Employment Standards TRIBUNAL

Citation: Inderpal Singh (Re)
2021 BCEST 94

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Inderpal Singh

- 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:** Jonathan Chapnick

**FILE NO.:** 2021/047

**DATE OF DECISION:** November 25, 2021

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Inderpal Singh | on his own behalf |
| Christopher D. Drinovz | counsel for Vancity Cabinets Ltd. |
| Tara MacCarron | delegate of the Director of Employment Standards |

## I. OVERVIEW

1. On November 22, 2019, Inderpal Singh (the "Employee") filed a complaint (the "Complaint") under section 74 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [***ESA*** or **Act**]. On April 27, 2021, a delegate of the Director of Employment Standards (the "Delegate") issued a determination regarding the Complaint (the "Determination").

2. In the Determination, the Delegate found that the Complaint was not filed within the six-month time limit set out in section 74(3) of the *ESA*. Given this finding, the Delegate exercised her discretion to stop investigating the Complaint pursuant to the former section 76(3)(a) of the *ESA*. As I briefly discuss below, sections 74 and 76 of the *ESA* were amended on August 15, 2021.

3. Under section 112(1) of the *ESA*, the Employee was allowed to appeal the Determination on one or more 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.

4. On May 27, 2021, the Employee appealed the Determination to the Employment Standards Tribunal (the "Tribunal"). On his appeal form, the Employee selected the "natural justice" ground of appeal set out in section 112(1)(b) of the *ESA*.

5. To succeed in his appeal, the Employee must show that at least one ground under section 112(1) of the *ESA* has been met. He has not done so. For the reasons that follow, the appeal is dismissed.

## II. EMPLOYMENT STANDARDS AMENDMENT ACT, 2019

6. As I noted above, the Determination was issued on April 27, 2021. Since that time, there have been several changes to the *ESA*, including changes to sections 74 and 76, which took effect on August 15, 2021: *Employment Standards Amendment Act*, 2019, S.B.C. 2019, c. 27, ss. 24-25, 44 [***Amendment Act***]; B.C. Reg. 215/2021. However, the changes that took effect on August 15, 2021 do not apply to this Complaint: *Amendment Act*, s. 40. Rather, sections 74 and 76, as they read when the Delegate issued the Determination, continue to apply to the Complaint and to this appeal.

7. Thus, all references to sections 74 and 76 below are references to the provisions as they were when the Delegate issued the Determination.

## III. ISSUES

8. In this part of my decision, I set out the issues I must decide in this appeal.

9. The Tribunal takes a large and liberal approach to appeals under the *ESA*. This means inquiring into the nature and substance of an appeal to determine whether the grounds of appeal have been met, rather than mechanically adjudicating the matter based solely on the particular boxes checked by the Employee: *Triple S Transmission Inc.*, BC EST # D141/03.

10. Based on my review of the Employee's submissions and supporting materials, I find that his challenge to the Determination falls largely outside the ground selected in his appeal form. The substance of the Employee's appeal is aimed at the Delegate's exercise of discretion; the Employee says that the Delegate "misused … her discretionary power" under section 76 of the *ESA*. This is an assertion of an error of law: *Li Zheng (Re)*, 2020 BCEST 142 at para. 25 [***Li Zheng***]. Accordingly, at issue in this proceeding is not only whether there was a breach of natural justice, but also whether there was an error of law.

11. Expressed as questions, then, the issues in this appeal are as follows:

    (a) Has the ground of appeal set out in section 112(1)(a) of the *ESA* been met? In other words, did the Delegate err in law?

    (b) Has the ground of appeal set out in section 112(1)(b) of the *ESA* been met? In other words, did the Delegate fail to observe the principles of natural justice in making the Determination?

12. The onus is on the Employee to satisfy the Tribunal, on a balance of probabilities, that the answer to at least one of these questions is "yes": *Robin Camille Groulx*, 2021 BCEST 55 at para. 9 and authorities cited therein.

13. In deciding the issues in this appeal, I have considered the Employee's May 27, 2021 appeal submissions, comprising the appeal form, the Employee's written reasons and arguments supporting the appeal, the documents provided by the Employee in support of the appeal, a copy of the Determination, and a copy of the written reasons for the Determination (the "Reasons for Determination"). I have also considered the record that was before the Delegate at the time of the Determination, which was provided to the Tribunal by the Delegate under section 112(5) of the *ESA* (the "Record"). In addition, I have considered the Delegate's August 13, 2021 response submissions in this appeal, as well as the August 18, 2021 response submissions of Vancity Cabinets Ltd. (the "Employer" or the "Company").

14. I thank the parties for their submissions. In the discussion below, I do not refer to all of the information and submissions that I have considered. Rather, I only recount the portions that I have relied upon to reach my decision.

## IV. BACKGROUND

15. In this part of my decision, I set out the background facts and circumstances that preceded the Determination made by the Delegate and the Employee's subsequent appeal.

**A. Circumstances giving rise to the Complaint**

16. The material facts in this case were largely in dispute; for the most part, the parties disagreed on the circumstances giving rise to the Complaint. The following background circumstances, however, were not disputed:

(a) The Employer operated a cabinet manufacturing business in Surrey, BC. On April 18, 2018, the Employer received a positive Labour Market Impact Assessment, which showed there was a need for a temporary foreign worker to fill an interior decorator job at the Company (the "LMIA"). Further to the LMIA, on April 30, 2018, the Employer offered the Employee a full-time interior decorator job at the Company, at the wage rate stipulated in the LMIA ($22.75 per hour).

(b) Further to the LMIA and the April 30, 2018 job offer from the Employer, on September 25, 2018, the federal government issued a closed temporary work permit to the Employee, authorizing the Employee to work as an interior decorator at the Company for two years.

(c) The Employee accepted the full-time interior decorator job at the Company and began working for the Employer sometime in fall 2018.

(d) The Employer terminated the Employee, and the Employee's last day of employment at the Company was sometime in 2019.

17. The Employee's description of his time at the Company was very different from the Employer's. The Employee's Complaint submissions stated that he was "forced to do general labor work" for the Employer and "was never assigned *any* of the duties outlined in the [April 30, 2018] offer of employment." In his submissions, the Employee alleged "emotional abuse" and "financial abuse" by the Employer, including various instances of unpaid regular wages and overtime wages. In addition, in the Employee's Complaint submissions, he claimed that the Employer sought to impose an improper wage payment scheme on him, under which he would be required to pay a portion of his wages back to the Employer for each hour worked. It was further alleged that, following the Employee's refusal of the Employer's improper wage payment scheme, "the status of his employment became unclear." According to the Complaint form, the Employee "did not receive any expressed [sic] notification of layoff or termination from the company, nor was he scheduled to continue his employment as he usually was" in the months previous. The Employee alleged that the Employer "wrongfully terminated" his employment and he "was left without any legal means of earning wages until he was able to obtain an open work permit."

18. The Employer's submissions and materials in response to the Complaint told a contrasting story. The Employer's response submissions stated that the Employee "had no experience or skill in interior design" and "was wholly incapable of performing" his job duties; as a result, following unsuccessful attempts to coach and train the Employee, "Vancity terminated his employment" on January 31, 2019 and paid the Employee "for all of the hours he worked." In its submissions, the Employer asserted that the timesheet evidence submitted by the Employee in support of the Complaint was "fabricated and untrue" and "not credible or reliable." In addition, in its submissions to the Delegate, the Employer flatly denied the Employee's allegations regarding the improper wage payment scheme.

**B. Complaint process**

19. The Employee submitted the Complaint on November 22, 2019. In his initial complaint form, he estimated that he was owed $14,560 in regular wages (plus annual vacation pay and statutory holiday pay) earned between October 1, 2018 and January 31, 2019.

20. The Delegate sent a "Notice of Complaint" and "Demand for Employer Records" to the Employer on February 4, 2021. The Delegate's notes, which were included in the Record, indicate that she spoke to both parties on the telephone that day, and they provided her with conflicting information regarding the timeline of the Employee's employment at the Company, including the Employee's last day of employment. Moreover, the Employee's information regarding his last day of employment conflicted not only with the Employer's information, but also with the date (November 18, 2019) specified in his initial Complaint form.

21. The Employer disclosed certain requested records to the Delegate on February 25, 2021. On March 3, 2021, the Employee's representative provided additional Complaint submissions, including an affidavit, sworn by the Employee on October 14, 2019 in support of the Employee's application at that time for an open work permit based on "the financial and emotional abuse" he allegedly experienced in relation to his job with the Employer (the "Affidavit"). The additional Complaint submissions alleged several *ESA* violations, including violations of section 8 (No false representations), section 17 (Paydays), section 18 (termination pay), section 27 (Wage statements), section 35 (Maximum hours of work before overtime applies), section 40 (Overtime wages), and section 63 (Liability resulting from length of service). The Employee also sought additional "damages" for wrongful termination.

22. On March 4, 2021, the Delegate emailed the Employee's representative to advise him of the Employer's position regarding the Complaint, to disclose the Employer's documentary evidence, and to invite a further submission, which the Employee's representative provided on March 29, 2021. In the March 29 submission, the Employee's representative disputed the accuracy of some of the Employer's documentary evidence regarding the Employee's termination date, asserting that the Employee's "termination took place on or around February 15, 2019."

23. On April 1, 2021, the Employer emailed the Delegate to provide its submissions and materials in response to the Complaint. The Employer denied "each and every allegation" made in the Affidavit, taking the position (supported by written witness statements and documentary evidence) that the Company "terminated [the Employee's] employment on January 31, 2019." Given this alleged termination date, the Employer argued that "the Complaint is time-barred under section 74" of the ESA and "should therefore be dismissed without consideration of the merits."

24. On April 7, 2021, the Delegate sent a letter to the Employee's representative regarding the timeliness issue raised in the Employer's response submissions, inviting the Employee's representative "to provide details in writing, including any supporting documentation, of why [the Employee] failed to file his complaint within the six-month time limit." In response to the Delegate's April 7 letter, the Employee's representative emailed the Delegate on April 16, providing the Employee's "explanation in his own words" as to "why he was late in filling his Employment Standards complaint." The representative summarized the Employee's explanation as follows:

> Mr. Singh began his employment with Vancity Cabinets shortly after first coming to this country. As a newcomer to Canada Mr. Singh was unfamiliar with the various legal frameworks in place to deal with situations such as his. The employer, Vancity Cabinets, terminated his employment in such a way as to make the actual date upon which his employment was terminated uncertain which delayed his pursuit of legal intervention. While he was diligent in seeking redress for the wrongs committed by his employer, it was not until he spoke with an advocate in September 2019 that he became aware of the appropriate legal channels. Once he had received proper legal advice he was diligent in pursuing his complaint in a timely manner. I submit to you that, the interests of protecting newcomers to this province, who are often in a vulnerable situation, favour permitting this complaint to proceed despite the fact that it was filed beyond the time limit.

## V. REASONS FOR DETERMINATION

25. With the above background facts and circumstances in mind, I now move on to describe the decision of the Delegate that is the subject of this appeal.

26. The Delegate sent the parties the Determination and Reasons for Determination on April 27, 2021. In the Reasons for Determination, the Delegate first outlined the issues before her as follows:

> 1. Was the complaint filed within the time limit set out in section 74(3) of the Act?
>
> 2. If the complaint was filed outside the time limit, should I exercise my discretion … to refuse to investigate the complaint under section 76(3) of the Act?

27. Next, the Delegate briefly described the information provided by each party. Under the heading, "Information Provided by Inderpal Singh," the Delegate summarized the Employee's information regarding the timeliness issue as follows:

> … Mr. Singh stated he had been a newcomer to Canada at the time his employment with Vancity Cabinets began and ended and, as such, he was not familiar with the various legal frameworks in place for individuals such as himself. Mr. Singh claimed the Employer terminated his employment in such a way that it was uncertain as to when his last day of employment was. This consequently delayed his pursuit of legal intervention … Accordingly, Mr. Singh filed his complaint with the Branch on November 22, 2019. For these reasons, Mr. Singh asked the director to grant him an extension to the six-month time limit to file a complaint, not only thereby allowing him to pursue his case, but also as a way to protect the interests of newcomers to British Columbia who find themselves in vulnerable situations.

28. After summarizing the information provided by the Employer, the Delegate moved on to the "Findings and Analysis" section of her reasons. In her findings and analysis regarding whether the Complaint was filed "within the time limit required by section 74(3) of the Act," the Delegate reasoned as follows:

> The Complainant's last day of employment is under dispute; however, the two dates brought forward by both parties fall outside the six-month time limit permitted by the Act. Mr. Singh claimed his last date of employment was February 15, 2019, whereas the Employer argued his last date of employment was January 31, 2019. Either way, Mr. Singh did not file his complaint until November 22, 2019. As such, Mr. Singh's complaint was not filed with the six-month time limit set out by section 74(3) of the Act.

29. The Delegate then proceeded to a discussion of whether to exercise her discretion under section 76(3) of the *ESA* to stop investigating the Complaint. She began this discussion as follows:

> Section 2(d) of the Act identifies one of the purposes of the Act is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act." One method for attaining this purpose is to require complaints to be submitted to the Branch within the six-month time limit. This provides all parties, including employers, complainants, and the Branch, with a consistent and reasonable period of time to deal with complaints.

30. The Delegate went on to explain the nature of the discretionary exercise under section 76(3), reasoning that a delegate of the Director of Employment Standards may exercise their discretion to stop investigating an untimely complaint "absent a compelling reason why the complaint was filed late." Against this analytical backdrop, the Delegate found as follows:

> Despite Mr. Singh claiming he was not aware of the resources available to him, being unaware of the option or requirements to file a complaint is not a compelling reason to continue an investigation when a complaint is out of time. The ability and 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.
>
> Even if the Branch were to accept Mr. Singh's claim [that] his last date of employment was February 15, 2019 … Mr. Singh was required to have filed his complaint on or before August 15, 2019. However, as he did not file his complaint until November 22, 2019, there was a substantial delay. Accordingly, I find the Complainant has provided no exceptional circumstances for filing the complaint late.

31. Given these findings, the Delegate exercised her discretion to stop investigating the Complaint.

## VI. ANALYSIS

32. In this part of my decision, I explain my findings regarding the issues in this appeal. In doing so, I outline relevant legal principles and discuss some of the submissions and documents provided to the Tribunal by the parties during the appeal process.

### A. Did the Delegate err in law?: *ESA*, section 112(1)(a).

33. Under section 112(1)(a) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "the director erred in law."

34. This ground of appeal centres on questions of legal analysis and reasoning. In deciding whether a delegate of the Director of Employment Standards has erred in law, the Tribunal considers whether the delegate has made any of the following errors:

(a) Misinterpreting or misapplying a section of the *ESA*.

(b) Misapplying an applicable principle of law.

(c) Acting (e.g. making a decision) without any evidence, or on an unreasonable view of the facts.

(d) Adopting a method of analysis or exercising a discretion in a way that is wrong in principle.

See, e.g., *Britco Structures Ltd.*, BC EST # D260/03; *Jane Welch operating as Windy Willow Farm*, BC EST # D161/05; *C. Keay Investments Ltd. c.o.b. as Ocean Trailer*, 2018 BCEST 5.

35. In the present appeal, the Employee specifically challenges the way in which the Delegate exercised a discretion. In his appeal submission, the Employee states that his Complaint was late "due to legitimate reasons," namely his "lack of knowledge/awareness of the Employment Standards Branch" and the "unknown status of [his] employment" following his termination. Given this explanation for his lateness, the Employee asserts that, in choosing to stop investigating the Complaint when she did, the Delegate "misused … her discretionary power." In deciding this appeal, then, I must determine whether the Delegate properly exercised her discretion to stop investigating the Complaint: *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553 at para. 12.

36. As the Employer stated in its reply submissions, the threshold for interfering with this type of discretionary decision is high. The Tribunal will not overturn a discretionary decision of this nature unless:

(a) the exercise of discretion was in bad faith or an abuse of power;

(b) the delegate erred in interpreting the limits of their discretionary authority;

(c) there was a procedural error in the delegate's exercise of discretion; or

(d) the discretionary decision was "unreasonable," in the sense that it was based on irrelevant considerations, or the delegate failed to consider relevant factors or exercised their discretion arbitrarily.

See *Li Zheng*; *Mark Bridge*, BC EST # RD044/09; *Joda M. Takarabe et al.*, BC EST #D160/98.

37. Moreover, the Tribunal gives a sympathetic reading to a delegate's reasons for determination. For instance, in examining the reasons for a delegate's determination, the Tribunal will assume (unless there is a good reason not to) that the delegate considered and weighed all the evidence and – based on that evidence – found every findable fact necessary to support the conclusions they reached: see *Budget Rent-a-Car of Victoria Ltd.*, BC EST # D021/12. In their reasons for determination, a delegate "need not explain every finding and conclusion" and need not "expound on each piece of evidence or controverted fact," as long as their "findings linking the evidence to the result can logically be discerned": *Michael L. Hook*, 2019 BCEST 120 at para. 40. Like those of other administrative decision-makers, a delegate's written reasons are not assessed against a standard of perfection: see *1170017 B.C. Ltd.*, 2021 BCEST 23.

38. Thus, in considering the Employee's challenge to the Delegate's exercise of her discretionary authority to stop investigating the Complaint, I have taken a deferential approach and given a sympathetic reading to the Reasons for Determination, to decide whether the Delegate erred in law. For the following reasons, I find that she did not.

***i. No errors or bad faith***

39. Section 74(3) of the ESA states that a "complaint relating to an employee whose employment has terminated must be delivered [to the Employment Standards Branch] within 6 months after the last day of employment." Section 74(4) sets out a similar six month time limit for complaints regarding alleged

contraventions of certain specific ESA provisions. Section 76(1) of the ESA generally requires a delegate of the Director of Employment Standards to "accept and review a complaint made under section 74." However, there are exceptions to this general requirement. Under section 76(3), a delegate "may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating, or adjudicating a complaint if … the complaint is not made within the time limit specified in section 74(3) or (4)."

40. Pursuant to these provisions, the Delegate decided to stop investigating the Complaint. There is no indication in the evidence or arguments before me that this was a bad faith exercise or an abuse of the Delegate's power. Nor has the Employee pointed me to any procedural errors in the Delegate's exercise or discretion.

41. Furthermore, I reject the suggestion, discernible in the following passage from the Employee's appeal submission, that the Delegate erred in interpreting the limits of her discretionary authority:

> … The Employment Standards Act was violated … It is the Director's obligation to carry out that justice and punish/penalize those who have violated sections of the ESA. Instead of the director using … her discretionary power to continue with the investigation, that discretion was used to stop the adjudication. Under the ESA section 76, it indicates that [the] Director **MAY** refuse to accept, review, mediate, investigate or adjudicate a complaint, not **MUST REFUSE**. With that being said, the Director could have used … her discretion to further conduct the investigation despite the complaint not being filed within the 6-month time limit … [emphasis in original].

42. I appreciate that the Employee likely experienced the Delegate's discretionary decision as unfair and unjust. Nevertheless, in examining the Delegate's decision, I find no misinterpretation of her discretionary authority. On the contrary, in the Reasons for Determination, the Delegate's discussion of section 76 of the *ESA* reflected the framework and principles that have been consistently applied by delegates and approved by the Tribunal in previous cases: see, *e.g.*, *Jun Yang*, 2020 BCEST 39 [***Yang***].

### *ii. Not unreasonable*

43. In addition to finding no errors or bad faith in the Delegate's exercise of discretion under section 76, I find that her discretionary decision was not unreasonable.

44. In the Reasons for Determination, the Delegate described the Employee's information regarding his "newcomer" status, the uncertainty surrounding his termination, and his lack of knowledge and awareness of the *ESA*. The Delegate also acknowledged the Employee's submission regarding the protection of vulnerable foreign workers, and she considered section 2(d) of the *ESA*, which the Tribunal has previously found to be particularly relevant to a delegate's exercise of discretion under section 76(3): see, *e.g.*, *Yang* at para. 44. The Delegate's decision was logical and supportable, and in no way based on irrelevant considerations.

45. Moreover, I take from the Reasons for Determination that, in the circumstances of the Complaint, the Delegate was not satisfied that the Employee's foreign worker status amounted to a "compelling reason" for continuing her investigation. I also deduce that the Delegate was not compelled by the Employee's submission that proceeding with the Complaint, despite its lateness, was "a way to protect the interests of newcomers to British Columbia who find themselves in vulnerable situations." Further, the Reasons

for Determination suggest that, in the circumstances of the Complaint, the Delegate concluded that the purposes of the *ESA* were best served by stopping her investigation of the Complaint when she did. I see no reviewable error in these findings and conclusions, as they were logically discernible on a sympathetic reading of the Reasons for Determination.

46. In sum, then, I find that the ground of appeal set out in section 112(1)(a) has not been met. The Employee has not shown me, on a balance of probabilities, that the Delegate erred in law by exercising her discretion in a way that was wrong in principle.

**B. Did the Delegate fail to observe the principles of natural justice in making the Determination?: *ESA*, section 112(1)(b).**

47. Under section 112(1)(b) of the *ESA*, a person may appeal a determination to the Tribunal on the ground that "the director failed to observe the principles of natural justice in making the determination." The Employee identified this ground of appeal in his appeal form and submissions to the Tribunal.

48. This ground of appeal centres on the principles of natural justice, and goes to whether the Delegate's process in making the Determination was fair. The principles of natural justice and procedural fairness typically include the right to know and respond to the case advanced by the other party, the right to have your case heard by an unbiased decision-maker, and the opportunity to present your information and submissions to that decision-maker.

49. As I stated above, I appreciate that the Employee likely experienced the Delegate's discretionary decision to stop investigating the Complaint as unfair and unjust. However, nowhere in his appeal materials is there any compelling evidence or argument regarding the issue of procedural fairness. Rather, the Employee's submissions and documents in this appeal largely replicate the types of evidence and argument he submitted to the Delegate during the Complaint process.

50. An appeal to the Tribunal is not an opportunity for an appellant to reargue the case they made to a delegate of the Director of Employment Standards: *Masev Communications*, BC EST # D205/04. The appellant's task in an appeal is entirely different. They must marshal their information and arguments to show that it is more likely than not that the delegate erred in making their determination on the basis of one or more of the specific grounds set out in section 112(1) of the *ESA*. The Employee has not succeeded in this endeavour in the present case.

51. Based on my review of the information and materials before me, I agree with the Employer's submission that the Employee "was afforded procedural fairness in all respects of the [Delegate's] investigation and resulting Determination." The Employee appears to have been given a full and fair opportunity to present his case to the Delegate, including his explanation for the untimeliness of the Complaint. The Delegate considered the evidence and arguments before her, and issued a Determination that was logical and supportable. As discussed above, there is no indication in the Record or elsewhere that the Delegate acted in bad faith, and the Employee has not pointed me to any procedural errors in the Delegate's decision-making.

52. I therefore find that the ground of appeal set out in section 112(1)(b) has not been met. The Employee has not shown me, on a balance of probabilities, that the Delegate failed to observe the principles of natural justice in making the Determination.

## VII. ORDER

53. For all of the above reasons, the Employee's appeal is dismissed and the Determination is confirmed: *ESA*, section 115(1).

**Jonathan Chapnick**
**Member**
**Employment Standards Tribunal**