

An appeal

- by -

Kane Nelson
("Mr. Nelson")

- 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: Marnee Pearce

FILE NO.: 2018A/30

DATE OF DECISION: May 29, 2018

DECISION

SUBMISSIONS

Kane Nelson on his own behalf

OVERVIEW

1. Kane Nelson (“Mr. Nelson”) appeals a Determination issued by Janko Predovic, a delegate (“Delegate Predovic”) of the Director of Employment Standards (the “Director”), on February 13, 2018, on the basis that the Director failed to observe the principles of natural justice in making the Determination (the “Determination”) and requesting that it be varied or referred back to the Director.
2. In the Determination, the Delegate found that Mr. Nelson failed to deliver his complaint concerning unpaid wages to the Employment Standards Branch (the “Branch”) within six months after Mr. Nelson’s last day of employment and exercised his discretion to refuse to investigate the complaint.
3. Mr. Nelson’s last day of employment with Hot Street Productions Ltd. (“Hot Street”) was June 9, 2016, and the deadline for delivery of the complaint was December 9, 2016; his complaint was delivered to the Branch on January 9, 2018, outside of the time limit set out in section 74(3) of the *ESA*.
4. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was sent to Mr. Nelson on April 11, 2018, allowing the opportunity to object to its completeness. No objection was received, and accordingly, the Tribunal accepts it as being the complete record of the material that was before the Director when the Determination was made.
5. Section 114 of the *ESA* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that this Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal, the written submissions filed with the appeal, and my review of the material that was before the Director when the Determination was being made.

ISSUE

7. The issue to be decided at this stage is whether the appeal should be dismissed under section 114(1) of the *ESA*.

THE FACTS

8. A complaint may be filed under section 74 of the *ESA* and there are some procedural requirements relating to these complaints – the complaint must be in writing and delivered to the Branch (subsection 74(2)) and a former employee is governed by the following limitation period (subsection 74(3)): “A

complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment”.

9. Mr. Nelson is an actor who worked in a Hot Street production for a 5-week period, with the last day of work being June 9, 2016.
10. Mr. Nelson received an October 30, 2016 e-mail from a co-worker advising that a complaint filed with the Branch resulted in a Determination that Hot Street was to make immediate payment to all employees of outstanding wages, expenses, overtime, vacation pay, and interest. In order to access his unpaid wages, Mr. Nelson was provided with a pre-filled form to complete and send to the Branch.
11. Mr. Nelson declined to complete the form, instead accepting as accurate an e-mail from his Talent Agent on October 31, 2016, which passed on legal advice from the agency’s lawyer that actors were not employees and did not have access to remedies under the *ESA*.
12. On January 9, 2018, Mr. Nelson delivered his complaint to the Branch, claiming that Hot Street owed him \$12,523.23 in lost income.
13. On January 12, 2018, Mr. Nelson responded in writing to a query from Jane Wong, a delegate of the Director, concerning his reasons for filing outside of the statutory deadline. He wrote that he had not filed his complaint within the 6 months because he accepted the opinion that he was a self-employed contractor and that the form provided on October 30, 2016, did not apply to him. It was only after he heard that other “self-employed contractors” (actors) had received a payment from Hot Street, that he filed the complaint.
14. After obtaining Mr. Nelson’s written response, Delegate Predovic went on to decide two questions, as set out in the Reasons, namely, was Mr. Nelson’s complaint filed beyond the 6-month statutory time limit pursuant to subsection 74(3) of the *ESA*, and if so, should discretion be exercised to stop investigating the complaint pursuant to subsection 76(3) of the *ESA*.
15. Although Mr. Nelson’s complaint was admittedly filed outside the subsection 74(3) 6-month time limit, the Director was still obliged to consider, as a matter of discretion, whether to accept the late complaint and adjudicate on its merits. Since the delegate ultimately refused to accept the complaint, this Tribunal must decide whether the Director appropriately exercised his discretionary authority to refuse to accept and adjudicate the complaint.

FINDINGS AND ANALYSIS

16. As noted above, Mr. Nelson was well aware that he had filed late, and he attributed the delay to having accepted indirect advice from the lawyer for his talent agency that he was a self-employed contractor and accordingly did not have access to the *ESA* and statutory benefits.
17. The Director ultimately dismissed the complaint under subsection 76(3)(a) because Mr. Nelson, faced with two “divergent and irreconcilable opinions on whether he was eligible for remedies under the *Act* – one from the talent agency’s lawyers and one from his co-workers...took no steps to ascertain which opinion was correct...”

18. Delegate Predovic found that Mr. Nelson’s decision to accept one recommendation concerning his employment status over another was his to make, but so too must be the consequences of that decision.
19. Delegate Predovic also noted that the delay in the filing of the complaint was substantial, over a year, and accepting such a filing delay was not consistent with the interest of promoting fair and efficient dispute resolution under the *ESA*.
20. In his appeal submissions, Mr. Nelson described the consequences of non-payment, including mental stress and financial uncertainty. Mr. Nelson argues that he should receive the same “respect and courtesy” that his fellow actors who were successful under the *ESA* in obtaining their outstanding payments, have received. He argues that the Tribunal should use the discretion provided and extend the timeframe for filing his complaint.
21. Mr. Nelson says that the Director failed to observe the principles of natural justice when he decided to dismiss the complaint under subsection 76(3)(a).
22. At their essence, the principles of natural justice are procedural rights that ensure that parties know the case being made against them, are given an opportunity to reply, and have the right to have their case heard by an impartial decision maker.
23. There is nothing in the Determination or the Record to support a finding that the Director breached the principles of natural justice. I find that the Director gave Mr. Nelson a reasonable opportunity to provide an explanation for his failure to file a timely complaint. The Director ultimately found that the complainant’s explanation was not compelling and did not justify a decision to exercise discretion in favour of adjudicating the complaint on its merits.
24. Complaints to the Branch must be filed within the applicable 6-month time period and late complaints will only be accepted as a matter of the Director’s discretion. I cannot say that, in this case, the Director made a careless or otherwise unreasoned decision to refuse to adjudicate the complaint on its merits. The Director asked for a compelling reason justifying late filing and did not believe that such an explanation was provided. There is nothing to suggest that the Director’s decision was tainted by bad faith or that it lacked any principled justification.
25. I also note that the Tribunal is generally reluctant to interfere with the exercise of discretion by the Director, and will only do so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal’s decision in *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98):

The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context has been described as being:

...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter which he is bound to consider. He must exclude from his

consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.
Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229.

26. I find the Director's exercise of his statutory discretion in section 76(3)(a) to refuse to investigate the complaints to be reasonable, addressing the pertinent issues and evidence, and in keeping with the legislative intent of promoting fair and efficient dispute resolution under the *ESA*.
27. This appeal has no reasonable prospect of succeeding and accordingly, must be dismissed under subsection 114(1)(f) of the *ESA* – "...the tribunal may dismiss all or part of the appeal if...(f) there is no reasonable prospect that the appeal will succeed."

ORDER

28. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed and in accordance with subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued.

Marnee Pearce
Member
Employment Standards Tribunal