

An appeal

- by -

Matthew Cortez
("Mr. Cortez")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Carol L. Roberts

FILE NO.: 2018A/39

DATE OF DECISION: May 29, 2018

DECISION

SUBMISSIONS

Matthew Cortez on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Matthew Cortez (“Mr. Cortez”) has filed an appeal of a Determination issued by Janko Predovic, a delegate (“Delegate Predovic”) of the Director of Employment Standards (the “Director”), on March 2, 2018.
2. Mr. Cortez filed a complaint with the Director alleging that Hot Street Productions Ltd. (“Hot Street”) contravened the *ESA* in failing to pay him regular wages and overtime.
3. Following an investigation, Delegate Predovic concluded that Mr. Cortez’ complaint was filed outside the time limit established by section 74 of the *ESA* and decided to stop investigating the complaint.
4. Mr. Cortez contends that the Director failed to observe the principles of natural justice in making the Determination.
5. These reasons are based on Mr. Cortez’ written submissions, the section 112(5) record (the “Record”) that was before the Director at the time the decision was made and the Reasons for the Determination.

ISSUE

6. Whether or not Mr. Cortez has established any basis to interfere with the Director’s Determination.

FACTS

7. Mr. Cortez was an actor/dancer who worked for Hot Street until June 9, 2016. He filed his complaint on January 17, 2018.
8. On January 31, 2018, Jane Wong, a delegate (“Delegate Wong”) of the Director, informed Mr. Cortez that his complaint was filed after the statutory time limit and requested an explanation from him.
9. Mr. Cortez’s response consisted of evidence of having worked for Hot Street and a statement that his talent agent advised him not to file a complaint because he was not covered by the *ESA*. Mr. Cortez included a copy of the e-mail from his agent dated October 30, 2016.
10. In the Determination, Delegate Predovic noted that the e-mail was sent after a Determination had been issued against Hot Street and after workers, including Mr. Cortez, had been explicitly told in a mass e-mail update, sent earlier that day by other complainants who had successfully recovered wages, that wages were still recoverable. Delegate Predovic also noted that the mass e-mail included a pre-filled PDF complaint form along with a statement that the writer did not believe it was too late to complete the form for outstanding wages. The note included instructions where to send the form, once complete.

11. Delegate Predovic noted that Mr. Cortez did not act on the e-mail as recommended by his co-workers, relying instead on the advice of his talent agent.
12. Mr. Cortez stated that he found it unfair to have worked so hard without compensation and outlined his financial circumstances.
13. Delegate Predovic determined that Mr. Cortez's application should have been filed no later than December 9, 2016. As it was filed January 7, 2018, the delegate determined that it was filed outside the time limit established in section 74(3) of the *ESA*.
14. Having made that Determination, Delegate Predovic then considered whether the Director should exercise his discretion to refuse to investigate the complaint. After reviewing the purposes of the *ESA* including providing fair and efficient procedures for resolving disputes and promoting fair and efficient procedures for resolving disputes, Delegate Predovic decided not to investigate the complaint.
15. The Delegate noted that the requirements to file a complaint in a timely fashion are explicit and publicly available on the Branch website. The Delegate also noted that although Mr. Cortez received two opinions on whether he was eligible to recover wages under the *ESA*, he took no steps to determine which one was correct, even though he could have contacted the Branch for clarification.
16. Delegate Predovic considered the fact that Mr. Cortez did not contact the Branch until he filed his complaint.
17. Delegate Predovic found it was not in keeping with the purposes of the *ESA* to "pin the consequences of [Mr. Cortez's] legal or procedural missteps on the Employer."
18. Delegate Predovic further noted that the delay in filing the complaint was substantial (over one year), underscoring his decision to stop investigating the complaint on the basis that it would not promote the fair and efficient dispute resolution of complaints.

ARGUMENT

19. While Mr. Cortez acknowledges that his complaint was not filed in the time prescribed by section 74(3) of the *ESA*, he says that he was told he was required to rely on his agent to deal fairly on his behalf.
20. Mr. Cortez says that he trusted his agent to represent him and because his agent did not do so, he has severed his relationship with the agent.
21. Mr. Cortez's appeal submission ends with the words "Please help me."
22. I infer Mr. Cortez's argument to be that following his agent's erroneous advice should not be held against him as the result causes him significant prejudice.

ANALYSIS

23. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:
- (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
 - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
 - (f) there is no reasonable prospect the appeal will succeed;
 - (g) the substance of the appeal has been appropriately dealt with in another proceeding;
 - (h) one or more of the requirements of Section 112(2) have not been met.
24. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
25. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Mr. Cortez has met that burden.
26. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. It does not mean that the Director's delegate must arrive at a conclusion the appellant considers just and fair.
27. There is nothing in Mr. Cortez's appeal submission that establishes that the Director failed to provide him with sufficient information about the time limit issue presented by his late filing of the complaint and afford Mr. Cortez the opportunity to explain his situation. While I appreciate Mr. Cortez is unhappy with the Determination, I find no basis to conclude that Mr. Cortez was denied natural justice.
28. Section 74(3) of the *ESA* establishes a six-month limit on the filing of complaints. Section 76(1) requires the Director to accept and review complaints, and section 76(3)(a) provides the Director with discretion to refuse to accept or continue investigating a complaint that is not made within the time limit. (see also *Karbalaieali v. British Columbia (Employment Standards)*, 2007 BCCA 533)
29. In *Mark Bridge* (BC EST # RD051/08), I concluded that *Karbalaieali, supra*, required that the Director exercise his discretion to determine whether acceptance of the complaint should be refused. The

Tribunal would then be “required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate’s discretion” in accordance with the Court of Appeal’s decision.

30. In deciding not to accept Mr. Cortez’s complaint, Delegate Predovic noted that the time limits for filing a complaint were designed, in part, to provide for fair and efficient procedures for resolving disputes as well as to promote the fair treatment of both employers and employees (section 2 of the *ESA*). He weighed the importance of the purposes of the time limit along with the reasons advanced for the lateness of the filing. Delegate Predovic concluded that Mr. Cortez’s decision to follow the advice of his agent rather than inquire into the accuracy of that information, particularly in light of contrary information provided by colleagues was not a sufficiently compelling reason for exercising his discretion in favor of extending the time limit.
31. Delegate Predovic considered Mr. Cortez’s explanation and concluded that, in consideration of all of the evidence before him as well as the purposes of the *ESA*, there was no basis to exercise his discretion in favor of Mr. Cortez. I find no error in the exercise of Delegate Predovic’s discretion.
32. The appeal is dismissed.

ORDER

33. Pursuant to section 115 of the *ESA*, I Order that the Delegate’s March 2, 2018 Determination to stop investigating the complaint be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal