

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Li Zheng
(the “Appellant”)

- 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: Brandon Mewhort

FILE NO.: 2021/061

DATE OF DECISION: September 28, 2021

DECISION

SUBMISSIONS

Li Zheng on her own behalf

OVERVIEW

1. This is an appeal filed by Li Zheng (the “Appellant”) of a determination issued by Taylor McDowell, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on June 4, 2021 (the “Determination”). The appeal is filed pursuant to section 112 of the *Employment Standards Act* (the “ESA”).
2. The Appellant worked as a salesperson for Mazda Canada Inc., which carries on business as Signature Mazda (the “Employer”). The Appellant’s last day of work for the Employer was July 4, 2019. The Appellant filed a complaint under section 74 of the *ESA* alleging that the Employer failed to provide adequate written notice of termination or compensation for length of service. The complaint was delivered to the Employment Standards Branch on March 19, 2021, which was well past the six-month time limit established under section 74(3) of the *ESA*.
3. The Delegate found the length of delay to be substantial and he did not find any compelling reason for it. As a result, the Delegate exercised his discretion to stop investigating the complaint pursuant to section 76(3) of the *ESA*.
4. In her appeal, the Appellant argues that the Delegate failed to recognize medical conditions that prevented her from filing her complaint within the six-month time limit. The Appellant argues that it was unfair and unreasonable for the Delegate to stop investigating the complaint.
5. Section 114(1) of the *ESA* provides that 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, among other things, there is no reasonable prospect the appeal will succeed.
6. I have decided to dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed. I have assessed the appeal based on the Determination, the reasons for Determination, the appeal, the Appellant’s written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made.

ISSUE

7. Whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

8. In the Determination, the Delegate considered the preliminary matter of whether the Appellant's complaint was filed within the time limit established under section 74(3) of the *ESA* and, if it was not, whether the Delegate should exercise his discretion to stop investigating the complaint.
9. The Delegate found the complaint was clearly not filed within the time limit established under section 74(3) of the *ESA*. Then, in deciding whether to exercise his discretion to stop investigating the complaint, the Delegate considered several factors, including:
 - a. While the Appellant may have had health issues, including a short stay in the hospital in December 2019, she gained other employment shortly after her termination from the Employer and that subsequent employment was carried on without the need for any accommodation until January 2020.
 - b. Beyond stating that she had health issues, the Appellant did not provide any evidence to demonstrate that those health issues prevented her from filing her complaint within the six-month time limit.
 - c. The requirements to file a complaint are explicit and available publicly on the website of the Employment Standards Branch. The Branch also has a toll-free phone number to call for additional information.
 - d. The Appellant had experience with the Branch's complaint process. In particular, she filed a separate complaint against a different past employer on February 27, 2020. A determination was issued regarding that complaint on June 25, 2020, finding that the complaint was not delivered within the six-month time limit. However, the Delegate accepted that the Appellant may not have been aware of the statutory timelines in this case, given that the deadline for filing a complaint in this case was January 6, 2020, which was before she filed the other complaint.
10. The Delegate determined that there was not a sufficient or compelling reason to extend the filing timeline and to investigate the merits of the Appellant's complaint. In particular, the Delegate found that the Appellant not being aware of the filing timelines and being too busy with another job were not compelling reasons. Accordingly, the Delegate exercised his discretion pursuant to section 76(3) of the *ESA* and stopped investigating the Appellant's complaint.

ARGUMENTS

11. The Appellant argues that the Delegate failed to recognize the medical conditions that prevented her from filing the complaint on time. In particular, the Appellant argues that she made it clear to the Delegate that she still has not recovered from trauma that happened in 2018, as a result of a financial crime committed against her. The Appellant attached to her appeal form a news article from the Canadian Broadcasting Corporation dated February 22, 2021, in which it was reported that she lost \$340,000 in a wire transfer scam in May of 2018.
12. The Appellant says that, according to her psychiatrist, it will take years to recover from her trauma. The Appellant says she asked the Delegate whether a medical note is required to prove her medical condition;

however, the Appellant did not discuss what the Delegate's response was. For example, the Appellant did not allege that the Delegate failed to give her an opportunity to provide a medical note.

13. The Appellant says that, as a result of the trauma, she has been suffering from some memory loss, which she shared with the Delegate. Again, the Appellant argues the Delegate did not take that into account in the Determination.
14. The Appellant says that if a note from her treating psychiatrist is required to prove her medical condition prevented her from filing the complaint on time, then she will ask her psychiatrist for one. However, the Appellant has not suggested in her submissions that new evidence has become available that was not available at the time the Determination was being made.

ANALYSIS

15. 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.
16. When asked in the appeal form to select her grounds of appeal, the Appellant indicated that the Delegate erred in law and that the Delegate failed to observe the principles of natural justice in making the Determination. I will consider both of those alleged grounds of appeal.

Alleged error of Law

17. This Tribunal has demonstrated “considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances”: *Victor Noakes (Re)*, 2021 BCEST 16 (“*Noakes*”) at para 28.
18. This Tribunal has stated that it “will not interfere with that 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”: *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98.
19. This Tribunal has also relied on an excerpt from *Re Maple Lodge Farms Ltd. v. Government of Canada*, 1982 CanLII 24 (SCC), [1982] 2 SCR 2 at 7, in which the Supreme Court of Canada discussed the exercise of a statutory discretion:

It is, as well, a clearly established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised 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.

20. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*, 2021 BCEST 34 at para 13. In this case, the Appellant has only submitted that the exercise of the Delegate’s discretion was unreasonable. The Appellant has not alleged an abuse of power, a mistake in construing the limits of his authority, a procedural irregularity, or bad faith.
21. I note the Delegate did not expressly consider the purposes of the *ESA* in exercising his discretion – e.g., the Delegate did not discuss how section 2 states 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. However, in my view, there is nothing in the Determination or on the record to suggest that the Delegate relied upon considerations irrelevant or extraneous to the statutory purposes of the *ESA*, particularly section 76(3).
22. The complaint in this case was filed well outside the six-month time limit – in fact, it was filed more than 20 months after the Appellant’s last day of work for the Employer. The Delegate then exercised his discretion to stop investigating the complaint given the length of delay and because, in his view, there was not a sufficient or compelling reason to extend the six-month time limit.
23. In particular, the Delegate found that, while the Appellant may have had health issues, she gained other employment shortly after her termination from the Employer, which was carried on without the need for any accommodation until January 2020. The Delegate also found that the Appellant did not provide any evidence to demonstrate that her health issues prevented her from filing her complaint within the six-month time limit. In my view, it cannot be said that the Delegate exercised his discretion unreasonably.
24. Based on my review of the record and the Determination, I am not persuaded the Delegate erred in law and I find no basis upon which to interfere with the exercise of his discretion. I therefore dismiss this ground of appeal.

Alleged failure to observe principles of natural justice

25. In *Noakes, supra*, this Tribunal considered a similar case in which an employee appealed a delegate’s decision to stop investigating a complaint. This Tribunal held at para 21 of *Noakes* that: “A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation.”
26. Then, in considering whether the delegate failed to observe principles of natural justice, this Tribunal held (*Noakes* at para 22):
- In the circumstances, the only obligations placed on the Director by principles of natural justice were to advise Mr. Noakes his complaint was not filed within the period allowed in section 74 of the *ESA*, to provide him with an opportunity to explain the delay, to fairly consider his reasons, and to make a decision.
27. In this case, the Delegate notified the Appellant that her complaint was not delivered within the time limit. The Delegate then, in my view, gave the Appellant a reasonable opportunity to provide an explanation for not delivering her complaint in time. The record shows that the Delegate had two telephone conversations with the Appellant and sent her two emails asking for an explanation. It is apparent from the Determination that the Delegate considered the Appellant’s explanations and found they were not

compelling. The Delegate then exercised his discretion and stopped investigating the Appellant's complaint for the reasons discussed above.

28. The Appellant alleges that the Delegate failed to recognize the health issues that prevented her from filing the complaint on time. I disagree. It is clear in the Determination that the Delegate did, in fact, consider the Appellant's health issues. The Delegate found that the Appellant did not provide any evidence to demonstrate that those health issues prevented her from filing her complaint within the six-month time limit. Notably, the Appellant does not allege that the Delegate failed to provide her an opportunity to provide such evidence.
29. In my view, the Appellant has not provided any evidence in support of her allegation that the Delegate failed to observe the principles of natural justice. I therefore dismiss this ground of appeal.

ORDER

30. I order that the Determination be confirmed pursuant to section 115 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal