

An appeal

- by -

Mousa Al-allaq
(the “Complainant”)

- 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)

PANEL: Robert E. Groves

FILE NO.: 2019/13

DATE OF DECISION: May 13, 2019

9. The Complainant alleged that during and after the period he was employed, the Employer promised to pay overtime wages. Initially, the Employer promised to pay when the project on which they were working ended. Thereafter, the Employer continued to promise to pay, but after a year had passed the Employer's position changed. It advised the Complainant that no payment for overtime would be made.
10. The Complainant then submitted his complaint on September 6, 2018. Subsection 74(3) of the *ESA* requires that a complaint relating to an employee whose employment has terminated must be delivered to an office of the Employment Standards Branch within six months of the last day of employment. For the Complainant, the six month statutory time limit expired on January 2, 2018. Therefore, his complaint was submitted more than eight months late.
11. The Complainant's reasons for delivering his complaint late were that he relied for more than a year on the Employer's promise that he would, in fact, be paid. The Complainant also stated the Employer informed him there was no time limit for filing a complaint under the *ESA*.
12. In her Reasons, the Delegate noted, correctly, that subsection 76(3)(a) of the *ESA* permits the Director to exercise a discretion to refuse to investigate a complaint if it is not made within the time limit stipulated in subsection 74(3) (see *Karbalaeiali v. British Columbia (Employment Standards)* 2007 BCCA 533).
13. Here, the Delegate determined that the discretion should be exercised against the Complainant. The Delegate's analysis is captured in the following excerpt from her Reasons:

One of the purposes of the Act, as set out in section 2, is to provide fair and efficient procedures for resolving disputes. The six month time limit to file a complaint is one way of ensuring that complaints are resolved in a fair and efficient manner. Allowing a complaint filed eight months after the time limit to proceed in the absence of a compelling reason for the delay would not accord with this stated purpose of the Act.

I have considered the evidence and argument provided by Mr. Al-allaq. I find that his reason for not filing his complaint within the statutory time limits is insufficient to warrant the continued investigation of his complaint.

On that basis, pursuant to section 76(3)(a) of the Act, I find it is appropriate for the Director to exercise discretion to stope investigating this complaint.

Accordingly, no further action will be taken.

ANALYSIS

14. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:
 - 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.

15. Subsection 115(1) of the *ESA* should also be noted. It says this:
- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.
16. As I have stated, the Complainant grounds his appeal on the assertion that evidence has become available that was not available at the time the Determination was being made.
17. In my view, that is not a basis on which the appeal can succeed.
18. The evidence on which the Complainant relies is evidence directed to proving that the Employer failed to pay him overtime wages. It consists, primarily, of pay stubs and text messages.
19. Not only is this evidence not “new” in the sense that it was unavailable to the Complainant before the Determination was issued, it is also not germane to the concern that informed the Delegate’s conclusion that the investigation of the complaint should be refused. The Determination did not establish that no overtime wages were owed. Instead, it focused on different issues: whether the complaint had been delivered late and, if so, whether the Director should exercise the discretion to refuse to investigate it.
20. What the Complainant’s appeal must address is whether the Delegate erred in law in deciding that the complaint was filed late and that the Director should exercise the discretion to refuse to investigate it. Those issues engage subsection 112(1)(a) of the *ESA*, not subsection 112(1)(c).
21. The fact that the Complainant may have failed to describe the ground of his appeal accurately is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.*, BC EST # D141/03).
22. I turn, then, to the question whether the Delegate erred in law in deciding that the Director should exercise the discretion to refuse to investigate the Complainant’s complaint. This, indeed, is the sole issue to be decided on the appeal, as it is more than clear that the Complainant delivered his complaint more than eight months late.
23. The criteria the Tribunal will consider when deciding whether it is appropriate to interfere with the Director’s exercise of the discretion under subsection 76(3)(a) were set out in *Jody L. Goudreau et al.*, BC EST # D066/98, as follows:
- 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 matters 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.

24. The Supreme Court of Canada has also provided guidance on this question. In *Maple Lodge Farms Limited v. Government of Canada* [1992] 2 SCR 2, the court said this:

It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where 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.

25. The material in the record provided to the Tribunal by the Director reveals that from the very earliest point in the investigation, the Delegate advised the Complainant that his complaint had been delivered late and that a decision would need to be made whether the investigation should be permitted to continue before the complaint could proceed on its merits.

26. In response to the Delegate's request of the Complainant that he provide reasons why he had not delivered his complaint within the time limit, the Complainant stated that he was unfamiliar with the provisions of the *ESA* and that he had relied on what he later learned was the Employer's misrepresentation that there was no time limit for delivering a complaint of unpaid overtime wages to the Employment Standards Branch.

27. Initially, and no doubt due to the concerns over the timeliness of the complaint, the Delegate understood from the Complainant that if no voluntary payment of overtime wages could be arranged with the Employer, the Complainant would withdraw his complaint. When the Employer denied that any overtime wages were payable, the Delegate advised the Complainant that the file would be closed.

28. The Complainant then informed the Delegate that he had not agreed to a withdrawal of the complaint. Accordingly, the Delegate proceeded to consider the issue of the timeliness of the complaint in substance. In the Determination she subsequently issued, the Delegate concluded, implicitly, that the Complainant's reliance on the Employer's promises to pay for overtime, and its statements to the effect that there was no time limit for delivering a complaint under the *ESA*, were insufficient to persuade the Director to refrain from refusing to investigate the complaint.

29. It is trite to say that an appeal under the *ESA* is an error correction process, with the burden of showing error in a determination falling on the appellant (see *M.S.I. Delivery Services Ltd.*, BC EST # D051/06).

30. Having regard to the principles informing the power of the Tribunal to interfere with the discretion that has been exercised under subsection 76(3)(a) in this case, I cannot conclude that the Complainant has established any reviewable error on the part of the Delegate. In my view, it was not reasonable for the Complainant to have relied solely on the Employer's representations regarding payment and the Complainant's ability to file a timely complaint. A prudent person in the position of the Complainant

would have satisfied himself that the Employer's statements concerning the relevant provisions of the *ESA* in particular were accurate. Conversely, it has been decided by the Tribunal that ignorance of the provisions of the *ESA* is insufficient to require the Director to continue investigating a complaint delivered outside the statutory time limit (see *Re Koh*, BC EST # D008/12).

31. For these reasons, I have concluded that the Complainant's appeal must be dismissed.

ORDER

32. Pursuant to subsection 114(1)(f) of the *ESA*, I order that the appeal be and is hereby dismissed as there is no reasonable prospect that it will succeed.

Robert E. Groves
Member
Employment Standards Tribunal