

An appeal

- by -

Thomas Fleming
("Mr. Fleming")

- 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: David B. Stevenson

FILE No.: 2016A/22

DATE OF DECISION: March 30, 2016

DECISION

SUBMISSIONS

Thomas Fleming on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Thomas Fleming (“Mr. Fleming”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 29, 2015.
2. Mr. Fleming had filed a complaint alleging his former employer, Cleantech Building Services Limited (“Cleantech”), had contravened the *Act* by failing to pay annual vacation pay. The Determination found Mr. Fleming had not made the complaint within the time limit specified in section 74 of the *Act* and refused to continue investigating it.
3. Mr. Fleming has filed an appeal of the Determination, relying on all of the available grounds for appeal listed in section 112(1) of the *Act*. Mr. Fleming seeks to have the Determination cancelled, varied or referred back to the Director.
4. In correspondence dated February 9, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.
5. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Fleming. He has been provided with the opportunity to object to its completeness. In correspondence dated February 18, 2016, Mr. Fleming made a request for disclosure of information provided to the Director by Cleantech. In response, the Director says the record contains all of the evidence provided by Cleantech. Mr. Fleming’s final comment does not address the completeness of the record, but advances submissions on the merits of his annual vacation pay claim and why the Tribunal should cancel the Determination, conduct an oral hearing on his claim and make a finding in his favour.
6. I am satisfied the record is complete. Nothing in the comments made by Mr. Fleming persuade me there has been any omission from the record of material that was provided to the Director during the complaint process and relied on in making the Determination.
7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. 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) of the *Act*, 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 period;*

- (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.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Cleantech 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 at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

10. Mr. Fleming was employed by Cleantech as a Building Caretaker commencing September 2013. Based on the material in the record, including information provided by Mr. Fleming with his complaint, Mr. Fleming's last day of work with Cleantech, and his date of termination of employment, was November 17, 2014.
11. Mr. Fleming did not file his complaint with the Director until November 6, 2015, almost twelve months after the termination of his employment.
12. As part of the complaint process, the Director notified Mr. Fleming of the time limits for filing a complaint found in section 74 of the *Act* and the apparent failure to file his complaint within the statutory period allowed. The Director requested he provide the reasons for the delay in filing and details regarding any efforts to resolve his dispute with Cleantech during that time. Mr. Fleming provided a response, which is summarized in the Determination on page 6.
13. The Director found Mr. Fleming's complaint was filed outside of the statutory time limits in section 74 of the *Act* and found he had not provided a reason why the Director should not be governed by those time limits and stop investigating the complaint.

ARGUMENT

14. Mr. Fleming submits the Director erred in finding his employment with Cleantech was terminated on November 17, 2014. He submits there is "reasonable doubt", based on all the evidence, that he was dismissed on November 17, 2014. He argues, variously, that his employment with Cleantech did not end until mid-December 2014, possibly January 2015 and that in his view he was still "officially" an employee until August 2015, when he received a final Record of Employment from Cleantech. He makes several submissions in support of these assertions.

15. Mr. Fleming also submits the Director accepted and relied on information from Cleantech without giving him an opportunity to respond to it. Specifically, he says the Director used information from Cleantech that his termination date was November 17, 2014, without providing that information to him for comment.
16. Mr. Fleming alleges he was deterred from filing a complaint earlier than November 2015 by information he was provided in a telephone discussion with a person at the Employment Standards Branch in June 2015, who told him – based on information he provided – that he was “about 3.5 weeks over the cutoff date” for filing a complaint.

ANALYSIS

17. I will first note that the Director has delivered correspondence to the Tribunal, dated February 29, 2016, indicating there were three typographical errors in referencing three dates on page 5 of the Determination. The dates in question were recorded in the Determination as November 12, 2015, November 14, 2015, and November 17, 2015. In each case the year was incorrectly recorded as “2015” and should have been “2014”. The typographical error is apparent on the face of the Determination and I have taken that information into account and made the correction in providing these reasons.
18. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, 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.*
19. 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.
20. 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. 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. dba Honda North*, BC EST # D043/99.
21. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.
22. The Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):
1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
 2. a misapplication of an applicable principle of general law;

3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

23. I find there is no merit to this appeal. I reach this conclusion for three reasons.

24. First, Mr. Fleming disputes the key finding of fact made by the Director in the Determination: that his employment was terminated on November 17, 2014. That finding was reasonably grounded in the evidence provided by the parties, and found in the record. The Determination sets out the basis for finding Mr. Fleming was terminated as of November 17, 2014; the analysis provided reflects a view of the facts that could reasonably be entertained. Nothing in the appeal shows the conclusion reached by the Director is perverse, inexplicable or manifestly wrong. There is no error of law shown in that finding and the Tribunal may not disturb it.

25. Second, as the Determination indicates, the view adopted by the Director that Mr. Fleming was terminated as of November 17, 2014, emanated from information provided by him. It was only very late in the process that he took a position that he was “laid off” in November 2014, not terminated. At the time he took this position he was fully aware that Cleantech took the position he had been terminated mid-November 2014. The Determination and the record indicate Mr. Fleming made all of the arguments he raises again in this appeal concerning the termination date of his employment. They did not persuade the Director to a different conclusion on the termination date of his employment and he has provided nothing with this appeal that shows the Director made a reviewable error on that or makes those arguments any more persuasive than when they were submitted to the Director. He has not been denied a full and fair opportunity to present his position on the date of his termination.

26. Third, I find the Director did not err in refusing to continue investigating the complaint as a result of the delay in filing. For the reasons provided in the Determination, I find the factors relied on by Mr. Fleming for the Director not exercising discretion to stop investigating the complaint, including the comments made to Mr. Fleming by a person at the Employment Standards Branch in June 2015, not persuasive. The decision of the Director considered factors that were relevant to the question being considered and was made within the legal framework of the *Act*.

27. In any event, the decision made was on a matter of discretion belonging to the Director. Short of showing the Director acted arbitrarily, without authority or not in good faith, the Tribunal is highly unlikely to interfere with the exercise of such discretion: *Takarabe and others*, BC EST # D160/98. No basis for interfering with the Director’s discretion in this matter has been shown.

28. In sum, there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

29. Pursuant to subsection 115(1)(a) of the *Act*, I order the Determination dated December 29, 2015, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal