



EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Rong Lu

("Lu")

- 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: Jenny Ho

FILE NO.: 2021/082

DATE OF DECISION: January 27, 2022

DECISION

SUBMISSIONS

Rong Lu

on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Rong Lu (“Ms. Lu”) has filed an appeal of a determination (the “Determination”) issued by Abraham An, delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on September 17, 2021.
2. In the Determination, the Delegate found that Ms. Lu had failed to file her complaint within the time limit set out in section 74 of the *ESA* and, exercising the discretion allowed to the Delegate in section 76 of the *ESA*, the Delegate decided not to proceed with the complaint.
3. Ms. Lu has appealed the Determination on the sole ground that the Delegate failed to observe principles of natural justice in making the Determination and seeks to have the Determination cancelled and her complaint investigated.
4. In correspondence dated October 13, 2021, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director, and notified the other parties that submissions on the merits of the appeal were not being sought from any other party at that time.
5. The record has been provided to the Tribunal by the Delegate and a copy has been delivered to Ms. Lu and Caspersnoopy Enterprises Ltd. and Shanshan Café Enterprises Ltd. carrying on business as La Cuisson Café (the “Employer”). Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, and my review of the material that was before the Delegate when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any appeal if the tribunal determines that any of the following apply:
 - (a) the appeal is not within the jurisdiction of the tribunal;
 - (b) the appeal was not filed within the applicable time limit;
 - (c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;
 - (d) the appeal was made in bad faith or filed for an improper purpose or motive;

- (e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;
- (f) there is no reasonable prospect the appeal will succeed;
- (g) the substance of the appeal has been appropriately dealt with in another proceeding;
- (h) one or more of the requirements of section 112(2) have not been met.

7. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and the Employer will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), the appeal will be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

8. Ms. Lu has requested an extension of the appeal period to submit additional documents for the Tribunal's consideration. I have reviewed these documents and determined that they are not relevant to the question before me.

ISSUE

9. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*. In other words, whether or not Ms. Lu has established any basis for the Tribunal to interfere with the Delegate's decision.

BACKGROUND

10. Ms. Lu was employed as a supervisor/barista by the Employer in October 2017. Due to the pandemic, Ms. Lu was laid off in March of 2020. The complaint form filed by Ms. Lu indicates that the last day of work was March 21, 2020. The Delegate found that the last day of work was March 26, 2020.

11. The complaint under section 74 of the *ESA*, filed by Ms. Lu, was received by the Director on October 27, 2020. In the complaint form, Ms. Lu alleged that the Employer contravened the *ESA* by failing to pay her regular wages, vacation pay, compensation for length of service, and wages for training. Based on an initial review of the complaint information provided by Ms. Lu, the Delegate found that the complaint was filed outside of the time limit set out in section 74(3) of the *ESA*, which reads:

- 74 (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within six months after the last day of employment.

12. On September 10, 2021, the Delegate telephoned Ms. Lu to inform her that the complaint had been filed outside the six-month limit and asked for reasons for the delay. Ms. Lu explained to the Delegate that the Employer had promised to pay her the owed wages when business improved. Believing that the Employer would pay her, she waited, but she was never paid. She was unaware of the six-month statutory time limit. She was told by friends that she could file at any time. She also said that she was not informed of the statutory time limit by the Employment Standards Branch when she called.

13. In the Determination, the Delegate considered two questions:
1. Was the complaint filed within the time limit set out in section 74(3) of the *ESA*?
 2. If the complaint was filed outside of the time limit, should he exercise discretion to refuse to investigate the complaint under section 76(3) of the *ESA*?
14. To the first question, the Delegate concluded that Ms. Lu filed her complaint outside of the six-month time limit in section 74(3) as the complaint was filed approximately one month after the statutory time limit.
15. To the second question, the Delegate referred to section 76(3) of the *ESA* that he may refuse to investigate a complaint that was not filed within the six-month statutory time limit. He correctly noted that the word “may” indicates this decision is discretionary.
16. The Delegate considered the information provided by Ms. Lu and, based on the information provided, found Ms. Lu had not filed her complaint within the time period allowed in the *ESA* and, for the reasons provided in the Determination, decided to exercise the discretion found in section 76(3) of the *ESA* to refuse to investigate the complaint.

ARGUMENTS

17. On the appeal form, Ms. Lu has checked off the “natural justice” ground of appeal. In her written appeal submission, she reiterates the reasons she provided to the Delegate for filing the complaint late: that the Employer told her she would get paid when business improved so she waited, and when the Employer ignored her calls and messages, she told her friends about her situation and a friend suggested that she file a complaint. She also raises allegations against the Employer.

ANALYSIS

18. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which states:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal 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.
19. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker.
20. While Ms. Lu only alleges the Delegate failed to observe the principles of natural justice in making the Determination, I have also considered her appeal under the error of law ground.
21. In her appeal submission, Ms. Lu questions why it took over a year since she filed her complaint for the Delegate to contact her. Her challenge to the Determination is also directed at the Delegate’s exercise of

discretion; she submits that the Delegate should have used his discretionary power under section 76 of the *ESA* differently.

22. In this appeal, the burden is on Ms. Lu to establish if the Delegate erred in law or failed to observe the principles of natural justice in making the Determination.

23. The decision whether to investigate a late-filed complaint is a discretionary decision.

24. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances.

25. As noted in *Inderpal Singh* 2021 BCEST 94, "...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."

26. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99.

27. In deciding not to proceed with Ms. Lu's complaint, the Delegate considered the following:

- a) one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes and that purpose is met by requiring timely filing of complaints;
- b) section 76(3) of the *ESA* confers the Delegate the discretion to refuse to investigate an untimely complaint unless there are compelling reason to explain why the complaint was filed late;
- c) Ms. Lu relied on the information provided by her friends, that "she could file an ESB complaint anytime";
- d) it was Ms. Lu's obligation to clarify the requirements of the *ESA*. The information could be obtained either by calling the Branch's information line or looking on the Branch's website; and
- e) although Ms. Lu's complaint was not filed substantially late (i.e. less than one month), there was no compelling reason to continue the investigation.

28. The Delegate notified Ms. Lu her complaint was untimely and gave her an opportunity to explain why she failed to file a timely complaint. The Delegate considered Ms. Lu's explanation, and ultimately found her explanation was not compelling and did not justify a decision to exercise his discretion in favour of investigating the complaint on its merits.

29. All of the reasons put forward by Ms. Lu in this appeal for the late filing of her complaint were addressed in the Determination. The Delegate considered factors that were relevant to the question being considered and the Determination was made within the legal framework of the *ESA*.
30. Ms. Lu also alleges that the Director did not proceed with investigating the complaint for more than a year after she filed her complaint.
31. The record shows that Ms. Lu filed her complaint on October 27, 2020 and that the Delegate contacted her by telephone and e-mail on September 10, 2021. This is a time period of approximately ten and a half (10.5) months.
32. The Tribunal has refused to cancel determinations where there was a delay of 39 months (*Ecco Il Pane Bakery Inc.* BC EST # D396/00) and over 4 years (*Tung*, BC EST # D028/01) where there was not serious prejudice (*Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44).
33. Ms. Lu has not provided any evidence that shows the delay of 10.5 months demonstrated serious prejudice to the complaint investigation process or to herself.
34. I find nothing in the appeal submission or the record that would support a finding that the Director erred in law or failed to comply with principles of natural justice in making the decision not to exercise his discretion to investigate her late-filed complaint.

Other Arguments

35. On appeal, Ms. Lu also alleges the Employer did not treat his employees properly, including asking employees to work without pay, failing to pay vacation pay, failing to pay statutory holiday pay, failing to pay overtime, failing to give employees ROE letters in a timely way, charging employees for preparing a Record of Employment, failing to give employees a T4, and erring in the amount of wages sent to the Canada Revenue Agency. As well, Ms. Lu submits copies of her paystubs for several years.
36. These allegations were not raised in the complaint before the Director.
37. Ms. Lu apologizes for her lack of legal knowledge and for failing to file her complaint in time. She states she understands the law and the policy, but states that her situation should be considered when considering whether to exercise the discretion to investigate her complaint even though it was filed outside of the statutory time period.
38. While Ms. Lu's claims may have been meritorious, and I make no finding in that regard, she was also required to provide a compelling basis for her request to the Director to investigate her late-filed complaint. After considering her reasons for filing late, the Delegate was not persuaded this was an appropriate case to investigate. I have reviewed the submissions before the Director and the Tribunal, and I am not persuaded the Delegate erred or breached procedural fairness in the exercise of his discretion.
39. There is no apparent merit to this appeal and no reasonable prospect it will succeed. The appeal is dismissed.

ORDER

40. Pursuant to section 115 of the *ESA*, I order the Determination dated September 17, 2021, be confirmed.

Jenny Ho
Member
Employment Standards Tribunal