

An appeal

- by -

Nosheen Asad

- 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/64

DATE OF DECISION: August 7, 2018

DECISION

SUBMISSIONS

Nosheen Asad on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), Nosheen Asad (“Ms. Asad”) has filed an appeal of a Determination (the “Determination”) issued by the Director of Employment Standards (the “Director”) on May 3, 2018.
2. Ms. Asad filed a complaint with the Director alleging that PH Restaurants Limited Partnership (“PH”) contravened the *ESA* in failing to pay her compensation for length of service.
3. Following an investigation, a delegate of the Director concluded that Ms. Asad’s complaint was filed outside the time limit established by section 74 of the *ESA* and decided to stop investigating the complaint.
4. Ms. Asad contends that the Director failed to observe the principles of natural justice in making the Determination.
5. These reasons are based on Ms. Asad’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

ISSUE

6. Whether or not Ms. Asad has established any basis to interfere with the Director’s determination.

FACTS

7. Ms. Asad was employed by PH as a manager at a Pizza Hut location in Burnaby. Her employment began June 14, 2003. In January 2016, Ms. Asad sustained a workplace injury. She attempted a gradual return to work, but was unable to perform even modified duties, and in June 2016, underwent surgery. Although she returned to work in November 2016 with modified duties and hours, she was unable to continue because she continued to experience medical difficulties related to her injury. In March 2017, PH’s payroll administrator informed Ms. Asad that her employment was being terminated because she was unable to return to work. PH issued Ms. Asad a Record of Employment (“ROE”) indicating her final pay period was May 29, 2016. PH later provided a letter to Ms. Asad indicating her last day of work was May 14, 2017. Ms. Asad underwent a second surgery in December 2017 due to ongoing problems.
8. Ms. Asad filed her complaint on January 11, 2018.
9. On January 15, 2018, a delegate of the Director informed Ms. Asad that her complaint was filed after the statutory time limit and requested that she provide an explanation for the late filing.

10. Ms. Asad informed the delegate that the reason for the delay was that she was not aware she was potentially entitled to compensation for length of service. She said that once she had recovered from her December 2017 surgery and had the “information and awareness” of her potential claim, she consulted the Branch and filed her complaint.
11. The delegate determined that Ms. Asad’s application should have been filed no later than November 14, 2017. As it was filed January 11, 2018, the complaint was filed almost two months outside the time limit established in section 74(3) of the *ESA*.
12. Having made that determination, the delegate 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, the delegate decided not to investigate the complaint.
13. The delegate concluded that while it was unfortunate that Ms. Asad was not aware of her potential statutory entitlement until after the time limit had expired, she did not consider that Ms. Asad’s lack of awareness constituted an exceptional circumstance that would warrant the Director exercising his discretion to accept the claim. Noting that information regarding the time limit for filing complaints is readily available on the Branch’s website as well as in the *ESA*, the delegate found that a lack of awareness of the complaint process was not a compelling reason for Ms. Asad not to file a complaint within the six-month time period.
14. The delegate found that Ms. Asad’s surgery was not a factor in her failure to file the complaint within the time period, as the surgery took place one month after the deadline had passed.
15. The delegate decided that no further action would be taken.

ARGUMENT

16. Ms. Asad acknowledges that she was late in filing her complaint, stating that she did not take steps to file within the time period because she was unaware she was eligible for “severance.” She says that she worked for PH for 15 years and that she was injured on the job. She says she is incapacitated due to her injury and that she is not able to join the workforce.
17. Ms. Asad asks to have her application be “reconsidered” on “humanitarian grounds,” suggesting that her injury has affected her physically and emotionally.
18. Attached to Ms. Asad’s appeal is a May 24, 2018, doctor’s report regarding her ongoing rehabilitation.

ANALYSIS

19. 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, or 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 that 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.

20. 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.

21. Ms. Asad's appeal is, in essence, a plea for a reconsideration of the delegate's decision not to investigate her complaint. An appeal is not an opportunity to revisit a decision based on "humanitarian" grounds. There must be a legal basis for the appeal, as identified in section 112(1), and an appellant has the burden of demonstrating those grounds. I am not persuaded that Ms. Asad has met that burden.

Failure to comply with natural justice

22. 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.

23. There is nothing in Ms. Asad's appeal submission that establishes that the delegate failed to provide her with sufficient information about the time limit issue presented by her late filing of the complaint. Furthermore, the delegate afforded Ms. Asad the opportunity to explain why she filed her complaint after the statutory deadline for doing so. While I appreciate Ms. Asad feels the Determination is wrong and "unjust", I find no basis to conclude that she was denied natural justice.

24. I have also considered whether or not Ms. Asad has established any other ground of appeal.

Error of law

25. 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] B.C.J. No. 2275 (B.C.C.A.):

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

26. I am not persuaded the delegate erred in law.

27. 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 *Karbalaeeiali v. British Columbia (Employment Standards)*, 2007 BCCA 533)

28. In *Bridge*, BC EST # RD051/08, I concluded that *Karbalaeeiali* 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.

29. In deciding not to accept Ms. Asad’s complaint, the delegate 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 promoting the fair treatment of both employers and employees (section 2 of the *ESA*). She weighed the importance of the purposes of the time limit along with the reasons advanced for the lateness of the filing. The delegate concluded that Ms. Asad’s lack of knowledge of her rights was not a sufficiently compelling reason for exercising her discretion in favor of extending the time limit.

30. The delegate considered Ms. Asad’s explanation and concluded that, in consideration of all of the evidence before her as well as the purposes of the *ESA*, there was no basis to exercise her discretion in favor of Ms. Asad.

31. The Tribunal will only interfere with the Director’s exercise of discretion in exceptional and very limited circumstances:

The Tribunal will not interfere with [the] 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. (*Re: Jody L. Goudreau and Barbara E. Desmaris, employees of Peach Arch Community Medical Clinic Ltd.* (BC EST # D066/98)

32. In *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR, the Supreme Court held:

It is...a clearly established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might exercise the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

33. I find no basis to interfere with the exercise of the delegate's discretion.

34. As a result, I find there is no reasonable prospect the appeal will succeed. The appeal is dismissed.

ORDER

35. Pursuant to section 115 of the *ESA*, I order that the delegate's May 3, 2018, Determination to stop investigating the complaint be confirmed.

Carol L. Roberts
Panel
Employment Standards Tribunal