

An appeal

- by -

Jun Yang
(the “Appellant” or “Mr. Yang”)

- 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.: 2019/211

DATE OF DECISION: April 27, 2020

DECISION

SUBMISSIONS

Jun Yang on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Jun Yang (the “Appellant” or “Mr. Yang”) has filed an appeal of a determination (the “Determination”) issued on December 18, 2019, by Jake Kislock, a delegate (the “Delegate”) of the Director of Employment Standards. In the Determination, the Delegate found the Appellant’s Complaint was not made within the time limit specified in section 74 of the *ESA* and that under section 76 of the *ESA*, the Delegate would not continue to investigate the Complaint.
2. Mr. Yang appeals the Determination on the following grounds: (1) a failure to observe principles of natural justice; and (2) new evidence has become available that was not available at the time the Determination was made.
3. He also requests an extension to the statutory appeal period under sub-section 109(1)(b) to April 30, 2020. The statutory appeal deadline was January 27, 2020.
4. I decline to extend the time to file the appeal and thus dismiss the appeal pursuant to sub-section 114(1)(b) of the *ESA*.
5. This decision is based on the submissions made by Mr. Yang in his Appeal Form, the sub-section 112(5) record (the “Record”), the Determination and the Reasons for the Determination (the “Reasons”).

ISSUE

6. The issues before the Employment Standards Tribunal are whether:
 - (a) the time period for filing the appeal should be extended pursuant to section 109(1)(b) of the *ESA*; and
 - (b) all or part of this appeal should be allowed or dismissed.

ARGUMENT

7. The Appellant’s submissions regarding the merits of the appeal are that:
 - (a) he did not receive his T4 from CIMS Partnerships Ltd. (the “Respondent”) until after March 2019 and it was only then that he saw he was owed money;
 - (b) he spent time asking the Respondent and his union about the missing money, which delayed submission of his Complaint; and
 - (c) the Respondent says it paid the disputed money to Mr. Yang’s union, but the union refuses to pay him because it had an agreement with the Respondent.

8. Regarding his request for an extension of time to appeal, the Appellant says his reasons are the holiday season, his 2019 tax return and time needed to get in touch with the Respondent, his union and the Employment Standards Branch (the “Branch”).

THE FACTS AND ANALYSIS

Background

9. On July 27, 2019, the Appellant filed a Complaint under section 74 of the *ESA* alleging the Respondent violated the *ESA* by failing to make a pension payment of \$543.68 on his behalf.
10. The Respondent operates an industrial construction and maintenance business in Burnaby, BC.
11. The Appellant was employed by the Respondent from January 30 to February 25, 2018, at a rate of pay of \$42 per hour. He was part of a bargaining unit covered by a collective agreement.

Issues Before the Delegate

12. The issue before the Delegate was whether he should continue to investigate the Complaint even though it was filed outside of the statutory time period.

The Complaint

13. The Complaint said the Appellant contacted the Respondent about the pension payment he believed he was owed, and the Respondent said he was already paid. The Appellant said he had not received the money. He said the Respondent told him his union had taken the money. The Appellant contacted his union, but said the Union said it did not want to pay him.
14. The Appellant said he failed to submit his Complaint within the six-month period because he did not receive his T4 for 2018 until March 2019. When he got his T4, he contacted the Respondent and his union.

Delegate’s Findings and Analysis

15. The Delegate determined the Complaint was not made in the time limit in sub-section 74(3) of the *ESA* and he decided not to exercise his discretion to proceed with the Complaint under section 76(3) of the *ESA*.
16. The Delegate’s initial review of the Complaint indicated it was likely filed outside of the six-month time limit in sub-section 74(3) of the *ESA*. He went on to consider whether it was filed out of time, and, if it was, whether he should exercise his discretion to refuse to continue to investigate the Complaint under sub-section 76(3).

Was the Complaint filed out of time?

17. The Delegate noted that under sub-section 74(3) of the *ESA* a complaint must be filed within six months after the last day of employment. The Appellant’s last day of employment was February 25, 2018, and his Complaint was filed on July 27, 2019. Thus, the Delegate found the Complaint was filed outside of the sub-section 74(3) time limit.

Exercise of discretion under sub-section 76(3) of the ESA

18. The Delegate first stated sub-section 76(3) says the Director may refuse to accept, review, mediate, investigate or adjudicate a complaint, or may stop reviewing, mediating, investigating or adjudicating a complaint that was not made within the six-month time limit. The word “*may*” in the legislation means the decision is discretionary.
19. The Delegate then explained that one purpose of the *ESA* (set out in sub-section 2(d)) is “*to provide fair and efficient procedures for resolving disputes over the application and interpretation of the [ESA].*” One way to achieve this purpose is by requiring complaints to be submitted within the six-month time limit in section 74 of the *ESA*. Enforcing the time limit provides employers, employees and the Branch with a consistent and reasonable period of time to deal with complaints.
20. The requirements to file a complaint are very explicit and available publicly on the Branch’s website. Also, if employees or employers have questions about the Branch’s processes or requirements of the *ESA*, they are able to telephone the Branch information line for clarification.
21. Sub-section 74(3) is mandatory as it states a complaint *must* be filed within six months after the last day of employment. The Delegate said this meant he would only exercise his discretion to proceed in exceptional circumstances where there were compelling reasons to do so.
22. The Delegate asked the Appellant to explain why he did not file within the six-month time limit. The explanation the Appellant gave the Delegate was that he did not receive his 2018 T4 until March 2019.
23. The Delegate found there was a substantial delay between the deadline for filing the Complaint (August 27, 2018) and when it was filed (July 27, 2019). The Delegate found the Appellant did not provide a compelling reason to continue the investigation. Therefore, the Delegate exercised his discretion under sub-section 76(3) to stop investigating the Complaint.

Analysis

24. 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 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.
25. The Appellant relies on grounds (b) and (c) in its appeal.
26. On the merits of his appeal, the Appellant submits that:
- (a) he did not receive his T4 from CIMS Partnerships Ltd. (the “Respondent”) until after March 2019 and it was only then that he saw he was owed money;

- (b) he spent time asking the Respondent and his union about the missing money, which delayed submission of his Complaint; and
- (c) the Respondent told him it paid the disputed money to Mr. Yang's union, but the union refused to pay him because it had an agreement with the Respondent.

27. The Appellant also requests an extension of time to file his appeal.

Issue 1: Should the Time for Filing the Appeal Be Extended?

28. The Determination was issued on December 18, 2019. The statutory appeal deadline was January 27, 2020. Mr. Yang filed his Appeal Form on December 24, 2019, but in that document he requested an extension of time to file his appeal until April 30, 2020. On January 4, 2020, the Appellant provided submissions about his request for an extension of the appeal deadline. He says it is because: of the holiday season; of his 2019 tax return; and he is collecting lots of information for the appeal and so he needs time to get in touch with the Respondent, his union and the Branch.

29. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing an appeal from a Determination, the time periods established in the *ESA* are not that unusual: *Niemisto*, at p. 3.

30. The Tribunal has criteria to determine whether or not time periods for filing appeals should be extended. These criteria are set out in the *Niemisto* decision. Appellants seeking extensions for filing appeals should satisfy the Tribunal that:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;
- iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
- v) there is a strong *prima facie* case in favour of the appellant.

Niemisto at p. 3; see also *Gorenshtein v. British Columbia*, 2013 BCSC 1499 at paras. 28 and 57

31. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, not all of the above factors may be applicable in determining whether an extension should be granted or not, depending on the circumstances of each case.

32. Based on the *Niemisto* criteria, I deny the Appellant's request to extend the time limits for filing his appeal under sub-section 109(1)(b). My reasons are set out below, but in short, he has not provided a reasonable and credible explanation for his need until April 30, 2020, to complete his appeal; the Respondent would be unduly prejudiced; and the Appellant does not have a strong *prima facie* case for appeal.

33. Mr. Yang filed his Appeal Form, submissions on the merits of the appeal, a copy of the Determination and Reasons and his submissions on the request for an extension of time to file his appeal before the appeal deadline. Usually, this would mean an appeal has been filed in time, but the Appellant appears to be

asking for an extension of time to complete his appeal because he is “*collecting a lot of information to appeal.*” Based on the material he filed before the appeal deadline I find he has a genuine and ongoing *bona fide* intention to file his appeal and the Respondent and Director have been made aware of this intention.

34. However, the Appellant does not meet the rest of the conditions for an extension of time.
35. First, I find the Appellant has not provided a reasonable and credible explanation for his need for an extension of time to file documents in the appeal. The Appellant points to the “*holiday season*”. If he means Christmas and New Year’s, then this holiday was over at least three weeks before the January 27, 2020, deadline and months before the requested date of April 30, 2020. It does not provide a reason for the extension. The Appellant also says he needs time to get his 2019 tax return. He does not explain how this information is relevant to his appeal as his Complaint relates to alleged non-payment of pension amounts from 2018. The Appellant further submits he needs time to get in touch with the Respondent, his union and the Branch. He does not provide any reason why he needs three more months to do this. Also, I find it very unlikely there could be any information relevant to his appeal from the Delegate’s decision to not continue investigating his Complaint that he could get from the Branch that is not already before me in the Record, the Determination or the Reasons.
36. Overall, the Appellant’s point appears to be that he is collecting a lot of information for the appeal. However, this is not a reasonable basis on which to seek an extension of time to file an appeal. His appeal is not on the merits of his Complaint, but is an appeal on the very specific question about whether the Delegate should have continued to investigate the Complaint even though it was filed out of time. The information that is relevant to that question is already before me in the form of the Record, the Determination and the Reasons. Even if there was some new evidence that was relevant to this issue, it would have to meet the Tribunal’s strict test for the admission of new evidence on appeal and the Appellant has provided no basis on which I might conclude that the information he is gathering might meet that test.
37. Second, I find the Respondent would be unduly prejudiced by the granting of an extension. As noted by the Delegate, the *ESA*’s mandatory time limit to file a Complaint is intended “*to provide fair and efficient procedures for resolving disputes over the application and interpretation of the [ESA].*” This means fair and efficient for employers, employees and the Branch. An important way to achieve this purpose is by requiring complaints to be submitted within the six-month time limit in section 74 of the *ESA*. The Appellant’s last day of employment with the Respondent was February 25, 2018. The statutory time limit to file his Complaint was in August 2018, but it was not filed until July 27, 2019, which was about a year and five months since his last day of employment. After the Complaint was filed, the Respondent waited approximately another five months to find out the Complaint would no longer be investigated. Even if the appeal deadline was not extended, by the time my decision is issued, the Respondent will have waited more than two years to learn the outcome of the Complaint. In these circumstances, extending the appeal deadline would unduly prejudice the Respondent.
38. Third, I conclude Mr. Yang does not have a strong *prima facie* case in his favour on the question of whether he has a strong case to overturn the Delegate’s decision to stop investigating the Complaint.

39. The legislative provisions at the relevant time period were as follows:

Complaint and time limit

74 (1) An employee, former employee or other person may complain to the director that a person has contravened

...

(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

...

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

(2) The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint.

(3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit specified in section 74 (3) or (4),

...

40. These provisions mean a complaint must be filed in writing within six months of the last day of employment (or within six months of the date of contravention in certain circumstances that do not apply here).

41. Because of sub-section 76(3), the Director, or his Delegate, 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: *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553 at paras. 11 and 12.

42. When there is an appeal from the Director (or Delegate)'s Determination to stop investigating a complaint because it is filed outside the *ESA's* time limits, the question for the Tribunal is whether the Director (or his Delegate) properly exercised his discretion in refusing to accept it or continue the investigation: *Karbalaeiali v. British Columbia (Employment Standards)*, *supra*, at para. 12.

43. The threshold for overturning the Director's exercise of discretion is very high: see e.g. *Jody L. Goudreau et.al.*, BC EST # D066/98, and *Joda M. Takarabe et. al.*, BC EST #160/98. In *Jody L. Goudreau*, the Tribunal held it would not interfere unless it could 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. "*Unreasonable*" 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.

44. When considering whether a complaint should be investigated even when it is filed late, the Director considers whether the would-be complainant has provided a “*compelling reason*” to excuse the delay in filing and 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* (sub-section 2(d)). This is precisely what the Delegate did with respect to the Appellant’s Complaint. Thus, on appeal, there would be no basis on which to find the Delegate erred in determining the legal principles applicable to the question of whether he should have exercised his discretion to continue investigating the Complaint.
45. About whether the Delegate erred in concluding the Appellant did not provide a compelling reason to excuse his delay in filing, I note the Tribunal has found the following were not sufficient to require the Director to exercise his discretion to investigate a late-filed Complaint:
- (a) limited financial resources: *Re: Todd Coutts*, BC EST # D073/11;
 - (b) the expectation of full recovery by civil claim before the six-month filing limit: *Re: Todd Coutts*, BC EST # D073/11;
 - (c) legal advice that resulted in the would-be complainant concluding that his employment would not terminate, and the six-month limitation period for filing his complaint would not commence to run, until payments ceased: *Re: Ted N. Hunt*, BC EST # D089/11;
 - (d) strategically not filing a complaint in case payments from an employer were jeopardized: *Re: Ted N. Hunt*, BC EST # D089/11;
 - (e) misunderstanding the time line in the Branch’s Self-Help Kit: *Re: Tessa Carter*, BC EST # D124/11; *Re: Zeljko Dragicevic*, BC EST # D132/15;
 - (f) a lack of knowledge about the *ESA* and limited English skills: *Re: Elizabeth Koh on behalf of James Koh, deceased*, BC EST # D008/12; *Fara Ghafari (Re)*, 2018 BCEST 79;
 - (g) being unaware of the six-month filing deadline: *Re: Zeljko Dragicevic*, BC EST # D132/15; *Fara Ghafari (Re)*, 2018 BCEST 79;
 - (h) delay because of time spent trying to get a hold of the employer as part of the Self-Help Kit: *Re: Gordon James Daniel Peregrym*, BC EST # D085/14;
 - (i) a heavy work schedule: *Re: Gordon James Daniel Peregrym*, BC EST # D085/14;
 - (j) reluctance to confront a former employer: *Re: Linda Margaret Pierre*, BC EST # D022/16;
 - (k) a lack of “*time, energy, effort, courage and resources*” to file on time: *Re: Linda Margaret Pierre*, BC EST # D022/16; and
 - (l) anxiety due to employment termination without medical evidence: *Re: Anna Maria Giannini*, BC EST # D061/17.
46. Also, in exercising his or her discretion, the Director or delegate is not required to presume there may be relevant information that has not been included in the complaint. It is the primary responsibility of a complainant to set out sufficient details to show the basis for his or her complaint.

47. Given the above, there would be no basis on appeal to find the Appellant provided a compelling reason and the Delegate erred in the exercise of his discretion.

Issue 2: Should the appeal be allowed or dismissed?

48. Given my decision above I do not need to answer this question. However, had I granted the extension of time to file the appeal, for the reasons I give above as to why there is no strong *prima facie* case, I would also have found that the appeal had no reasonable prospect of success and dismissed it under sub-section 114(1)(f) of the *ESA*.

Summary

49. In summary, I decline to extend the time to file the appeal under sub-section 109(1)(b) and dismiss the appeal under sub-section 114(1)(b) of the *ESA*.

ORDER

50. Pursuant to sub-section 115(1)(a) of the *ESA*, I order the Determination, dated December 18, 2019, confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal