

EMPLOYMENT STANDARDS TRIBUNAL

An appeal  
pursuant to section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C.113 (as amended)*

- by -

Bradley MacIver

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** David B. Stevenson

**FILE NO.:** 2022/126

**DATE OF DECISION:** September 15, 2022

## DECISION

### SUBMISSIONS

Bradley MacIver on his own behalf

### OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “ESA”) by Bradley MacIver (“Mr. MacIver”) of a determination issued by Leslie Tubrett, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on June 15, 2022 (the “Determination”).
2. The Determination found Mr. MacIver had failed to file his complaint within the time limit set out in section 74 of the *ESA* and, exercising the discretion allowed the Director in section 76 of the *ESA*, decided not to proceed with the complaint.
3. Mr. MacIver has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination.
4. In correspondence dated July 21, 2022, the Employment Standards Tribunal (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 Director and a copy has been delivered to Mr. MacIver, in care of his legal counsel of record, and the respondent employer, Lifesupport Air Medical Services Inc. (“Lifesupport”), in care of K LW Holdings, Ltd., formerly LIFESUPPORT Air Medical Services Inc., and its legal counsel. Both have been provided with the opportunity to object to its completeness. Mr. MacIver, through his legal counsel, has accepted the record is complete. No objection to the completeness of the record has been received from Lifesupport.
6. The Tribunal accepts the record is complete.
7. 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 Director 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 that 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.

8. 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 respondent 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), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

### 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*.

### THE DETERMINATION

10. Lifesupport operates a medical air transport and emergency services company. Mr. MacIver was employed as a nurse from September 2, 2011, to November 28, 2018, at a rate of pay of \$575.00 a day.

11. Mr. MacIver filed a complaint with the Employment Standards Branch on December 16, 2020, alleging Lifesupport had contravened the *ESA* by failing to pay regular wages, overtime wages, statutory holiday pay and compensation for length of service, and had failed to provide the proper hours free from work.

12. In assessing the complaint, the Delegate concluded it had been filed a considerable period of time after the time allowed for filing a complaint under section 74(3) of the *ESA*.

13. The Delegate provided Mr. MacIver an opportunity to explain the failure to file a complaint within the required statutory period of time.

14. Counsel for Mr. MacIver provided the following information and explanation on his behalf:

- a) In October 2018, Mr. MacIver filed a complaint under the *Canada Labour Code* (the “*CLC*”) for non-payment of wages and safety concerns;
- b) At the time, Mr. MacIver understood the business of Lifesupport, and his employment, fell under federal jurisdiction;
- c) This understanding was apparently confirmed in November 2018 in correspondence to Lifesupport, copied to counsel for Mr. MacIver, from an Inspector in the Employment and Social Development Canada Labour Program indicating Mr. MacIver’s complaint was within federal jurisdiction;

- d) In December 2018, Mr. MacIver was terminated from his employment and, in February 2019, he added an unjust dismissal claim to his complaint under the *CLC*;
  - e) In March 2019, counsel for Mr. MacIver was advised Lifesupport was contesting federal jurisdiction;
  - f) In June 2019, an Adjudicator was appointed to decide the claim of unjust dismissal which required, as a preliminary matter, a decision on the jurisdictional question;
  - g) Between November 2019 and June 2020, submissions were made to and proceedings took place on the jurisdictional question;
  - h) A decision was issued by the Adjudicator on November 27, 2020 finding Lifesupport was not a federal undertaking and there was no jurisdiction under the *CLC* to address and decide Mr. MacIver's complaint;
  - i) On December 16, 2020 Mr. MacIver filed a complaint under the *ESA*; and
  - j) In December 2020, Mr. MacIver filed a notice of civil claim for wrongful dismissal.
15. The Delegate found Mr. MacIver's last day of employment was December 4, 2018, and, as the complaint under the *ESA* was not filed until December 16, 2020, was outside of the six-month time limit expressed in section 74(3) of the *ESA*.
16. The Delegate found Mr. MacIver was aware in March 2019 of the challenge to federal jurisdiction and provided no reason for the not filing a complaint under the *ESA* at that time other than stating he wanted to await the outcome of the federal process.
17. The Delegate considered section 2(d) of the *ESA*, the delay and the absence of a compelling reason for the delay and, exercising the discretion given under section 76 of the *ESA*, decided to stop investigating the complaint.

## ARGUMENTS

18. Mr. MacIver does not dispute any of the salient facts relating to the decision of the Delegate not to investigate his complaint.
19. His main argument in this appeal is his assertion – which was made by his counsel to the Delegate – that because he had been advised in late 2017 by a person associated with the Employment Standards Branch that complaints respecting his employment were not provincial matters and as it has now been determined his employment is within provincial jurisdiction, the “provincial government” – meaning I presume the Employment Standards Branch – should be responsible for hearing his complaint.
20. He adds that when he filed his complaint under the *CLC* it was accepted as a federal matter and he was given no reason to believe he should file a parallel complaint under the *ESA*.
21. The appeal submission makes other arguments that were not made before the Delegate but, in any event, do not advance the merits of this appeal.

## ANALYSIS

22. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 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.
23. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
24. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
25. A party alleging a failure to comply with principles of natural justice, as Mr. MacIver has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99. I find nothing in the appeal that would support a finding the Delegate failed to comply with principles of natural justice.
26. In the circumstances, the only obligations placed on the Delegate by principles of natural justice were to advise Mr. MacIver 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. The Delegate satisfied those obligations; the Delegate notified Mr. MacIver his complaint appeared to be untimely and gave him a reasonable opportunity to provide an explanation for his failure to file a timely complaint. The Delegate ultimately found his explanation was not compelling and did not justify a decision to exercise discretion in favour of investigating and adjudicating the complaint on its merits.
28. The statutory framework under which this appeal arises is that complaints to the Employment Standards Branch must be filed within the applicable 6-month time period, which in the circumstances of this case was June 3, 2019 – 6 months from Mr. MacIver’s last day of employment: see section 74(3); late complaints will only be accepted as a matter of the Director’s discretion. That framework is summarized in *Karbalaeeali v. British Columbia (Employment Standards)* 2007 BCCA 533, at paras. 11-12, as follows:
- [11] While the Tribunal rightly stated that the *ESA* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, 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. In other words, s. 74 does not, as

the Tribunal said, preclude the Director’s discretion to accept a complaint. (original italics and bold)

[12] The question before the Tribunal was not whether the employee’s complaint was statute-barred but whether the Director’s delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate’s discretion. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised.

29. There is no issue that Mr. MacIver’s complaint was filed outside the time period allowed in section 74(3) of the *ESA*.
30. Mr. MacIver’s argument is that the Delegate, who has discretionary powers in section 76(3) of the *ESA*, ought to have exercised that discretion in favour of continuing to investigate the complaint on its merits because he was advised, in late 2017, by an unnamed person associated with the Employment Standards Branch, that his employment complaints were federal matters.
31. This information expands what was submitted to the Delegate, which is found at page 8 of the record, where counsel for Mr. MacIver says, “Mr. MacIver was advised by both provincial and federal government officials that his complaint fell under federal jurisdiction.”
32. I note here that there is no objective support for the assertion that Mr. MacIver had been given such “advice” by an Employment Standards Branch employee; nor is there any indication of who provided it, what inquiry was made at the time, or in what context the inquiry was made. But even accepting what Mr. MacIver says, his contention is not responsive to the concern of the Delegate that he neither sought any clarification or assistance from the Employment Standards Branch once the jurisdictional issue was raised, in early 2020, nor did he file a complaint under the *ESA* within the six-month time limit.
33. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director, or a Director’s delegate, may be varied on appeal.
34. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, or a Director’s delegate, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal’s decision in *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98:

The Tribunal 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. Unreasonable, in this context has been described as being:

...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter 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 often is said, to be acting “unreasonably”.

**Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229

35. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR, where the Court made the following comments about 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.

36. In this case, the Delegate considered the following matters in deciding not to proceed with the complaint:
- 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) The delay in this case was substantial – more than 18 months;
  - c) A decision to proceed with an investigation where a complaint has been filed late will only arise where there is a compelling reason to do so; and
  - d) Mr. MacIver did not explain why he failed to clarify his position under the *ESA* when it was apparent the issue of jurisdiction was not settled.

37. Part of the burden on Mr. MacIver in this appeal is to establish the Delegate acted “unreasonably” in the sense described above. None of the above matters were irrelevant to the discretionary decision which the Delegate was required to make and I am unable to conclude the Director acted unreasonably. I do not find the “advice” Mr. MacIver says he received in late 2017 affects the relevance of the matters the Delegate considered or, in the circumstances, adds an additional consideration which the Delegate was required to consider and give effect.

38. The decision of the Delegate considered factors that were relevant to the question being considered and was made within the legal framework of the *ESA*.

39. The legislature has spoken in clear and strong terms that timely filing of complaints is an important element in ensuring fair and efficient procedures for resolving disputes under the *ESA*. The language of section 74 of the *ESA* speaks in mandatory, not permissive, terms and should be read accordingly. Without attempting to catalogue the circumstances that would require a complaint filed outside of the time limits set out in section 74 to be accepted, reviewed, investigated and/or adjudicated, I would anticipate such cases would be rare.

40. In sum, I cannot say the Delegate made a careless or otherwise unreasoned decision to refuse to adjudicate the complaint on its merits. The Delegate asked for a compelling reason justifying the late filing and did not accept that the explanation provided by Mr. MacIver was sufficiently compelling to

warrant proceeding with the complaint. There is nothing to suggest that the Delegate's decision was tainted by bad faith or that it lacked any principled justification.

41. As stated above, short of showing the Delegate acted arbitrarily, without authority or not in good faith, the Tribunal will not interfere with the exercise of such discretion: *Takarabe et al.*, BCEST # D160/98. No basis for interfering with the Delegate's discretion in this matter has been shown in this case.
42. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

### **ORDER**

43. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated June 15, 2022, be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**