

An appeal

- by -

Michael Grenier
(the “Appellant”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2013A/55

DATE OF DECISION: January 10, 2014

DECISION

SUBMISSIONS

Peter Eastwood	counsel for Michael Grenier
Kimberley A. Robertson	counsel for The Bowra Group Inc. Receiver Manager of Kamlands Holdings Ltd.
Annette Fraser	on behalf of the Director of Employment Standards

OVERVIEW

1. Michael Grenier (the “Appellant”) appeals a determination of a delegate (the “Delegate”) of the Director of Employment Standards dated July 3, 2013 (the “Determination”).
2. The Determination followed a complaint filed by the Appellant alleging that the Bowra Group Inc. (the “Receiver”), Receiver Manager of Kamlands Holdings Ltd. (“Kamlands”), had contravened the *Employment Standards Act* (the “*Act*”) when it refused to pay him vacation pay and compensation for length of service following his termination as an employee of Kamlands on July 19, 2011.
3. The Delegate decided that since the Appellant’s complaint was not received within the time limit specified in section 74 of the *Act*, no further action would be taken in respect of it.
4. I have before me the Appellant’s Appeal Form and submission of his counsel, the record that the Director advises was before the Delegate at the time the Determination was made, submissions from the Delegate and counsel for the Receiver, and a reply submission from counsel for the Appellant.
5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. I find that the matters raised in this appeal can be decided on the basis of a review and consideration of the materials now before me.

FACTS

6. Kamlands operates a golf course and resort business near Kamloops, British Columbia. On June 10, 2011, a creditor obtained an order of the Supreme Court of British Columbia (the “Order”) appointing the Receiver as receiver manager for the company.
7. The Appellant had been employed for some years by Kamlands. On July 19, 2011, the Receiver terminated the Appellant’s employment.
8. Subsection 74(3) of the *Act* requires that a complaint relating to an employee whose employment has terminated must be delivered within six months after the last day of employment. That meant that the Appellant’s complaint had to be delivered to the Employment Standards Branch by January 19, 2012. The Appellant did not deliver his complaint until November 28, 2012, over nine months later.

9. The Delegate queried why the complaint had been filed late. Former counsel for the Appellant responded by letter dated December 20, 2012. That letter said this, in part:

Mr. Grenier was employed by Kamlands Holdings Ltd. (“Kamlands”) until July 19, 2011. On or about June 10, 2011 a receiver manager of Kamlands (“Receiver”) was appointed by the British Columbia Supreme Court (the “Order”). It is a term of the Order that no party be permitted to commence a proceeding against Kamlands (the “Stay”). ... Mr. Grenier did not commence his claim within 6 months after his termination, in part, due to the Stay. It is conceded that the Stay does not preclude a party from commencing a proceeding that would otherwise become barred by statute. However, it has always been Mr. Grenier’s belief that his claim would be resolved amicably between the parties without involvement of the Employment Standards Branch. It was not until recently that Mr. Grenier (*sic.*) understood that the Receiver, on behalf of Kamlands, would not pay any of Mr. Grenier’s claim for severance or unpaid vacation.

Since Mr. Grenier’s termination, he and his counsel have been in contact with the Receiver regarding various outstanding issues with respect to Mr. Grenier’s employment with Kamlands. These communications have included his claim for unpaid severance and unpaid vacation. Mr. Grenier was provided with a Record of Employment indicating that his contractual vacation pay remained outstanding. Mr. Grenier understood that this was an acknowledgement on behalf of Kamlands of the amounts owed to him. Settlement discussions regarding various aspects of the receivership as well as Mr. Grenier’s employment continued into the summer and fall of 2012.

...

It was not until shortly before the filing of Mr. Grenier’s complaint that he fully understood that the Receiver would not pay on behalf of Kamlands the contractual amounts owed as acknowledged in the Record of Employment or the amounts payable to him as required by statute.

10. The relevant portion of the Order appointing the Receiver to which counsel referred reads as follows:

THIS COURT ORDERS that no Proceeding against or in respect of the Debtor or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtor or the Property are hereby stayed and suspended pending further Order of this Court, provided, however, that nothing in this Order shall prevent any Person from commencing a Proceeding regarding a claim that might otherwise become barred by statute or an existing agreement if such Proceeding is not commenced before the expiration of the stay provided by this paragraph ...

11. In a subsequent letter to the Delegate, dated March 1, 2013, former counsel for the Appellant requested that the Branch issue a determination regarding his complaint. The letter also elaborated further as to the reasons why the Appellant’s complaint had been delivered late. It stated that the Receiver delayed issuing Records of Employment for the Appellant for a period of months following his termination, which prevented the Appellant from applying for employment insurance benefits in a timely way. Then, when the ROE’s were issued, the Receiver alleged that the Appellant was a shareholder and director of Kamlands, which further postponed his receipt of benefits until he obtained a favourable ruling from the Canada Revenue Agency confirming that he was, indeed, an employee of the company, and therefore eligible. He did not receive that ruling until the end of October 2011.

12. Counsel’s letter of March 1, 2013, then said this:

As previously noted, Mr. Grenier and his counsel had been working to resolve this, and many other issues, with the Receiver since the termination. The CRA confirmation of Mr. Grenier’s status as an employee of Kamlands came during these negotiations. As Mr. Grenier had previously been provided with a ROE acknowledging his contractual vacation pay entitlement, but for his alleged status as a

shareholder, and because the notation on the ROE had been ruled in error, Mr. Grenier understood that the ROE represented an acknowledgement on behalf of Kamlands/the Receiver of the amounts owed to him. Once it was established that Mr. Grenier was in fact an employee, Mr. Grenier understood that the amounts would be paid by the Receiver. Settlement discussions regarding various aspects of the receivership, as well as Mr. Grenier's employment entitlement continued into 2012. However, the Receiver, despite repeated enquiries, has never responded with a formal position or payment, leading to the conclusion that this Application was necessary.

The delay by the Receiver in issuing the ROE, the incorrect and inexplicable denial of Mr. Grenier's status as an employee by the Receiver in the ROE once issued, and the failure of the Receiver to deal with the matter following the CRA ruling, are the main factors resulting in the delay in making a claim under the *Employment Standards Act*.

13. The Delegate's rationale for declining to consider the Appellant's complaint further is captured in the following passages from the Reasons for the Determination:

On December 6, 2012, I asked Mr. Grenier to provide the reasons why he complained to the ESB outside of the six month time limit provided in the Act. Mr. Grenier explained that the Stay in the Order stipulated that "no party be permitted to commence a proceeding against Kamlands." However, Mr. Grenier admits he was aware that the Stay did not preclude him from commencing a proceeding that would otherwise become barred by statute, as evident by the ESB receiving his complaint on November 28, 2012.

Mr. Grenier had the advice and representation of counsel for at least a portion of his dealings with Kamlands. He was aware he could be entitled to wages. While I accept Mr. Grenier's priority to obtain his EI benefits, he chose to resolve the matter with Kamlands independent of the Branch complaint resolution process. I find there was no immediate intent by Mr. Grenier, from the time he was terminated, to make a complaint to the ESB. It is unfortunate that such discussions were unsuccessful but I find there is no reasonable and credible explanation for Mr. Grenier's failure to deliver his complaint to the ESB within the time limit set out in section 74 of the Act.

Pursuant to section 76(3) of the Act, I find it is appropriate to exercise my discretion to stop investigating Mr. Grenier's complaint.

14. Section 76 is the statutory provision that describes the rights and duties of the Director when a complaint is received pursuant to section 74 of the *Act*. The relevant portions of section 76 say this:

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

...

(3) The Director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if

(a) the complaint is not made within the time limit in section 74(3) or (4) ...

15. In this appeal, the Appellant, through new counsel, submits that while the items discussed by his former counsel in the December 20, 2012, and March 1, 2013, letters were factors that influenced the decision not to file a complaint with the Branch at an earlier date, the primary reason for the delay was that neither the Appellant nor his then counsel were aware of the six month limitation period stipulated in subsection 74(3) until the fall of 2012, long after the deadline had passed.

16. The Appellant submits that since the Delegate was unaware of the real reason for the delay at the time the Determination was made, she failed to observe the principles of natural justice when making the

Determination. The Appellant also argues that the appeal should succeed because new evidence has become available that was not available when the Determination was made.

17. The Appellant's natural justice argument rests on the assertion that the Delegate relied on representations that were not correct when she decided to proceed no further with an investigation of the complaint. In particular, the Appellant says that the principal misapprehension on which the Delegate acted was her stated conclusion that the Appellant had no immediate intent to make a complaint to the Branch from the time his employment was terminated.
18. In support of this argument, the Appellant has tendered an affidavit in which he swears that he always wished to pursue his claims under the *Act*, and that he repeatedly asked his then counsel to pursue those claims. He has also delivered an affidavit from his then counsel that confirms this fact. The affidavit of counsel further states that it was on counsel's advice that a complaint be postponed until negotiations with the Receiver had concluded. It also concedes that any error in failing to file the complaint was an error of counsel, and not the Appellant. The Appellant's material further concedes that the Delegate was never apprised of these communications between the Appellant and his then counsel, or any mistake concerning the need to file a complaint within the time stipulated in section 74.
19. The Appellant argues that natural justice requires that he have his actual reasons for not pursuing his claim in a timely way, and the fact that he did, in fact, intend to pursue a claim from the beginning, considered by the Delegate before the discretion described in section 76 is exercised. If that does not occur, the Appellant argues, he will be deprived of the opportunity to present what he asserts is a meritorious claim through no fault of his own, because he relied on the erroneous advice of his former counsel.
20. In the alternative, the Appellant argues that his affidavit material tendered on this appeal, to which I have referred, constitutes new evidence that, if it had been known to the Delegate at the time the Determination was made, might have influenced her to reach a different conclusion. The Appellant submits that since the Delegate was unaware of the real reasons why the filing of a complaint was postponed until long after the deadline was passed, she mistakenly concluded that the Appellant never intended to pursue his statutory rights until after the negotiations with the Receiver reached an impasse.
21. In further support of his position, the Appellant submits that the Receiver and Kamlands are not prejudiced by the late delivery of the complaint because he and his then counsel raised the issue of his entitlement to the benefits sought under the *Act* immediately following the termination of his employment.
22. For these reasons, the Appellant submits that the Tribunal should "change the Delegate's decision and ... accept [the Appellant's] complaint." Alternatively, the Appellant submits that the Tribunal should refer the matter back to the Delegate to consider the new evidence when exercising her discretion under subsection 76(3).
23. In her submission, the Delegate advises that the Appellant's complaint was investigated pursuant to section 76 and that all the submissions tendered by the Appellant and his then counsel were considered by the Delegate before she exercised her discretion under subsection 76(3) and decided that the complaint should proceed no further. She states that the Appellant was provided with the time and opportunity to give a reasonable explanation for his delay in filing his complaint. Notwithstanding that he may have relied on incorrect advice at the time, accurate information regarding the *Act* is publicly available. As for the affidavits tendered on the appeal, the Delegate states that evidence relating to the Appellant's intending to file a complaint in time, and to his, and his counsel's, ignorance of the time limit, is not evidence that is "new" for

the purposes of an appeal under the *Act*. Rather, it is evidence that existed, but was not presented to the Delegate prior to her issuing the Determination.

24. Counsel for the Receiver takes no position regarding the merits of the appeal, but states, among other things, that the exception permitting proceedings to be brought in respect of claims that may become statute-barred is common in orders appointing receivers in this province. Counsel states further that if the Appellant is successful in his complaint proceedings under the *Act*, it is not likely that any compensation will be recoverable by him as against Kamlands, in the circumstances, as the creditor on behalf of whose claim the receiver was appointed will be entitled to priority. Accordingly, the Tribunal should decline to provide relief to the Appellant as the appeal will, in effect, turn out to be moot.
25. In a submission in reply to the submission of counsel for the Receiver, counsel for the Appellant submits that the matters addressed by counsel for the Receiver are not before the Tribunal, and that it would be inappropriate for the Tribunal to speculate on these matters. The issue before the Tribunal, he says, is whether the Delegate should have stopped investigating the Appellant's complaint.

ISSUE

26. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

27. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

- 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.

28. Section 115(1) of the *Act* should also be noted. It says this:

- 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
- (a) confirm, vary or cancel the determination under appeal, or
 - (b) refer the matter back to the director.

29. I will deal first with the issue of new evidence, engaged by subsection 112(1)(c). That provision gives the Tribunal discretion to accept or refuse new evidence on appeal. In general, the Tribunal's approach when exercising the discretion is a strict one. This means that several questions must be answered in the affirmative before new evidence will be considered on appeal. Those questions include the following (see *Davies and others (Merilus Technologies Inc.)* BC EST # D171/03):

- (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

- (b) the evidence must be relevant to a material issue arising from the complaint;
- (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) the evidence must have high probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

30. Applying these considerations, it is clear that the Appellant has not satisfied the requirements of subsection 112(1)(c), at least because the information relating to his continuing intention to seek remedies pursuant to the *Act* and his, and his then counsel's, error regarding the time limit for making a complaint were well known to the Appellant prior to the issuance of the Determination. Despite this, the Appellant refrained from conveying this information to the Delegate, so that it might be considered by her when she exercised her discretion under subsection 76(3).
31. That is not the end of the matter, however. When evidence is adduced for the first time on appeal in order to demonstrate a jurisdictional error, the Tribunal takes a more relaxed approach. Such evidence is to be distinguished from other types of evidence alleged to be "new" which is tendered to prove or disprove the substance of the complaint on the merits. It is rare that the Tribunal will accept and consider the latter type of evidence on an appeal. Evidence that is tendered to show that the proceedings resulting in a determination were flawed in a jurisdictional sense is an entirely different matter (see *Grand Construction Ltd.*, BC EST # D018/13).
32. A failure to observe the principles of natural justice is a species of jurisdictional error. Accordingly, it is my view that the affidavit evidence tendered for the first time on this appeal by the Appellant should be accepted and considered, at least insofar as it relates to the Appellant's intention to pursue claims under the *Act*, and the reasons for his failure to do so in a timely way. I say this because the substantive nub of the Appellant's argument on appeal is that since the Delegate did not consider the actual reasons why the Appellant failed to file a complaint within the stipulated time, her Determination was based on incorrect or irrelevant evidence. The Appellant says this constitutes a failure to observe the principles of natural justice.
33. The Appellant's challenge to the Determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by the Delegate was somehow unfair. Two principal components of fairness are that a party must be informed of the case it is required to meet, and offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
34. The requirement for fairness is also mandated in section 77 of the *Act*, which reads:
- 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.
35. I agree with the Appellant's submission that the Director had an obligation to accept and review the Appellant's complaint. Section 76 requires it. I also agree that once the complaint has been accepted and reviewed, the Director (or in this case, the Delegate) was required to exercise a discretion when deciding whether any further action should be taken regarding the complaint because it was filed outside the stipulated time (see *Karbalaieali v. British Columbia (Employment Standards)* 2007 BCCA 553).
36. That is what the Delegate did. She must have accepted and reviewed the complaint as required, because she raised the timeliness issue with the Appellant, and in the correspondence to which I have referred his then counsel responded in detail with reasons explaining why the complaint had been filed late. None of those

communications refers to the new evidence the Appellant has tendered on appeal showing that he wished to claim compensation for length of service and vacation pay via the machinery of the *Act* prior to the expiry of the time limit for filing a complaint, and that the primary reason for his failure to do so was that he and his then counsel were unaware that a time limit existed. Instead, the December 20, 2012, letter said that it was “always ... Mr. Grenier’s belief that his claim would be resolved amicably between the parties without involvement of the Employment Standards Branch.” Further, in the March 1, 2013, letter, then counsel stated the following, after describing the difficulty the Appellant had experienced in clarifying the Records of Employment issued by the Receiver, and the necessity to obtain a ruling from the Canada Revenue Agency as to the Appellant’s status:

Once it was established that Mr. Grenier was in fact an employee, Mr. Grenier understood that the amounts would be paid by the Receiver. Settlement discussions regarding various aspects of the receivership, as well as Mr. Grenier’s employment entitlement continued into 2012. However, the Receiver, despite repeated enquiries, has never responded with a formal position or payment, leading to the conclusion that this Application was necessary. (emphasis added)

37. I have no reason to doubt the statements made in the affidavits filed by the Appellant in support of this appeal. Having said that, the new information contained in those statements was not information that was provided to the Delegate in anticipation of her issuing the Determination. In my view, it cannot be a failure to observe the principles of natural justice for the Delegate to have relied upon the statements bearing on the reasons for the delay that the then counsel for the Appellant offered for her consideration in response to her queries. I also reject the contention that the Delegate failed to observe the principles of natural justice when she failed to take into account the factors the Appellant has now revealed, but which neither he nor his then counsel shared with the Delegate prior to the issuance of the Determination.
38. Fairness demanded that the Appellant be made aware of the Delegate’s concern as to the timeliness of the complaint, and that he be provided with a reasonable opportunity to respond. The Delegate apprised the Appellant of her concern, and the Appellant, through his then counsel, provided detailed explanations for the delay. The Delegate considered those explanations when the Determination was made. I am not persuaded that it was an abuse of the Delegate’s discretion for her to decide, on the material before her, that the Appellant chose to pursue his claims with the Receiver “independent of the Branch complaint resolution process” and to conclude, therefore, that “there was no immediate intent by Mr. Grenier, from the time he was terminated, to make a complaint to the ESB.” A plain reading of the explanations provided by the Appellant’s then counsel could lead a reasonable person to reach those precise conclusions. If there was, as the Appellant now submits, a failure on the part of his then counsel to represent him properly, that is a matter that the Appellant must address with his then counsel. It cannot, in my opinion, constitute a factor that must be weighed when deciding whether the Delegate failed to observe the principles of natural justice in the making of the Determination.
39. It may be that the Delegate would have exercised her discretion in a different manner if the Appellant and his then counsel had shared with her the information that has now been presented on this appeal. However, that is a matter on which I need not speculate. The issue before me is whether the Appellant has demonstrated that the Delegate committed a procedural error going to her jurisdiction when making the Determination. In my opinion, the Appellant has failed to establish such an error.

ORDER

40. Pursuant to section 115 of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal