

An appeal

- by -

M. McPhail & Associates Inc.  
(“McPhail”)

- 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:** Carol L. Roberts

**FILE No.:** 2008A/34

**DATE OF DECISION:** May 22, 2008

## DECISION

### SUBMISSIONS

Marlene McPhail	on behalf of M. McPhail & Associates Inc.
Karin Doucette	on behalf of the Director of Employment Standards
Chen Tan	on her own behalf

### OVERVIEW

1. This is an appeal by M. McPhail & Associates Inc. (“McPhail”) pursuant to Section 112 of the *Employment Standards Act (Act)*, against a Determination of the Director of Employment Standards (“the Director”) issued January 18, 2008.
2. Ms. Tan filed a complaint against McPhail claiming overtime wages.
3. A delegate of the Director held a hearing into Ms. Tan’s complaint on October 4, 2007. At issue before the delegate was whether all the overtime hours in a time bank were paid at the correct rate. After considering all the evidence, the delegate issued a Determination in Ms. Tan’s favour. She concluded that the Employer had not established a time bank at the written request of the employee, as required by Section 42(1) of the *Act* and that, in any event, the establishment of a bank did not excuse the Employer from paying overtime wages at the rate provided in the *Act*.
4. The delegate determined that Ms. Tan had worked overtime. She accepted the accuracy of the Employer’s record of hours worked and paid. She reviewed payroll records for Ms. Tan’s last six months of employment. Because those records showed “banked time paid out”, the delegate also reviewed Ms. Tan’s payroll records for the full period of her employment to identify the overtime hours in the “bank”. The delegate calculated Ms. Tan’s overtime wage entitlement from a review of the records and the applicable overtime rates and determined Ms. Tan was entitled to \$5,658.34, including interest.
5. The delegate also imposed an administrative penalty in the amount of \$500.00 for the employer’s contravention of section 40 of the *Act*.
6. McPhail filed an appeal with the Tribunal on March 27, 2008 alleging that the delegate failed to observe the principles of natural justice in making the Determination. Ms. McPhail does not dispute the delegate’s conclusion that Ms. Tan was entitled to overtime wages but takes issue with the delegate’s calculation of the amount owed to Ms. Tan.
7. Pursuant to section 112 of the *Act*, the appeal was to have been filed within 15 days of the date of service (if served by registered mail) or within 8 days of being personally served. McPhail’s appeal period expired February 25, 2008.
8. These reasons address only the timeliness of McPhail’s appeal and are based on the written submissions of the parties.

## ISSUE

9. Whether the Tribunal should exercise its discretion under section 109(1)(b) of the *Act* and allow the appeal even though the time period for seeking an appeal has expired.

## ARGUMENT

10. Ms. McPhail acknowledges that the appeal is filed late. She says that the Determination was sent while she was on vacation and that she received it upon her return on January 28<sup>th</sup>. Because she believed the amount determined owing was incorrect, Ms. McPhail conducted her own review of the overtime. She says that she originally did not want to appeal the Determination because she agreed that McPhail had contravened the *Act*. On February 18, 2008, she sent a letter to the delegate, Ms. Doucette, outlining her concerns. She believed that Ms. Doucette could review her calculations and explain why they differed from McPhail's. It appears from the record that the delegate sent McPhail a fax on February 22, 2008 advising her that although she had made some errors in the calculations, she could not change the Determination and that she would have to appeal it. Ms. McPhail says she did not receive that fax. On March 19, McPhail was advised by the Ministry that it would be taking steps to collect the amount set out in the Determination. In a March 20, 2008 phone call with the delegate, Ms. McPhail was advised that she would have to contact the Tribunal to appeal the Determination as the delegate could not change her findings.
11. The delegate submits that there is no good reason McPhail was unable to meet the appeal deadline. She says that Ms. McPhail expressed the view that she would appeal the Determination, irrespective of its outcome, at the outset of the hearing. However, she further notes that although Ms. McPhail stated in her February 18, 2008 letter to the Branch that she did not agree with the outcome, she would not appeal the Determination. The delegate further submits that McPhail has a strong *prima facie* case because she agrees that she made an error calculating Ms. Tan's wages.
12. Ms. Tan adopts the delegate's submissions in large part and submits that the discrepancy in the calculation of her wages may have been attributable to a failure to calculate weekly overtime as well as vacation pay and interest on the unpaid amounts.

## THE FACTS AND ANALYSIS

13. Section 112 of the *Act* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 15 days of service, if served by registered mail, or 8 days after service, if served personally.
14. These time limits are in keeping with one of the purposes of the *Act*. Section 2(d) provides that one of the purposes of the *Act* is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.
15. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.

16. In *Niemisto* (BC EST #D099/96), the Tribunal set out criteria for the exercise of discretion extending the time to appeal. Those include that the party seeking an extension must satisfy the Tribunal that:
- (1) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
  - (2) there has been a genuine, ongoing *bona fide* intention to appeal the determination;
  - (3) the respondent party as well as the director has been made aware of this intention;
  - (4) the respondent party will not be unduly prejudiced by the granting of an extension; and
  - (5) there is a strong *prima facie* case in favour of the appellant.
17. These criteria are not exhaustive.
18. Having reviewed the submissions of the parties, I find it appropriate to grant the application.
19. I find there was a genuine and ongoing intention to appeal the Determination within the statutory time limit. Ms. McPhail faxed the delegate on February 18, 2008 in an attempt to have her correct what she believed were calculation errors. Ms. McPhail was under the misunderstanding that a simple call could change the amount of the Determination. Although it appears the delegate sent McPhail a fax on February 22, 2008 advising her that she could not change the Determination, McPhail did not receive the fax. Once McPhail was advised of the steps to be taken, she did not delay in filing her appeal.
20. I also find that Ms. McPhail's misunderstanding led, in part, to the delay in filing the appeal. While I find that the appeal could have been filed with the Tribunal by February 25, 2008 as McPhail had completed her review of the calculations by then, her misunderstanding of the delegate's role and jurisdiction once the Determination had been issued led to her failure to take the appropriate steps.
21. I am unable to find that either Ms. Tan or the Director will be prejudiced by the granting of the extension. The delegate concedes this point and Ms. Tan made no submissions to the contrary.
22. Given that the delegate has acknowledged that she has made errors in calculating Ms. Tan's wages, McPhail has established a strong *prima facie* case in its favour.

## **ORDER**

23. Pursuant to section 109(1)(a) of the Act, I allow the application to extend the time for filing an appeal to March 26, 2008.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**