

An appeal

- by -

Linda Margaret Pierre
(“Ms. Pierre”)

- 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: Carol L. Roberts

FILE No.: 2015A/164

DATE OF DECISION: February 3, 2016

DECISION

SUBMISSIONS

Linda Margaret Pierre on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Linda Margaret Pierre (“Ms. Pierre”) has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on October 27, 2015.
2. On September 10, 2015, Ms. Pierre filed a complaint with the Director alleging that WCG International Consultants Ltd. carrying on business as Experience Counts (“WCG”) contravened the *Act* in failing to pay her regular and overtime wages.
3. Following an investigation, a delegate of the Director concluded that Ms. Pierre’s complaint was not filed within the statutory time limit set out in section 74 of the *Act* and exercised her discretion to stop investigating the complaint.
4. Ms. Pierre contends that the Director failed to observe the principles of natural justice in making the Determination. Ms. Pierre also says evidence has become available that was not available at the time the Determination was being made. Ms. Pierre’s appeal was filed December 7, 2015, three days after the time period in which she could file an appeal. Ms. Pierre also sought an extension of time in which to file her appeal. The Tribunal notified the parties that if I decided Ms. Pierre’s complaint was presumptively meritorious, the parties would be invited to make submissions on whether I ought to grant Ms. Pierre’s extension application.
5. Section 114 of the *Act* and Rule 22 of the Tribunal’s *Rules of Practice and Procedure* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria.
6. These reasons are based on Ms. Pierre’s written submissions, the section 112(5) “record” that was before the delegate at the time the decision was made and the Reasons for the Determination.

ISSUE

7. Whether or not Ms. Pierre has demonstrated any statutory ground of appeal.

FACTS AND ARGUMENT

8. Ms. Pierre was employed by WCG as a workshop facilitator from August 19, 2013, until September 30, 2014. As noted above, Ms. Pierre’s complaint was filed September 10, 2015, almost one year after her employment with WCG had ended.
9. The delegate spoke with Ms. Pierre about the time limits for filing a complaint and asked Ms. Pierre to provide her with an explanation for not filing the complaint within the six-month period set out in the *Act*.

10. Ms. Pierre explained that, after resigning her employment, she immediately sought other work. She secured an elected position and part-time employment. Her May 2015 claim for EI benefits was denied because she had insufficient hours of work but she was encouraged to make a claim for unpaid hours. At that time, Ms. Pierre discovered that she had received no record of her hours of work or payment for those hours from WCG and approached a number of government agencies with a view to recovering wages she believed were owed to her. Those efforts took her until September 2015, at which time she discovered she would have to file a complaint with the Employment Standards Branch.
11. Ms. Pierre's explanations for not filing the complaint within the statutory time period, as recorded by the delegate, included both a reluctance to confront her former employer and the "time, energy, effort, courage and resources" to do so.
12. After determining that Ms. Pierre's complaint was filed outside the time limits prescribed by section 74 of the *Act*, the delegate then considered whether or not the Director should exercise her discretion to refuse to investigate the complaint.
13. The delegate considered the purposes of the *Act*, including section 2(d), noting that this paragraph provided all parties with a consistent and reasonable period of time to deal with complaints.
14. The delegate said:

Remaining undecided about whether or not to pursue Employment Standards Act issues, or being reluctant to address the issues with WCG, or even the failure to avail oneself of the correct resources to address these issues, to such an extent that the six-month period lapses is not a sufficient or compelling enough reason to file her complaint late. Nor does it accord with section 2(d) of the Act.
15. The delegate concluded that it was appropriate for the Director to exercise her discretion to stop investigating the complaint.
16. Mr. Pierre contends that the delegate failed to observe the principles of natural justice in finding the complaint out of time rather than deciding her complaint on its merits. She says she was unaware that the complaint had to be filed within six months after her employment ended. Ms. Pierre also says that she was focused on pursuing a remedy through other agencies.
17. Ms. Pierre further contends that she has new evidence, consisting of documents regarding her working additional hours and letters supporting her argument from former supervisors. Ms. Pierre says she had to locate and persuade those supervisors to write the letters of support, which took some time.
18. Finally, Ms. Pierre submitted new documents, consisting of a three-month probationary evaluation form, a draft performance report and emails. Ms. Pierre sought to have an "unbiased interpretation" of the evidence.

ANALYSIS

19. Section 112(1) of the *Act* provides that a person may appeal a determination on 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.

20. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds.
21. Although Ms. Pierre alleges a failure to comply with principles of natural justice as the ground of appeal, I find no basis for this argument.
22. The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness".
23. The relevant sections of the *Act* are 74(2) and (3) and 76(1) and (3) which provide as follows:

Complaint and time limit

- 74 (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
- (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

Investigations

- 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 specified in section 74(3)....

24. Before considering the substance of Ms. Pierre's complaint, the delegate first had to determine whether the complaint had been filed within the statutory time period. She decided, quite correctly, that it had not been. Ms. Pierre's complaint was made approximately six months after the time period provided in the *Act*.
25. Section 76 of the *Act* provides that the Director may refuse to investigate a complaint that is not made within the time period.
26. The delegate both advised Ms. Pierre about the statutory time limit and sought her explanation for her failure to file the complaint within that time period. I find that Ms. Pierre was made aware of the time limit and was afforded the opportunity to respond to the delegate's questions about why she had not filed the complaint on time. I find Ms. Pierre has not demonstrated a denial of natural justice.
27. The delegate considered Ms. Pierre's explanation for her failure to file within the six-month time period as well as the purposes of the *Act*, including section 2(d), which provides for fair and efficient procedures for the resolution of disputes, and decided to exercise her discretion against continuing to investigate the complaint.
28. The Tribunal will not interfere with the Director's 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 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 often is said, to be acting 'unreasonably'. **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229.

(see Re: *Jody L. Goudreau*, BC EST # D066/98 at page 4)

29. The Tribunal has also referred to the Supreme Court of Canada's decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 S.C.R. 2:

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. Where 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.

30. The burden is on Ms. Pierre to demonstrate that the delegate's exercise of discretion to cease investigating the Complaint was unreasonable. I not only find that Ms. Pierre has failed to discharge that burden, but I find the delegate, in this case, exercised her statutory discretion in section 76(3)(a) in accordance with the principles adopted by the Tribunal. I find no evidence that the delegate misinterpreted or misapplied any part of the *Act*, including, in particular, sections 74(2) and (3) and 76(3)(a). I also do not find that the delegate misapplied any principles of general law, or acted without any evidence in exercising her discretion not to investigate the complaint any further. Therefore, I also do not find there was any error of law.
31. Ms. Pierre submits evidence she says is new. That evidence appears to relate to what she says is the substance, or merits of her complaint, rather than the delegate's decision not to investigate the complaint. Not only is the new evidence unrelated to the issue before me, I am not persuaded that it meets the Tribunal's test for new evidence (as set out in *Re Merilus Technologies*, BC EST # D171/03), in any event.
32. There is nothing new in Ms. Pierre's appeal to explain why she failed to file her complaint within the six-month statutory time frame.
33. The appeal is dismissed.

ORDER

34. Pursuant to section 115 of the *Act*, I order the Determination dated October 27, 2015, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal