Citation: Xiang Li (Re)
2019 BCEST 77

An Application for Reconsideration

- by -

Xiang Li
(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.: 2019/80

DATE OF DECISION: August 7, 2019

DECISION

SUBMISSIONS

Xiang Li — on his own behalf

OVERVIEW

1. Xiang Li (the "applicant") applies for reconsideration of 2019 BCEST 50 (the "Appeal Decision") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). The central issue raised by this application concerns the section 74(3) six-month time limit for filing a complaint. The applicant failed to file a timely complaint and, accordingly, Tara MacCarron, a delegate of the Director of Employment Standards (the "delegate"), refused to proceed to adjudicate the complaint on its merits. This decision was taken after the delegate considered the applicant's explanation for failing to file his complaint within the statutory time limit.

2. The applicant appealed the delegate's decision and the Tribunal dismissed the appeal as having no reasonable prospect of succeeding. The applicant now applies for reconsideration of the Appeal Decision.

3. In my view, this application is not meritorious and, accordingly, must be dismissed because it does not pass the first stage of the *Milan Holdings* test (see BC EST # D313/98). Simply put, it does not raise, even on a presumptive basis, any argument that calls into question the correctness of the Appeal Decision.

THE STATUTORY FRAMEWORK

4. The *ESA* establishes a complaint-based unpaid wage recovery scheme. Pursuant to section 74(3) 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.

5. 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 six-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.

ISSUE

6. The principal issue before the Tribunal Member on appeal was whether the delegate improperly exercised her discretion in refusing to accept, review and adjudicate the applicant's complaint on its merits. The issue before me is whether the Appeal Decision should be cancelled or varied.

PRIOR PROCEEDINGS

7. The salient facts, as set out in the delegate's "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination on February 21, 2019, are not in dispute. The applicant worked as a car cleaner for an automotive sales, rental and repair business from April 9 to May 19, 2018 (he quit his employment on this latter date). Thus, May 19, 2018 was the "last day of employment" for purposes of calculating the section 74(3) six-month time limit. The applicant actually filed his complaint on December 11, 2018, about three weeks after the statutory complaint period expired. In his complaint, the applicant sought to recover a $90 wage deduction and he also claimed $81.15 in unpaid vacation pay.

8. Since the complaint was on its face time-barred, on December 18, 2018, a delegate of the Director of Employment Standards (not the same delegate who issued the Determination), wrote the applicant and asked him to provide, in writing, "further information as to why you failed to file your complaint within the six month time limit". The applicant provided his explanation by way of a letter dated December 31, 2018, and received by the Employment Standards Branch on January 7, 2019.

9. In his December 31 letter, the applicant acknowledged that he *was* aware of the six-month limit, having viewed the Employment Standards Branch's website, and he assumed (but never took any steps to confirm) that the six-month limit ran from the date when he first became aware of a possible contravention of the *ESA* (which he maintained was on June 16, 2018). The applicant did not provide any explanation in his December 31 letter as to why he waited until December 11, 2018, to formally file his complaint (i.e., nearly six months after he said he first learned about a possible *ESA* contravention).

10. I note that the following notice is set out on the Employment Standards Branch's website under the tab "File a complaint":

> File your complaint within six months
>
> Complaints need to be filed within six months of **when the problem happened** (if you still work for the same employer) **OR** within six months **of when your employment ended.**
>
> (**boldface** in original text)

11. The delegate's reasons disclose that she considered the applicant's explanation for having failed to file a timely complaint and ultimately concluded that his explanation fell well short of constituting an "extraordinary circumstance" that justified ignoring the six-month time limit.

12. The applicant appealed the Determination, alleging that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*). As noted above, the appeal was summarily dismissed as having no reasonable prospect of succeeding.

13. With respect to the "natural justice" ground of appeal, the Tribunal held (at paras. 22 – 24):

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.

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.

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.

14. With respect to the "error of law" ground of appeal, the Tribunal held (at paras. 32 – 38):

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.

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.

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*.

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.

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*.
>
> 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.
>
> 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.

15. The Tribunal dismissed the appeal and confirmed the Determination.

THE APPLICATION FOR RECONSIDERTION

16. The applicant says that the Tribunal Member adjudicating the appeal "did not give any analyses about how he reached the conclusion that the Director fairly considered the Complainant's reasons for late filing". However, this assertion stands in marked contrast to the Member's detailed reasons, the key portions of which I have reproduced above. The Member considered the two statutory grounds alleged and explained why neither ground was meritorious.

17. The applicant continues to maintain that he was somehow misled about the specifics of the six-month time limit (more particularly, regarding when it commences to run) because of failings on the part of the Employment Standards Branch and the inadequacy of its website. However, the website, in my view, clearly explained when the time limit would commence (see above) and if the applicant harboured any confusion, he certainly could have contacted the Branch directly for clarification – something he concedes he did not do. Further, even if one accepts that the applicant did not learn about his former employer's alleged contravention until June 16, 2018, he has never adequately explained why he failed to file his complaint at any point prior to December 11, 2018 (when the complaint was actually filed). The applicant decries a situation where "all the blame" has been laid at his doorstep and he maintains that there has been some sort of "cover-up", "distortion" and unfair "finger-pointing" when, in fact, the real blame lies with the Branch because "it did not provide the information about when the six month limit starts". I conclude that none of these assertions are factually accurate.

18. There is no blame, no cover-up. The Branch and the delegate have proceeded in a principled and transparent manner and the delegate simply determined that there was no compelling reason to set aside the six-month time limit the Legislature has seen fit to incorporate into the *ESA*.

19. Finally, and without providing any probative evidence, the applicant maintains that the Branch "has had favoritism for all employers", that its "mission is there to protect employers, not employees" and that it "has a tendency to protect employers at all costs". In essence, this is an allegation of wholesale systemic bias in favour of employers on the part of the Employment Standards Branch and its officers. I will only say that I do not believe that to be the case but, in any event, there is absolutely no evidence in the record before me to support this allegation.

20. The applicant says he "has no confidence that his application for reconsideration will be fairly treated and decided" and I expect these reasons will be viewed by the applicant as justifying his lack of confidence. Nevertheless, I must decide this application based on the record before me and that record, in my view, discloses no legal or other error in the Appeal Decision. The applicant may have a right to pursue redress through the Civil Resolution Tribunal (a matter about which I express no opinion), but the delegate fairly exercised her discretion to refuse to proceed with the applicant's *ESA* complaint and the Tribunal rightly refused to set aside that discretionary decision.

ORDER

21. This application for reconsideration is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal