

An appeal

- by -

Anna Maria Giannini  
(“Ms. Giannini”)

- 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:** Shafik Bhalloo

**FILE No.:** 2017A/46

**DATE OF DECISION:** May 30, 2016

## DECISION

### SUBMISSIONS

Anna Maria Giannini

on her own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Anna Maria Giannini (“Ms. Giannini”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 28, 2017 (the “Determination”).
2. The Determination was made in respect of two complaints filed by Ms. Giannini, who alleged her former employer, Clark Reefer Lines Ltd. (“Clark Reefer”), had contravened the *Act* by failing to pay her compensation for length of service and concomitant vacation pay, and by making unauthorized deductions.
3. The Determination found that Ms. Giannini did not file her complaints within the time limit specified in section 74(3) of the *Act* and, as a result, the Director decided not to proceed with the complaints pursuant to section 76(3)(a) of the *Act*.
4. Ms. Giannini’s appeal invokes the natural justice ground of appeal in section 112(1)(b) of the *Act*, namely, the Director breached the principles of natural justice in making the Determination.
5. Ms. Giannini is seeking to have the Tribunal refer the matter back to the Director.
6. In correspondence dated April 6, 2017, the Tribunal notified the parties, among other things, that no submissions were being sought from any of them pending review of the appeal by the Tribunal and that following such a review all, or part, of the appeal might be dismissed. If the Tribunal does not dismiss all of the appeal or does not confirm all of the Determination, the Tribunal will invite Clark Reefer and the Director to file reply submissions on the merits of the appeal. Ms. Giannini will then be given an opportunity to make a final reply to the submissions, if any.
7. The Tribunal received the section 112(5) “record” (the “Record”) from the Director on April 7, 2017, and forwarded a copy of the same to Ms. Giannini, and provided the latter the opportunity to object to its completeness. Ms. Giannini did not object to the completeness of the Record. Accordingly, the Tribunal accepts the Record as complete.
8. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal form and written submissions of Ms. Giannini and my review of the Record that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the appeal without a hearing of any kind, for any of the reasons listed in that subsection. If satisfied the appeal or part of it has some presumptive merit and should not be dismissed under section 114(1), Clark Reefer and the Director will be invited to file reply submissions on the merits of the appeal. Ms. Giannini will then be given an opportunity to make a final reply to the submissions, if any.

## ISSUE

9. The issue, at this stage of the proceeding, is whether there is any reasonable prospect the appeal can succeed.

## THE FACTS

10. Clark Reefer is a freight carrier company incorporated under the laws of British Columbia.
11. Ms. Giannini was employed as a rater with Clark Reefer. She commenced a leave of absence from Clark Reefer on May 30, 2016, due to stress. Clark Reefer made numerous requests of Ms. Giannini for information to confirm that her absence from work was justified. Ms. Giannini failed to comply with these requests and Clark Reefer terminated her employment on July 11, 2016, alleging just cause due to frustration of the employment contract.
12. On January 30, 2017, by way of a written letter, Ms. Giannini filed a complaint with the Director of Employment Standards (the “Director”) claiming that she was due “severance pay” from Clark Reefer. She attached to her letter of complaint several pages of correspondence from Clark Reefer and a medical note issued to her from a medical clinic on May 30, 2016.
13. Subsequently, on February 2, 2017, Ms. Giannini filed an Employment Standards Branch complaint form.
14. Since both the written letter complaint and the complaint form (collectively “the complaints”) appeared to have been filed outside the six month statutory time limit set out in section 74(3) of the *Act*, the delegate of the Director decided to investigate the timeliness of the complaints and reasons why they were filed late with a view to determining if it would be appropriate to discontinue investigating the complaints pursuant to section 76(3)(a) of the *Act*.
15. On February 17, 2017, the delegate contacted Ms. Giannini by telephone and the latter confirmed to the delegate that Clark Reefer terminated her employment on July 11, 2016. The delegate then afforded Ms. Giannini an opportunity to provide reasons why the complaints were filed late.
16. On February 21, 2017, Ms. Giannini submitted a written letter to the delegate explaining why she filed the complaints late. More particularly, she explained that, after the termination of her employment with Clark Reefer, she was distraught and experienced anxiety attacks and was not “thinking clearly”. She had a “hard time” filling out the self-help kit because she suffered anxiety attacks as a result of the mistreatment she experienced during her employment. She said she was “practically paralyzed with dread” when thinking about Clark Reefer and therefore, it “took a long time” for her to complete the complaint letter to the Director.
17. After obtaining Ms. Giannini’s written response, the delegate went on to decide two questions, as set out in the Reasons, namely: (i) was Ms. Giannini’s complaint filed beyond the six month statutory time limit pursuant to section 74(3) of the *Act*? (ii) if so, should discretion be exercised to stop investigating the complaint pursuant to section 76(3) of the *Act*?
18. With respect to the first question, the delegate concludes that both of the complaints were filed out of time under the *Act*. In so concluding, the delegate reasons as follows:

Section 74(2) of the Act states a complaint must be in writing and must be delivered to an office of the Employment Standards Branch. Section 74(3) establishes that 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. The Complainant's evidence was, and I find, that she commenced a leave of absence from the Employer on May 30, 2016, and the Employer terminated her employment on July 11, 2016. She filed complaints with the Branch on January 30, 2017 and on February 2, 2017, the first of which was filed 19 days over six months after her last day of employment with the Employer. There is no dispute that the Complainant filed the complaints outside the six month statutory time frame. I find the complaints were filed outside the six month statutory limit under section 74(3) of the Act.

19. With respect to the second question – whether the delegate should exercise her discretion to stop investigating the complaint – the delegate notes in the Reasons that while section 76(1) of the *Act* provides that the Director must accept and review a complaint filed with the Employment Standards Branch (the “Branch”), the Director is not obliged to mediate, investigate or adjudicate every complaint. Pursuant to section 76(3)(a) of the *Act*, the Director “may” refuse to mediate, investigate or adjudicate a complaint if the complaint is not made within the six month statutory time limit under section 74(3) of the *Act*. However, the Director must exercise the appropriate discretion before refusing a complaint pursuant to section 76(3). In the case at hand, in exercising her discretion to refuse to investigate the complaints, the delegate relies on section 2(d) of the *Act* and the lack of compelling evidence from Ms. Giannini to substantiate her medical unfitness to file her complaint within the six-month statutory timeline under the *Act*. More particularly, the delegate reasons as follows:

Section 74 sets out a mandatory provision in that it states a complaint “must” be filed within six months after the last day of employment. One of the purposes of the Act, as set out in section 2, is to promote fair and efficient procedures for resolving disputes on the interpretation and application of the Act. The six month limitation period for filing complaints is congruent with this purpose. Allowing a complaint filed outside of the six month limitation period to proceed absent a compelling reason would contradict this stated purpose the Act. Therefore, discretion to proceed with a complaint filed outside of the mandatory time limit will only be exercised in exceptional circumstances where there are compelling reasons to do so.

The Complainant's reasons for filing the complaint late were that she was distraught, suffered from anxiety attacks and had not been thinking clearly. Beyond stating such, she provided no evidence to substantiate that she was not medically fit to file a complaint with the Director within the six month filing timeline. I find that the Complainant's reasons for not filing her complaints on time are not sufficient to warrant the continued investigation of complaints filed outside of the allowable time frame. Based on the evidence, there is no extraordinary circumstance which produces a compelling reason to proceed with the complaints filed by the Complainant on January 30, 2017 and February 2, 2017. Pursuant to section 76(3)(a) of the Act, I find it appropriate to refuse to investigate the complaints because they were not made within the time limit specified in section 74(3) of the Act.

20. Accordingly, the delegate decided not to proceed with the investigation of the complaints.

### **SUBMISSIONS OF MS. GIANNINI**

21. In her appeal submissions, Ms. Giannini states that she is unsure as to what kind of medical proof the delegate requires of her anxiety caused by Clark Reefer. She states she included with the complaints several examples of how her stress built up over the years while working for Clark Reefer and caused her take a medical leave of absence.
22. The balance of Ms. Giannini's submissions goes to the substance of her complaints and I do not find it necessary to set them out here.

## ANALYSIS

23. Section 112(1) of the *Act* provides that a person may appeal the 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; and
  - (c) evidence has become available that was not available at the time the determination was being made.
24. The Tribunal has consistently stated that an appeal is an error correction process, with the burden on the appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds listed in section 112(1) above.
25. Ms. Giannini has framed her appeal on the failure by the Director to observe principles of natural justice in making the Determination. Principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker (*Re: 607730 B.C. Ltd. operating as English Inn & Resort*, BC EST # D055/05).
26. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *BWT Business World Incorporated*, BC EST #D050/96)
27. In this case, the onus is on Ms. Giannini as the appellant to demonstrate, on a balance of probabilities, a violation of her natural justice or procedural rights. Having reviewed the Determination including the Record and the written appeal submissions of the Ms. Giannini, I find there is no basis whatsoever for the natural justice ground of appeal.
28. Having said this, I note the relevant sections of the *Act* in this case are 74(2) and (3) and 76(1) and (3)(a) 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 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)....

29. While section 74(3) of the *Act* requires that a complaint must be delivered to the Branch within six (6) months after the last day of employment, the British Columbia Court of Appeal in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553 determined that the *Act*, in section 76(1) and (3)(a), gives the Director *discretion* to accept a complaint delivered more than six (6) months after the date of termination of employment:

[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.

[12] ....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.

30. In this case, before considering the substance of Ms. Giannini's complaints, the delegate first considered if Ms. Giannini's complaints were filed within the statutory timeline under the *Act*. Based on Ms. Giannini's own evidence that her last day of employment was July 11, 2016, the delegate concluded that neither of the complaints was filed within the statutory time limit for filing a complaint. I find the delegate's conclusion in this regard is correct. I also note that Ms. Giannini, in her appeal, does not dispute this conclusion.

31. Having said this, as noted above, under section 76(1) and (3) (a) of the *Act*, the delegate has discretion to refuse to investigate a complaint where the complaint is not made within the time limit specified in section 74(3). In this case, the delegate opted to exercise her discretion to refuse to investigate the complaints. In making this decision, the delegate considered the purposes of the *Act* including particularly section 2(d) which provides for fair and efficient procedures for the resolution of disputes. The delegate also considered Ms. Giannini's written explanation for her failure to file her complaints within the six-month statutory time period and the medical note issued to Ms. Giannini from a medical clinic dated May 30, 2016, (before the termination of her employment on July 11, 2016). The delegate concluded that the evidence proffered by Ms. Giannini failed to "substantiate she was not medically fit to file a complaint with the Director within the six month filing timeline." I find, based on the evidence before the delegate, it was open to the delegate to reach this conclusion and I am not persuaded there is any basis for me to interfere with it.

32. I also note that the Tribunal is generally disinclined to interfere with the exercise of discretion by the delegate, and will only do so in exceptional and very limited circumstances, as indicated in the following passage in the Tribunal's decision in *Re: Jody L. Gondreau 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.

33. Also instructive on the subject is the following passage in the Supreme Court of Canada's decision in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR:

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 exercise 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.

34. In conclusion, I find the delegate's exercise of her statutory discretion in section 76(3)(a) to refuse to investigate the complaints is in accordance with the principles set out in *Maple Lodge Farms Limited v. Government of Canada*, *supra*, and *Jody L. Goudreau and Barbara E. Desmarais*, *supra*.
35. In the result, I find that this appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under subsection 114(1)(f) of the *Act*.

## ORDER

36. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**