

An appeal

- by -

Kyle W. Kreutzer  
("Kreutzer")

- 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.:** 2008A/46

**DATE OF DECISION:** July 3, 2008

## DECISION

### SUBMISSIONS

Kyle Kreutzer	on his own behalf
Susan P. Arnold	on behalf of the British Columbia Lottery Corporation
M. Elaine Phillips	on behalf of the Director

### OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Kyle Kreutzer (“Kreutzer”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 31, 2008.
2. The Determination was made on a complaint filed by Kreutzer against the British Columbia Lottery Corporation (“BCLC”). Kreutzer alleged BCLC had contravened Section 63 of the *Act* when it terminated his employment on February 26, 2007.
3. The Director found the complaint was not made within the time limit specified in Section 74 of the *Act* and, exercising the authority found in Section 76(3), stopped reviewing or investigating the complaint.
4. Kreutzer appeals that decision on the basis he was “miss-informed” by members of the Employment Standards Branch staff about whether he should file a complaint. The appeal is framed as a failure by the Director to comply with principles of natural justice.
5. Kreutzer seeks an oral hearing. The Tribunal is not required to hold an oral hearing. Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act*, SBC 2004, ch. 45, including section 36 which states, in part: “. . . the tribunal may hold any combination of written, electronic and oral hearings”. The Tribunal has reviewed the material and the parties’ submissions and in its discretion has concluded this appeal can be decided on the written material in the appeal file.

### ISSUE

6. The sole issue in this appeal is whether the Director committed a reviewable error in exercising discretion under Section 76(3) to stop reviewing or investigating Kreutzer’s complaint.

### THE FACTS

7. The Determination contains the following recital of background facts:

BCLC manages and operates commercial gaming in British Columbia in accordance with the Criminal Code of Canada and the Gaming Control Act. Kreutzer was employed as a Gaming Control Manager from June 1, 2000 to February 26, 2007 at the rate of pay of \$24.14 per hour.

The complaint was filed on December 12, 2007 and the timeliness of the complaint is an issue which this determination must decide.

8. The Determination also sets out the facts provided by the parties. It is unnecessary to set out all of those facts. It suffices to say the facts note the complaint was filed with the Employment Standards Branch (the “Branch”) well outside of the time limits set out in Section 74 of the *Act* for filing a complaint, Kreutzer provided an explanation for the late filing and BCLC opposed the Director accepting the complaint.
9. In his explanation, Kreutzer said, among other things, that he had contacted the Branch within the six months following February 26, 2007 and was not told about a time limit for filing a complaint but was told he should seek legal advice. He filed a complaint against BCLC under the *Human Rights Code* in May 2007 and said he did not file a complaint with the Branch because a successful result of his Human Rights complaint would have made a complaint under the *Act* unnecessary. He said he “became misinformed” regarding how he should handle the Employment Standards portion of his termination, alleging he was instructed to “wait and see” if his Human Rights complaint would result in the reinstatement of his employment with BCLC. He was unable to identify the source or the date of that instruction. He did identify a person named “Dorothy” at the Branch’s Enquiry Line with whom he had spoken on December 12, 2007 and who told him he was “possibly entitled to 6 weeks’ severance pay but the 6 months had lapsed so [he] was under very unique circumstances”. He also said Dorothy told him he should have been compensated with 6 weeks’ termination pay.
10. The Director considered Kreutzer’s explanation for the late filing but was not persuaded it was sufficiently reasonable or credible to justify what would amount to a 9 ½ month extension of the statutory time limit for filing.

## **ARGUMENT**

11. In terms of the circumstances relating to the late filing of the complaint, the appeal adds nothing to the information that was before the Director. There is a minor disagreement with one finding of fact in the Determination, but even if I have the authority to address that disagreement, it would not alter my analysis.
12. Kreutzer says the Tribunal should overturn the Determination because of the unique and complicated nature of his circumstance and because he doesn’t believe BCLC “should be allowed not to follow the rules and regulations” set out in the *Act*.
13. Counsel for BCLC says the appeal should not be allowed. She says the appeal raises no natural justice issues; Kreutzer was provided with an opportunity to be heard on the issue addressed in the determination and to respond to the position of BCLC in response to his complaint.
14. The Director says Kreutzer was aware there was a question about the timeliness of his complaint and was given an opportunity to address that question.
15. Kreutzer has filed a final reply that expands on his view of whether it was just and proper for BCLC to have terminated his employment as and when it did, but doesn’t really provide any additional considerations related to the appeal itself.

## ANALYSIS

16. One cannot help but feel some sympathy for Kreutzer's circumstances, but this decision must be guided by an appropriate application of the *Act* and its purposes and objectives and not by any personal view of whether Kreutzer has or has not been fairly dealt with by his former employer.
17. As a result of amendments to the *Act* which came into effect on November 29, 2002, 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 made.*
18. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
19. I will make one additional observation about this appeal. Kreutzer has submitted that the Tribunal should change the Determination and allow the complaint to be fully investigated. Even if I accept there is validity to the appeal, I am doubtful of the Tribunal's ability to do what Kreutzer has requested as it would require the Tribunal to assume an authority under Section 112 and 115 that the legislature has seen fit to give only to the Director under Section 76. It is, however, not necessary in light of this decision to make any final judgment on that point.
20. This appeal raises considerations related to a decision of the Director under Section 76(3), which reads:
- 76. (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) or (4),*
  - (b) this Act does not apply to the complaint,*
  - (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,*
  - (d) the employee has not taken the requisite steps specified by the director in order to facilitate resolution or investigation of the complaint,*
  - (e) there is not enough evidence to prove the complaint,*
  - (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator,*
  - (g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint,*
  - (h) the dispute that caused the complaint may be dealt with under section 3 (7), or*
  - (i) the dispute that caused the complaint is resolved.*

21. This appeal challenges the Director's exercise of discretion under Section 76(3) (a).
22. There are three aspects of this case that initially come to bear on the analysis. First, there is no question that the complaint filed by Kreutzer was substantially out of time. The legislature has spoken in clear and strong terms that timely filing of complaints is an important element in ensuring fair and efficient procedures for resolving disputes under the *Act*. The language of Section 74 of the *Act* speaks in mandatory, not permissive, terms and should be read accordingly. Without attempting to catalogue the circumstances that would require a complaint filed outside of the time limits set out in Section 74 to be accepted, reviewed, investigated and/or adjudicated, I would anticipate such cases would be rare.
23. Second, as already noted, a decision under Section 76(3) is a discretionary decision. The Tribunal has consistently stated a reluctance to disturb discretionary judgments of the Director unless it can be shown the exercise of discretion was an abuse of power, the Director made a mistake in construing the limits of his authority, there was a procedural irregularity or the decision was arbitrary, unreasonable or based on irrelevant considerations, see *Joda M. Takarabe and others*, BC EST #D160/98 and *Jody L. Goudreau et al* (BC EST # D066/98).
24. Third, all of the reasons put forward to the Director by Kreutzer for the late filing were addressed in the Determination. The only additional consideration, which is raised in this appeal, is that by refusing to accept, investigate and adjudicate the complaint, BCLC may be "getting away" with not meeting an obligation set out in the *Act*. Such a consideration is, however, not particularly relevant or cogent to whether the Director should ignore the requirements of Section 74 and proceed with a late appeal. Such an argument could be applied to any case where a complaint was filed out of time. To give that argument effect would nearly, if not completely, nullify the statutory time limits for filing a complaint.
25. Kreutzer does not say the Director exercised discretion under Section 76(3) of the *Act* in a way that would justify intervention by the Tribunal. Even if such an argument were made, I would be hard pressed to find the Director's decision was one which could be considered an error in discretionary judgment.
26. On an analysis of the appeal, I accept the submissions of the Director and counsel for BCLC that Kreutzer has not shown any failure by the Director to comply with principles of natural justice. Accordingly, the appeal must be dismissed.

## **ORDER**

27. Pursuant to Section 115 of the *Act*, I order the Determination dated March 31, 2008 be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**