Citation: Tejinder Dhaliwal (Re)
2021 BCEST 51

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Tejinder Dhaliwal
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2021/042

DATE OF DECISION: June 2, 2021

DECISION

SUBMISSIONS

Tejinder Dhaliwal — on his own behalf

INTRODUCTION AND BACKGROUND FACTS

1. On October 9, 2020, Tejinder Dhaliwal (the "applicant") filed an unpaid wage complaint under section 76 of the *Employment Standards Act* (the "*ESA*"). In his complaint, the applicant noted that he worked as a "delivery driver" for a pizza restaurant, and that his last day of work was February 25, 2020.

2. Section 74 of the *ESA* states that "[a] complaint must be in writing and must be delivered to an office of the Employment Standards Branch…within 6 months after the last day of employment". Section 80 of the *ESA* provides for a "wage recovery period" of "12 months before the earlier of the date of the complaint or the termination of the employment". There is no provision in the *ES*A – as there is, for example, in the British Columbia *Human Rights Code* (section 22(3)) – specifically empowering the Director to extend the complaint filing period.

3. However, in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, the B.C. Court of Appeal held that "even though a written complaint is delivered more than six months after the termination of an employee's employment, the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so [and thus] s. 74 does not, as the Tribunal said, preclude the Director's discretion to accept a complaint" (para. 11).

4. In the matter now before me, Kathryn Rogers, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination and her accompanying "Reasons for the Determination" (the "delegate's reasons") dismissing the applicant's complaint under section 76(3)(a) of the *ESA*: "…the complaint is not made within the time limit specified in section 74 (3) or (4)."

5. The Determination and accompanying reasons were issued on January 26, 2021. The delegate's reasons for dismissing the complaint were as follows (at page R3):

> [The applicant] states he filed his complaint late because he was told by Employment Standards Branch staff that a one year time limit applied to the filing of complaints. He also states that a friend who was to assist in the filing of the complaint was out of the country.
>
> The requirements to file a complaint are very explicit and available publicly on the Branch's website. In addition, if employees or employers have questions about the Branch's process or the requirements of the Act they may phone the toll-free Branch information line for clarification.
>
> The [applicant] was required to file the complaint on or before August 26, 2020. As he did not file the complaint until October 8, 2020 [Note: the complaint was date stamped as having been received on October 9, 2020, but nothing turns on this discrepancy], there has been a delay. The [applicant] has provided no compelling reason to continue the investigation.

> Pursuant to section 76(3) of the Act, I am exercising my discretion as the Director's delegate to stop investigating this complaint.
>
> Accordingly, no further action will be taken.

6. On February 23, 2021, the applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*). The applicant's appeal documents included a statement to the effect that he had spoken with an unnamed person at the Employment Standards Branch ("ESB") "in 2020" who told him that he had "1 year time to file the complaint". He also noted that a friend who would assist him in this matter was "stuck" in India due to Covid-19 travel restrictions. The applicant did not indicate when he actually called the ESB, and no telephone records (for example, an itemized telephone bill) were submitted that might have confirmed that a call was, in fact, made to the ESB.

7. On April 23, 2021, the Tribunal confirmed the Determination (2021 BCEST 34 – the "Appeal Decision"). The Tribunal held (at para. 21):

> The delegate did not expressly consider any of the purposes of the *ESA* in arriving at her decision, although she did consider the legislation generally. However, even if the delegate failed to specifically consider that the *ESA* is intended to provide for fair and efficient procedures for resolving disputes as well as to promote the fair treatment of both employers and employees (section 2 of the *ESA*), I am not persuaded that she erred in law. The Employee filed his complaint almost eight months following his last day of work, approximately two months beyond the statutory deadline. His explanation for why he did so was, as the delegate found, unlikely. I am not persuaded that the delegate's decision not to extend the time period for filing a complaint is in error.

THE APPLICATION FOR RECONSIDERATION AND FINDINGS

8. The applicant now applies for reconsideration of the Appeal Decision pursuant to section 116 of the *ESA*. The applicant's reasons provided in support of his reconsideration application are set out in full, below:

> With due respect. I beg to say that I already mention in beginning that, when I first day call to Victoria (Employment Standard) office the lady attend my call she said I have a One year period to fill my Complaint. If she give my Right Information about six month time to fill my Complaint then I submit my Complaint before six month. So I think there is time misunderstanding. so its my request to please reconsideration my case. I will be very thankful to you. [*sic*]

9. It appears that English is not the applicant's first language, and that he may not be fully proficient in English. It may also be the case that he confused information given to him regarding the "wage recovery period" (12 months) with information provided to him regarding the time limit for filing a complaint (6 months). There is, of course, no transcript relating to the telephone conversation that he allegedly had with an unidentified ESB staff member. Indeed, there is no evidence whatsoever regarding this alleged telephone call with an ESB staff member other that the applicant's uncorroborated assertion that it occurred, and that he was told he had one year in which to file his complaint. The delegate's position was that it was "unlikely" that an ESB staff member would have informed the applicant that he had one year, rather than six months, to file his complaint.

10. While it is, of course, possible that an ESB information officer – presumably trained to field calls about the *ESA* from members of the public – might have provided incorrect information regarding the complaint filing limitation period, I agree with both the delegate and the Member on appeal that it is unlikely that an information officer would have made such an obvious error when communicating with a caller. As noted by the delegate in her reasons, the 6-month complaint period is clearly set out on the ESB's website, and in various other materials prepared by the ESB for members of the public.

11. The Tribunal cannot set aside the delegate's discretionary decision to stop investigating the applicant's complaint unless the delegate was acting in bad faith or otherwise abused her discretionary authority in making that decision. There is nothing in the record before me that suggests the delegate acted in bad faith or abused her discretionary authority.

12. In essence, the applicant relies on the doctrine of "officially induced error" (see *Lévis (City) v. Tétreault; Lévis (City) v. 2629-4470 Québec inc.*, [2006] 1 S.C.R. 420) to justify his failure to file a timely complaint. However, even assuming that doctrine applies in a civil rather than criminal or quasi-criminal context to relieve the applicant from strict compliance with a limitation period (and the doctrine may not be available in this circumstance – see *Village of Anmore v. Piamonte*, 2014 BCPC 349), the burden of proving the false representation about the complaint limitation period lies on the applicant. In this case, there is no cogent and probative evidence that the alleged misrepresentation occurred. There is simply no basis for setting aside either the Determination or the Appeal Decision.

ORDER

13. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal