



An appeal

- by -

Xiang Li

- 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: David B. Stevenson

FILE NO.: 2019/34

DATE OF DECISION: June 3, 2019

DECISION

SUBMISSIONS

Xiang Li on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Xiang Li has filed an appeal of a Determination (the “Determination”) issued by Tara MacCarron, a delegate of the Director of Employment Standards (the “Director”), on February 21, 2019.
2. The Determination found Xiang Li had failed to file his complaint within the time limit set out in section 74 of the *ESA* and, exercising the discretion allowed the Director in section 76 of the *ESA*, the Director decided not to proceed with the complaint.
3. Xiang Li has appealed the Determination on the grounds the Director erred in law and failed to observe principles of natural justice in making the Determination. Xiang Li seeks to have the Determination varied or cancelled.
4. In correspondence dated April 5, 2019, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Xiang Li and Topwin Auto Centre Inc. (“the respondent employer”). Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
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 Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 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.*

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the respondent employer will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

8. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Xiang Li was employed as a car cleaner by the respondent employer from April 9, 2018, to May 19, 2018. The last day of employment was found to be May 19, 2018.
10. On December 11, 2018, Xiang Li filed a complaint alleging he was owed wages for unpaid vacation pay and reimbursement for amounts deducted from his wages. Based on the information provided by Xiang Li, the Director found the complaint was filed outside of the time limit set out in section 74(3) of the *ESA*, which reads:
- 74 (3) *A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within six months after the last day of employment.*
11. On December 18, 2018, the Director sent a letter to Xiang Li requesting further information for his apparent failure to meet the statutory time limit. Xiang Li responded in correspondence received by the Director on January 7, 2019. To summarize, Xiang Li stated he believed the period for filing his complaint with the Director commenced on June 16, 2018, the date he first saw the paycheck on which his claim was based.
12. The Director considered the information provided by Xiang Li and, based on the information provided, found Xiang Li had not filed his complaint with the time period allowed in the *ESA* and, for the reasons provided in the Determination, decided to exercise the discretion found in section 76(3) of the *ESA* to refuse to investigate the complaint.

ARGUMENT

13. Xiang Li submits the Director made an error of law and failed to observe principles of natural justice in making the Determination.

14. He argues the Director erred in law by confining the exercise of discretion in section 76(3) to “exceptional [or extraordinary] circumstances where there are compelling reasons to do so”.
15. Xiang Li argues the Director failed to observe principles of natural justice by not considering all of the evidence related to the complaint and for the failure to file within the statutory time period. Under this argument, Xiang Li alleges bias against the decision maker. He also disputes whether he should be responsible for not being aware of the time period for filing a complaint, submitting the information available on the Employment Standards Branch website and on the internet is not sufficiently clear to alert a potential complainant to the statutory provisions relating to the time limits for filing complaints.
16. Xiang Li submits there were, in any event, compelling reasons for the Director to accept the complaint. He identifies the nature of the alleged contraventions by the respondent employer – unlawful deductions and failure to pay annual vacation pay – and that the respondent employer will “get away with it” if the complaint is not accepted as compelling reasons why the Director should have accepted the complaint.

ANALYSIS

17. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 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.*
18. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
19. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
20. Xiang Li argues the Director committed an error of law and failed to comply with principles of natural justice.
21. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding the Director failed to comply with principles of natural justice.
22. In the circumstances, the only obligations placed on the Director by principles of natural justice were to advise Xiang Li his complaint was not filed within the period allowed in section 74 of the *ESA*, to provide him with an opportunity to explain the delay, to fairly consider his reasons, and to make a decision.

23. The Director satisfied those obligations; the Director notified Xiang Li his complaint appeared to be untimely and gave him a reasonable opportunity to provide an explanation for his failure to file a timely complaint. The Director ultimately found his explanation was not compelling and did not justify a decision to exercise discretion in favour of adjudicating the complaint on its merits.
24. Under this ground of appeal, Xiang Li also alleges bias. In respect of this allegation, the Tribunal has indicated the test against which a bias allegation is considered is an objective one; the evidentiary bar for finding bias is high and requires clear and objective evidence. Nothing in this appeal comes near satisfying the test for establishing bias: see *Dusty Investments Inc. d.b.a. Honda North, supra*, at pages 7 – 9.
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. The statutory framework under which this appeal arises is that complaints to the Branch must be filed within the applicable 6-month time period, which in the circumstances of this case was 6 months from Xiang Li’s last day of employment: see section 74(3); late complaints will only be accepted as a matter of the Director’s discretion. That framework is summarized in *Karbalaieali v. British Columbia (Employment Standards)* 2007 BCCA 553, at paras. 11 – 12, as follows:
- [11] While the Tribunal rightly stated that the *ESA* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, even though a written complaint is delivered more than six months after the termination of an employee’s employment, the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so. In other words, s. 74 does not, as the Tribunal said, preclude the Director’s discretion to accept a complaint. (original italics)
- [12] The question before the Tribunal was not whether the employee’s complaint was statute-barred but whether the Director’s delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then 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. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised.

27. There is no issue that Xiang Li's complaint was filed outside the time period allowed in section 74(3) of the *ESA*.
28. The thrust of Xiang Li's argument under this ground of appeal is that the Director erred in law in failing to exercise the discretionary power in section 76(3)(a) in favour of continuing to investigate the complaint on its merits. More specifically, this aspect of the appeal challenges an exercise of discretion granted to the Director under the *ESA*.
29. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director may be varied on appeal.
30. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing 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 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.
31. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR, where the Court made the following comments about the exercise of a statutory discretion:
- 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.
32. In this case, the Director considered the following matters in deciding not to proceed with the complaint:
- i. One of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes and that purpose is met by requiring timely filing of complaints;
 - ii. Xiang Li was aware of the *ESA*; he says he researched the relevant law of British Columbia and visited the Employment Standards Act website. He noted on one of the links' reference to "the six month period for filing a complaint" and made an assumption about when that period started;

- iii. He made no direct contact with the Branch to seek clarification on the time limits for filing a complaint; and
- iv. A lack of specific knowledge of the requirements of the *ESA* is not a good reason to ignore its requirements and continue investigation of a late complaint.

33. Part of the burden on Xiang Li in this appeal is to establish the Director acted “unreasonably” in the sense described above. None of the above matters were irrelevant to the discretionary decision which the Director was required to make.
34. All of the reasons put forward by Xiang Li for the late filing were addressed in the Determination. The decision of the Director considered factors that were relevant to the question being considered and was made within the legal framework of the *ESA*.
35. The additional considerations raised by Xiang Li in this appeal: the nature of the alleged contraventions of the *ESA* and that by refusing to accept, investigate and adjudicate the complaint, the respondent employer may be “getting away” with not meeting an obligation set out in the *ESA* are not particularly relevant or cogent to whether the Director should ignore the requirements of section 74 and proceed with a late appeal. Such considerations could be applied to any case where a complaint was filed out of time. To give those considerations effect would nearly, if not completely, nullify the statutory time limits for filing a complaint.
36. I find the Director’s exercise of his statutory discretion in section 76(3)(a) to refuse to investigate the complaint 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*.
37. The legislature has spoken in clear and strong terms that timely filing of complaints is an important element in ensuring fair and efficient procedures for resolving disputes under the *ESA*. The language of section 74 of the *ESA* speaks in mandatory, not permissive, terms and should be read accordingly. Without attempting to catalogue the circumstances that would require a complaint filed outside of the time limits set out in section 74 to be accepted, reviewed, investigated and/or adjudicated, I would anticipate such cases would be rare. I do not find the use by the Director of the terms exceptional or extraordinary to be particularly concerning. There is no indication those terms describe anything other than the view already taken by the Tribunal that proceeding with complaints filed out of time will rarely occur.
38. In sum, I cannot say 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 the late filing and did not accept the explanation provided by Xiang Li was sufficiently compelling to warrant proceeding with the complaint. There is nothing to suggest that the Director’s decision was tainted by bad faith or that it lacked any principled justification.
39. As stated above, short of showing the Director acted arbitrarily, without authority or not in good faith, the Tribunal will not interfere with the exercise of such discretion: *Takarabe and others*, BC EST # D160/98. No basis for interfering with the Director’s discretion in this matter has been shown in this case.

40. There is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

41. Pursuant to section 115 of the *ESA*, I order the Determination dated February 21, 2019, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal