



An appeal

- by -

Rajinder Singh Saini  
("Mr. Saini")

- 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:** Carol L. Roberts

**FILE No.:** 2018A/101

**DATE OF DECISION:** May 21, 2019

## DECISION

### SUBMISSIONS

Daniel Sorensen	counsel for Rajinder Singh Saini
Scott McCann	counsel for the Consulate General of India
Laurel Courtenay	counsel for the Director of Employment Standards
Melanie Zabel	delegate of the Director of Employment Standards

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“*ESA*”), Rajinder Singh Saini (“Mr. Saini”) has filed an appeal of a Determination (the “Determination”) issued by the Director of Employment Standards (the “Director”) on August 17, 2018.
2. Mr. Saini filed a complaint with the Director of Employment Standards alleging that the Consulate General of India in Canada (the “Employer”) contravened the *ESA* in failing to pay him overtime wages.
3. Following an investigation, a delegate of the Director concluded that Mr. Saini’s complaint was filed outside the time limit established by section 74 of the *ESA* and decided to stop investigating the complaint.
4. Mr. Saini contends that the Director erred in law in making the Determination.
5. 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.
6. Following a review of the appeal submission, I sought submissions from the Employer and the Director.

7. The Employer requested that the appeal be dismissed on the basis that the Tribunal lacked jurisdiction over the complaint and the appeal. The Employer says that it is a consular post for India, and as such, any commercial activities of the state are immune from the jurisdiction of Canadian courts.
8. On December 24, 2018, the Tribunal advised the Employer that it should give Notice of Constitutional Question (“Notice”) to the Attorneys General of British Columbia and Canada in accordance with section 46 of the *Administrative Tribunals Act* and section 8 of the *Constitutional Question Act*.
9. Although the Tribunal sought submissions from the parties on the Notice, both the Attorney General of Canada and the Attorney General of British Columbia declined to participate.
10. Mr. Saini argues that his claim does not qualify as commercial activity as it is grounded in statute, and any determination under the *ESA* would not interfere with the Employer’s sovereignty under the *State Immunity Act*.
11. The Director of Employment Standards contends that it is not necessary to determine whether or not the *ESA* applies to the complaint because the delegate properly declined to exercise her discretion not to proceed with the complaint.
12. These reasons are based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination.

## JURISDICTION

13. The Employer contends that, as a consular post, it is recognized by the *Vienna Convention on Consular Relations* (the “*Convention*”), to which Canada is a signatory. It submits that the *Foreign Missions and International Organizations Act* (SC 1991, c. 41) gives the force of Canadian law to the *Convention* and recognizes that consular posts are part of the foreign state to which they relate. Consequently, the Employer argues, it has immunity from the jurisdiction of any court in Canada under section 3 of the *State Immunity Act* (RSC 1985, c. S-18). While section 5 of that *Act* creates a commercial activity exception to that immunity, the Employer says that the exception applies only to payment of money owed under a contract of employment, rather than the provisions of employment legislation. (*Re Canada Labour Code*, [1992] 2 S.C.R. 50 and *United States of America v. Zakhary*, [2015] F.C.J. No 295)
14. In reply, counsel for Mr. Saini contends that the Employer is not immune from the Tribunal’s jurisdiction and argues that the Tribunal should determine that overtime monies are owing to Mr. Saini. Counsel relies on *Gilligan (Re)* ([1998] O.E.S.A.D. No. 5) in which an Ontario Employment Standards Adjudicator determined that the Ontario *ESA* did apply to the Swedish Trade Council, and *Roy v. South Africa (Department of International Relations and Cooperation)* ([2013] O.J. No. 3331).
15. Counsel for the Director says that it is not necessary for the Tribunal to decide if the *ESA* applies to the complaint because Mr. Saini’s complaint was, in any event, out of time. Counsel submits that courts, and this Tribunal, should not decide issues of law, particularly constitutional-type issues that are not necessary to the resolution of the matter before the court (*Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 at paras. 6 – 13).

16. For the reasons that follow, I find that it is unnecessary to consider the Employer's argument that the Tribunal lacks jurisdiction over the complaint and the appeal.
17. In *Phillips (ibid)*, the Supreme Court of Canada, relying on *Attorney General of Quebec* ([1978] 2 S.C.R. 605), held that it should not decide issues of law that are not necessary to a resolution of an appeal, particularly constitutional issues:

*...save in exceptional circumstances, it is not desirable to express an opinion on a question of law which it is not necessary to decide in order to dispose of the case at hand, especially when it is a constitutional question (para. 7)*

## ISSUE

18. Whether or not Mr. Saini has established any basis to interfere with the Director's Determination.

## FACTS

19. The facts are undisputed.
20. Mr. Saini worked as a chauffeur for the Consulate General of India in Canada from February 13, 2012, until October 18, 2017. On February 26, 2018, Mr. Saini sent the Employer a self-help kit in which he claimed overtime wages. In a March 13, 2018 email, the Employer advised Mr. Saini that "his request was being looked into."
21. On or about March 16, 2018, Mr. Saini had a telephone discussion with an official of the Employer, whom, he asserts, informed him that the matter would be "taken care of by April 30, 2018."
22. On April 18, 2018, Mr. Saini followed up with the Employer by email, indicating that if the matter had not been addressed by April 30, 2018, he would forward his request to Employment Standards. On May 4, 2018, Mr. Saini reminded the Employer that he was to have a reply to his complaint by the end of April and that if he did not receive a response "within weeks time after receiving this email" (*sic*) he would have "no choice to take further action." (*sic*)
23. On June 2, 2018, the Employer advised Mr. Saini that the Ministry of External Affairs had sought some additional information pertaining to his claim and indicated that it would respond to Mr. Saini once it had that information.
24. Mr. Saini filed his complaint on June 6, 2018.
25. On July 6, 2018, a delegate of the Director informed Mr. Saini that his complaint was filed outside the six-month statutory time limit and requested that he provide an explanation for his failure to file the complaint within that time.
26. Mr. Saini informed the delegate, in essence, that he did not file his complaint because of the Employer's ongoing assurances that his complaint was being "taken care of," and he assumed that the matter was going to be resolved.

27. In her Determination, the delegate determined that Mr. Saini's application had been made seven weeks after the six-month statutory limit for filing a complaint as set out in section 74(3) of the *ESA*.
28. Having made that determination, the delegate then considered whether the Director should exercise her 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.
29. The delegate wrote that although Mr. Saini had been attempting to resolve the matter directly with the Employer, she did not find that his situation constituted extraordinary circumstances that would warrant the Director exercising her discretion to accept the claim outside of the mandatory time limit.
30. The delegate noted that Mr. Saini afforded the Employer "ample opportunity" to resolve his complaint, and rather than filing his complaint within the statutory deadline of April 18, 2018, he gave the Employer further opportunity to resolve the complaint. The delegate also noted that because Mr. Saini had accessed the self-help kit by February 26, 2018, he had access to information regarding the complaint resolution process, including the six-month statutory deadline for filing complaints.
31. 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 there was no compelling reason for Mr. Saini not to file a complaint within the six-month time period.
32. The delegate decided that she would not take any further action.
33. Mr. Saini contends that the delegate failed to consider all of the purposes of the *ESA* in making the Determination. He argues that the delegate considered only section 2(d) in making the Determination and failed to consider other purposes. Specifically, he argues that in exercising her discretion against allowing the complaint to proceed, the Director is not only permitting the Employer to continue possible contraventions of the *ESA* but is requiring Mr. Saini to potentially receive less than what he is entitled under the *ESA*.
34. Mr. Saini contends that the *ESA*'s purposes of fairness and efficiency were not properly considered by the delegate, particularly in this case. He argues that the delegate should have exercised her discretion in favour of Mr. Saini in this instance as the Employer "actively encouraged (or even deceived) the Employee into thinking that the timelines were not of concern and that a resolution was forthcoming."
35. Counsel for Mr. Saini also contends that, by not exercising her discretion to allow the complaint to proceed, the delegate is not promoting fairness in circumstances where there is a power imbalance between the parties.
36. Mr. Saini further contends that the Employer, by its actions, represented that the six-month timeline was not something the Employer would insist upon. Having represented that the matter was being looked into and that the matter would be taken care of, Mr. Saini argues that the Employer can no longer rely on the *ESA* statutory limitation period.

37. Counsel for the Director as well as the Director's delegate submit that the delegate properly exercised her discretion when she refused to accept the complaint because there were no extraordinary circumstances or compelling reasons why the Complainant could not have filed his complaint within the statutory time limit.
38. The Director submits that the Complainant submitted the complaint seven weeks after the statutory deadline for filing the complaint and had the opportunity to explain why he had done so. The Director says that, in exercising her discretion, the delegate considered the purposes of the *ESA*, as well as the Complainant's explanation for not filing within the statutory time period. The Director says it is not necessary for the delegate to expressly consider all the enumerated purposes of the *ESA* in exercising her discretion, and in the absence of any error in the exercise of that discretion, the appeal should be dismissed.
39. Counsel for the Director says that if the Tribunal concludes that the delegate erred in her discretion, the appropriate remedy would be to remit the matter back to the delegate for reconsideration.

## ANALYSIS

40. 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.
41. An appellant has the burden of demonstrating there is a basis for interfering with the delegate's decision. I am not persuaded that Mr. Saini has met that burden.

### *Error of law*

42. 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.
43. I am not persuaded the delegate erred in law.
44. There is no dispute that Mr. Saini's employment ended October 18, 2017, and that his complaint was not filed within the six-month statutory deadline.

45. Section 74(3) of the *ESA* provides that complaints must be delivered to the Director within six months after the last day of employment. 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 *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 533)
46. In *Bridge*, BC EST # RD051/08, I held that *Karbalaeiali* 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.
47. In deciding not to exercise her discretion in favour of Mr. Saini’s claim, the delegate considered the purposes of the *ESA*, the importance of the reasons for the statutory time limit, as well as the reasons advanced for the lateness of the filing.
48. 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))
49. In *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR, the Supreme Court held:
- It is...a clearly-established rule that the 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. 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.
50. Although the delegate did not expressly set out all of the *ESA*’s purposes in the Determination, I find no basis to interfere with the exercise of her discretion.
51. One of Mr. Saini’s arguments is that the Employer “represented” to him that it would not rely on the six-month limitation period. The evidence does not support this argument. There is nothing in the Employer’s emails requesting that Mr. Saini “hold off” filing his complaint, nor did the Employer at any time suggest that the matter would be resolved to Mr. Saini’s satisfaction or otherwise. There is no evidence the

Employer made any promises, assurances or representations that it owed Mr. Saini additional wages. The only assurance offered by the Employer was that the Employer would respond to Mr. Saini's request by April 30, 2018.

52. Furthermore, even if the Employer had made promises or representations to Mr. Saini, the six-month statutory limitation period was not the Employer's to waive. That limitation period is established by statute and enforced by the Director of Employment Standards. In this case, the Director decided not to exercise its discretion to extend the limitation and I am not persuaded that this is an error of law or is otherwise reviewable. The appeal is dismissed.

### **ORDER**

53. Pursuant to section 115 of the *ESA*, I order that the delegate's August 17, 2018, Determination to stop investigating the complaint be confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**