

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Li Zheng
(the “Complainant”)

- 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: Maia Tsurumi

FILE NO.: 2020/113

DATE OF DECISION: December 08, 2020

DECISION

SUBMISSIONS

Li Zheng	on her own behalf
Melanie Zabel	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Li Zheng (the “Complainant”) has filed an appeal of a determination (the “Determination”) issued by Ali Al-Samak, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on June 25, 2020. In the Determination, the Delegate determined that the Complainant did not file her complaint (the “Complaint”) within the time limit specified in section 74 of the *ESA* and under sub-section 76(3), the Delegate declined to exercise the Director’s discretion to accept the late-filed Complaint.
2. Li Zheng appeals the Determination on the grounds that the Delegate failed to observe principles of natural justice in making the Determination.
3. For the reasons set out below, I grant the appeal pursuant to sub-section 115(1) of the *ESA* and remit the matter back to the Director for reconsideration.
4. My decision is based on the submissions made by the Complainant in her Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, the Reasons for the Determination, submissions from the Branch (the “Branch Submissions”) and the Complainant’s response submissions.

ISSUE

5. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal should be allowed or dismissed pursuant to sub-section 115(1) of the *ESA*.

THE DETERMINATION

Background

6. The Complainant filed her Complaint on February 27, 2020. The Delegate issued the Determination on June 25, 2020.
7. Yurman Retail Canada Corp. (“Yurman”) operates a jewelry store. The Complainant worked for Yurman until July 19, 2018.

Issues Before the Delegate

8. The issues before the Delegate were whether the Complaint was filed after the six-month deadline for filing a complaint under sub-section 74(3), and, if the Complaint was late-filed, whether the Delegate should exercise their discretion to refuse to investigate the Complaint under sub-section 76(3) of the *ESA*.

Evidence Relied on by the Delegate

9. The Delegate reviewed the Complaint. Regarding the late filing, it said that:
- a. the Complainant did not know there was a six-month time limit;
 - b. she had a bad car accident in December 2018 and developed a concussion and post-traumatic stress disorder (“PTSD”); and
 - c. she was still suffering from these medical issues.
10. A letter from a doctor, dated February 4, 2019, describing the Complainant’s medical conditions as a result of the accident was attached to the Complaint. This letter stated she was suffering from post-traumatic headache, PTSD, anxiety, depression and soft tissue pains in her neck.
11. The Delegate then spoke with the Complainant by telephone. During that call, the Complainant said as follows:
- a. her last day of employment was July 19, 2018;
 - b. she was in a car accident in December 2018 and was the victim of a crime;
 - c. she suffered PTSD and is still suffering from it; and
 - d. she did not know about the filing deadline and because of her mental health issues resulting from the crime and the car accident, she was unable to file the Complaint within the six-month deadline.
12. During the telephone call, the Delegate told the Complainant that she might be out of time in filing her Complaint because she had not provided a compelling reason for the late filing. The Complainant was very upset and hung-up on the Delegate.
13. The Delegate followed-up the telephone call with a letter to the Complainant. That letter stated, in part, that:
- a. the Complainant’s last day of work was July 19, 2018, therefore, the time for filing her Complaint ended six months later on December 20, 2018;
 - b. the *ESA* provided that the Director (or delegate) may refuse to proceed with a complaint if it was not made within the time limit;
 - c. extensions to the filing deadline were not granted as a matter of course;
 - d. before the Delegate could proceed with investigating the merits of the Complaint, the Delegate had to decide whether to extend the time period for filing;

- e. in exercising their discretion, the Delegate had to consider the purposes of the *ESA*, including ensuring employees receive at least basic standards of compensation and conditions of employment, promoting the fair treatment of employers and employees; and providing fair and efficient procedures for resolving disputes;
- f. the six-month time limit in the *ESA* for filing complaints helped to achieve the last two listed purposes; and
- g. the Complainant became frustrated when she spoke with the Delegate by phone and did not want to continue answering questions, so to assist the Delegate in making a decision, the Delegate needed further information as to why the Complaint was filed outside the six month time limit: the reason for the late filing with any supporting documents and the reason for not filing between July 19 and December 20, 2018.

14. The Complainant did not respond to the Delegate.

The Delegate's Decision

15. The Delegate found the Complaint was filed outside the six-month time limit as the Complainant confirmed her last day of employment was July 19, 2018, but her Complaint was not filed until February 27, 2020.

16. The Delegate then considered whether to exercise their discretion to refuse to investigate the Complaint under sub-section 76(3) of the *ESA*. The Delegate found that there was a substantial delay in filing the Complaint and the Complainant had provided no compelling reason to continue the investigation. Therefore, the Delegate decided to exercise discretion to stop investigating the Complaint.

17. In arriving at the Determination, the Delegate reviewed sub-section 2(d) of the *ESA*, which identifies that one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*. The Delegate noted that one way to attain this purpose was to require submission of complaints within the six-month time limit. This gave all parties a consistent and reasonable period of time to deal with complaints.

18. The Delegate stated that as the time limit is mandatory, discretion to proceed is only exercised in exceptional circumstances where there were compelling reasons and the Complainant did not provide a sufficiently compelling reason. The Delegate said the reasons for late filing were that the Complainant did not know about the time limit and that she was in a car accident in December 2018, which caused her a concussion and PTSD from which she was not fully recovered. The Complainant did not provide a reason for not filing her Complaint between July 19, 2018 and December 2018.

19. The Delegate's decision is premised on the assumption that the deadline for filing the Complaint was December 20, 2018.

ARGUMENT

20. The Complainant submits that the Delegate failed to observe principles of natural justice because they did not consider the Complainant's multiple, serious medical disabilities caused by:

- a. a serious crime on the Complainant, whereby she lost most of her family's life savings in May 2018 and developed very serious health problems; and
- b. the Complainant's serious car accident in December 2018, which caused her a concussion, post-traumatic stress disorder, anxiety, depression and soft tissue injuries and reduced her capability to perform regular daily activities.

21. In response to the Complainant's appeal, the Branch Submissions say there was no breach of natural justice. The Delegate did consider this information. Reference to it is found in the Record and the Determination. The Complainant disagrees with the Delegate's conclusions, but that does not mean she was not provided with procedural fairness. Also, the Complainant was given an opportunity to provide the Delegate with more information about the timeliness of the Complaint.
22. In response to my question about why the Determination says the six-month deadline for filing was December 19, 2018, when the deadline was in fact January 19, 2019, the Branch Submissions say the Delegate is no longer with the Branch and the Director cannot explain why the Delegate said the deadline was December 19, 2018. The Branch Submissions agree that the deadline was January 19, 2019. However, the Branch Submissions submit that the Complaint was not filed until February 27, 2020, more than a year after the actual deadline for filing the Complaint had passed. Therefore, the Director argues that the Delegate's finding that the Complaint was filed out of time was factually correct and that none of the findings in the Determination would have been different had the Delegate not been mistaken about the deadline being December 19, 2019. The Director's position is that the Delegate made no overriding or palpable error in finding that the Complaint was not filed within the *ESA's* six-month timeframe and that the Delegate considered all the evidence provided by the Complainant and made no mistake in exercising their discretion to refuse to investigate the Complaint.

ANALYSIS

23. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on any 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.
24. I agree with the Director that there was no breach of natural justice. The Delegate gave the Complainant an opportunity to explain the delay in filing and considered the evidence she provided. However, my conclusion does not end the matter.
25. Although the Complainant said the Delegate breached principles of natural justice, a challenge to the Delegate's exercise of discretion under sub-section 76(3) of the *ESA* is in fact a claim that the Delegate has erred in law: see e.g. *Re: Mark Bridge*, BC EST # D091/07 (reconsideration denied in BC EST # RD044/09). In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined questions of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;
 2. a misapplication by the decision-maker of an applicable principle of general law;
 3. where a decision-maker acts without any evidence;
 4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or
 5. where the decision-maker is wrong in principle.
26. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.
27. In *Karbalaeeali v. British Columbia (Employment Standards)*, 2007 BCCA 553, the Court of Appeal held that the Director has a residual discretion to accept and review untimely complaints. The Director must accept and review all complaints and, insofar as a particular complaint may be out of time, he or she must consider whether the complaint should nonetheless be more thoroughly investigated or adjudicated.
28. When the Tribunal receives an appeal of the Director (or his delegate)'s exercise of discretion regarding sub-section 76(3), the Tribunal must determine whether the complaint should have been accepted and reviewed having regard for the factors it considers properly bears on the exercise of the delegate's discretion.
29. The threshold for overturning the Director's exercise of discretion is very high. The Tribunal will not interfere unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of his or her authority, there was a procedural irregularity, or the decision was unreasonable: *Jody L. Goudreau et.al.* (BC EST # D066/98. Unreasonable in this context means, "...a general description of the things that must not be done. For instance, a person entrusted with 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 is often said, to be acting unreasonably." Absent any of these considerations, the Director even has the right to be wrong: *Re: Ted N. Hunt*, BC EST # D089/11, para. 42.
30. As discussed by the Delegate, in deciding how to exercise his discretion, the Director considers whether the complainant has provided a compelling reason to excuse the delay in filing. What is compelling is determined in light of the purpose to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA* in sub-section 2(d). Consideration of whether there was a compelling reason for a delay in filing involves determining whether there was an intent to file within the statutory time limit: see e.g. *Re: Ted N. Hunt*, BC EST # D089/11, paras. 41 – 46. Also relevant in the decision is sub-section 2(b) (promoting fair treatment of employers and employees), which the Delegate in this appeal expressly referred to.
31. In exercising his discretion, the Director is not required to presume there may be relevant information that has not been included in the complaint: *Re: Jolly Binuhe*, BC EST # D081/14; *Re: Gregorgina Bahiwal*,

BC EST # D082/14. It is the primary responsibility of a would-be complainant to set out sufficient details to show the substantive basis for their complaint.

32. Here, the Complainant said she did not file on time because she did not know about the time limit and because of her health resulting from a car accident in December 2018. Misunderstanding the time limit or being unaware of it is not a compelling reason to accept the complaint: *Re: Zeljko Dragicevic*, BC EST # D132/15; *Fara Ghafari (Re)*, 2018 BCEST 79.
33. Regarding whether medical problems may meet the compelling reason requirement, the Tribunal has held that anxiety due to employment termination does not: *Re: Anna Maria Giannini*, BC EST # D061/17. However, I note in that case, there was no medical evidence provided. In this appeal, the Complainant provided a letter from a doctor, describing her health issues from her car accident. The Delegate appears to have accepted this letter as evidence.
34. Despite the above, I find the Delegate's exercise of discretion was an error of law. I agree with the Director that the Delegate correctly and reasonably found the Complaint was not filed in time. However, I disagree with the Director about how the Delegate exercised their discretion.
35. The Delegate's exercise of discretion was unreasonable because it was based on irrelevant considerations and failed to consider relevant considerations.
36. The Determination was based on the Delegate's assumption that the deadline was December 19, 2018. The emphasis the Delegate puts on the filing deadline of December 19, 2018, indicates that they thought the Complainant's accident occurred after the deadline and therefore should not have prevented her from being able to file her Complaint on time. However, this was not the correct deadline for filing. The deadline was in fact January 19, 2019. Therefore, the Delegate's decision was based on an irrelevant consideration—the wrong filing date—which in turn appears to have led the Delegate to fail to consider the car accident as a relevant consideration in deciding whether or not there was a compelling reason for the Complainant's late filing.
37. Therefore, I cancel the Determination and remit the Complaint back to the Director of Employment Standards to exercise his discretion under sub-section 76(3) on whether or not to accept the late-filed Complaint.

ORDER

38. Pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated June 25, 2020, cancelled and direct the matter back to the Director for reconsideration.

Maia Tsurumi
Member
Employment Standards Tribunal