Employment Standards TRIBUNAL

Citation: Rajinder Singh Saini (Re)
2019 BCEST 73

An Application for Reconsideration

- by -

Rajinder Singh Saini
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2019/69

DATE OF DECISION: July 25, 2019

DECISION

SUBMISSIONS

Daniel A. Sorensen — counsel for Rajinder Singh Saini

OVERVIEW

1. The *Employment Standards Act* (the "*ESA*") establishes a complaint-based wage recovery scheme. Pursuant to section 74 of the *ESA*, a written complaint must be delivered to an office of the Employment Standards Branch "within 6 months after the last day of employment". The *ESA* does not contain a provision akin to, for example, section 22 of the *Human Rights Code*, empowering the Director of Employment Standards to extend the 6-month complaint period.

2. However, section 76(3)(a) of the *ESA* states that the Director of Employment Standards *may* refuse to investigate or adjudicate a complaint if it was not filed within the 6-month complaint limitation period. In *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, the British Columbia Court of Appeal held that 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)" and "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" [*italics* in original text]. The Director – acting through his delegates (see section 117) – must "properly exercise his discretion" when he refuses to accept and review a complaint.

3. These proceedings concern a complaint (a claim for unpaid overtime pay) that was filed about seven weeks after the 6-month complaint limitation period expired. Rachael Larson, a delegate of the Director of Employment Standards (the "delegate"), in a Determination issued on August 17, 2018, held that the present applicant did not have a "compelling reason" for failing to file a timely complaint. Accordingly, the delegate refused to proceed with the complaint. The applicant filed an appeal alleging that the delegate erred in law. The Tribunal dismissed the appeal and confirmed the Determination (see 2019 BCEST 48 – the "appeal decision"). The applicant now seeks to have the appeal decision reconsidered under section 116 of the *ESA*.

ISSUE

4. The principal issue before the member on appeal was whether the delegate improperly exercised her discretion in refusing to accept, review, and adjudicate the applicant's complaint. The issue before me is whether the member's decision should be cancelled or varied.

BACKGROUND FACTS

5. The applicant was employed as a chauffeur with the Consulate General of India (in Vancouver) from February 13, 2012, to October 18, 2017, when he quit. On February 26, 2018, the applicant sent a "self-help kit" (a process no longer being used by the Employment Standards Branch) to his former employer seeking over $184,000 in unpaid overtime allegedly earned during his tenure with the consulate. I would

parenthetically note that when the self-help kit was sent, the wage recovery period was limited to 6 months (a recent amendment has increased the wage recovery period to 12 months, with a possibility of a 24-month recovery period in certain circumstances).

6. The section 112(5) record indicates that the consulate responded on March 13, 2018, by way of an e-mail to the applicant acknowledging receipt and stating "your request is being looked into". The applicant's legal counsel asserted in his appeal submission that "the Employer contacted [the applicant] and encouraged him to hold off on further actions as they were 'looking into it'". However, there is nothing in the consulate's March 13 e-mail requesting the applicant to "hold off further actions". The applicant's legal counsel further alleged that someone from the consulate telephoned the applicant on March 16, 2018, "advising him that they would take care of his claim", but this assertion is not independently corroborated by any other evidence.

7. On April 18, 2018 (the last day of the 6-month complaint limitation period), the applicant sent an e-mail to the consulate regarding his overtime claim stating: "I hope it will be taken care of by the end of this month" and "I will wait until then to forward my request to B.C. Employment Standards". It should be noted that by the end of April 2018, the 6-month complaint period would have expired some two weeks earlier. As noted by the delegate in her "Reasons for the Determination" issued concurrently with the Determination (the "delegate's reasons"), the applicant either knew or reasonably should have known about the six-month limitation period (see pages 5 and 6). The applicant has never, so far as I can tell, asserted that he was not aware of the 6-month limitation period.

8. In any event, the end of April came and went with no resolution of the applicant's claim. The applicant sent a further e-mail to the consulate on May 4, 2018: "I hope I would receive a answer on this matter within weeks time after receiving this email" [*sic*]. The consulate replied by e-mail on May 7, 2018, advising that "[y]our request has already been sent to the Ministry for the [*sic*] consideration [and] [a]s soon, we receive any reply from the Ministry regarding this issue will inform you" [*sic*]. The applicant responded by e-mail on May 13, 2018: "I appreciate your consideration. But it's taking too long to get this issue to be solved. I will wait until May 30th. After that I have to forward this case to the B.C. employment Standards" [*sic*].

9. On June 2, 2018, the consulate sent an e-mail to the applicant advising: "The Ministry of External Affairs, New Delhi had sought some additional information pertaining to your case which has been recently sent to Ministry. We look forward hearing from the Ministry of External Affairs and would revert to you as soon as information is received from them" [*sic*]. This last communication appears to end the paper trail between the applicant and the consulate. The applicant filed his unpaid wage complaint on June 6, 2018, about seven weeks after the 6-month complaint period expired.

10. Given that the applicant's unpaid wage complaint filed on June 6 was, on its face, untimely, on July 6, 2018, a Director's delegate (not the delegate who issued the Determination) wrote to the applicant requesting him to provide "details **in writing**, including any supporting documentation, of why you failed to file your complaint within the six month time limit" (**boldface** in original text). By letter dated July 13, 2018, the applicant provided much of the background information set out above and then the following explanation for failing to file his complaint within the 6-month time limit: "Since I received the confirmation from my employer and asked me to wait until they are working on it. I was assuming that the matter going to be resolved. So I waited for reasonable time…I apologize for the delay. I was assuming

the matter going to be solved. So after the last email I received from the employer I decided to bring this to your notice" [*sic*]. I note the applicant has never stated in any of his, or his counsel's, submissions that he was unaware of the 6-month limitation period.

11. As noted above, the delegate determined that the applicant either knew or should have known about the 6-month limitation period governing the filing of written complaints. The delegate observed that this limitation period is consistent with the *ESA*'s stated purpose of providing fair and efficient dispute resolution procedures (see section 2(d) of the *ESA*). Further, the delegate concluded that the applicant's explanation for failing to file a timely complaint (namely, that he had hoped or expected his complaint would be settled directly with the consulate without having to file) did not constitute a "compelling reason" to set aside the legislated 6-month time limit.

12. On appeal, the applicant argued that the delegate erred in law (see section 112(1)(a)) when she focused on the "fair and efficient procedures" purpose of the *ESA* (section 2(d)) without considering the other purposes set out in section 2, such as ensuring employees receive at least minimum standards of pay (section 2(a)), "fair treatment" (section 2(b)), and encouraging "open communication" (section 2((c)). Indeed, the applicant's counsel argued that allowing the untimely complaint to proceed would have been consistent with all of the statutory purposes set out in section 2.

13. Counsel asserted that the consulate "actively encouraged (or even deceived) the [applicant] into thinking that the timelines were not of concern and that a resolution was forthcoming". Flowing from this assertion, the applicant's counsel submitted that the doctrine of promissory estoppel applied. Specifically, counsel argued that the consulate, by its conduct, represented to the applicant "that the six-month timeline was not something that the [consulate] would insist upon" and, as such, "the [consulate] cannot now rely on the six-month time limit in the [*ESA*] to have the complaint not proceed".

14. On appeal, and separate from the timeliness of the complaint, the consulate argued that the Tribunal did not have any jurisdiction over the parties' employment relationship because "it has immunity from the jurisdiction of any court in Canada under section 3 of the *State Immunity Act*" (appeal decision, para. 13). The member on appeal refused to address this constitutional issue because the complaint was, in any event, properly dismissed as being untimely. The member concluded that there was no lawful basis to interfere with the delegate's discretionary decision to refuse to accept and adjudicate the applicant's complaint.

THE APPLICATION FOR RECONSIDERATION

15. Counsel for the applicant submits that the appeal decision should be varied or cancelled and referred back because the member on appeal erred in law and, additionally, breached the principles of natural justice. I note that the original appeal was confined to the "error of law" ground of appeal. Fundamentally, however, the applicant's challenge to the appeal decision is predicated on the assertion that the delegate, in exercising her discretion to refuse to accept and adjudicate the complaint, failed to separately consider *all* of the relevant statutory purposes set out in section 2 and, to that extent, her reasons were deficient.

16. Further, the applicant's counsel says that the member breached the principles of natural justice when she refused to address the constitutional question raised by the consulate. Counsel submits that this issue should have been addressed because it "has important consequences for all employees who work under

an organization, or consulate such as the case at hand, which claim they are immune from the minimum employment standards in British Columbia".

FINDINGS AND ANALYSIS

17. The Supreme Court of Canada has clearly stated that a reviewing court or tribunal must not interfere with a discretionary decision by a statutory authority "merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility" (*Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 S.C.R. 2 at p. 7). So long as "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" (*Maple Lodge* at pp. 7-8).

18. The exercise of a statutory discretion will only be set aside, as described in the appeal decision, in "exceptional and very limited circumstances". I am unable to conclude that the delegate made any error of law or principle in refusing to accept the applicant's unpaid wage complaint.

19. While the delegate did not specifically address each and every section 2 purpose underlying the *ESA* in deciding not to accept and adjudicate the applicant's complaint, I am not persuaded that she was, in this instance, obliged to do so.

20. There is nothing in the material before me to show that the applicant was unaware of the 6-month limitation period. He does not assert any lack of knowledge. The delegate sought the applicant's explanation for having failed to file a timely complaint. The applicant's explanation was that he assumed his dispute would be resolved without having to file a complaint and, that being the case, he gave the consulate a reasonable time to address his unpaid overtime claim. Critically, however, the consulate never advised the applicant that his claim would be resolved in his favour, it never requested the applicant to refrain from filing a complaint, and it never purported to "waive" the 6-month limitation period.

21. In my view, the doctrine of promissory estoppel, even assuming it applies in the context of a statutory wage recovery scheme such as that set out in the *ESA*, has no application here. As in *Maracle v. Travellers Indemnity Co. of Canada*, [1991] 2 S.C.R. 50, the consulate never formally acknowledged its liability to the applicant nor did it purport to waive the application of the 6-month limitation period. And with respect to the latter matter, I am not persuaded that an employer has the legal right to waive the limitation period. The 6-month limitation period is a mandatory statutory requirement and only the Director has the discretion to relax its strict application.

22. While the delegate focused her reasons on the section 2(d) "fair and efficient dispute resolution procedures" purpose, it must be remembered that her analysis flowed from the applicant's stated reason for failing to file a timely complaint – he refrained from filing, despite apparently being aware of the 6-month limitation period, because he expected that his complaint would be resolved by mutual agreement and thus there would no need to file a complaint.

23. As is the case with the other statutory purposes, if a person otherwise has a legitimate unpaid wage claim, they will always be denied the benefits of the *ESA* if the individual fails to file a timely complaint (assuming no extension of the complaint filing period). Simply having a presumptively valid claim is not a legitimate

reason for failing to file a timely complaint. If that were the case, the time limit, in many cases, would be rendered meaningless. Similarly, the complaint period should not be ignored merely because there may be, as is asserted by the applicant's counsel in this case, a power imbalance between the employer and the employee – such an imbalance characterizes many employment relationships. To a large degree, the *ESA*'s complaint procedure is designed to ameliorate a power imbalance since a person can file a complaint (confidentially in some cases) and leave it to the Employment Standards Branch to investigate and adjudicate the complaint. The applicant was not facing, so far as I can determine, any sort of impediment that prevented him from filing a timely complaint – he seemingly deliberately chose not to file a complaint within the 6-month time limit because he expected that his claim would be settled through direct negotiations with the consulate.

24. As noted above, I do not read the communications from the consulate as constituting a request to the applicant to refrain from filing a complaint and/or an acknowledgement of liability. The consulate's various responses to the applicant went no further than simply advising that his claim had been received and was under review. Further, if the applicant had filed a timely complaint, that action would not have prevented the parties from continuing to work toward a resolution of the matter.

25. I agree with the member on appeal that if the delegate's discretionary decision to refuse to accept and adjudicate the applicant's complaint stands, it would not be appropriate to delve into the constitutional question raised by the consulate.

26. To the extent that the applicant has a *contractual* (to be contrasted with a purely statutory) claim for unpaid overtime pay, he may be able to pursue his claim in the civil courts or through the Civil Resolution Tribunal (see *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182). I pass no judgment on the merits of such a possible course of action. However, insofar as the *ESA* is concerned, the applicant's complaint was clearly untimely, and I am unable to conclude that the delegate improperly exercised her discretion to refuse to accept and adjudicate the complaint.

27. Since I am not persuaded, even on a presumptive basis, that the delegate erred in law, fact, or principle in refusing the proceed with the applicant's complaint, this application does not pass the first stage of the *Milan Holdings* test (see BC EST # D313/98). Accordingly, it must be dismissed.

ORDER

28. This application to have the appeal decision reconsidered is refused. Pursuant to section 116(1)(b) of the ESA, the appeal decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal