Citation: Mary Jo Fetterly (Re)
2021 BCEST 4

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Mary Jo Fetterly
(the "Employer")

- 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.: 2020/120

DATE OF DECISION: January 8, 2021

DECISION

SUBMISSIONS

Victoria Merritt	counsel for Mary Jo Fetterly
Ping Kang	on her own behalf
Carrie H. Manarin	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Mary Jo Fetterly, (the "Employer") of a July 8, 2020 determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director found that the Employer had contravened sections 40, 45/46, 58, and 63 of the *Employment Standards Act* ("*ESA*") in failing to pay a former Employee wages and compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $13,308.19. The Director also imposed four $500 administrative penalties on the Employer for the contraventions, for a total amount payable of $15,308.19.

3. The grounds for the appeal are that the Director erred in law and failed to comply with the principles of natural justice in making the Determination. After reviewing the appeal submissions, I decided I would not dismiss the appeal under section 114 of the *ESA*, and sought submissions from the Director and the Employee.

4. This decision is based on the section 112(5) "record" that was before the Director at the time the Determination was made, the submissions of the parties, and the Reasons for the Determination.

FACTS

5. The Employer is a quadriplegic as a result of a spinal cord injury. She employed Ping Kang (the "Employee") as a caregiver from about June 1, 2011, until August 28, 2017, when she terminated the Employee for allegedly making unauthorized withdrawals from her bank account. The Employee filed a complaint on September 23, 2017, alleging that the Employer had contravened the *ESA* in failing to pay her compensation for length of service.

6. The record indicates that the Employment Standards Branch (the "Branch") scheduled a mediation into the complaint in late 2017.

7. The Branch then scheduled a hearing into the Employee's complaint on January 5, 2018. Both parties appeared at the hearing in person. Also present for the hearing were three witnesses on behalf of the Employer as well as the Employer's counsel.

8. The parties disagree on precisely what occurred, but, according to the Determination, the Employee left the Branch before the hearing commenced. The Determination suggests that there was a discussion

between a delegate ("the 1st delegate") and the parties regarding the Director's jurisdiction to decide the complaint. The Determination indicates that the parties understood that the 1st delegate believed that the Branch had no jurisdiction to decide the matter on the basis that the Employee was a "sitter" as defined in the *Employment Standards Regulation* (the "*Regulation*").

9. According to the Determination, after being informed that the hearing was about to start, the Employee told the 1st delegate that she did not want to see the Employer or be questioned by her Counsel, and that she did not want to proceed with the hearing. The 1st delegate told the Employee that if she wanted to proceed with her complaint, she had to participate in the hearing. The Employee responded "no go through hearing" and said that she wanted to leave. The 1st delegate informed the Employee that if she left the Branch office, the complaint process "would be done" and if she left, that meant she was withdrawing her complaint.

10. The 1st delegate told the Employee that she would need to sign a withdrawal form and the Employee agreed to do so. The 1st delegate obtained a withdrawal form but when presented with it, the Employee refused to sign. The 1st delegate then left the hearing room to review the file. When the 1st delegate returned, the Employee was no longer present. The 1st delegate later saw the Employee leaving the Branch office and went to speak with her. He informed her that by choosing not to participate in the hearing, "she was closing the matter." The Employee stated that she understood and left the Branch office.

11. At no time did the Employee indicate she was sick or unable to participate in the hearing, nor did she request an adjournment of the hearing. The 1st delegate confirmed the withdrawal of the complaint by way of an email to the Employee later that day:

> As we discussed this morning, you have withdrawn your complaint and your file will be closed, as you left the office before your hearing.
>
> With the closure of the file, no further work will be conducted on your file by the Employment Standards Branch.

12. Approximately two weeks later, after not hearing from the Employee, the 1st delegate contacted the Employer to confirm that the complaint file had been closed. His letter to the Employer read as follows:

> The complaint filed by [the Employee] has been closed, as [the Employee] abandoned her matter on January 5, 2018, the day of the hearing. As a result, the Employment Standards Branch will not conduct any further work on the original complaint.

13. On June 7, 2018, the Employee emailed the 1st delegate regarding her case. In the email, the Employee indicated that she was told that the Branch did not have jurisdiction over her complaint. The 1st delegate did not respond to the email.

14. In November 2018, the Employee contacted a Branch regional manager, and told her that she did not want to withdraw her complaint. The Employee informed the regional manager that she was previously unable to participate in the process due to an illness but now that she was well, she wanted to re-open her complaint.

15. The complaint was assigned to a new delegate (the "2nd delegate") and a new hearing was scheduled for March 6, 2019.

16. The 2nd delegate conducted a pre-hearing teleconference on February 9, 2019, to review the documentation that had been submitted to date. Counsel for the Employer contended that the 2nd delegate should first address the issue of whether or not the Employee had withdrawn her complaint and was now time-barred from filing another complaint. Counsel requested that the 2nd delegate address only evidence related to that issue. The 2nd delegate denied the request on the basis that significant time had passed since the Employee's employment had ended, and that a further delay would impact the reliability of the evidence.

17. Counsel also sought an order compelling the 1st delegate to attend the hearing to give evidence about the withdrawal issue. Counsel also sought an order compelling the appearance of a Vancouver Police Department ("VPD") Constable along with an unredacted version of a VPD report regarding ATM transactions.

18. The 2nd delegate decided that the complaint would be decided by way of investigation, and informed the parties that, once she had heard the evidence, she would decide whether it was necessary to obtain further evidence from the 1st delegate. The 2nd delegate decided it was not necessary to obtain further evidence from the VPD since the Employee had acknowledged making the transactions identified in the report.

19. The 2nd delegate conducted a fact-finding meeting on March 6, 2019, at which the Employer and her Counsel, and the Employee appeared in person. Also attending in person were the Employee's daughter and four witnesses. The Employee, Employer and four witnesses all gave oral evidence. The Employer also submitted 31 additional pages of evidence. At this meeting, the Employee confirmed that she was seeking only compensation for length of service. Consequently, the Employer's Counsel was not permitted to ask the Employee any questions regarding her overtime or hours of work.

20. The 2nd delegate conducted a second fact-finding meeting on May 9, 2019, at which the Employer and her Counsel, and the Employee all appeared in person. The Employer submitted an additional 82 pages of documents. At this fact-finding meeting, the Employee informed the 2nd delegate that she wished to amend her complaint to add a claim for overtime and meal breaks. The Employer's Counsel objected, arguing that the Employee had abandoned those claims both during what the 2nd delegate characterized as the "pre-hearing" conference in February 2018 as well as at the first fact-finding conference. The 2nd delegate reserved her decision about whether or not to allow the Employee to amend her complaint. Counsel also argued that the 2nd delegate should stop investigating the complaint under section 76(3) of the *ESA.* Counsel argued that the Employee was consistently evasive and delaying the process, which amounted to an abuse of the Branch's process. Although the 2nd delegate denied the Employer's application, she did direct the Employee to be more efficient in her questioning of the Employer.

21. The 2nd delegate found it necessary to conduct a third fact-finding meeting as the Employer had not had the opportunity to ask the Employee questions on her evidence.

22. The 2nd delegate also advised the parties that it was necessary to obtain the 1st delegate's evidence with respect to the circumstances of the first hearing on January 5, 2018. The 2nd delegate interviewed the 1st

delegate on June 27, 2019, and summarized that evidence in a July 22, 2019 letter to the parties. That evidence is set out in paragraphs 10 – 12.

23. The 2nd delegate held a third fact-finding meeting on July 12, 2019. The Employer appeared with counsel, and the Employee claimed that she would also be represented by counsel. The fact- finding meeting was adjourned for one half hour, after which the Employee claimed that her legal counsel would not be attending. At the end of the meeting, the Employee claimed that she had additional questions to ask the Employer. The 2nd delegate denied the Employee's request to ask the Employer additional questions regarding her evidence at the second fact-finding meeting.

24. Following the third fact-finding meeting, the 2nd delegate decided that the Employee was not barred from pursuing a claim for meal breaks and overtime given that "an investigation is a fluid process and investigators are not bound by strict rules of procedure."

25. The 2nd delegate established a schedule for submissions on the issues, which were to be completed by November 8, 2019.

26. The 2nd delegate left the Branch in December 2019 without issuing a Determination, and the file was assigned to a third delegate (the "3rd delegate") to complete the investigation. The 3rd delegate determined that she was unable to make a decision based on the 2nd delegate's notes, so she prepared a 30-page summary of the material on file and asked the parties for comment. The 3nd delegate also asked the parties for additional written submissions on specific issues on April 17, 2020, and June 11, 2020.

Determination

27. The issues before the Director were as follows:

i. Whether or not the Employee had withdrawn her complaint;

ii. Whether or not the Employee was a "sitter" and thus excluded from the provisions of the *ESA*;

iii. If the Employee was not excluded from the *ESA*, whether she was entitled to additional wages for overtime or for working during meal breaks; and

iv. If the Employee was not excluded from the *ESA*, whether she was entitled to compensation for length of service.

28. After reviewing the evidence of the parties regarding the circumstances of January 5, 2018, the 3rd delegate found, among other things, that the 1st delegate informed the Employee that if she left, she would be deemed to have withdrawn her complaint. The 3rd delegate also noted that the Employee acknowledged receiving the 1st delegate's email of January 5, 2018, that the complaint was being considered withdrawn and closed because she left the Branch office.

29. The 3rd delegate also considered the Employer's argument that the Employee had demonstrated no extraordinary circumstances that would warrant re-opening her complaint almost a year later and that on January 9, 2018, the 1st delegate had communicated to the Employer's counsel that the Employee intended to withdraw her complaint.

30. The 3rd delegate found:

> While there is some evidence that [the Employee] may not have felt mentally well in January and February 2018, she provided no compelling reason why she waited until June 2018 and then November 2018 to contact the Branch to say that she wanted to "re-open" her complaint. While [the Employee] claimed that she needed a rest from her conflict with [the Employer], [the Employee] was apparently well enough to commence and participate in proceedings with [the Employer] in the Human Rights Tribunal during the same period.
>
> Despite [the Employee's] failure to provide a plausible explanation for not pursuing her complaint between January and November 2018, the fact remains that [the Employee] never signed a Withdrawal of Complaint form and never expressly told the Branch that she wanted to withdraw her complaint.

31. The 3rd delegate concluded that the Employee had not withdrawn her complaint.

32. The 3rd delegate determined that, in addition to performing tasks related directly to the Employer's care, the Employee performed tasks of a housekeeping nature. The 3rd delegate concluded that the Employee was not a sitter under section 32(1)(c) of the *Regulation* and thereby excluded from the minimum standards prescribed by the *ESA*.

33. The delegate found that the Employee was entitled to overtime wages and statutory holiday pay.

34. Finally, the delegate found that the Employer had not discharged the burden of demonstrating that she had just cause to terminate the Employee's employment.

ARGUMENT

35. The Employer argues that the Director failed to observe the principles of natural justice by:

- representing to the parties that the Director did not have jurisdiction to hear the complaint and then later allowing the complaint to proceed;
- allowing the Employee to revise and reinstate her complaint without considering any prejudice to the Employer, resulting in inordinate and prejudicial delay;
- consistently refusing to allow the Employer to submit relevant evidence and call a witness from the VPD to testify;
- making a decision without having heard the three fact-finding meetings in which the parties and witnesses gave oral testimony on the central issues in the complaint; and
- making a decision without considering the credibility of either party, and without reconciling inconsistent evidence between the parties and witnesses.

36. The Employer also argues that the Director erred in law by making findings of fact that had no rational foundation and were insupportable on the evidence.

ANALYSIS

37. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination; and
>
> (c) evidence has become available that was not available at the time the determination was being made.

38. I have concluded that the Director failed to observe the principles of natural justice and erred in law in allowing the Employee to proceed with her complaint after January 5, 2018. Given my conclusion on this issue, I have not addressed the other issues in this appeal.

Error of Law

39. The Tribunal has 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.

40. Part 10 of the *ESA* governs 'Complaints, Investigations and Determinations.' Section 74(3) requires that complaints relating to an employee whose employment has been terminated must be delivered within six months after the last day of employment.

41. Section 76 of the *ESA* provides:

> (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),
>
> (b) this Act does not apply to the complaint,
>
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,

(d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,

…

(g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,

(h) the dispute that caused the complaint may be dealt with under section 3 (7), or

(i) the dispute that caused the complaint is resolved.

Did the Director make a decision to stop investigating the Employee's complaint on January 5, 2018?

42. The evidence, in my view, supports a finding that the Employee decided not to pursue her complaint. While the parties had different interpretations regarding the events of January 5, 2018, there is no dispute that the Employee refused to participate in a hearing at which all parties were prepared to proceed. There is no dispute that the 1st delegate informed the Employee that if she left the Branch without participating in the hearing, the Director would not continue to investigate her complaint. The record indicates that the Employee understood this communication. After being warned about the consequences of her non-participation, the Employee left the premises. The Employee received the 1st delegate's written confirmation that she had withdrawn her complaint and that it would not be investigated.

43. After receiving no response from the Employee for several weeks, the Director then communicated to the Employer that the complaint would not be pursued. I find that a reasonable person, viewing the circumstances objectively, would have understood from the circumstances that the complainant had abandoned the complaint and that the Director had decided to stop investigating it under section 76(3).

44. Given that the Director had made a decision to stop investigating the complaint, I find that the Director erred in law in later concluding that the Employee had not withdrawn the complaint because she had not signed a withdrawal form. There is nothing in the *ESA* that requires a complainant to formally withdraw a complaint. The Director has the authority to make decisions about the conduct of a complaint based on the circumstances before them. In this case, the 1st delegate confirmed with the Employee their discussions that day, in which the Employee had withdrawn her complaint. The Employee did not challenge either the 1st delegate's understanding of what had occurred, nor did she challenge his decision not to continue investigating her complaint.

45. Although the Director contends that where a complainant "fails to take the requisite steps specified by the Director in order to facilitate resolution or investigation of the complaint, the Director may refuse to continue to investigate the complaint", the Director also submits that in such cases, "section 79(8) of the Act requires the Director to issue a determination dismissing the complaint."

46. In my view, section 79(8) did not apply to the facts before the Director. Section 79(8) provides that, if satisfied that the requirements of the *ESA* and the regulations have not been contravened, the Director must dismiss a complaint. Given that the 1st delegate did not conduct any analysis into the question of whether the *ESA* applied or whether the complaint had merit, he could not have satisfied himself that the requirements of the *ESA* and the regulations had been contravened.

47. As the 1st delegate concluded that the Employee had withdrawn the complaint and made a decision to not continue investigating it, there was no statutory basis for a different delegate to conclude, 30 months later, that the Employee had not withdrawn her complaint and to continue with an investigation. I find that the Director erred by acting on a view of the facts that cannot be entertained.

Did the Director err in allowing the Employee to reinstate or revive her complaint?

48. While section 73(3) establishes a statutory time period in which a complainant must file a complaint, the Director has the discretion under section 76(3)(a) to accept and review an otherwise late complaint (see *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553). Even if I am wrong in concluding that the Director did not make a decision to stop investigating the Employee's complaint, the Director's subsequent exercise of discretion to revive or re-open the Employee's complaint must be exercised judicially.

49. The "revival" of the complaint occurred in November 2018, well over one year after the last date of the Employee's employment and ten months after the Employee had abandoned her complaint. In her submissions on appeal, the 3rd delegate submitted that the Director considered the purposes of the *ESA* in re-opening the Employee's complaint "in light of the fact that her complaint file had been closed yet there appeared to have been neither a withdrawal nor a determination on the issues."

50. In deciding to exercise her discretion to allow the Employee to revive her complaint, the 3rd delegate considered that the Employee had no plausible or compelling reasons for the significant delay. The 3rd delegate noted that although the Employee suggested she had been too ill to pursue her complaint under the *ESA*, that illness had not prevented her from pursuing a complaint against the Employer under the *Human Rights Code*.

51. The 3rd delegate did not consider the length of time that had passed since the end of the employment or the abandonment of the complaint or the purposes of the *ESA.* Nor did the 3rd delegate consider the potential hardship and prejudice to the Employer, which appeared to be significant. The sole basis for the reason for allowing the Employee to revive the complaint was that she did not expressly withdraw it. The exercise of discretion must not be based on irrelevant considerations (see *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R.2)). In my view, a failure to consider relevant factors constitutes an error of law.

52. In *J.C. Creations Ltd.* (BC EST # RD317/03), the Tribunal recognized the importance of an informal, efficient and cost-effective process:

> Employment standards legislation has been described by the Supreme Court of Canada as providing "...a relatively quick and cheap means of resolving employment disputes": *Danyluk v. Ainsworth Technologies Inc*., [2001] 2 S.C.R. 460, at p. 496. That approach is consistent with the report which led to the establishment of the Employment Standards Tribunal:
>
> > The advice the Commission received from members of the community familiar with the appeal system, the staff of the Ministry and the Attorney General was almost unanimous. An appeal system should be relatively informal, with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. (*O'Reilly (Re),* [2002] B.C.E.S.T.D. No. 167, BCEST #RD165/02 (Reconsideration of BCEST #D596/01))

53. These principles are embedded in the *ESA,* specifically in section 2(d), in which the purposes of the legislation include the provision of "fair and efficient procedures for resolving disputes over the application and interpretation of this Act." The record indicates that the process was anything but fair and efficient.

54. In my view, fairness requires that the parties be able to rely on a decision of the Director under section 76(3) that the Employee's complaint file was closed and that it would not be investigated. I find that, "reviving" the complaint well after the statutory time period has passed without a full consideration of the purposes of the legislation and the potential prejudice to the Employer, constitutes a denial of natural justice as well as an error of law.

55. I allow the appeal.

ORDER

56. Pursuant to section 115(1) of the *ESA*, I cancel the Determination.

Carol L. Roberts
Member
Employment Standards Tribunal