



Citation: Paramjeet Kaur (Re)  
2020 BCEST 48

An appeal

- by -

Paramjeet Kaur

- 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.:** 2019/205

**DATE OF DECISION:** May 22, 2020

## DECISION

### SUBMISSIONS

Paramjeet Kaur on her own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Paramjeet Kaur (the “Appellant”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 15, 2019.
2. On October 21, 2019, the Appellant filed a complaint with the Director alleging that Tevatia Holdings Ltd. carrying on business as Siddhartha’s Indian Kitchen (the “Employer”) had contravened the *ESA* by making unauthorized deductions from her wages and by failing to pay her regular and overtime wages, annual vacation and statutory holiday pay.
3. On November 15, 2019, the delegate issued a Determination in which she concluded that the complaint had not been filed within the statutory time period established under section 74 of the *ESA* and decided she would not proceed with the investigation pursuant to section 76.
4. The Appellant appeals the Determination contending that the Director failed to observe the principles of natural justice in making the Determination.
5. Section 114 of the *ESA* provides that the Employment Standards Tribunal (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.
6. These reasons are based on the Appellant’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.
7. If I am satisfied that the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1), the Respondent will, and the delegate may be invited to file further submissions. If the appeal is not meritorious, it will be dismissed.

### FACTS AND ARGUMENT

8. The Appellant was employed as a cook at the Employer’s restaurant under the Temporary Foreign Worker program from November 20, 2017 until February 11, 2019. The complaint was filed October 21, 2019, slightly over 8 months after the Appellant’s employment ended. Because the Appellant had returned to India, the delegate and the Appellant communicated exclusively by email.
9. Upon determining that the complaint was filed outside the statutory time period, the Director’s delegate considered whether she should exercise her discretion to proceed with an investigation of her complaint.

The delegate asked the Appellant for the reasons why she filed her complaint late. The Appellant informed the delegate that her employer threatened to deport her if she filed a complaint against him.

10. The delegate considered the purposes of the *ESA* and noted that section 74 was a mandatory provision, requiring the complaint to be filed within six months after the last day of employment. The delegate further noted that although she had the discretion to refuse to accept or adjudicate a complaint, or stop investigating a complaint, she would only exercise her discretion to proceed in exceptional circumstances.
11. The delegate considered the Appellant's reasons for not filing within the statutory time period, which was her allegation that the Employer threatened to deport her while she was employed. She noted that there was no evidence those threats continued after the Appellant's employment ended. Consequently, the delegate found that the Appellant had provided no compelling reason to continue the investigation.
12. The Appellant says that the delegate "ignored all the rights of TFWPA [Temporary Foreign Worker Act]". She submits that she provided all the information about her reasons for submitting a late complaint, but the delegate "ignored" them. She contends that the Employer exploited her and although she attempted to resolve the complaint with the Employer after her employment ended, he did not respond to her. She said she received a "voluntary departure notice" on October 8, 2019, after which she filed her complaint.
13. The Appellant submitted evidence that was not before the delegate with her appeal submission. That evidence consisted of screen shots of WhatsApp messages, copies of bank statements and audio recordings of conversations, along with translations of those conversations (which were in Hindi). She requested the Tribunal to review that evidence in support of her appeal.
14. Although the delegate acknowledged that the Appellant had submitted audio recordings with her complaint, the delegate confirmed she did not listen to or consider those recordings.

## **ANALYSIS**

15. 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.

16. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

17. The Appellant's appeal is, in essence, a request that the Tribunal reconsider the delegate's decision not to investigate her complaint and come to a different conclusion.

18. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the determination on one of the statutory grounds. I find that the Appellant has not met that burden.

#### *Failure to comply with natural justice*

19. 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. It does not mean that the Director's delegate must arrive at a conclusion the Appellant considers just and fair.

20. There is nothing in the appeal submission that establishes that the delegate failed to provide the Appellant with information about the time limit issue presented by her late filing of the complaint. Furthermore, the delegate afforded the Appellant the opportunity to explain why she filed after the statutory deadline for doing so. While I appreciate the Appellant believes the Determination is wrong, I find no basis to conclude that she was denied natural justice.

21. The delegate agreed that she had not listened to audio recordings submitted by the Appellant. However, my review of those recordings as well as the other documentation submitted on appeal shows that they relate to the Appellant's allegation that the Employer "exploited" her. That evidence is not relevant to the question of whether the complainant provided exceptional circumstances for why she did not file her complaint within the statutory time period, or whether the delegate ought to have exercised her discretion to investigate the complaint. I find no basis to conclude that the delegate denied the Appellant natural justice in deciding whether or not to extend the statutory time period.

22. I have also considered whether or not the Appellant has established any other ground of appeal.

#### *Error of law*

23. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;

4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

24. I am not persuaded the delegate erred in law.

25. Section 74(3) of the *ESA* establishes a six-month limit on the filing of complaints. Section 76(1) requires the Director to accept and review complaints, and section 76(3)(a) provides the Director with discretion to refuse to accept or continue investigating a complaint that is not made within the time limit. (see also *Karbalaeeali v. British Columbia (Employment Standards)*, 2007 BCCA 533)

26. In *Bridge* (BC EST # RD051/08), I concluded that *Karbalaeeali* required that the Director exercise his discretion to determine whether acceptance of the complaint should be refused. The Tribunal would then be “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” in accordance with the Court of Appeal’s decision.

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*).

28. The delegate considered the Appellant’s explanation for her failure to file the complaint within the statutory time period and concluded that there was no basis to exercise her discretion in favour of the Appellant.

29. 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. Desmaris, employees of Peach Arch Community Medical Clinic Ltd.* (BC EST #D066/98)

30. In *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR the Supreme Court held:

It is...a clearly established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might exercise 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. I find no basis to interfere with the exercise of the delegate's discretion. There was no evidence before the delegate that the Appellant was threatened with deportation if she filed a complaint after her employment ended, and she provided no other reason for her failure to file the complaint within the six month period set out in section 74 other than that she was trying to deal with the issue of her wages directly with the Employer.
32. I also note the Appellant's argument that the delegate failed to consider the provisions of the *TFWPA* in arriving at her decision. The complaints provision of the *TFWPA* (section 33) is not yet in force. Furthermore, the Appellant's complaint was filed under the *ESA*, not the *TFWPA*. I find no error in the delegate's decision to assess the complaint under the provisions of the *ESA*.

#### *New Evidence*

33. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:
- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) the evidence must be relevant to a material issue arising from the complaint;
  - (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.
34. As noted above, while I accept that the delegate did not listen to the Appellant's audio recordings, I find that this evidence, even if it had been reviewed by the delegate, would not have led the delegate to a different conclusion on the material issue; that is, whether the complaint was filed within the statutory time period.
35. I find no reasonable prospect the appeal will succeed.

**ORDER**

36. Pursuant to section 115 of the *ESA*, I order that the delegate's November 15, 2019 Determination to stop investigating the complaint be confirmed.

---

**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**