



An appeal

- by -

Joel Barnes
("Mr. Barnes")

- 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: Shafik Bhalloo

FILE No.: 2013A/59

DATE OF DECISION: October 2, 2013

DECISION

SUBMISSIONS

Joel Barnes on his own behalf

OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Joel Barnes (“Mr. Barnes”) of a determination that was issued on July 9, 2013 (the “Determination”) by a delegate of the Director of Employment Standards (the “Director”).
2. Mr. Barnes filed a complaint at the Employment Standards Branch (the “Branch”) against his former employer, Mark Anthony Group Inc. carrying on business as Mission Hill Family Estate (“Mission Hill”) (the “Complaint”). The delegate found that Mr. Barnes did not file the Complaint within the time period allowed in the *Act* and, as a result, he refused to investigate the Complaint.
3. In his appeal, Mr. Barnes challenges the Determination under all three (3) available grounds for appeal in section 112, namely, the Director erred in law and failed to observe the principles of natural justice in making the Determination, and new evidence has become available that was not available at the time the Determination was made. Mr. Barnes is seeking the Tribunal to cancel the Determination with the effect of having the Director further investigate his Complaint.
4. Rule 22 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”) and section 114 of the *Act* set out the Tribunal’s discretionary power to dismiss all or part of an appeal without seeking submissions from the parties. I have decided that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Determination, Mr. Barnes’ written submissions and my review of the section 112(5) “record” that was before the Director when the Determination was being made. If I am satisfied that the appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114, Mission Hill and the Director may be invited to file further submissions. Conversely, if I find that the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

5. The issues in this appeal may be described as follows:
 - (i) Did the Director err in law or fail to observe the principles of natural justice in refusing to accept and investigate the Complaint?
 - (ii) Has new evidence become available that was not available at the time the Determination was being made and, if so, does that evidence justify changing, varying or cancelling the Determination?

ARGUMENT

6. Mission Hill operates a winery and restaurant in Kelowna, British Columbia. Mr. Barnes filed the Complaint against Mission Hill, his former employer, on February 22, 2013. In his Complaint Form, Mr. Barnes claimed that Mission Hill failed to pay him wages, overtime pay and statutory holiday pay throughout his period of

employment as a Seasonal Steward with Mission Hill from May 1, 2012, to August 7, 2012. I note, however, that Mr. Barnes submitted his Record of Employment with Mission Hill, issued to him on August 20, 2012, showing that his first day worked with Mission Hill was May 6, 2012, and the last August 7, 2012.

7. As the Complaint was not filed within six (6) months of his last day of employment, the Director provided Mr. Barnes with an opportunity to explain the delay. By way of written submissions in a letter to the delegate dated February 26, 2013, Mr. Barnes explained that the delay in filing the Complaint was due to a family crisis “over the past 30 months”. More particularly, he explained that his stepfather was very ill and required around-the-clock care from mid-August 2012 until his passing on January 15, 2013, and this effectively prevented him from submitting the Complaint within the statutory time limit.
8. In his subsequent letter to the delegate dated May 21, 2013, Mr. Barnes reiterated the delay in filing his Complaint to the family crisis relating to his stepfather’s illness and his subsequent passing on January 15, 2013, but then added “I do not understand how I failed, [sic] to report my grievances within the six-month time-frame, I simply wanted out of Mission Hill Family Estate as an employee.”
9. In the same letter he also noted that he discovered, at the time of his stepfather’s passing on January 15, 2013, the Ministry of Social Development was auditing his income assistance file as he may have been overpaid benefits. It appears that when Mr. Barnes learned of the potential financial impact of this audit on him, he felt obligated to file the Complaint with the Branch against Mission Hill.
10. Based on the August 7, 2012, end date of Mr. Barnes’ employment with Mission Hill, the delegate concluded that Mr. Barnes should have filed the Complaint by February 7, 2013, but failed to do so. The Complaint having been filed out of time, the delegate then exercised her discretion and refused to investigate the Complaint noting that while Mr. Barnes experienced a crisis due to his stepfather’s lengthy illness and subsequent passing in mid-January, 2013, this “did not prevent him from accessing the Branch or filing his complaint online on or before February 7, 2013”. The delegate went on to explain in the Reasons for the Determination that Mr. Barnes’ written submissions indicated that “he was motivated to file a complaint with the Branch upon learning that an audit was being conducted regarding his Income Assistance file”. While he discovered the news of the audit in mid-January and could have filed his Complaint before the expiry of the time for filing the Complaint, he failed to do so. Therefore, the delegate felt justified in exercising her discretion to refuse to further investigate the Complaint.

SUBMISSIONS OF MR. BARNES

11. I have reviewed Mr. Barnes’ appeal submissions filed with his Appeal Form, as well as his subsequent exchanges with the Tribunal. While I do not reiterate all of his submissions here, I note that I find unhelpful and not relevant to the subject matter of this appeal: (i) his submissions alleging his ill treatment by the staff at the Branch with respect to which he claims to have launched a complaint with the Ombudsman’s Office; (ii) his submissions pertaining to the delegate’s alleged lack of responsiveness subsequent to his filing of the Complaint; (iii) his substantive submissions pertaining to his outstanding wage claims; (iv) his submissions pertaining to the alleged mistreatment he experienced from the Ministry of Social Development and its representative; (v) his allegations pertaining to the mistreatment of other employees by Mission Hill; and (vi) his bare assertion against the Branch that he is “being discriminated against for having multiple disabilities” with respect to which he claims to have launched a complaint “with BC Human Rights Coalition”.
12. However, what is relevant to the subject matter of this appeal but missing in the appeal submissions is any submissions challenging the delegate’s exercise of the discretion in refusing to further investigate the Complaint and any submissions supporting the grounds of appeal Mr. Barnes has ticked off in his Appeal

Form to challenge the Determination. Instead, Mr. Barnes reiterates the submissions he previously made to the delegate before the Determination was made, namely, that it was his “30-month family crisis” which prevented him from “addressing and submitting” the Complaint to the Branch.

ANALYSIS

13. The pertinent sections of the *Act* with respect to this appeal are sections 74(2) and (3) and 76(3)(a).

14. Section 74(2) and (3) of the *Act* states:

74 (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

15. Section 76(1) and (3)(a) of the *Act* states:

Investigations

76 (1) Subject to subsection (3), the director must accept and review a complaint made under section 74.

...

(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)....

16. While subsections (2) and (3) in Section 74 mandate that a complaint must be delivered to the Branch within six (6) months after the last day of employment, the B.C. Court of Appeal in *Karbalaeiali v. British Columbia (Employment Standards)* (2007 BCCA 533) concluded that the Director has discretion under section 76 and, in particular, subsections (1) and (3)(a) to accept a complaint delivered more than six (6) months after the date of termination:

[11] While the Tribunal rightly stated that the *ESA* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, 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.

17. In this case, while the delay on Mr. Barnes’ part in filing the Complaint was not inordinate, it was nevertheless out of time. Therefore, the delegate had the discretion, under section 76 and particularly under subsection (1) and (3)(a) to refuse to investigate the Complaint or to continue to investigate it. The delegate, as indicated above, opted to exercise her discretion to refuse to continue investigating the Complaint. The extent to which, and under what circumstances, the Tribunal will review that exercise of discretion by the delegate is set out in *Re: Jody L. Goudreau and Barbara E. Desmarais, Employees of Peace Arch Community Medical Clinic Ltd.* (BC EST #D066/98) as follows:

The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context has been described as being:

...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'.
Associated Provincial Picture Houses v. Wednesbury Corp. [1948] 1 K.B. 223 at 229.

18. Also instructive on the issue of the exercise of a statutory discretion is the following comments of the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR:

It is, as well, a clearly established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might exercise the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith, and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

19. It should also be noted that the burden is on Mr. Barnes to demonstrate that the delegate's exercise of discretion to cease investigating the Complaint was unreasonable. I not only find that Mr. Barnes has failed to discharge that burden, but I find the delegate, in this case, exercised her statutory discretion in section 76(3)(a) in accordance with the principles delineated by both the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada*, *supra*, and the Tribunal in *Re: Jody L. Goudreau and Barbara E. Desmarais*, *supra*. More specifically, I see no evidence of misinterpretation or misapplication of any part of the *Act*, including, in particular, sections 74(2) and (3) and 76(3)(a), on the part of the delegate. I also do not find that the delegate misapplied any principles of general law, or acted without any evidence in exercising her discretion not to investigate any further the Complaint. To the contrary, I find the delegate acted on a view of facts which could reasonably be entertained, and her analysis, in principle, was correct. Therefore, I do not find there was any error of law.
20. I also do not find there is any evidence of a breach of principles of natural justice on the part of the delegate. The onus is on Mr. Barnes to provide evidence in support of this ground of appeal and he has not done so other than make a bare allegation in the Appeal form that the Director breached the principles of natural justice. The evidence in the case indicates otherwise. Mr. Barnes was afforded a further opportunity to make submissions explaining why he filed the Complaint late after the expiry of the statutory time limit, and he took advantage of that opportunity and made his additional submissions on May 21, 2013, which the delegate considered in making the Determination. Therefore, I do not find any basis for cancelling or varying the delegate's Determination on the natural justice ground of appeal.
21. I also do not find any basis to vary the Determination on the basis of the new evidence ground of appeal. There exists a strict test which the Tribunal employs in deciding whether to accept new evidence on appeal of a determination. That test is a conjunctive test consisting of four (4) parts and it is set out in the Tribunal's decision in *Re: Merilus Technologies Inc.* (BC EST # D171/03):
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

- (b) The evidence must be relevant to a material issue arising from the complaint;
- (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
- (d) The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

22. In this case, I do not find Mr. Barnes to have proffered any evidence in the appeal submissions that would qualify or satisfy the test for considering new evidence on appeal in *Re: Merilus Technologies Inc., supra*, and therefore, the new evidence ground of appeal has no merit in this appeal.
23. In the circumstances, pursuant to section 114(1)(f) of the *Act*, I dismiss this appeal on the ground that there is no reasonable prospect that it will succeed.

ORDER

24. Pursuant to section 115 of the *Act*, I order the Determination, dated July 9, 2013, be confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal