Employment Standards TRIBUNAL

Citation: James Smith (Re)
2020 BCEST 18

An appeal

- by -

James Smith
("Mr. Smith")

- 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.: 2019/203

DATE OF DECISION: March 12, 2020

DECISION

SUBMISSIONS

James Smith — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), James Smith ("Mr. Smith") has filed an appeal of a determination issued by Sophie Vogel-Nakamura, a delegate of the Director of Employment Standards (the "Director"), on November 22, 2019 (the "Determination).

2. The Determination found Mr. Smith had failed to file his complaint within the time limit set out in section 74 of the *ESA* and, exercising the discretion allowed in section 76 of the *ESA*, the Director decided not to proceed with the complaint.

3. Mr. Smith has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination and that evidence has become available that was not available when the Determination was being made.

4. In correspondence dated December 12, 2019, 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. Smith 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 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*.

THE FACTS

9. Mr. Smith was employed as a labourer by Northern Lite Mfg. GP Inc. ("the respondent employer") from March 5, 2018. His last day of employment was found by the Director to be March 4, 2019.

10. On October 8, 2019, Mr. Smith filed a complaint alleging he was owed compensation for length of service, based on his assertion he had been terminated by the respondent employer on, or about, October 31, 2018, and reimbursement for five months of extended health benefits paid by him from October 2018, to February 2019.

11. Based on the information provided by Mr. Smith the Director found the complaint was 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.*

12. On October 31, 2019, the Director sent a letter to Mr. Smith requesting further information for his apparent failure to meet the statutory time limit. Mr. Smith responded in correspondence received by the Director on November 6, 2019. To summarize, Mr. Smith stated he was unaware he had been terminated by the respondent employer in October 2018, until he received a decision from WorkSafe BC dated October 9, 2019, notifying him that his wage loss claim for an injury he incurred in October 2018, had been accepted. In that decision, the entitlement officer for WorkSafe BC included the comment, "The Employer reported you were terminated October 31, 2018." Mr. Smith said that until he saw the WorkSafe BC decision, he believed he continued to be employed by the respondent employer while he was injured and until he submitted his resignation in February 2019.

13. The Director considered the information provided by Mr. Smith and, based on this information, found Mr. Smith had not filed his complaint within 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.

ARGUMENT

14. Mr. Smith submits an exception to the six-month rule should have been made in his case since he was not aware until October 2019, that the respondent employer said, apparently, that he had been fired in October 2018.

15. He argues the Director erred in law by confining the exercise of discretion in section 76(3) to "exceptional (or extraordinary) circumstances where there are compelling reasons to do so".

16. The additional evidence submitted with the appeal comprises communications between Mr. Smith and persons from the respondent employer, the WorkSafe BC decision and his doctor's medical certificate.

ANALYSIS

17. 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.*

18. 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.

19. 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.

20. Mr. Smith has grounded this appeal an alleged failure to comply with principles of natural justice and in evidence becoming available that was not available when the Determination was made.

21. I shall first address the matter of additional evidence.

22. 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*.

23. I do not accept this ground of appeal, or the additional evidence, for several reasons.

24. First, the evidence is not "new"; it was available when the complaint was filed and could have been provided. Second, the evidence does not add anything to the information given by Mr. Smith to the Director. 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.

25. In respect of the natural justice ground of appeal, a party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding the Director failed to comply with principles of natural justice.

26. In the circumstances, the only obligations placed on the Director by principles of natural justice were to advise Mr. Smith his complaint was not filed within the period allowed in section 74 of the *ESA*, to provide him with an opportunity to explain the delay, to fairly consider his reasons, and to make a decision.

27. The Director satisfied those obligations; the Director notified Mr. Smith 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.

28. 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. Smith'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 *Karbalaeiali v. British Columbia (Employment Standards)* 2007 BCCA 553, at paras. 11 – 12, as follows:

> [11] While the Tribunal rightly stated that the *ESA* 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.

29. There is no issue that Mr. Smith's complaint was filed outside the time period allowed in section 74(3) of the *ESA*.

30. The thrust of Mr. Smith's argument under this ground of appeal is that the Director, who has discretionary powers in section 76(3) of the *ESA*, ought to have exercised that discretion in favour of continuing to investigate the complaint on its merits. More specifically, this aspect of the appeal challenges an exercise of discretion granted to the Director under the *ESA*.

31. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director may be varied on appeal.

32. The Tribunal has 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.

33. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms v. Government of Canada*, [1982] 2 SCR 2, 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. 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.

34. 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.

35. Part of the burden on Mr. Smith 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.

36. All of the reasons put forward by Mr. Smith 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*.

37. 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*.

38. 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. Without attempting to catalogue the circumstances that would require a complaint filed outside of the time limits set out in section 74 to be accepted, reviewed, investigated and/or adjudicated, I would anticipate such cases would be rare. I do not find the use by the Director of the terms exceptional or extraordinary to be particularly concerning. There is no indication those terms describe anything other than the view already taken by the Tribunal that proceeding with complaints filed out of time will rarely occur.

39. 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 compelling reason justifying the late filing and did not accept the explanation provided by Mr. Smith 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.

40. 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.

41. I will add a gratuitous comment on the merits of the appeal. Based on the material provided by Mr. Smith, which included a communication from him to the respondent employer in March 2019, saying he can no longer work for the respondent employer, the acceptance of that communication by the respondent employer as a resignation, and the finding by the Director that those communications signaled the end of his employment, I see no possibility of Mr. Smith successfully establishing a claim for length of service compensation or a refund of extended health benefits for what appears to be a phantom termination in October 2018. Except for the comment in the WorkSafe BC decision, which has no evidentiary foundation, there is nothing to support a conclusion that Mr. Smith was terminated in October 2018.

42. 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

43. Pursuant to section 115 of the *ESA*, I order the Determination dated November 22, 2019, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal