

An appeal

- by -

Hilda Kariuki
("Kariuki")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2019/198

DATE OF DECISION: June 3, 2020

DECISION

SUBMISSIONS

Dan Armstrong

delegate of the Director of Employment Standards

INTRODUCTION AND PRIOR PROCEEDINGS

1. On September 27, 2018, Hilda Kariuki (“Kariuki”) filed a complaint under section 74 of the *Employment Standards Act* (the “ESA”) claiming an estimated \$93,000 in unpaid wages allegedly owed to her by Pin Services Ltd. (“Pin Services”). In due course, this complaint was investigated by Dan Armstrong, a delegate of the Director of Employment Standards (the “delegate”), who issued a Determination dated November 5, 2019.
2. By way of the Determination, the delegate determined that Ms. Kariuki was an employee rather than, as was alleged by Pin Services, an independent contractor. The delegate then proceeded to make the following unpaid wage orders:
 - With respect to the matter of unpaid regular wages, the delegate determined that Ms. Kariuki earned \$41,081, was paid \$15,525, and was thus owed \$25,556.
 - The delegate held that a so-called “comfort level deposit” paid by Ms. Kariuki constituted a fee paid in contravention of section 10 of the *ESA* (fees paid for hiring or providing information). Ordinarily, it would follow that the amount paid by Ms. Kariuki (\$8,000) would have been the subject of a wage recovery order under section 10(3). However, the delegate did not make a wage recovery order because the complaint was untimely with respect to this matter.
 - The delegate further determined that Pin Services contravened section 21 of the *ESA* by requiring Ms. Kariuki to pay certain business costs including such things as postage, shipping/transportation costs, and printing costs, totalling \$4,095.90.
 - Although Ms. Kariuki submitted 2 weeks’ notice of resignation, the delegate held that the circumstances surrounding the end of Ms. Kariuki’s employment fell within the section 66 “deemed termination” provision, since Pin Services failed to pay “a significant amount of wages when they were required to be paid” (page R22 of the delegate’s “Reasons for the Determination”). Accordingly, she was entitled to one week’s wages as compensation for length of service (\$951.56).
 - Finally, the delegate awarded 4% vacation pay on Ms. Kariuki’s unpaid wages (\$1,681.30), section 88 interest (\$1,392.89), and he levied six separate \$500 monetary penalties (see section 98) based on Pin Services’ contraventions of sections 17, 18, 21, 28, 58, and 63 of the *ESA*.
3. Ms. Kariuki and Pin Services both appealed the Determination. On March 12, 2020, I issued my reasons for decision in these two appeals (see 2020 BCEST 20). I dismissed Pin Services’ appeal but made a section 114(2) “referral back” order regarding Ms. Kariuki’s appeal.

4. Ms. Kariuki's appeal concerned the delegate's determination that a portion of her claim, relating to the "\$8,000 comfort deposit", was statute-barred. While it was clear that Ms. Kariuki's complaint in this regard was filed outside the 6-month time limit set out in section 74(4) of the *ESA*, the delegate did not address whether, in any event, he should exercise his discretion to adjudicate this aspect of her claim in accordance with the B.C. Court of Appeal's decision in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553.
5. At paras. 18 and 19 of my reasons, I held:

In this case, the delegate, as appears clear from his reasons quoted above, never went beyond finding that the complaint, as it concerned section 10, was untimely. The delegate did not consider, as he was obliged to do under *Karbalaeiali*, whether, as an exercise of discretion, he should nevertheless accept and adjudicate Ms. Kariuki's section 10 claim. While I acknowledge that *Karbalaeiali* concerned the section 74(3) complaint period, I see no basis for distinguishing the court's comments simply because this matter concerns the section 74(4) complaint period. In my view, the court's comments in *Karbalaeiali* apply with equal force regarding the latter limitation period.

Accordingly, since the delegate never turned his mind to his discretionary authority to proceed with an untimely section 10 complaint, I am of the view the appropriate order is to refer that matter back to the delegate, under section 114(2)(a), for his further consideration. In making this order, I wish to be clear that I am not expressing any view regarding whether, as a matter of the delegate's discretionary authority, he should adjudicate Ms. Kariuki's section 10 claim on its merits. I am only directing the delegate to consider whether he should, as a matter of his discretionary authority, proceed to adjudicate Ms. Kariuki's section 10 claim on its merits.
6. I ultimately issued an order confirming the Determination in all respects save for the section 10 issue. I ordered that this matter be "referred back to the Director for further investigation" under section 114(2) of the *ESA*.

THE REFERRAL BACK PROCEEDINGS

7. On April 24, 2020, the delegate submitted his report to the Tribunal.
8. Briefly, the delegate stated that Ms. Kariuki failed to file a timely section 10 complaint "due to a lack of awareness of the ability to recover them [i.e., monies payable under section 10] under the Act". The delegate noted that Ms. Kariuki, when contacted, had not provided any explanation for failing to file a timely section 10 complaint other than a simple lack of knowledge, and that "she had not suggested there were any circumstances which hindered her ability to submit her claim for wages under section 10 (hiring fees)". By way of summary, the delegate concluded:

I find that Ms. Kariuki did not submit her complaint concerning hiring fees within the limitation period due to a lack of awareness of the ability to recover them under the Act. While it is unfortunate that she was not aware of this, I do not perceive there to have been any exceptional circumstances which prevented her from obtaining this information. There are a number [of] free and for payment services available to individuals such as Ms. Kariuki where they can seek guidance with respect to questions concerning employment law. For instance, the Employment Standards Branch provides extensive online material as well as a toll-free telephone information

service to assist people with questions regarding the Act and Regulation. An individual in her situation might also consider procuring the services of a lawyer.

I find that Ms. Kariuki's failure to apprise herself of the legal remedies available to her with respect to hiring fees does not constitute an exceptional circumstance.

I find that Ms. Kariuki's evidence does not disclose a compelling reason for the exercise of my discretion to accept and adjudicate her section 10 claim. Pursuant to section 76(3) of the Act, I have ceased investigating this complaint issue. Accordingly, the hiring fees which Ms. Kariuki's [sic] paid to Pin Services cannot be recovered under the Act.

9. On April 29, 2020, the Tribunal forwarded the delegate's April 24th referral back report to Ms. Kariuki and Pin Services and directed both parties to provide their reply submissions by no later than May 21, 2020. The Tribunal's April 29th letter noted that if no replies were received by the deadline, "the Tribunal Member will proceed to decide this appeal". Neither party submitted any reply submission and, that being the case, I am now issuing my final decision in this matter.

FINDINGS

10. As set out in *Karbalaeiali, supra*, the Director of Employment Standards (acting through his delegates) is not obliged to accept and adjudicate an untimely complaint but must, as an exercise of his discretion, determine if it would be appropriate to do so. In this instance, and for the reasons set out above, the delegate determined that there was no compelling reason justifying Ms. Kariuki's failure to file a timely complaint.
11. In several decisions, the Tribunal has observed that the exercise of a delegate's discretion whether to accept or reject an untimely complaint is entitled to considerable deference (see, for example, *Smith*, 2020 BCEST 18, reconsideration refused: 2020 BCEST 36, and *Bassi*, 2020 BCEST 29). The Tribunal must not intervene merely because it might have determined the matter somewhat differently. Rather, the delegate's discretionary decision should only be set aside if there is evidence of bad faith or if the delegate's decision is wholly unreasonable. As stated by the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada* [1982] 2 S.C.R. 2, an exercise of discretion by a statutory decision-maker should not be overturned "merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility."
12. In this instance, the delegate considered Ms. Kariuki's explanation for her failure to file a timely complaint and concluded she had not advanced a "compelling reason" to justify proceeding with her complaint on its merits. In these "referral back" proceedings, Ms. Kariuki has not advanced any argument to suggest that she did have a compelling reason for failing to file a timely section 10 complaint. Indeed, in an April 22, 2020 e-mail communication to the delegate, Ms. Kariuki conceded that her section 10 complaint was a "hail Mary" and that she did not have any substantive explanation regarding why her complaint was not filed within the statutory 6-month complaint period.
13. If a complainant could sidestep the section 74(4) 6-month limitation period merely by asserting a lack of knowledge (and, as noted by the delegate here, a concomitant lack of diligence), the section 74(4) time limit would be rendered essentially meaningless. I am unable to conclude that there is any lawful

justification for setting aside the delegate's discretionary decision to cease investigating Ms. Kariuki's complaint under section 76(3) of the ESA.

ORDER

14. The appeal is dismissed and, pursuant to section 115(1)(a) of the ESA, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal