

An appeal

- by -

Ming (Michael) Cheng
(“Mr. Cheng”)

- 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: Marnee Pearce

FILE No.: 2017A/50

DATE OF DECISION: June 20, 2017

DECISION

SUBMISSIONS

Ming (Michael) Cheng

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Ming (Michael) Cheng (“Mr. Cheng”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 9, 2017 (the “Determination”).
2. Mr. Cheng had filed a complaint against his employer H.G.L. Investments Ltd. (“H.G.L.”) alleging that H.G.L. contravened the *Act* by failing to pay compensation for length of service upon his termination.
3. The Determination concluded that Mr. Cheng failed to deliver his complaint within the required time limits, and that Mr. Cheng was reasonably aware of the complaint process as set out in the Self-Help Kit and Complaint Resolution factsheet. Mr. Cheng had completed the necessary kit documentation, and sent H.G.L. a completed form in July 2016. Accordingly, pursuant to section 76(3) of the *Act* no further action would be taken on Mr. Cheng’s complaint.
4. The Determination concluded, in the alternative, that Mr. Cheng was a member of the Chartered Professional Accountants of British Columbia (“CPABC”) and performed work for the employer as an accountant; this is an excluded profession under section 31(b) of the *Employment Standards Regulation* (the “*Regulation*”). In addition to being delivered outside of the required time limit, Mr. Cheng’s complaint falls outside of the purview of the *Act*.
5. In his appeal, Mr. Cheng submits that the Director failed to observe the principles of natural justice in making the Determination, and asks for the Determination to be referred back to the Director and changed.
6. The section 112(5) record (the “record”) has been provided to the Tribunal by the Director and a copy was mailed to Mr. Cheng on April 28, 2017, allowing the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being a complete record of the material that was before the Director when the Determination was made.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for the Determination (the “Reasons”), the appeal and written submissions of Mr. Cheng, and my review of the section 112(4) record (the “Record”) that was before the Director when the Determination was being made.
8. Under section 114(1) of the *Act*, the Tribunal has the discretion to dismiss all or part of the 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 the requirements of section 112(2) have not been met.*

9. If satisfied that 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 H.G.L. 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

10. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under section 114 of the *Act*.

THE FACTS

11. H.G.L. operates an investment company in Vancouver, and Mr. Cheng was employed as H.G.L.'s Controller from November 16, 2015, to June 17, 2016, when he was terminated without notice or pay in lieu of notice.
12. During his employment with H.G.L., Mr. Cheng was a member of the CPABC, and carried the designation of professional accountant.
13. On July 19, 2016, Mr. Cheng initiated proceedings under the *Act* when he forwarded to H.G.L. the Employment Standards Branch Self-Help Kit, including request for payment and the Complaint Resolution factsheet. Both documents reference the 6-month time limit for filing complaints under the *Act*.
14. Mr. Cheng's last day of employment was June 17, 2016, and his complaint, filed on-line, was received on January 2, 2017, fifteen days beyond the December 18, 2016, 6-month legislated deadline for filing.
15. Mr. Cheng's evidence to the Director regarding the delay in filing his complaint was that he was unaware of the 6-month time limit, was in a poor emotional state because of his termination, and needed to focus his energies on finding new employment.
16. The Director, in the Determination, concluded that because Mr. Cheng accessed the Employment Standards Branch website in order to send the Self-Help Kit to H.G.L. and used the website again to file his complaint, he was reasonably aware of the complaint process and related requirements, including deadlines.
17. The Director did not find that Mr. Cheng's frustration and stress, as well as his employment search, were sufficient reasons to justify a failure to file a complaint within the required time period.
18. The Determination found that pursuant to section 76(3) of the *Act*, no further action would be taken on Mr. Cheng's complaint.

19. In the alternative, the Determination concluded that the *Act* did not apply to Mr. Cheng as he was a member of the CPABC and performed work as an accountant in his capacity as controller with H.G.L.

SUBMISSIONS OF MR. CHENG

20. Mr. Cheng has argued in his appeal that the Director failed to observe the principles of natural justice in making the Determination.
21. Specifically, Mr. Cheng argued that he expected the Director to review his complaint by focusing on the employment facts, not procedural matters – in particular, the overdue complaint and CPA designation.
22. The Director accepted his complaint and should have addressed it on its merits once she discussed the issues with H.G.L.
23. Because the Director had discussed the issues with H.G.L. and listened to Mr. Cheng’s arguments, Mr. Cheng believed the Director was “incapable” of advising H.G.L. that they failed to abide by the *Act*.
24. Mr. Cheng wrote that H.G.L. had offered severance pay subject to Mr. Cheng signing a release. If he had signed the release, the Determination letter would not have been written; therefore, the Determination “was wrong”.
25. Mr. Cheng requested that his complaint be returned to the Director to renegotiate with H.G.L. and convince the employer that in order to get severance pay he should not need to sign a release form.

ANALYSIS

26. 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.

27. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have general application and have consistently been applied in considering appeals.
28. 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 that there is an error in the Determination under one of the statutory grounds.
29. Mr. Cheng’s ground for appeal is based on an alleged failure on the part of the Director to observe the principles of natural justice in making the Determination; a party alleging a breach of the principles of natural justice must provide some evidence in support of that position: *Dusty Investments Inc. d.b.a Honda North*, BC EST # D043/99.

30. Sections 76 and 77 of the *Act* confers upon the Director the duty to receive, review, and where appropriate, investigate or adjudicate complaints alleging contraventions of both the *Act* and *Regulation*. Natural justice, in turn, demands that the Director exercise that duty fairly, in good faith, and with a view to the public interest. (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).
31. Mr. Cheng has argued that because H.G.L. had offered severance conditional upon him signing a release form, a Determination wouldn't have been made, and therefore, was wrong.
32. The record makes no reference to a conditional severance offer. Mr. Cheng has accepted that the record is complete, and I find this argument to have no weight.
33. Mr. Cheng argued that because the Director entertained a review of his claim which included contact with H.G.L., the late application was not significant and the decision should not have been denied on this basis.
34. Mr. Cheng should have been aware that the matter of the late filing of his appeal remained in issue, as he received an email from the Director on February 15, 2017, referencing this deficiency and legislative requirement for filing an appeal within the 6-month deadline, and also referencing section 31 of the *Regulation* concerning excluded professions. He was offered an opportunity to withdraw his complaint in these circumstances.
35. When he did not withdraw his complaint, the Director proceeded to investigate the identified issues – late filing of his appeal, and Mr. Cheng's likely exclusion from the *Act* because he was a member of a legislated excluded profession under the *Regulation*.
36. In order to provide Mr. Cheng with a reasoned and fair decision, the Director reasonably contacted the employer H.G.L. on a limited basis. The record shows that the email communication of March 2, 2017, from H.G.L. confirmed receipt of the Self-Help kit on July 19, 2016, and that H.G.L. hired Mr. Cheng in his capacity as an accountant with a CPA/CGA designation.
37. In all, the Director outlined the issues and provided a fair and unbiased forum for resolution. Mr. Cheng was given an opportunity to respond to the outstanding issues of his late application and his excluded professional designation. There is no suggestion, and no evidence, of any bias on the part of the decision maker.
38. I do not find that there is any evidence of a breach of natural justice on the part of the Director. The allegation that the Director was "incapable" of telling H.G.L. that they had breached the *Act* is tantamount to alleging bias on the part of the Director. I find this allegation to be without any foundation. An allegation of bias is a very serious matter as it impugns the adjudication process and challenges the integrity of the decision-maker, and therefore, it should not be made lightly without any basis.
39. Mr. Cheng has not, for the purposes of this review, met the burden of showing the Director failed to observe the principles of natural justice and this ground of appeal would not be successful.
40. The Director provided the alternative decision in the Determination that the *Act* does not apply to Mr. Cheng as he is a member of the CPABC and performed work at H.G.L. in the capacity of a professional accountant. In keeping with the mandatory reading of section 31(b) of the *Regulation*, and given that Mr. Cheng was hired in this capacity to work as a controller of an investment company, this is a reasonable and supportable finding.

41. It is appropriate to exercise my discretion under section 114(1) and dismiss this appeal. The purposes and objects of the *Act* are not served by requiring the other parties to respond to it as there is no reasonable prospect that the appeal will succeed.

ORDER

42. Pursuant to section 115 of the *Act*, I order the Determination dated March 9, 2017, be confirmed.

Marnee Pearce
Member
Employment Standards Tribunal