

An appeal

- by -

Martin Uvacik

- 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: Richard Grounds

FILE NO.: 2019/213

DATE OF DECISION: June 16, 2020

DECISION

SUBMISSIONS

Martin Uvacik on his own behalf

OVERVIEW

1. This is an appeal by Martin Uvacik (the “Appellant”) who brought a complaint under the *Employment Standards Act* (the “ESA”) against Enigma Stone Ltd. (“Enigma”). Sarah Beth Hutchinson, a delegate of the Director of Employment Standards (the “Delegate”), issued a determination where she concluded that the Appellant had not filed his complaint within the required six month statutory time limit and exercised her discretion not to investigate the complaint (the “Determination”).
2. The Appellant appealed the Determination pursuant to section 112 of the *ESA* on the basis that the Delegate failed to observe the principles of natural justice in making the Determination because she failed to take notice that Enigma was making payments to the Appellant.
3. The Tribunal disclosed the section 112(5) record (the “record”) to the parties and requested submissions on the completeness of the record. No submissions were received, and the Tribunal accepts the record as being complete. It was subsequently noted by the Tribunal that the Determination included with the Appeal was not complete, so a complete copy of the Determination was requested from the Director of Employment Standards and disclosed to the parties.
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. Submissions were not requested from the parties or the Delegate.
5. For the reasons that follow, the Appellant’s appeal is denied and the Determination is confirmed.

ISSUE

6. The issue before the Tribunal is whether the Delegate failed to observe the principles of natural justice when she exercised her discretion not to investigate the Appellant’s complaint.

ARGUMENT

7. The Appellant submits that the Delegate failed to observe the principles of natural justice when she did not proceed with investigating the complaint. The Appellant submits that the Delegate should have “taken notice” of the fact that the employer was making payments towards what it owed the Appellant. The Appellant submits that the complaint was only filed when the employer stopped making payments and that there was no need to file a complaint until the payments stopped.
8. The Appellant also submits that there were “many and clear case’s of perjury” [sic] by Enigma and “constant contradictions of statements” made by Enigma with no corresponding evidence.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

9. Enigma operates a masonry business in British Columbia and Miroslav Sarvas is its sole director. The Appellant started working for Enigma in 2015 and signed an agreement to work as a subcontractor. The Appellant only worked for Enigma during this time and primarily used tools provided by Enigma. In the fall of 2017, the Appellant worked for Enigma in Whistler and in Richmond. The Appellant facilitated hiring of another worker at the Richmond worksite and, according to the Appellant, paid that worker on behalf of Enigma.
10. Enigma would pay the Appellant after Enigma was paid on contracts. The Appellant's last day of work for Enigma was November 2, 2017. Enigma owed the Appellant money after he stopped working for Enigma and made some payments to the Appellant.
11. On November 8, 2018, the Complainant filed a complaint under section 74 of the *ESA* for the balance of the money owed to him by Enigma. A key issue on the merits of the claim would be whether or not the Appellant was an employee or contractor for Enigma.

The Determination

12. The complaint proceeded to a hearing in front of the Delegate on June 7, 2019. On November 19, 2019, the Delegate issued the Determination which concluded that the Appellant had not filed his complaint within the required six-month time limit after the last day of employment, which deadline would have expired on May 2, 2018. The Delegate concluded that "continued negotiations for payment between parties is not sufficient evidence to support a finding that an employment relationship is ongoing."
13. The Delegate considered whether or not to exercise her discretion to refuse to investigate the complaint and concluded that the Appellant had not provided any compelling reasons to explain the significant delay in filing his complaint. The Delegate concluded that there were no exceptional circumstances that caused the Appellant to file his complaint late and found that it was appropriate to exercise her discretion to take no further action regarding the complaint.
14. Given the Delegate's decision to not investigate the complaint, it was not necessary for the Delegate to determine whether or not the Appellant was an employee.

ANALYSIS

15. The Appellant stopped working for Enigma on November 2, 2017. Enigma subsequently made payments to the Appellant for money owed to him. Pursuant to section 74(3) of the *ESA*, the Appellant had until May 2, 2018, to file a complaint under the *ESA*. The Appellant filed his complaint on November 8, 2018, after Enigma stopped making payments to him. The Appellant did not feel that there was any need to file a complaint until Enigma stopped making payments to him. The Delegate did not find this to be a

compelling reason for missing the statutory deadline to file a complaint and refused to investigate the complaint.

16. The Delegate considered the Appellant's argument about Enigma making payments to him but concluded that "continued negotiations" did not extend the employment relationship between them which ended on November 2, 2017. The Delegate noted that the requirements to file a complaint are "very explicit" and publicly available where persons can phone the Branch information line for clarification. The Delegate did not find the Appellant's reasons for the "significant delay in filing his complaint" to be compelling or that they amounted to "exceptional circumstances" that caused him to file his complaint late.
17. 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.
18. The Appellant submits that the Delegate failed to observe the principles of natural justice when she exercised her discretion to refuse to investigate the complaint. The Appellant essentially submits that the Delegate should have been persuaded that giving Enigma time to make payments to him was a good reason for not filing a complaint under the *ESA* within the required six-month time limit. Although the Appellant submits that Mr. Sarvas committed perjury, the appeal submissions do not include any specifics about this or how this might impact on the exercise of the Delegate's discretion.
19. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias. Failing to agree with the Appellant that making payments should extend the six-month deadline to file a complaint does not itself support a finding that the Delegate failed to observe the principles of natural justice. The deciding issue is whether the Delegate improperly exercised her discretion to not investigate the complaint which was filed outside the statutory time limit.
20. In *Jody L. Goudreau et.al.* (BC EST # D066/98), the Tribunal set out the circumstances under which it would interfere with the Director's exercise of discretion:

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 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 often is said, to be acting unreasonably".

Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

21. The Supreme Court of Canada has directed that discretion must be exercised for bona fide reasons, must not be arbitrary, and must not be based on irrelevant considerations.¹ In *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R.2, the Supreme Court stated:
- 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.
22. The Appellant bears the burden to prove that the Delegate exercised her discretion in an improper manner. Aside from disagreeing with the Appellant's argument, there is no evidence the Delegate improperly exercised her discretion in deciding to refuse to investigate the Appellant's complaint. There is no suggestion, or evidence, that she exercised her discretion arbitrarily, that she based her decision on irrelevant considerations, or that she acted in bad faith.
23. I find no basis to conclude that the Delegate failed to observe the principles of natural justice when she exercised her discretion not to investigate the Appellant's complaint which was filed outside the statutory six-month time limit.

ORDER

24. Pursuant to section 115 of the *ESA*, I order the Determination dated November 19, 2019, be confirmed.

Richard Grounds
Member
Employment Standards Tribunal

¹ *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)], relied on by the Tribunal in *Joda M. Takarabe et. al.* (BC EST # D160/98).