

An appeal

- by -

Fara Ghafari
("Ms. Ghafari")

- 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/65

DATE OF DECISION: August 7, 2018

DECISION

SUBMISSIONS

Fara Ghafari on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“ESA”), Fara Ghafari (“Ms. Ghafari”) has filed an appeal of a Determination issued by Melanie Zabel, a delegate (“Delegate Zabel”) of the Director of Employment Standards (the “Director”) on May 9, 2018 (the “Determination”).
2. Ms. Ghafari filed a complaint with the Director alleging that West Fraser Mills Ltd. (“WFM”) contravened the *ESA* in failing to pay her compensation for length of service and a “termination bonus.”
3. Following an investigation, Delegate Zabel concluded that Ms. Ghafari’s complaint was filed outside the time limit established by section 74 of the *ESA* and decided to stop investigating the complaint.
4. Ms. Ghafari contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
5. These reasons are based on Ms. Ghafari’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. Ghafari has established any basis to interfere with the Director’s determination.

FACTS

7. Ms. Ghafari began working for WFM as a systems analyst on October 1, 1995. In July 2004, Ms. Ghafari went off work on disability. On January 1, 2005, while Ms. Ghafari was still receiving disability benefits, WFM reorganized and Ms. Ghafari’s department was moved to Quesnel. Although WFM indicated that it was hopeful that Ms. Ghafari would remain employed during the transition period, it ultimately notified her that her employment would be terminated effective December 31, 2005. WFM’s letter indicated that Ms. Ghafari would continue to receive salary and benefits until that date, and that, if Ms. Ghafari continued to work until December 31, 2005, she would receive a completion bonus as well as outplacement services to assist her in finding alternate employment.
8. In January 2006, Ms. Ghafari requested payment of the completion bonus. WFM informed her that she would not receive the bonus until she returned to work. Ms. Ghafari in fact never returned to work and in February 2017, WFM and British Columbia Life & Casualty Company (“BC Life”), WFM’s disability insurer, informed Ms. Ghafari that her benefits would be discontinued if she did not provide certain information to the insurer. Ms. Ghafari did not provide that information and her benefits were discontinued effective March 31, 2017. In May 2017, BC Life and WFM commenced a civil action

seeking repayment of disability benefits paid to Ms. Ghafari between January 2010 and March 2016 in the amount of over \$180,000. Ms. Ghafari requested payment of her completion bonus again in June 2017 and in October 2017. WFM denied Ms. Ghafari's request.

9. Ms. Ghafari filed her complaint on February 5, 2018.
10. On February 15, 2018, Jane Wong, a delegate of the Director ("Delegate Wong"), informed Ms. Ghafari that her complaint was filed after the statutory time limit and requested that she provide an explanation for the late filing.
11. Ms. Ghafari informed Delegate Wong that she was not aware there was a six-month statutory time period in which to file a complaint, and that she filed her complaint within six months of being told, in October 2017, that she would not receive the bonus.
12. Ms. Ghafari informed Delegate Zabel that her employment ended on March 31, 2016, when the payment of her benefits was suspended.
13. Delegate Zabel determined that Ms. Ghafari's application should have been filed no later than September 30, 2016, or six months after the date her long term disability benefits were suspended. Delegate Zabel noted that even if she determined that Ms. Ghafari's employment ended in February 2017, the complaint was nevertheless still filed "well outside" the six-month statutory limit for filing a complaint set out in section 74(3) of the *ESA*. Delegate Zabel also found that WFM's October 2017 letter denying her a completion bonus had no bearing on the deadline for filing a complaint.
14. Having made that determination, Delegate Zabel 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, the delegate decided not to investigate the complaint.
15. Delegate Zabel concluded that while it was unfortunate that Ms. Ghafari was not aware of the time limits prescribed by the *ESA*, she did not consider that Ms. Ghafari'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*, Delegate Zabel found that a lack of awareness of the complaint process was not a compelling reason for Ms. Ghafari not to file a complaint within the six-month time period.
16. Delegate Zabel decided that no further action would be taken.

ARGUMENT

17. Although I found Ms. Ghafari's grounds of appeal somewhat difficult to discern, I understand that she believes the Director erred in law in determining that her claim for a completion bonus was statute barred.
18. Ms. Ghafari contends that she was entitled to the completion bonus on March 31, 2016, and assumed it would be paid to her. She says that when it was not, she made several inquiries into when it would be

paid to her, the last date of which was in October 2017. She argues that Delegate Zabel was wrong in concluding that WFM's October 2017 decision to deny the bonus did not have a bearing on the deadline for filing her complaint.

19. Ms. Ghafari states "it seems to me that the reason West Fraser Mills Ltd. denied my bonus is because in their opinion I was NOT "terminated" not because I did not file within the time limit specified in Section 74."
20. Ms. Ghafari also alleges that the Director was biased against her. Ms. Ghafari's allegations in this respect stem from Delegate Zabel's use of a name other than hers in the Determination: "does she bundle up all the people who have a middle eastern name and draw the same conclusions for all?"
21. In submitting the section 112 record in response to the appeal, Delegate Zabel acknowledged that she used an incorrect name for Ms. Ghafari in two places in the Determination. She stated that this was an inadvertent error, and apologized.

ANALYSIS

22. 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.
23. 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.
24. An appellant has the burden of demonstrating there is a basis for interfering with the delegate's decision. I am not persuaded that Ms. Ghafari has met that burden.

Failure to comply with natural justice

25. 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.
26. There is nothing in Ms. Ghafari's appeal submission that establishes that the delegate failed to comply with the principles of natural justice. Ms. Ghafari does not suggest that the delegate failed to provide her with sufficient information about the time limit issue presented by her late filing of the complaint nor does she argue that the delegate did not afford her an opportunity to explain why she filed after the statutory deadline for doing so. I find no basis to conclude that Ms. Ghafari was denied natural justice.
27. Ms. Ghafari suggests that the delegate was biased against her based on her ethnicity.
28. The Tribunal has addressed the onus on persons making allegations of bias in several decisions: see for example *Re: Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, and *Cyberbc.Com AD and Host Services Inc. operating as 108 Tempo and La Pizzaria*, BC EST # RD344/02 (Reconsideration of BC EST # D693/01), and *Tyrone Daum*, BC EST # D123/16.
29. When it is alleged that a decision-maker is not impartial, the test that must be applied is whether the particular conduct gives rise to a reasonable apprehension of bias. It is not necessary to establish actual bias because it is virtually impossible to determine whether the decision-maker approached the matter with a truly biased state of mind.
30. The generally accepted test for bias was that set out by de Grandpre J. in his dissenting reasons in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369. 394:
- [T]he apprehension of bias must be a reasonable one, held by reasonable and right -minded persons, applying themselves to the question and obtaining thereon the required information...
[The] test is "what would an informed person, viewing the matter realistically and practically- and having thought the matter through-conclude..."
31. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further, the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".
32. An allegation of bias against a decision maker is serious and should not be made speculatively:
- An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))

33. To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A) September 28, 1999)

34. As the Supreme Court in *R. v. S (R.D.)* ([1997] 3 SCR 484) stated:

Regardless of the precise words used to describe the test (of apprehension of bias), the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice.

35. The onus of demonstrating bias lies with the person who is alleging its existence. Furthermore, a “real likelihood” or probability of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

36. Although I find that Delegate Zabel failed to carefully review the Determination to ensure its accuracy as well as the privacy of another complainant, I am not persuaded that the allegation of bias has been made out.

Error of law

37. 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.

38. I am not persuaded the Director erred in law.

39. Section 74(3) of the *ESA* provides that complaints must be delivered to the Director within six months after the last day of employment. (my emphasis) 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)

40. I find no error in Delegate Zabel's conclusion that Ms. Ghafari's employment ended on March 31, 2016. Ms. Ghafari did not dispute that her employment ended at that time, and the record confirms that WFM

notified Ms. Ghafari that her long-term disability benefits were suspended on that date. Consequently, Ms. Ghafari's complaint ought to have been filed no later than September 30, 2016.

41. Delegate Zabel went on to note that even if she were to consider February 2017, the date Ms. Ghafari's long term benefits were actually terminated, as being the last date of employment, Ms. Ghafari's complaint had still been delivered out of time.
42. After her employment ended, Ms. Ghafari made several inquiries to WFM regarding her completion bonus. The delegate found that those inquiries had no effect on the statutory time period, a conclusion with which I agree. Ms. Ghafari's inquiries into those bonus payments do not operate to extend the time period in section 74(3).
43. 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.
44. In deciding not to accept Ms. Ghafari's complaint, Delegate Zabel 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. Delegate Zabel concluded that Ms. Ghafari knew her employment had ended by March 31, 2016, and that her lack of knowledge of her rights was not a sufficiently compelling reason for exercising her discretion in favor of extending the time limit.
45. Delegate Zabel considered Ms. Ghafari'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. Ghafari.
46. 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))

47. 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.

48. I find no basis to interfere with the exercise of the Director's discretion.

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

ORDER

50. Pursuant to section 115 of the *ESA*, I order that the delegate's May 9, 2018, Determination to stop investigating the complaint be confirmed.

Carol L. Roberts
Panel
Employment Standards Tribunal