

An appeal

- by -

Jason Klassen
("Mr. Klassen")

- 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: Marnee Pearce

FILE NO.: 2019/46

DATE OF DECISION: July 24, 2019

DECISION

SUBMISSIONS

Jason Klassen on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Jason Klassen (“Mr. Klassen”) has filed an appeal of a Determination (the “Determination”) issued by the Director of Employment Standards (the “Director”) on April 5, 2019.
2. Mr. Klassen filed a complaint with the Director alleging that Okanagan Quality Control Ltd. (“OKQC”) owed him regular wages, overtime wages, annual vacation pay, and compensation for length of service.
3. Following an investigation, a delegate of the Director (the “Delegate”) concluded that Mr. Klassen’s complaint was filed outside the time limit established by section 74 of the *ESA* and decided to stop investigating the complaint.
4. Mr. Klassen submits that evidence has become available that was not available at the time the Determination was made and asks that the matter should be referred back to the Director.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was e-mailed to Mr. Klassen and OKQC on June 4, 2019, allowing 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 a complete record of the material that was before the Director when the Determination was made.
6. I have decided this appeal is an appropriate case for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal and written submissions of Mr. Klassen, and my review of the record that was before the Director when the Determination was being made.

ISSUE

7. Whether or not Mr. Klassen has established any basis to interfere with the Director’s Determination.

FACTS

8. OKQC operates a rock-crushing company in British Columbia and Mr. Klassen was employed as a loader operator from May 29, 2017, to March 19, 2018, at the rate of pay of \$22.00 per hour.
9. Mr. Klassen was terminated on March 19, 2018, following a motor vehicle accident in which equipment belonging to OKQC was damaged.
10. Mr. Klassen’s complaint was filed on September 25, 2018, outside of the legislated six-month time limit.

11. On February 20, 2019, the Delegate wrote to Mr. Klassen seeking reasons why the complaint was filed late.
12. Mr. Klassen responded in writing to the Delegate's questions on March 5, 2019, explaining that he had obtained alternative employment immediately after the termination of his employment with OKQC. His new employment involved working in remote areas with no access to cellular or internet service.
13. The Delegate spoke with Mr. Klassen's new employer on March 6, 2019. The Delegate was told that he hired Mr. Klassen in late April or early May of 2018. Although there is no access to cellular or internet service when Mr. Klassen works in remote areas, employees do not spend their days off at the job site, and they spend nights in hotels while traveling between job sites.
14. The Delegate considered whether she should exercise her discretion to accept the claim outside of the mandatory time limit. The Delegate did not find Mr. Klassen's situation constituted exceptional circumstances justifying the exercise of her discretion.
15. The Delegate wrote that Mr. Klassen's limited access to the services required to file a complaint was not sufficiently compelling. Mr. Klassen was not confined to a remote job site for the entire 6 months after his last day of employment. He stayed at hotels while traveling between job sites. It was reasonable to expect that Mr. Klassen would have had adequate access to services allowing the filing of his complaint within the six-month time limit prescribed by the *ESA*.
16. The Delegate also noted that Mr. Klassen's inability to obtain supporting documentation in a timely manner was not a sufficiently compelling reason to extend the timeframe for filing a complaint as the Director does not require the submission of supporting documents with a complaint when it is filed.
17. The Delegate decided to stop investigating the complaint pursuant to section 76(3) of the *ESA*.

SUBMISSIONS OF MR. KLASSEN

18. Mr. Klassen appeals the decision that his complaint has been denied because it was received 5 days late.
19. Mr. Klassen reiterates that he was away working without a cell phone or laptop and could not complete the self-help kit and the formal complaint.
20. Mr. Klassen wrote that he did not realize the self-help kit and the formal complaint could be done together; if he had known this, he would have filed his complaint within the legislated timeframe.
21. Mr. Klassen believes that OKQC does not want to pay him monies owed because the equipment that was damaged while attached to his vehicle was not insured.
22. Mr. Klassen asks the Tribunal to "look again" at the evidence associated with non-payment of wages and other benefits.

ANALYSIS

23. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.
24. An appellant has the burden of demonstrating there is a basis for interfering with the delegate's decision. I am not persuaded that Mr. Klassen has met that burden.
25. Section 74(3) of the *ESA* provides that complaints must be delivered to the Director within 6 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 *Karbalaieali v. British Columbia (Employment Standards)*, 2007 BCCA 533).
26. 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 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. (Re: Jody L. Goudreau and Barbara E. Desmarais, employees of Peach Arch Community Medical Clinic Ltd. (BC EST # D066/98)
27. There is no dispute that Mr. Klassen's employment ended March 19, 2018, and that his complaint was not filed within the six-month statutory deadline.
28. The Delegate provided Mr. Klassen with the opportunity to explain why his complaint was filed outside of the six-month statutory limit. The reasons were considered by the Delegate, who contacted Mr. Klassen's current employer to investigate his evidence.
29. The Delegate considered the purpose of the *ESA*, noting that section 2(d) identified that one of the purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act." The six-month deadline provides all parties with a consistent and reasonable time to deal with complaints. As section 74 is a mandatory provision in that it states a complaint must be filed within 6 months after the last date of employment, the Delegate identified that

she should only exercise her discretion to proceed in exceptional circumstances where there are compelling reasons to do so.

30. In deciding not to exercise her discretion in favour of Mr. Klassen's claim, the Delegate considered the purposes of the *ESA*, the importance of the reasons for the statutory limit, as well as the reasons advanced for the lateness of filing. I find no basis to interfere with her discretion because of an error in law.
31. The Delegate outlined the issues and provided a fair and unbiased forum for resolution. Mr. Klassen was given the opportunity to respond to the outstanding issue of his late application; there is no evidence or suggestion of any bias on the part of the decision-maker. I find there is no basis to interfere with the Delegate's discretion because of a failure of natural justice.
32. Mr. Klassen has selected as his ground for appeal that new evidence has become available that was not available at the time the Determination was made. The new evidence includes copies of e-mail discussions between Mr. Klassen and OKQC in April and May 2018, various receipts, a record of employment, and timeslips.
33. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
 - a. the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
 - b. the evidence must be relevant to the material issue arising from the complaint;
 - c. the evidence must be credible in the sense that it is reasonably capable of belief; and
 - d. the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
34. The material provided by Mr. Klassen appears to be the material he would have submitted if his complaint had been filed in a timely fashion, relating to his earnings record and the termination of his employment. This does not meet the threshold of new evidence, as it could have been, with due diligence, provided to the Delegate during the investigation.
35. An appeal is not simply an opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, with the burden being on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds. This burden has not been met, and, in any event, there is no reasonable prospect that this appeal will succeed.
36. The appeal is dismissed.

ORDER

37. Pursuant to section 115 of the *ESA*, I order that the Delegate's April 5, 2019, Determination to stop investigating the complaint be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal