

An appeal

- by -

Gordie Crowe
(the “Appellant”)

- 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: James F. Maxwell

FILE NO.: 2019/81

DATE OF DECISION: September 4, 2019

DECISION

SUBMISSIONS

Gordie Crowe on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Gordie Crowe (the “Appellant”) has filed an appeal of a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Director”) on June 17, 2019.
2. Prior to this, the Appellant had submitted a complaint to the Employment Standards Branch pursuant to section 74 of the *ESA* alleging that his former employer, Castle Fuels (2008) Inc. (the “Employer”) had failed to provide the Appellant with documents that would enable him to claim meal expenses against his taxes.
3. In the Determination that the Director issued in response to the Appellant’s complaint, the Director held that the Appellant had failed to submit his complaint in a timely way and had thereafter failed to provide an adequate explanation for the delay in filing the complaint. The Director exercised a discretion to cease investigating the complaint, with the result that no further action was to be taken regarding the complaint.
4. The grounds upon which the Appellant appeals the Determination are that the Director allegedly failed to observe the principles of natural justice in making the Determination, and that evidence has allegedly become available that was not available at the time the Determination was being made. The Appellant requests that the within matter be referred back to the Director.
5. I have examined the Determination, the Delegate’s Reasons in support of it (the “Reasons”), the Appellant’s Appeal Form, his submission in support of his appeal, and the record that the Director provided to the Tribunal pursuant to subsection 112(5) of the *ESA* (the “Record”). Copies of the material in the Record were delivered to the parties, and no one has objected that the Record is incomplete.
6. Subsection 114(1) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal, at any time after an appeal is filed and without a hearing, if certain criteria are satisfied. One of those criteria is that there is no reasonable prospect that an appeal will succeed. In the present case, I am satisfied that there is no reasonable prospect that the within appeal will succeed. For that reason, I dismiss this appeal. My reasons follow.

ISSUES

7. The issue to be determined in this matter is whether there is a reasonable prospect that the within appeal would succeed.

FACTS

8. The Appellant commenced work for the Employer in May 2018, and his employment ended August 30, 2018, when the Appellant resigned.
9. The Appellant filed a complaint against the Employer on May 2, 2019. In his complaint, the Appellant contended that the Employer had failed to supply him with certain records that he required to claim meal expenses against his income taxes.
10. On June 4, 2019, the Director responded to the Appellant's complaint, pointing out that the complaint had been filed beyond the statutory deadline for doing so, and requesting that the Appellant provide reasons for filing the complaint late.
11. In response to the Director's communication, the Appellant responded with an e-mail, providing copies of e-mails and texts evidencing a series of discussions pursuant to which the Appellant had requested that the Employer supply the records. The Appellant did not provide any explanation as to the reasons that he had not filed his complaint within the statutory period. In fact, the e-mails and texts supplied by the Appellant illustrate that the Appellant had not even requested the records from the Employer within the statutory period.
12. On June 17, 2019, the Director issued a Determination. In the Determination, the Director held that the Appellant's complaint had not been filed within the six month period stipulated by section 74(3) of the *ESA*. In the absence of a reason explaining the failure to file the complaint on time, the Director exercised a discretion to cease investigating the complaint.
13. On July 3, 2019, the Appellant filed the within appeal with the Tribunal.

ANALYSIS

14. Section 112(1) of the *ESA* provides that a person may appeal a determination on one or more of the following grounds:
 - the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
15. The burden is on an Appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.
16. In the present case, the Appellant contends that the Director failed to observe the principles of natural justice in making the Determination, and contends that new evidence has come to light that was not available at the time the Determination was made, and asks that for these reasons the matter be referred back to the Director.

17. Section 114 of the *ESA* provides that an appeal may be dismissed summarily in certain circumstances, as follows:
- 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 the appeal if the tribunal determines that any of the following apply:
- ...
- (f) there is no reasonable prospect that the appeal will succeed; ...
18. For the purposes of this appeal, I will examine whether there is a reasonable prospect that this appeal would succeed on the basis of the arguments and allegations advanced by the Appellant.
- Did the Director fail to observe the principles of natural justice in making the Determination?**
19. In his appeal, the Appellant alleged that the Director failed to observe the principles of natural justice in making the Determination.
20. The Appellant tendered a brief submission with his appeal. In that submission, the Appellant stated that at no time had he anticipated that the Employer would decline to provide the records that he had requested. The Appellant provided no specifics in support of his allegation that the Director had breached the principles of natural justice in making the Determination.
21. The onus is on the Appellant to show that the Director breached the principles of natural justice in making the Determination.
22. I do not find anything in the Appellant's submissions or in the Director's record that supports the argument that Director failed to apply the principles of natural justice in reaching the Determination. I find that the Director began an investigation of the Appellant's complaint and afforded an opportunity to the Appellant to explain why he had failed to file the complaint within the statutory time limit. The Appellant failed to provide any explanation for failing to file the complaint on time.
23. In *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, the British Columbia Court of Appeal stated (at para. 11) that "...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."
24. The Appellant has presented no convincing evidence in support of his allegations that the Director failed to apply the principles of natural justice. On the contrary, I am satisfied that the Director reviewed the complaint, began an investigation, and afforded the Appellant an opportunity to provide a compelling reason for the delay in filing the complaint. The Appellant supplied no reason for the delay in filing the complaint. I am satisfied that the Director properly exercised his discretion and discontinued the investigation.

Has new evidence come to light that was not available at the time the Determination was made?

25. The Appellant contended that new evidence has come to light that was not available at the time the Determination was made. However, the Appellant has provided no new evidence, or any explanation as to what that alleged new evidence might be. The onus is upon the Appellant to satisfy the Tribunal that there is new evidence that was not hitherto available, and the Appellant has not met that onus.

CONCLUSION

26. For the foregoing reasons, I conclude that there is no reasonable prospect that the within appeal would succeed.

ORDER

27. I dismiss this appeal, pursuant to section 114(1)(f) of the *ESA*. Pursuant to section 115 of the *ESA*, I confirm the Determination.

James F. Maxwell
Member
Employment Standards Tribunal