

An appeal

- by -

Carineth Pascual
(the “Appellant”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2013A/48

DATE OF DECISION: September 25, 2013

DECISION

SUBMISSIONS

Carineth Pascual

on her own behalf

INTRODUCTION

1. This is an appeal filed by Carineth Pascual (the “Appellant”) under section 112 of the *Employment Standards Act* (the “*Act*”) and it concerns a Determination, and accompanying “Reasons for the Determination” (the “delegate’s reasons”), both issued by a delegate of the Director of Employment Standards on June 26, 2013. In short, the delegate determined that the Appellant’s unpaid wage complaint filed against her former employer was time-barred by subsection 74(3) of the *Act* and, further, there was no proper basis to exercise her discretion to proceed to investigate the complaint notwithstanding the Appellant’s failure to file a timely complaint.
2. Although the Appellant’s appeal form identified her ground of appeal as subsection 112(1)(c) – the Appellant has new evidence that was unavailable when the Determination was being made – a review of her supporting materials clearly shows that the thrust of her appeal is that that the delegate erred in law in summarily dismissing her complaint because it was filed outside the *Act*’s complaint limitation period. Accordingly, I propose to proceed under that ground of appeal. I should add that the Appellant has not submitted any “new evidence” in her appeal materials.
3. I am adjudicating this appeal based on the Appellant’s submissions and a review of the subsection 112(5) “record” that was before the delegate. At this juncture, the Tribunal has not sought any submissions from the delegate or from the respondent employer.

FINDINGS AND ANALYSIS

4. The Appellant concedes that her complaint was not filed within the 6-month complaint period set out in subsection 74(2). Her complaint was filed with the Employment Standards Branch office in Nanaimo on February 18, 2013, but the statutory 6-month complaint period expired on October 24, 2012 (about 4 months earlier). Subsection 76(3)(a) states that if an unpaid wage complaint is not filed within the 6-month complaint period, the Director of Employment Standards “*may* refuse to accept, review, mediate, investigate or adjudicate a complaint” (my *italics*). Our Court of Appeal, in *Karbalaieali v. British Columbia (Director of Employment Standards)*, 2007 BCCA 553, held that the combined effect of this provision and subsection 76(1) (“the director must accept and review a complaint”) is to import a discretion in the Director to proceed to investigate a complaint even if it is otherwise time-barred. The Court of Appeal, at paras. 11 and 12, made the following comments that are particularly apposite to this appeal:

...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...

The question before the Tribunal was not whether the employee’s complaint was statute-barred but whether the Director’s delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. 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.

5. Thus, the issue before me is whether the delegate erred in law in exercising her discretion to refuse to continue investigating the complaint because it was time-barred. The delegate's decision in this regard would only constitute an error of law if she, for example, exercised her discretion in bad faith or if she relied on some wholly irrelevant and extraneous consideration.

6. In declining to exercise her discretion in favour of continuing to investigate the Appellant's complaint, the delegate took into account the following considerations:

- Shortly before she quit her employment in late April 2012, the Appellant contacted the Kamloops Immigrant Services Office (she had been working at a local hotel in Kamloops under the auspices of the federal Temporary Foreign Worker Program), and later met with someone in that office who assisted her in completing the Employment Standards Branch's "Self-Help Kit" which was delivered to her former employer on May 28, 2012.
- Her former employer summarily dismissed her request for unpaid wages and thus in June 2012 the Kamloops Immigrant Services office arranged for her to meet (on August 30, 2012) with a pro bono lawyer who advised her that she could either pursue a complaint against her former employer under the *Act* or file a court action (likely in the Small Claims Court).
- In late November 2012 (by which time the 6-month complaint period had already expired), the Appellant returned to the Philippines to see her father who was ill. She returned to Kamloops on January 22, 2013, and later relocated to Nanaimo and, as noted above, she filed her complaint in the Nanaimo ESB office on February 18, 2013.
- The delegate noted that the Appellant must have been aware of the 6-month complaint period limitation because: a) this time limitation is clearly set out in the Self-Help Kit itself and b) the evidence suggested that when given an option of pursuing a complaint or a court action, the Appellant appeared to be initially in favour of the latter and that may have accounted for the delay in filing a timely *Act* complaint.

7. In light of these considerations, the delegate ultimately concluded, at page 8 of her reasons:

The requirements to file a complaint and how to use the [Self-Help Kit] are very explicit and detailed. In addition, if individual employees or employers have questions about process or the requirements of the Act they may contact the Branch for clarification. [The Appellant] had also been working with the Kamloops Immigrant Services, and she had explicitly been advised of her option to continue through the Employment Standards Branch though she seemed reluctant to do so.

Remaining undecided about how to pursue her Employment Standards issues to such an extent that the six-month time period lapses is not a sufficient reason to file her complaint late, and does not accord with section 2(d) of the Act. [referring to one of the enumerated purposes of the *Act*: "to provide fair and efficient procedures for resolving disputes"]

8. The Appellant, although conceding that she did not file her complaint within the 6-month complaint period, now says that she had a "valid reason" for not doing so. In particular, she alleges that her former employer was dishonest, did not live up to its obligations under the parties' employment contract and that, as a recent immigrant, she did not fully comprehend the Canadian legal system. While acknowledging that she met with Kamloops Immigrant Services and a pro bono lawyer, she maintains that she did not appreciate that if she were to file an *Act* complaint, there was a governing 6-month limitation period. I note, however, that the

Appellant's appeal materials include a "Fact Sheet" entitled "Complaint Resolution" and in this document the 6-month complaint period is clearly spelled out.

9. In my view, the Appellant's present explanation is largely the same as that provided to the delegate when asked to provide further details regarding why she did not file a timely complaint. I am unable to conclude, based on the record before me, that the delegate improperly, unfairly or unreasonably exercised her discretion to refuse to investigate the Appellant's complaint on its merits. I think it reasonable to conclude, notwithstanding the Appellant's present assertion to the contrary, that she was well aware that she had separate options of pursuing legal action or a complaint under the *Act*, and there is evidence in the record that the Appellant appeared, at least initially, to lean toward the Small Claims Court option. The Appellant may still have the ability to pursue the latter avenue but, in my view, the delegate's decision to foreclose the *Act* complaint process option did not constitute an error in law or, for that matter, a breach of principles of natural justice (see subsection 112(1)(b) of the *Act*). The only reasonable inference to be drawn from the material before me is that the Appellant must have appreciated, or was otherwise wilfully blind to the fact, that a complaint under the *Act* was subject to a 6-month limitation period. In my view, the Appellant did not (and still has not) provided a credible and cogent explanation for her failure to file a timely complaint.

ORDER

10. Pursuant to subsection 114(1)(f) of the *Act*, I am dismissing this appeal on the ground that it has no reasonable prospect that it will succeed, and in accordance with subsection 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal