

An appeal

- by -

Donald Klein
("Klein")

- 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.: 2009A/070

DATE OF DECISION: July 16, 2009

DECISION

SUBMISSIONS

Donald Klein	on his own behalf of
Colleen Armstrong	on behalf of 0604309 B.C. Ltd.
Karin Doucette	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Donald Klein (“Klein”) of a Determination that was issued on May 14, 2009 by a delegate of the Director of Employment Standards (the “Director”). The Director concluded that the complaint filed by Klein against his former employer, 0604309 B.C. Ltd. doing business as Superior Auto Body (“Superior”) had not been filed within the time allowed in section 74 of the *Act* and, acting pursuant to section 76, declined to take any further action on it.
2. Klein has appealed and says there is evidence available that was not available when the Determination was being made. He asks the Tribunal to change the Determination by over-riding the decision of the Director that no further action would be taken on the complaint.

ISSUE

3. The issue is whether Klein has shown there is any error in the Determination that would allow the Tribunal to interfere with the decision of the Director to refuse to take further action on the complaint.

ARGUMENT

4. The Determination sets out the following facts, which I will only summarize:
 1. Superior was an auto body shop in Quesnel, BC;
 2. Klein commenced employment with Superior as an auto body technician on October 15, 2002;
 3. The last day on which Klein performed any work for Superior was December 3, 2007;
 4. On that day, he commenced a leave of absence for medical reasons and on December 5, 2007 was issued a Record of Employment by Superior which stated the reason for its issuance as “D” - illness or injury;
 5. On March 10, 2008, Klein was medically cleared to return to work and advised Superior of his availability for work;
 6. Klein did not return to work at that time as there was none available;

7. Klein checked periodically with Superior after March 2008 to see if work was available, but there was none;
 8. On August 27, 2008, Klein was told the business was closing and he picked up his tools from the shop on August 29, 2008;
 9. Klein completed a Self Help Kit and on November 6, 2008, he hand delivered the Self Help Kit to the person who had been the accountant for Superior;
 10. On December 10, 2008, Klein filed a complaint under the *Act*, claiming annual vacation pay for the period from June 1, 2007 to December 4, 2007 and length of service compensation;
 11. The time period in section 74 of the *Act* for Klein to file a complaint under the *Act* ended on December 9, 2008.
 12. The Director refused to exercise discretion to extend the time period for one day;
 13. In reaching that decision, the Director stated in the Determination that it would be appropriate to consider the following factors:
 - was there a reasonable explanation for failing to file within the prescribed time limits;
 - was there a genuine intention to file a complaint, or to at least get the employer to pay;
 - was the employer aware of the complaint;
 - would the employer be unduly prejudiced by an extension of the time limits; and
 - did Klein have a strong *prima facie* case?
 14. The Director concluded that Klein had not provided a reasonable explanation for failing to file within the six month time limit and as a result, no other factors needed to be considered.
5. In addition to the facts set out in the Determination, Klein has asserted additional facts with the appeal. Once again, I will only summarize these factual assertions:
1. Other employees were paid in cash for wages they were owed when the business of Superior was closed;
 2. Klein believed he had six months from the time Superior's shop was closed to file a complaint under the *Act*; and
 3. Klein was told in January 2009 by a delegate of the Director that his six months started March 10, 2008.
6. It should be noted that the second assertion set out immediately above is not new. It was asserted by Klein to the Director before the Determination was made, but was not accepted. In considering and rejecting this assertion, the Director states, at page 7 of the Determination:

This [thinking the six month time limit would start when the business closed in August] is not supported by the evidence presented. Mr. Klein used the Branch [Self Help Kit] this document states there is a six-month time limit for filing a complaint; it also, at page two, under “GETTING STARTED”, gives two questions to help the reader determine whether they should be proceeding:

Question 2: Has the problem taken place in the last six months?

OR

If you no longer work for the employer, has it been less than six (6) months since your last day worked?

When reading this last question, which uses the phrase “last day worked”, applying the plain reading of this, the last day Mr. Klein actually “worked” was December 3, 2007. A time period that is “less than six (6) months” would expire June 2, 2008, yet no action was taken by Mr. Klein until November.

7. In the appeal, Klein says he didn’t think this language was a concern as he has been on medical leave and “didn’t know the rule of termination with regards to lay off”.

ARGUMENT

8. In this appeal, Klein says evidence has come available which was not available when the Determination was being made. As it relates to the reason for refusing to process his complaint, the “new” evidence provided in the appeal is an assertion that Klein was led to believe through discussion with an unnamed person at the government agent’s office in Quesnel that he had six months from the time Superior closed the doors on its business to file an employment standards complaint.
9. In response to the appeal, the Director acknowledges that section 74 of the *Act*, despite its apparently mandatory language, does not amount to an absolute statutory bar to complaints filed outside the time period found in that provision.
10. The Director says, however, the decision whether to extend the time limit and investigate the complaint is a matter within the discretion of the Director under section 76 and the exercise of that discretion was consistent with the mandatory time limit language of section 74. In the context of how the Director’s discretion was exercised in this case, the Director has referred to, and adopted, comments in a decision of the Tribunal, *Kyle W. Kreuzer*, BC EST # D068/08, where it says, at para 22:

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.

11. A response has been filed on behalf of Superior which, in part, questions whether Klein has added any new evidence to the matter.

ANALYSIS

12. 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.

13. 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. It is not simply an opportunity for a dissatisfied party to have the Tribunal review the material in the file and reach its own conclusion without reference to the findings and conclusions made by the Director: see *World Project Management Inc. et al*, BC EST # D134/97 (Reconsideration of BC EST # D325/96).
14. As well, the Tribunal has taken a relatively strict approach on “new” evidence, indicating it is not intended to be an invitation to a party to seek out additional evidence to supplement an appeal if that evidence was reasonably available and could have been provided to the Director before the Determination was issued. As well as considering whether the evidence which a party is seeking to introduce on appeal was reasonably available during the complaint process, the Tribunal considers whether such evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it is reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and *Senor Rana’s Cantina Ltd.*, BC EST # D017/05.
15. In this case, I find that the evidence provided is not new. This same evidence was provided to the Director, who was not compelled by it to extend the statutory period for filing. A consideration of other assertions raised in support of the selected ground of appeal show that such assertions are either unrelated to the result in the Determination or similarly restate assertions already made to, and considered by, the Director in making the Determination.
16. Accordingly, this appeal will be decided on the findings of fact found in the Determination, to extent they are rationally supported by the material in the section 112(5) record.
17. The Tribunal has recently confirmed that a decision by the Director whether to extend the statutory time limit for filing a complaint or to refuse to investigate a complaint is a matter within his discretion: *Mark Bridge*, BC EST # RD044/09. The Tribunal also affirmed its 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 and another*, BC EST # D066/98.
18. In this case, the difficulty I am faced with is that the Director made two decisions which bear on the discretionary point. First, that the *Act* is benefits conferring legislation and is to be interpreted liberally; and second, that it was appropriate to consider five factors in deciding whether to extend the time limit and continue to investigate the complaint. On the latter point, I wish to make clear that the five factors are ones which the Director decided were appropriate to consider.
19. On the first point, the Director never provides any examination of the relevance of this undeniably correct statement as it relates to the Director’s discretionary exercise. On the second point, the Director, while

stating the appropriateness of considering five factors, actually considers only one, making that one factor determinative on the question and disregarding the other factors, without explaining why that one factor should prevail, to the exclusion of the others, or how those others ceased to have relevance in the face of the Director's conclusion on the first.

20. Looking at the Director's discretionary exercise overall, I find it to be arbitrary and unreasonable, in the sense described in *Goudreau, supra*, and must be set aside. As I have alluded to above, a decision under section 76 is one the legislature has placed exclusively with the Director. The Tribunal does not have the authority to make discretionary judgements under that section. Accordingly, the only result is to refer the matter back to the Director for further consideration and analysis.

ORDER

21. Pursuant to section 115 of the *Act*, I order the Determination dated May 14, 2009 be referred back to the Director.

David B. Stevenson
Member
Employment Standards Tribunal