

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Sean Wittich  
("Mr. Wittich")

- 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:** David B. Stevenson

**FILE No.:** 2020/121

**DATE OF DECISION:** November 17, 2020

## DECISION

### SUBMISSIONS

Sean Wittich on his own behalf

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Sean Wittich (“Mr. Wittich”) of a Determination issued by Ali Al-Samak, a delegate of the Director of Employment Standards (the “Director”), on August 7, 2020.
2. The Determination found Mr. Wittich had failed to file his complaint within the time limit set out in section 74 of the *ESA* and, exercising the discretion allowed the Director in section 76 of the *ESA*, decided not to proceed with the complaint.
3. Mr. Wittich has appealed the Determination on the ground of evidence becoming available that was not available when the Determination was being made.
4. In correspondence dated August 27, 2020, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Wittich and the respondent employer. Both have been provided with 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 complete.
6. I have decided that this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for Determination, the appeal, the written submission filed with the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
  - 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 any appeal if the tribunal determines that any of the following apply:
    - (a) the appeal is not within the jurisdiction of the tribunal;
    - (b) the appeal was not filed within the applicable time limit;
    - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
    - (d) the appeal was made in bad faith or filed for an improper purpose or motive;
    - (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of section 112(2) have not been met.

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the respondent employer will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

### **ISSUE**

8. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

### **ARGUMENT**

9. Mr. Wittich submits that he may not have provided the full story explaining the delay in filing his complaint under the *ESA* and seeks in this appeal to provide a fuller explanation of his claim and the circumstances that caused the delay, hoping it will be sufficiently supportive and compelling to overlook the delay and allow an investigation of his complaint to go forward.
10. Mr. Wittich has submitted documents with his appeal which he has asked the Tribunal to review. This material comprises some communications between Mr. Wittich and an employment lawyer, between he and the respondent employer concerning matters relating to his wage claim and some documents supporting his claim for commissions, identified in these documents as profit sharing.

### **THE FACTS**

11. Mr. Wittich was employed as an operations manager by PLAN Contracting Ltd. (“the respondent employer”) from January 1, 2010, until his last day of employment, which was found by the Director to be October 7, 2019.
12. On May 20, 2020, Mr. Wittich filed a complaint under the *ESA* alleging the respondent employer had contravened the *ESA* by failing to pay annual vacation pay and commissions.
13. Based on the information provided by Mr. Wittich and following an initial review, the Director concluded the complaint appeared to have been filed outside of the time limit set out in section 74(3) of the *ESA*, which reads:
- 74 (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within six months after the last day of employment.

14. On July 30, 2020, the Director communicated with Mr. Wittich requesting further information for his apparent failure to meet the statutory time limit. Mr. Wittich replied that he had consulted with three lawyers about taking up his claims against the respondent employer, but all advised Mr. Wittich that it

would not be economically feasible for him to pursue his claims through the courts. Mr. Wittich said additional delay was caused by multiple T4s that were issued by the respondent employer after a substantial delay. He said he was not aware of the provisions of the *ESA* or that he might have a claim for wages under the *ESA* until he contacted the Employment Standards Branch and was told he might have a wage claim. He filed a complaint the day following receipt of this information.

15. The Director considered the information provided by Mr. Wittich and, based on that information and the date of filing of the complaint, found Mr. Wittich had not filed his complaint with the time period allowed in the *ESA* and, for the reasons provided in the Determination, decided to exercise the discretion found in section 76(3) of the *ESA* to refuse to investigate the complaint.

### ANALYSIS

16. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 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.
17. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
18. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the Appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
19. Mr. Wittich has grounded this appeal in evidence becoming available that was not available when the Determination was being made.
20. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations. Including, whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

21. I find Mr. Wittich has not made out this ground of appeal. I make this finding for the following reasons.
22. First, the evidence is not “new”; it was available when the Director was considering the matter of delay in filing. Second, the information and material provided does not add to the information given by Mr. Wittich to the Director when asked to explain the delay. Third, it is not “probative”, in the sense that it is not capable of resulting in a different conclusion than what is found in the Determination.
23. I shall address this appeal without reference or consideration to the additional material submitted by Mr. Wittich.
24. The statutory framework under which this appeal arises is that complaints to the Branch must be filed within the applicable 6-month time period, which in the circumstances of this case was 6 months from Mr. Wittich’s last day of employment: see section 74(3); late complaints will only be accepted as a matter of the Director’s discretion. That framework is summarized in *Karbalaeeiali v. British Columbia (Employment Standards)* 2007 BCCA 533, at paras. 11 – 12, as follows:
- [11] While the Tribunal rightly stated that the Act makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). 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). 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. In other words, s. 74 does not, as the Tribunal said, preclude the Director’s discretion to accept a complaint. (original italics)
- [12] The question before the Tribunal was not whether the employee’s complaint was statute-barred but whether the Director’s delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate’s discretion. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised.
25. There is no issue that Mr. Wittich’s complaint was filed outside the time period allowed in section 74(3) of the *ESA*.
26. The Director satisfied the obligations implicit in the above excerpts from *Karbalaeeiali, supra*; the Director notified Mr. Wittich 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.
27. The thrust of Mr. Wittich’s argument in this appeal is that the discretionary powers exercised by the Director in section 76(3) of the *ESA*, ought to be reviewed and either varied or set aside by the Tribunal.

28. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director may be reviewed and varied or set aside on appeal.
29. Decisions of the Tribunal have demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal's decision in *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98):
- 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 matter 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 Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982]2 SCR, where the Court made the following comments about the exercise of a statutory discretion:
- It is, as well, a clearly established rule that 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. When 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. 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. The statutory time period for filing a complaint is mandatory and a decision to proceed will only arise in exceptional circumstances where there are compelling reasons to do so.
32. Part of the burden on Mr. Wittich in this appeal is to establish the Director acted "unreasonably" in the sense described above. Neither of the above matters were irrelevant to the discretionary decision which the Director was required to make.
33. All of the reasons put forward by Mr. Wittich 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*.

34. As indicated above, the additional information and material submitted with this appeal do not substantively add to the information Mr. Wittich provided when asked by the Director for an explanation. It provides more detail on his claims and the delay but does not alter the basis on which the Director exercised discretion.
35. I find the Director's exercise of statutory discretion in section 76(3)(a) to refuse to investigate the complaints 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*.
36. 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.
37. 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 reason justifying the late filing and did not accept the explanation provided by Mr. Wittich 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.
38. As stated above, short of showing the Director acted arbitrarily, without authority or not in good faith, the Tribunal will not interfere with the exercise of such discretion: *Takarabe and others*, BC EST # D160/98. No basis for interfering with the Director's discretion in this matter has been shown in this case.
39. In sum, there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

## **ORDER**

40. Pursuant to section 115 of the *ESA*, I order the Determination dated August 7, 2020, be confirmed

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**