

Citation: Leonard Haughian (Re)
2019 BCEST 91

An appeal

- by -

Leonard Haughian
(the “Complainant”)

- 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: Robert E. Groves

FILE NO.: 2019/68

DATE OF DECISION: August 27, 2019

DECISION

SUBMISSIONS

Leonard Haughian on his own behalf

OVERVIEW

1. This is an appeal brought by Leonard Haughian (the “Complainant”) pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”).
2. The Complainant appeals a determination issued on May 6, 2019 (the “Determination”) by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”).
3. The Complainant had filed a complaint with the Director alleging that his former employer, Autocanada Inc. and Autocanada MR Motors GP Inc. and MR Motors LP carrying on business as Maple Ridge Chrysler (the “Employer”), had contravened the *ESA* by making unauthorized deductions from the Complainant’s wages.
4. The Delegate determined that she should not proceed with the complaint because the Complainant had delivered it to the Employment Standards Branch years beyond the time limit specified in subsection 74(3) of the *ESA*.
5. The Complainant’s appeal relies on the ground set out in subsection 112(1)(b) of the *ESA*. He argues that the Delegate failed to observe the principles of natural justice when making the Determination. He asks that the complaint be referred back to the Director.
6. Subsection 114(1) of the *ESA* stipulates that the Tribunal may dismiss all or part of an appeal, at any time after an appeal is filed and without a hearing, if any of a listed number of criteria is satisfied. In this instance, I am persuaded that it is appropriate to consider the criterion established in subsection 114(1)(f). That subsection permits the Tribunal to dismiss an appeal if it determines there is no reasonable prospect that the appeal will succeed.

FACTS

7. The Complainant was employed in the Employer’s sales department. He was hired, initially, in 1998. His employment ended in January 2015 at a time when the Complainant held the position of Sales Manager.
8. The circumstances under which the Complainant’s employment came to an end were disputed. The Complainant asserted that he was dismissed. The Employer argued that he had resigned.
9. A principal source of the dispute between the Complainant and the Employer was the latter’s assertion that the Complainant had loaned one of the Employer’s demonstrator vehicles to a customer, without authority. The vehicle had then been involved in an accident. The Complainant asserted that the Employer improperly made deductions from his wages in order to obtain reimbursement for the damages.

10. The termination of the Complainant's employment resulted in litigation between the parties. The record discloses that court proceedings were commenced in the Supreme Court of British Columbia and in the Provincial Court (Small Claims Division).
11. The Small Claims Division documentation reveals that the Complainant's legal process in that forum contained a plea for recovery of unauthorized deductions in addition to claims relating to defamation and an alleged forgery of his signature on a lease document. However, the Complainant's claims in that court were dismissed at a Settlement Conference held in May 2017. The court dismissed the defamation claim for lack of jurisdiction. The Settlement Conference notes state that the forgery claim had been adjudicated in the Supreme Court proceeding, and so it was *res judicata*. There was no mention in the Conference notes of the claim for unauthorized deductions.
12. The Delegate's Reasons for the Determination (the "Reasons") state, correctly, that subsection 74(3) of the *ESA* requires a complainant whose employment has been terminated to deliver a complaint within six months after the last date of employment. Since the Complainant delivered his complaint to the Branch on January 14, 2019, it was obvious that the complaint had been delivered roughly three and a half years late.
13. The record contains notes that another delegate of the Director raised the timeliness issue with the Complainant in a telephone conversation. The Complainant told the delegate that it took him years to have his case heard in court and that it was a "judge" who told him to file a complaint with the Branch. The Delegate's Reasons state that the Complainant also submitted a letter advising that he had had two lawyers assisting him, and neither had informed him of "Labour Standards".
14. Since there was no question that the Complainant had delivered his complaint late, the Delegate concerned herself with the question whether she should exercise her discretion to refuse to investigate the complaint pursuant to subsection 76(3)(a) of the *ESA*, which reads:

76. (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit in section 74(3) ...
15. The Delegate recognized, properly, that the use of the word "may" in subsection 76(3) means that she was required to exercise a discretion when deciding whether any further action should be taken regarding the complaint given that it had been filed outside the stipulated time (see *Karbalaieali v. British Columbia (Employment Standards)* 2007 BCCA 553).
16. The Delegate elected to exercise her discretion against the Complainant and ordered that the investigation of the complaint be stopped. Her rationale is captured in the following excerpts from her Reasons:

Section 2(d) of the Act identifies that one of the purposes of the Act is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act". One method of attaining this purpose is to require complaints to be submitted to the Branch within the six month time limit. This provides all parties, including employers, complainants and the Branch, with a consistent and reasonable period of time to deal with complaints. As

section 74 is a mandatory provision in that it states a complaint **must** be filed within six months after the last day of employment, I will only exercise my discretion to proceed in exceptional circumstances where there are compelling reasons to do so. [emphasis included]

...

While it is unfortunate Mr. Haughian was unaware of the Employment Standards Branch and/or its complaints process until four years after the end of his employment, and that he was not made aware of it either by lawyers or by the court until recently, I do not accept that this is the type of exceptional circumstance that would warrant the Director exercising his discretion to accept a claim outside the mandatory statutory time limit created by section 74 of the Act. A lack of awareness of the Employment Standards Branch complaint process is not a compelling reason why Mr. Haughian could not have filed a complaint with the Director within the six month timeframe.

ISSUE

17. Should the appeal be permitted to proceed, or should the Tribunal exercise its discretion pursuant to subsection 114(1)(f) and dismiss the appeal because there is no reasonable prospect that it will succeed?

DISCUSSION

18. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:
- 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.
19. Subsection 115(1) of the *ESA* should also be noted. It says this:
- 115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.
20. As I have stated, the Complainant grounds his appeal on the assertion that the Delegate failed to observe the principles of natural justice.
21. A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Director was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.

22. In this case, a representative of the Director communicated with the Complainant regarding the timeliness issue, informed the Complainant of the provision in the *ESA* setting out the time limit, and asked the Complainant to provide a substantive explanation for the delay in delivering the complaint. The Complainant delivered a detailed response. The reasons the Complainant gave for the late delivery of his complaint are set out above. They are the same reasons the Complainant has given in his submission supporting his appeal.
23. In these circumstances, it cannot be said that the Complainant was not informed of the concern he had to address or that he was in any way denied an opportunity to make an argument in support of his position regarding it.
24. There is, in addition, no evidence that the Delegate ignored the Complainant's representations or acted in a way that suggests the existence of a bias.
25. In fact, the Complainant provides no submission that could support a finding that the process leading to the Determination was procedurally flawed. It follows that I cannot accept the Complainant's assertion there was a failure to observe the principles of natural justice.
26. In my view, the Complainant's identification of subsection 112(1)(b) of the *ESA* as the ground for his appeal is misconceived. A review of the substance of his claim establishes that the kernel of his dispute with the Determination is that the Delegate erred in law when she decided that she should exercise her subsection 76(3)(a) discretion by ordering that the investigation of his complaint be stopped.
27. The fact that the Complainant may have failed to describe the ground of his appeal accurately is not the end of the matter, however. In order to do justice to the parties to an appeal, most of whom will be unrepresented by legal counsel, it is the practice of the Tribunal to seek to discern the true basis for a challenge to a determination, regardless of the particular box an appellant has checked off on an Appeal Form (see *Triple S Transmission Inc.* BC EST # D141/03).
28. I turn, then, to the question whether the Delegate erred in law in deciding that the investigation of the Complainant's complaint should be stopped.
29. The criteria the Tribunal will consider when deciding whether it is appropriate to interfere with an exercise of the discretion under subsection 76(3)(a) were set out in *Jody L. Goudreau et al.* BC EST # D066/98 as follows:

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.

30. The Supreme Court of Canada has also provided guidance on this question. In *Maple Lodge Farms Limited v. Government of Canada* [1992] 2 SCR 2, the court said this:

It is, as well, 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. 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.

31. Here, there is no evidence of bad faith on the part of the Delegate. As I have indicated, there is also no evidence of a failure to observe the principles of natural justice.

32. I do not discern that the Delegate relied on irrelevant considerations in the exercise of the discretion. On the contrary, she identified a key reason for the existence of the time limit for filing complaints. It is contained in section 2 of the *ESA*, which sets out the purposes the legislature has stated should be considered when interpreting the provisions of the statute. The relevant subsection is 2(d) which, as referred to above in the excerpt from the Delegate's Reasons, states that it is a purpose of the legislation "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act."

33. Absent very exceptional circumstances by way of explanation, the burden of proof which rests on the person who delivers a complaint late, a delay of over three years cannot normally be expected to result in the type of fair and efficient procedure the statute contemplates.

34. In this instance, the reasons the Complainant offers as exceptional circumstances are that he was embroiled in other litigation relating to his employment and he was unaware that the *ESA* might provide a mechanism to vindicate his assertion that the Employer had made unauthorized deductions from his wages.

35. In my opinion, it was entirely reasonable for the Delegate to decide that these explanations were insufficient to warrant an exercise of the discretion in a way that would have permitted the investigation of the complaint to continue. Put simply, ignorance of the provisions of the *ESA*, standing alone, is not a reason that is capable of breathing life into a complaint that has been filed out of time (see *Koh*, BC EST # D008/12).

36. The fact that the Complainant states he had the assistance of two lawyers and neither informed him regarding the provisions of the *ESA* is also of no moment. If there was a failure of communication, it is a matter the Complainant must take up with his legal counsel, and which must be addressed elsewhere. In my view, it was not unreasonable for the Delegate to have decided that it did not constitute the type of circumstance that must warrant the continuation of the investigation. In the end, it was for the Complainant, and no one else, to make himself aware of the relevant provisions of the *ESA*.

ORDER

37. Pursuant to subsection 114(1)(f) of the *ESA*, I order that the appeal be and is hereby dismissed as there is no reasonable prospect that it will succeed.

Robert E. Groves
Member
Employment Standards Tribunal