

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Amit Jolly
(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: Carol L. Roberts

FILE NO.: 2020/136

DATE OF DECISION: December 22, 2020

DECISION

SUBMISSIONS

Amit Jolly on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Amit Jolly (the “Appellant”) has filed an appeal of an August 17, 2020 determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Director”).
2. The Director found that the Appellant’s complaint had not been made within the statutory time limit prescribed by section 74 of the *ESA* and decided not to proceed with the complaint.
3. The Appellant contends that the Director failed to observe the principles of natural justice in making the Determination.
4. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employer or the Director.
5. This decision is based on the section 112(5) “record” that was before the Director at the time the Determination was made, the Appellant’s submissions, and the Reasons for the Determination.

THE FACTS

6. On April 7, 2020, the Appellant filed a complaint alleging that Coast Building Supplies Ltd. (“CBS”) contravened the *ESA* by misrepresenting the position offered to him.
7. Upon an initial review of the complaint, the delegate noted that it appeared the complaint had been filed outside the six-month time limit set out in section 74(4) of the *ESA*.
8. On July 22, 2020, the delegate informed the Appellant that his complaint was filed after the six-month time limit set out in the *ESA* and requested that he provide an explanation for his failure to file the complaint within the time period. The Appellant informed the delegate that on or about September 2017, one of the directors of CBS interviewed him, that he received his work permit on or about September 28, 2017, and that he began working for CBS some time in November 2017. The Appellant reported that there was a disagreement between the directors, and that his work was sporadic for the first few months. He said that the director told him to wait until the dispute was resolved to obtain full-time employment.
9. The Appellant said that he kept a record of the hours he worked for CBS, but he did not provide that record to the delegate when requested. The Appellant left Canada for a period of approximately nine

months intermittently in 2018 and 2019 because his mother was ill, but said that the CBS director told him that he would be paid for the time he was away.

10. The Appellant said that he was not paid for work performed from June 2018 until April 2019. The Appellant never received a copy of his Labour Market Impact Agreement and when he asked CBS for a copy, he was told that it had no record of his employment. The Appellant received T4 slips from CBS for 2017 and 2018, but not for 2019, and did not receive a record of employment (“ROE”). The Appellant’s application for permanent residency was denied on January 15, 2019.
11. The Appellant informed the delegate that his last day of work was September 27, 2019.
12. The Appellant eventually contacted Service B.C. for assistance. On March 4, 2020, Service B.C. advised the Appellant to contact the Temporary Foreign Workers Protection Unit (“TFWPU”). The Appellant contacted the TFWPU on April 2, 2020, and was advised to file a complaint. The Appellant filed his complaint on April 7, 2020.
13. The Appellant informed the delegate that he did not know where to file the complaint and was unaware of the time requirement in which to file the complaint. He also said that had sustained injuries in a motor vehicle accident in September 2019 for which he was still undergoing treatment.
14. In her Determination, the delegate found that the Appellant’s complaint was filed six months and 11 days after his last day of work. The delegate characterized the delay as “substantial.”
15. The delegate then considered whether she should exercise her discretion to refuse to investigate the complaint. After reviewing the purposes of the *ESA*, including providing fair and efficient procedures for resolving disputes, the delegate decided not to investigate the complaint.
16. The delegate noted that the Appellant had sustained an injury and had understood that the Covid-19 pandemic would affect the operations of government offices, but considered that none of these circumstances prevented him from submitting a complaint on time. She also considered that he was able to contact Service BC as well as TFWPU and despite being informed on March 4, 2020 by Service BC to contact the Branch, he did not do so for another month.
17. Noting that information regarding the time limit for filing complaints is readily available on the Branch’s website as well as in the *ESA*, the delegate found that there was no compelling reason for the Appellant not to have filed his complaint within the six-month time period.
18. The delegate decided to stop investigating the complaint.

ARGUMENT

19. Much of the Appellant’s submission simply repeats the information he provided to the delegate.
20. The Appellant argues that he was unaware of the six-month time period prescribed by the *ESA*, and notes that his complaint was filed 5 days after the six-month time period.

ANALYSIS

21. Section 114 of the *ESA* provides that 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:
- (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, 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.
22. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:
- (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.
23. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination. I am not persuaded that the Appellant has done so in this case.
24. I am not persuaded the delegate failed to observe the principles of natural justice.
25. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.
26. The record discloses that the Director's delegate communicated with the Appellant by email regarding his complaint, seeking information, offering a preliminary assessment, and offering him an opportunity to provide additional information. I am satisfied the Appellant was made aware of the statutory time limit and afforded the opportunity to explain his circumstances. The fact that the delegate exercised her discretion not to accept the complaint does not constitute a denial of natural justice.
27. In deciding not to accept the Appellant's complaint, the delegate noted that the time limits for filing a complaint were designed, in part, to provide for fair and efficient procedures for resolving disputes as well as promoting the fair treatment of both employers and employees (section 2 of the *ESA*). She weighed the importance of the purposes of the time limit along with the reasons advanced for the lateness of the filing. The delegate found that even though the Appellant did not have a lawyer, he had been provided

with information about the Branch and the complaints process. She also noted that the Branch website clearly identified the statutory time limit on filing complaints.

28. Section 74(3) of the *ESA* provides that complaints must be delivered to the Director within six months after the last day of employment. That section is mandatory – in other words, the complaint must be delivered within that time.
29. Section 76(1) requires the Director to accept and review complaints. Section 76(3) provides the Director with discretion to refuse to accept or continue investigating a complaint on a number of enumerated grounds, including that is not made within the time limit. (see also *Karbalaieali v. British Columbia (Employment Standards)*, 2007 BCCA 533)
30. Although the Appellant was working for CBS on a work permit that expired September 27, 2019, the Appellant was unable, or did not, provide the delegate with any evidence when his work ended.
31. The Appellant says, and I accept, that he was in India to care for his ailing mother and returned to Canada on February 11, 2020.
32. There was no documentary evidence as to when the Appellant’s employment ended. In fact, CBS denied that it had employed the Appellant, even though there was documentary evidence that the Appellant had been paid for work performed in 2017 and 2018.
33. Although the delegate characterized the delay as “substantial,” given that it was filed 11 days after the statutory deadline, it is not a characterization I would agree with. The Appellant contacted the Branch on April 2, 2020, and filed his complaint on April 7, 2020. If the Appellant’s last day of work was in fact September 27, 2019, his complaint ought to have been filed by March 27, 2020, which was a Friday. He contacted the Branch April 2, 2020, which was four working days later, and filed the complaint the following Tuesday. Nevertheless, there is no dispute that the complaint was not filed within the statutory time frame.
34. The delegate considered the Appellant’s explanation for not filing the complaint within six months and concluded that, in consideration of all of the evidence before her as well as the purposes of the *ESA*, there was no basis to exercise her discretion in favor of investigating the complaint.
35. The Tribunal will only interfere with the Director’s exercise of discretion in exceptional and very limited circumstances:

The Tribunal will not interfere with [the] 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. (*Re: Jody L. Goudreau and Barbara E. Desmarais, employees of Peach Arch Community Medical Clinic Ltd.*, BC EST # D066/98)

36. In *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR, the Supreme Court held:
- It is...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.
37. I find no basis to interfere with the exercise of the delegate's discretion. There is no evidence the delegate exercised her discretion in bad faith or that she considered irrelevant matters. She considered all of the reasons advanced by the Appellant as reasons for not filing within the six-month period and decided that they did not constitute compelling reasons for proceeding with the complaint.
38. I dismiss the appeal under section 114(1) of the *ESA*.

ORDER

39. Pursuant to section 115 of the *ESA*, the Determination, dated August 17, 2020, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal