

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Jatin Dhiman
(the “Complainant”)

- 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: Maia Tsurumi

FILE No.: 2021/070

DATE OF DECISION: October 27, 2021

DECISION

SUBMISSIONS

Jatin Dhiman

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Jatin Dhiman (the “Complainant”) has filed an appeal of a determination (the “Determination”) issued by Taylor McDowell, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on July 2, 2021. The Delegate determined the Complainant did not file his complaint (the “Complaint”) within the time limit specified in sub-section 74(3) of the *ESA*. Under sub-section 76(3), the Delegate declined to exercise the Director’s discretion to investigate the late-filed Complaint.
2. The Complainant appeals the Determination on the grounds that the Delegate failed to observe principles of natural justice in making the Determination.
1. For the reasons set out below, I dismiss the appeal under 114(1)(f) of the *ESA*, because there is no reasonable prospect the appeal will succeed.
2. My decision is based on the submissions made by the Complainant in his Appeal Form, the sub-section 112(5) record (the “Record”), the Determination, and the Reasons for the Determination.

ISSUE

3. The issue before the Employment Standards Tribunal (the “Tribunal”) is whether this appeal should be allowed or dismissed pursuant to sub-section 114(1)(f) of the *ESA*.

THE DETERMINATION

Background

4. The Complaint was filed on March 9, 2021. The Delegate issued the Determination on July 2, 2021.
5. The Complainant worked for Elysia Samarodin and Mark Zeabin carrying on business as Vetta Ventures (the “Respondent”) as a general labourer from June 23, 2020 to August 20, 2020.
6. The Delegate’s initial review of the Complaint indicated it appeared to have been filed outside of the six-month time limit in sub-section 74(3) of the *ESA*.

Issues Before the Delegate

7. The issues before the Delegate were whether the Complaint was filed after the six-month deadline for filing a complaint under sub-section 74(3), and, if the Complaint was late filed, whether the Delegate should exercise his discretion to refuse to investigate the Complaint under sub-section 76(3) of the *ESA*.

Evidence Relied on by the Delegate

8. The Complaint stated the Complainant's last day of work was August 20, 2020, and he was not paid beyond his first pay period. After he resigned from his position, the Complainant attempted many times to resolve his dispute with the Respondent and was told he would be paid. In September, October, November and December 2020, the Complainant tried to resolve his dispute without success.
9. In January 2021, the Complainant travelled to India. He returned to Canada on February 6, 2021.
10. On March 6, 2021, the Complainant made a final, and unsuccessful, attempt to resolve the issue of his unpaid wages. Again, the Respondent said it would pay the Complainant "soon", but never did so.
11. Prior to filing the Complaint, the Complainant did not contact the Employment Standards Branch (the "Branch") and he stated he was unaware of the time limit in section 74 of the *ESA*.

The Delegate's Decision

12. The Delegate found the Complaint was filed outside the six-month time limit. As the Complainant's last day of employment was August 20, 2020, the Complaint had to be filed by February 22, 2021. It was filed on March 9, 2021.
13. The Delegate then considered whether to exercise his discretion to refuse to investigate the Complaint under sub-section 76(3) of the *ESA*. While all complaints are initially accepted for filing, at the time of the Complaint, the Director had the discretion to refuse to investigate a complaint if there was no compelling reason why the complaint was filed out of time.
14. The Delegate found the Complainant's reason for late filing was not sufficient or compelling enough for the Delegate to continue investigating the Complaint.
15. The Complainant told the Delegate that he was attempting to come to a voluntary resolution with the Respondent about his unpaid wages during the six months following his resignation. In every exchange with the Respondent, he was told he was going to be paid his wages shortly and he was hopeful he would be paid, which is why he did not file his Complaint until March 9, 2021. He also did not know about the six-month filing deadline.
16. While the Delegate was sympathetic to the Complainant's explanation for why he did not file his Complaint until March 9, 2021, he found the Complainant's efforts to reach a direct resolution about his unpaid wages would not have prevented him from filing his Complaint within the six-month time limit. Complainants do not have to notify their employer or show they tried to resolve the issue themselves before filing a complaint.
17. In arriving at his Determination, the Delegate reviewed sub-section 2(d) of the *ESA*, which says one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*. The Delegate said one way to attain this purpose was to require submission of complaints within the six-month time limit. This gives all parties a consistent and reasonable period of time to deal with complaints.

18. The Delegate stated the requirements for filing a complaint are very explicit and available publicly on the Branch's website. Further, if employees or employers have questions about the Branch's process or the ESA's requirements, they can phone the toll-free Branch information line.

ARGUMENTS

19. The Complainant submits the Delegate failed to observe principles of natural justice. In his submissions to the Tribunal, he reiterated what he told the Delegate about his work history, not receiving any pay except for his first pay period, trying to unsuccessfully resolve the dispute with his employer, and ultimately filing his Complaint. He also submitted documents in support of his Complaint.

ANALYSIS

20. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the ESA provides that a person may appeal a determination on any of 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.
21. I conclude the appeal has no reasonable prospect of success and dismiss the appeal under sub-section 114(1)(f). There is no basis on which to conclude there was a breach of natural justice. The Delegate gave the Complainant an opportunity to explain his delay in filing and considered the evidence provided. There was also no error of law or new evidence about the late filing that was not available when the Delegate made his Determination.
22. When the Tribunal receives an appeal of the Director (or their delegate)'s exercise of discretion regarding sub-section 76(3), the Tribunal must determine whether the complaint should have been accepted and reviewed having regard for the factors it considers properly bears on the exercise of the delegate's discretion.
23. The threshold for overturning an exercise of discretion under sub-section 76(3) of the ESA is very high. The Tribunal will not interfere unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of his or her authority, there was a procedural irregularity, or the decision was unreasonable: *Jody L. Goudreau et.al.* (BC EST #D066/98. Unreasonable in this context means, "...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 is often said, to be acting unreasonably." Absent any of these considerations, the Director even has the right to be wrong: *Re: Ted N. Hunt*, BC EST # D089/11, para. 42.
24. As noted by the Delegate, in deciding whether to exercise the discretion, the Director (or Delegate) considers whether the complainant has provided a compelling reason to excuse the delay in filing. What

is compelling is determined in light of the purpose to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA* in sub-section 2(d). Consideration of whether there was a compelling reason for a delay in filing involves determining whether there was an intent to file within the statutory time limit: see e.g., *Re: Ted N. Hunt*, BC EST # D089/11, paras. 41 – 46.

25. Here, the Complainant said he did not file on time because he was trying to resolve the issue himself before filing. Also, he did not know about the deadline. While, like the Delegate, I appreciate the Complainant trying to resolve his problem with his former employer directly and that ultimately, he was not aware of the time limit for filing complaints under the *ESA* and missed the deadline. There is nothing to indicate he intended to file within the six-month time limit but was unable to do so. Misunderstanding the time limit or being unaware of it is not a compelling reason to continue investigating a complaint when it is filed out of time: *Re: Zeljko Dragicevic*, BC EST #D132/15; *Fara Ghafari (Re)*, 2018 BCEST 79.

ORDER

26. Pursuant to sub-section 114(1)(f) of the *ESA*, I confirm the Determination dated July 2, 2021.

Maia Tsurumi
Member
Employment Standards Tribunal