

An appeal

- by -

Li Na (Shine) Zhang  
(“Ms. Zhang”)

- 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.:** 2012A/62

**DATE OF DECISION:** October 29, 2012

## DECISION

### SUBMISSIONS

|   |   |
|---|---|
| Nikki Ellis, Law Students' Legal Advice Program | on behalf of Li Na (Shine) Zhang                  |
| Li Na (Shine) Zhang                             | on her own behalf                                 |
| Ravi Sandhu                                     | on behalf of the Director of Employment Standards |

### OVERVIEW

1. Li Na (Shine) Zhang (“Ms. Zhang”) filed a complaint with the Director of Employment Standards (the “Director”) alleging that Wei (Sophia) Zhao (“Ms. Zhao”) had contravened the *Employment Standards Act* (the “*Act*”) in failing to pay regular wages, overtime wages, statutory holiday pay and annual vacation pay. On May 10, 2012, the Director issued a Determination ordering Ms. Zhao to pay a total of \$5,466.62, representing wages, statutory holiday pay, annual vacation pay and accrued interest. The Director also imposed five administrative penalties in the amount of \$500 each for the contraventions pursuant to section 29(1) of the *Employment Standard Regulation* (the “*Regulation*”), for a total amount payable of \$7,966.62.
2. The deadline for filing an appeal of the Determination was 4:30 p.m. June 18, 2012. The appeal was submitted on June 19, 2012. The appeal documents alleged that the Director had erred in law and failed to observe the principles of natural justice. In a cover letter to the Tribunal, Nikki Ellis (“Ms. Ellis”) indicated that since she had only recently obtained the file and needed to consult with a supervising lawyer, further submissions, amendments and supporting documents may be submitted in the following two weeks. As the appeal was both late and incomplete, the Tribunal’s appeal manager advised Ms. Zhang to submit the additional documents as well as her explanation for filing the appeal late, no later than July 3, 2012.
3. On July 3, 2012, Ms. Zhang, through her representative, filed a second appeal, alleging that the Director had failed to observe the principles of natural justice in making the Determination. Ms. Zhang also alleged that evidence had become available that was not available at the time the Determination was being made. On July 9, 2012, the Tribunal received additional documents from Ms. Zhang, and on July 11, 2012, Ms. Zhang indicated that she wished only the completed appeal dated July 3, 2012, as well as the additional documents submitted July 9, 2012, to be considered on appeal. Ms. Ellis requested that the incomplete appeal, filed June 19, 2012, not be considered in her appeal in part, because she no longer wished to pursue error of law as a ground of appeal, and in part because the later appeal represented the entirety of the appeal.
4. Neither the Director nor Ms. Zhao filed a submission responding to Ms. Zhang’s request, and on August 21, 2012, I granted Ms. Zhang’s request to have only her July 3 and July 9, 2012, submission considered on appeal.
5. This decision addresses only the timeliness of Ms. Zhang’s appeal and is based on the section 112(5) “record”, the written submissions of the parties, and the Reasons for the Determination.

### ISSUE

6. 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.

## FACTS AND ARGUMENT

7. Following an investigation into Ms. Zhang's complaint, the Director's delegate determined that Ms. Zhang was entitled to wages as set out above.
8. Ms. Zhang contends that the Director failed to observe the principles of natural justice. She argues that the Director's delegate did not meaningfully hear her side of the story, accepted late evidence from the employer but not from her, and refused to grant her an adjournment even though English was her second language. She also argues that she had difficulty preparing her evidence and arguing effectively because of her limited abilities in English. Ms. Zhang further asserts that she was not given a chance to cross-examine the employer during the hearing.
9. Ms. Zhang further contends that she could have submitted evidence at the hearing but for the delegate's refusal to grant her an adjournment and, as I understand her argument, such evidence should be considered as new evidence on appeal.
10. Ms. Ellis contends that the appeal was faxed to the Tribunal at 4:29 pm June 18, 2012, according to the fax transmission report and that the appeal was therefore filed in a timely fashion. She says that the Tribunal nevertheless maintains that the appeal was not received within the statutory deadline.
11. Ms. Ellis says that, in the event the appeal is deemed to have been filed late, there are a number of credible explanations for that being so, including Ms. Zhang's difficulty in obtaining legal assistance in this matter. She says Ms. Zhang first tried to get assistance from the Atira Women's Resource Centre, and when that was unsuccessful, was finally able to meet with her on May 31, 2012. Ms. Ellis says that she had limited time to review the evidence and get guidance from her supervising lawyer. Ms. Ellis said that Ms. Zhang's difficulties with English also contributed to the delay in making the appeal. Attached to Ms. Ellis's submission is a letter from Amber Prince, a legal advocate who provides poverty law advocacy to low-income and marginalized women. Ms. Prince stated that Ms. Zhang contacted her in early April 2012, to assist her at the hearing before the delegate. Ms. Prince also stated that since Ms. Zhang received the Determination, she had been "working diligently to obtain legal representation to appeal this matter" to the Tribunal.
12. Ms. Ellis submitted that, in light of all of the above, Ms. Zhang had clearly made a sincere effort and continued intention to appeal the Determination.
13. Ms. Ellis further submits that both the Director and Ms. Zhao were made aware of the appeal, and thus Ms. Zhang's intention to appeal, upon receiving correspondence from the Tribunal discussing the incomplete late appeal.
14. Ms. Ellis submitted that Ms. Zhao would not be prejudiced by the granting of an extension, as there would only be a two week delay in the receipt of any documentation and appeal submissions.
15. Ms. Ellis contended that the appeal raises a strong *prima facie* case of procedural fairness which affected the outcome of the hearing.
16. Finally, Ms. Ellis argued that the Tribunal should consider the interests of fairness and justice when making a decision on whether or not to allow the late appeal. She argues that this is not an instance of an egregiously late appeal or indolence on the part of Ms. Zhang. Rather, she said, this is an instance of the appeal being deemed late because it was received by fax a few minutes after the appeal deadline. She says that it is in the interest of justice to allow the late appeal to be heard on its merits.

17. The Director opposed Ms. Zhang's application. Mr. Sandhu contended that there is no reasonable and credible explanation for failing to request an appeal within the statutory limit. He says that the only explanation given for the late appeal is that Ms. Zhang did not get representation in time and therefore, that her representative did not have enough time to submit the appeal within the time period. He says that this has been Ms. Zhang's pattern throughout the complaint resolution process. He says that Ms. Zhang failed to submit documents in a timely fashion throughout the process even when the time to do so was extended at her request.
18. The Director further submitted that Ms. Zhang's appeal submissions fail to show there is a likelihood of success on appeal. He says that her entire appeal is based on her argument that all her evidence was not considered in making the Determination. He says this argument is false, as all evidence provided by Ms. Zhang up to the date of the hearing was considered and included as part of the Record.
19. In reply, Ms. Zhang argued that the reason she filed her appeal late was because of difficulties with the English language and the difficulty she experienced in obtaining the assistance of an advocate. She argues that two weeks is an insufficient amount of time for UBC law students to have their work checked by a supervising lawyer.

## ANALYSIS

20. 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 30 days of service, if served by registered mail, or 21 days after service, if served personally.
21. 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*.
22. Section 109(1)(b) provides that the Tribunal may extend the time for requesting an appeal even though the time period has expired.
23. 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.
24. These criteria are not exhaustive.
25. I find it appropriate to grant the application.
26. Although it was incomplete, I accept that Ms. Zhang's initial appeal was filed very near to the statutory time period. If the initial documents were sent at 4:29 pm. on June 18, 2012, any delay in filing is very minor.

27. Included with the application for an extension is a letter from Ms. Prince. Although the information in Ms. Prince's letter relates largely to the difficulties experienced by Ms. Zhang during the Director's investigation of her complaint, Ms. Prince also states that Ms. Zhang worked diligently to obtain legal representation to appeal the Determination after receiving it. I have no information to contradict that. Consequently, I find that Ms. Zhang has demonstrated a genuine, ongoing and *bona fide* intention to file the appeal by the statutory deadline.
28. I also accept that Ms. Zhang has limited command of the English language and that she is prejudiced in both the process and the substance of the appeal by that limitation.
29. I am not persuaded that Ms. Zhao will be prejudiced, unduly or otherwise, by the granting of an extension. She made no submissions in response to Ms. Zhang's application and I am not prepared to infer any prejudice in the circumstances.
30. Finally, I find that Ms. Zhang has established a strong *prima facie* case on appeal. The issues to be addressed by the Tribunal on appeal include whether or not Ms. Zhang was denied natural justice when she was not granted an extension of time in which to introduce certain evidence and to obtain legal assistance given her difficulties in meaningfully expressing herself.

## **ORDER**

31. Pursuant to section 109(1)(b) of the *Act*, I allow the application to extend the time for filing an appeal to July 9, 2012.

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