say that they observed him working additional hours on a regular basis; however, there was no indication these witnesses could provide evidence specific to June 25, 2015, the date in issue.

26. Further, as the appellant's witnesses were not managers, supervisors or directors, and the question before the Director was whether ISS implicitly allowed the appellant to work additional hours, and as ISS's policy clearly states that additional hours must be authorized by a Director or Chief Executive Officer, the Delegate determined the evidence of the appellant's witnesses was not relevant to the investigation.

27. With respect to the appellant's allegation that he did not have the opportunity to respond to the evidence of his two supervisors, the Director submitted that throughout the entire investigative process ISS's position was that the appellant was required to have advance authorization from a supervisor to work additional hours above those stated in his contract, and he did not have that authorization, either explicitly or implicitly. This consistent position was communicated to the appellant on several occasions, and he responded to this evidence.

28. The Director submitted that by way of a telephone conversation on June 10, 2016, the Director communicated ISS's position on pre-approval required for overtime, and Mr. Melrose responded. On November 18, 2016, the Director further communicated ISS's position to Mr. Melrose, and he responded.

29. On the matter of error of law and the appellant's position that ISS submitted false timesheets, the Director wrote that the timesheets submitted by ISS correspond with the appellant's hours as set out in his contract, including 45 minutes of preparation time, and they correspond with ISS's evidence that the appellant never had authorization to work additional hours beyond those stipulated in his contract.

30. Regarding the security logs from the Richmond location, the Director submitted that these were only evidence that Mr. Melrose was present at the Richmond location at the times and dates specified, and not evidence regarding the issue of whether ISS directly or indirectly required the appellant to work additional hours on June 25, 2015.

31. The Director's submissions summarized that the appellant did not explicitly request approval to work additional hours on June 25, 2015, nor was he explicitly granted permission to do so. ISS provided evidence that it had no knowledge of the appellant working additional hours on June 25, 2015. The appellant provided no compelling or detailed evidence that any of his managers or supervisors at ISS knew he worked additional hours on that date, aside from his own assertion.

32. On March 31, 2017, a submission was received from ISS's counsel. ISS's primary argument is that there is no reasonable prospect of the appeal succeeding, because Mr. Melrose is attempting to overturn a finding of fact, being the Director's conclusion that "aside from Mr. Melrose's assertion, there is no evidence that his managers or directors at ISS knew he worked additional hours on June 25, 2015" [Reasons for Determination at p. 9].

33. ISS included with its submissions a copy of the decision of the Tribunal *DSC Hotel Management Systems Ltd.,* BC EST # D082/07, which outlines that the weight of evidence is a matter for the Delegate and a question of fact, not law, and it is only when there is a conclusion reached that could not reasonably be entertained that an error of law is shown.

34. The *DSC Hotel Management Systems Ltd.* decision also addresses breach of natural justice, as an oral hearing was not held in that instance. The decision referenced *Re Medallion Developments Inc.*, BC EST #235/00, which indicated that section 77 does not mandate face-to-face hearings or meeting between the Delegate and the person under investigation, but it does require that reasonable efforts be made so the person under investigation is made aware of the allegations and given the opportunity to respond.

35. Mr. Melrose provided his response to the submissions of the Director or ISS by the mandated deadline of 4:00 pm on April 18, 2017.

36. Mr. Melrose argues that the Richmond location security logs, found in the record, establish he worked extra hours on June 25, 2015, and that he worked extra hours regularly.

37. Mr. Melrose argues that ISS of BC has not contested the additional hours and overtime he worked. He understands that the opposing argument is that he was not authorized, explicitly or implicitly, to work these hours, in particular, on June 25, 2015; however, he submits that the onus is on ISS to provide evidence that he was made aware of the policy requiring that overtime or extra hours be approved in advance by ISS.

38. Mr. Melrose submits that the Director was aware of his intention to appeal the decision because when he tried to initiate an email discussion regarding the findings after receiving the Determination, he was advised of the appeal process.

## ANALYSIS

39. The issue is whether there should be an extension granted for the filing of an appeal.

40. Section 112(3) of the *Act* delineates the appeal period for appealing a determination to the Tribunal. It provides:

> (3) The appeal period referred to in subsection (2) is
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> (a) 30 days after the date of service of the determination, if the person is served by registered mail, and
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> (b) 21 days after the date of service of the determination, if the person was personally served or served under section 122(3).

41. Section 122 of the *Act* provides:

> (1) A determination or demand or a notice under section 30.1(2) that is required to be served on a person under this Act is deemed to have been served if
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> (a) served on a person, or
>
> (b) sent by registered mail to the person's last known address.
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> (2) If service is by registered mail, the determination or demand or notice under section 30.1(2) is deemed to be served 8 days after the determination or demand or notice under section 30.1(2) is deposited in a Canada Post Office.

42. In this case, the Determination was issued on November 30, 2016. A November 30, 2016, email from the Director to Mr. Melrose provided a copy of the Determination, noting that a hard copy was sent to his home by registered mail on the same day.

43. The cover letter sent by the Director with the Determination advised Mr. Melrose that if he wished to appeal the Determination, his appeal had to be delivered to the Employment Standards Tribunal by 4:30 pm on January 9, 2017.

44. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired. In *Metty M. Tang,* BC EST # D211/96, the Tribunal outlined the approach it has consistently followed in considering 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. In *Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. These include that the party seeking the extension must satisfy the Tribunal that:

> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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> ii) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
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> iii) the respondent party as well as the director has 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 have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of such criterion is on the party requesting the extension of time.

47. With respect to the first criterion, I am persuaded that Mr. Melrose had a reasonable and credible explanation for the failure to request an appeal within the statutory time limit. I accept his explanation that while faxing the material on January 9, 2017, the fax line was busy and his submission was placed in a queue; if the material was not received until January 10, 2017, this was unintentional.

48. Given the minimal delay explained above, I accept that there was a genuine and ongoing *bona fide* intention on the part of Mr. Melrose to appeal the Determination, as per the second criterion.

49. With respect to the third criterion, Mr. Melrose has argued that the Director's response to his November 30, 2016, email query of the Determination findings was to advise him of appeal options, as the investigation was closed. It is unclear to me how this establishes that ISS or the Director was made aware of his intention to appeal the Determination. However, given the minimal delay – one day – this is of little import.

50. Given the minimal delay, I find that neither the Director nor ISS would be unduly prejudiced by the granting of an extension, the fourth criterion to be considered.

51. With respect to the final criterion, namely, whether there is a strong *prima facie* case in favour of Mr. Melrose, I note that, except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed", the Tribunal does not consider the merits of the appeal when deciding whether to extend the appeal period (see *Re: Ombosala Owolabi operating as Just Beauty,* BC EST # RD193/04). Having said this, as previously indicated, Mr. Melrose has relied on two grounds for appeal, namely, the "error of law", and the "natural justice" grounds of appeal.

52. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
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> (a) the director erred in law;
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> (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.

53. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds for review identified in section 112. This burden requires the appellant to provide, demonstrate, or establish a cogent evidentiary basis for appeal.

54. In this appeal, Mr. Melrose argues that ISS erred in law by indirectly allowing him to work beyond 40 hours a week, that he was required to work 12 hour shifts, that there is no evidence provided by the employer that he

was familiar with the policy manual concerning overtime, that inaccurate timesheets were kept, that his supervisors were aware of his extra hours and did not record these additional hours in the timesheets, and that he worked 10.5 hours on June 25, 2015, and was only paid for 7.5 hours of work.

55. The Director considered Mr. Melrose's evidence and arguments in the initial Determination; Mr. Melrose appears to be challenging findings and conclusions of fact made by the Director while resubmitting his original position.

56. It is well established that the Tribunal has no authority to consider appeals based on alleged errors in findings and conclusions of fact unless such findings and conclusions amount to an error of law; see *Britco Structures Ltd.,* BC EST # D260/03. The Tribunal noted in *Britco Structures Ltd.* that the test for establishing an error of law on this basis is stringent, requiring the appellant to show the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are made without rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director.

57. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam*), [1998] BCJ No. 2275 (BCCA):

> 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 facts which could not reasonably be entertained; and
> 5. adopting a method of assessment which is wrong in principle.

58. I am not persuaded that the Director made an error in law in dealing with the evidence.

59. I am satisfied that the Director performed a conscientious analysis of the available evidence, making findings that were adequately supported by the material and reasoned in the Determination. This finding is reinforced by the submissions from the Director and counsel for ISS. While I appreciate that Mr. Melrose disagrees with the conclusions concerning hours worked, his awareness of the directives in the ISS policy manual regarding preapproval for overtime, and the accuracy of the employer's timesheets, I find that the Director has addressed these issues reasonably and rationally. It is not shown that any of the factual findings and conclusions were made without any evidence at all, were perverse and inexplicable, or that the Director misapplied the law.

60. Specifically, and in response to Mr. Melrose's April 18, 2017, submission that the June 25, 2015, Richmond security log establishes that he worked extra hours, and that this was implicitly approved by the supervisors who should have been aware that he historically worked extra hours, I accept that this has been reasonably addressed within the Determination. The evidence supports Mr. Melrose presence at the Richmond location at the times and dates specified, but is not evidence that ISS directly or indirectly required the appellant to work additional hours on June 25, 2015.

61. Mr. Melrose has argued that the onus is on the employer to provide evidence that he was made aware of the overtime policy contained within the ISS policy manual.

62. The Determination considered the evidence submitted by Mr. Melrose – that he was not aware of the policy until after June 25, 2015 – and the evidence of ISS regarding the ISS policy manual. The manual has been in effect, with modifications over the years, since April 1, 2001. All versions of the manual outline that pre-approval of any additional hours worked is required for payment. The manual is available to staff at each ISS location, and available online. Mr. Melrose had been employed for seven years by ISS, and the Director accepted that Mr. Melrose knew or should have known about the policy requiring advance approval for additional hours of work. This is a reasonable finding based on rational evidence, and certainly not perverse and inexplicable.

63. Mr. Melrose has not, for the purposes of this review, met the burden of showing the Director erred in law.

64. Mr. Melrose also argues that there was a failure to observe the principles of natural justice during the course of the Determination.

65. In the context of the complaint process conducted in this case, the notion of "natural justice" requires the Director to provide all of the parties with a fair opportunity to be heard and to not interfere with that opportunity in an unfair or appropriate way. That requirement substantially echoes what is set out in section 77 of the *Act*. As the Tribunal stated in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring the 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).

66. Mr. Melrose submits that he did not receive full disclosure of evidence relied upon, noting that the Director accepted evidence from two additional witnesses on behalf of the employer, and he was not given the opportunity to respond to their testimony and evidence.

67. The record shows that in June 2016 by way of telephone discussion and follow-up written response, the ISS Director of Human Resources stated that Mr. Melrose did not request permission to work extra hours on June 25, 2015, and that ISS has no corroborating information in support of Mr. Melrose's claim for overtime. This was discussed with Mr. Melrose by telephone interview on November 18, 2016, and he confirmed that he did not ask his direct manager or any other manager for permission to be paid overtime. The names of his supervisors were also confirmed.

68. The Director has submitted, and I accept, that throughout the entire process ISS has argued that Mr. Melrose required advance authorization for overtime in keeping with company written policy. This position and associated evidence was, indeed, key to the findings in the Determination. In keeping with an investigation, Mr. Melrose's two supervisors were interviewed to determine if they did provide such advance authorization, implicitly or explicitly, for working overtime hours on June 25, 2015; they answered no. Neither supervisor knew if Mr. Melrose worked additional unapproved hours on June 25, 2015. Their explanations and credibility were accepted by the Director.

69. The evidence provided by the two supervisors should not have been new to Mr. Melrose. Indeed, he confirmed their evidence in part when he told the Director in the November 18, 2016, telephone interview that he did not ask his supervisors for overtime approval.

70. Mr. Melrose argued that he was denied natural justice when the Director did not contact his witnesses because, as stated in the Determination, none of the witnesses were managers, supervisors or directors and their evidence was not relevant. These witnesses would have stated Mr. Melrose was witnessed working extra hours. The evidence these witnesses would have provided was recognized by the Director, and reasons given for not interviewing them were rational and consistent with the recognized issues under investigation – they would not be able to substantiate whether Mr. Melrose was working approved overtime on June 25, 2015.

71. As the Tribunal held in *Paul Miner* BC EST # D031/98 (Reconsideration of BC EST # D472/97), "The Director's delegate must perform a thorough investigation and interview all witnesses with a potentially important contribution to make, but this does not include each and every individual who may have something to say about the incident in question." Just how far the Director is required to go in investigating a complaint will depend on the circumstances of the case. In *Island Scallops Ltd.*, BC EST # D198/02, the Tribunal held as follows concerning the Director's obligation under section 77:

> In my view, the nature of the duty of the Delegate under s.77 of the *Act* must depend on the matter which is in issue between the parties. At minimum, the Delegate must provide to the parties information, and to consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a Determination. Each case will turn on its own facts.

72. It is clear from the Determination and the material in the record that Mr. Melrose was provided with the opportunity to know the evidence and position of ISS, and was given the opportunity to present his position in response. I find that there is no material evidence or other reasonable basis before the Tribunal to conclude that the Director failed to make reasonable efforts to give Mr. Melrose an opportunity to respond to the investigation and/or failed to consider his evidence that was available before the Determination was made.

73. Mr. Melrose has not, for the purposes of this review, met the burden of showing the Director failed to observe the principles of natural justice.

74. I deny the extension of the appeal period and dismiss the appeal.

## ORDER

75. Pursuant to section 115 of the *Act,* I order the Determination dated November 30, 2016, be confirmed.

**Marnee Pearce**
**Member**
**Employment Standards Tribunal**