

An appeal

- by -

Jolly Binuhe
(“Ms. Binuhe”)

- 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.: 2014A/85

DATE OF DECISION: September 25, 2014

DECISION

SUBMISSIONS

Ai Li Lim

counsel for Jolly Binuhe

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Jolly Binuhe (“Ms. Binuhe”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 13, 2014.
2. The Determination was made in respect of a complaint filed on behalf of Ms. Binuhe, who alleged Alienna’s International Foreign Worker Ltd. (“Alienna’s”) had contravened Part 2, section 10 of the *Act* by charging her a fee for placing her in employment.
3. The Determination found the complaint was not made within the time limit specified in section 74 of the *Act* and, applying section 76 of the *Act*, decided no further action would be taken on it.
4. An appeal has been filed of the Determination on behalf of Ms Binuhe, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
5. In correspondence dated July 21, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by a Tribunal Member and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to Ms. Binuhe who has been given the opportunity to object to the its completeness. No objection has been received and, accordingly, the Tribunal accepts it as complete.
7. I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made on behalf of Ms. Binuhe and my review of the section 112(5) “record” that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in that subsection, which states:

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 the 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 the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*

(b) *one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, Alienna's will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

ISSUE

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

THE FACTS

10. The facts of this appeal are brief.
11. Alienna's operates an employment agency. In 2011, Ms. Binuhe contacted Alienna's for the purpose of obtaining employment in the Grand Prairie, AB, and/or the Dawson Creek, BC, areas. In September 2011, Alienna's found potential employment for Ms. Binuhe in Dawson Creek, BC. On September 22, 2011, Ms. Binuhe paid Alienna's \$1,030.00. This amount was not the full amount set out in the contract but was the only money ever paid by Ms. Binuhe to Alienna's. Alienna's has from time to time requested Ms. Binuhe pay the balance of the contract amount. The last such request was found by the Director to have been made April 1, 2013.
12. In March 2012, Ms Binuhe commenced employment in Dawson Creek, BC.
13. A complaint was filed by Ms. Binuhe to the Director on October 4, 2013, alleging the \$1,030.00 paid under the contract was received by Alienna's in violation of section 10 of the *Act*.
14. The Director found the filing of the complaint was outside the time limit allowed under section 74 of the *Act* and, under section 76(3) of the *Act*, exercised discretion to refuse to proceed with it. In doing so, the Director rejected the argument that the complaint was not out of time because the \$1,030.00 claimed was part of an ongoing transaction that was not yet completed.

ARGUMENT

15. The representative for Ms. Binuhe submits the Director erred in law and failed to observe principles of natural justice in making the Determination.

1. Errors of Law

16. It is submitted the Director erred in interpreting section 74(4) of the *Act*. That provision states:

(4) *A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within six months after the date of the contravention.*

17. On the material provided, the Director found both the amount charged and the last request for payment had occurred outside the time period described above. The latter date was identified as April 1, 2013. The

representative for Ms. Binuhe argues there was no evidential basis for concluding April 1, 2013, was the date of the last requested payment from Alienna's to Ms. Binuhe.

18. There was a meeting in May 2013 between the owner of Alienna's and a group, including Ms. Binuhe, who had issues with Alienna's concerning the withholding of documents. It is argued that meeting should have been viewed by the Director as a request for payment by Alienna's.
19. The representative for Ms. Binuhe submits the Director also erred by interpreting section 10(1) of the *Act* "to mean that only requests for payment are prohibited". It is argued that such an interpretation runs against the "presumption against tautology", is inconsistent with the remedial nature of the *Act*, the direction to give the *Act* a "large and liberal construction and interpretation" and the stated purposes of the *Act* and ignored that the contravention was ongoing.

2. Failure to observe principles of natural justice

20. It is argued the Director failed to observe principles of natural justice by refusing to investigate the complaint before dismissing it under section 76. The representative for Ms. Binuhe says the Director was required to become fully apprised of "all relevant information" before making a decision under section 76. It is argued this requirement includes initiating an investigation "that can uncover facts and details otherwise unavailable to a complainant" and that Ms. Binuhe had a reasonable expectation this would be done.

ANALYSIS

21. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, examining the statutory grounds of appeal chosen and considering those against established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
22. 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.*

23. The Tribunal has established that an appeal under the *Act* is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. An appeal to the Tribunal under section 112 is not intended simply as an opportunity to resubmit the evidence and argument that was before the Director in the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.
24. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the

appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation.

25. This appeal challenges the conclusion by the Director that the appeal has been filed outside of the time limits found in section 74 of the *Act*, alleging there was an error of law in that finding. Generally, the Tribunal has adopted the following definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle

26. In the context of section 10 of the *Act*, I am not persuaded the Director erred in law in how that provision was applied to this case. I do not accept the view of the representative for Ms. Binuhe that the Director interpreted section 10 to mean “only requests for payment are prohibited”. That “interpretation” is not found anywhere in the Determination and, in any event, such an interpretation of section 10 was unnecessary as the Director found, *on the facts*, that Alienna’s had neither charged nor requested payment from Ms. Binuhe in the six month period preceding the complaint.

27. The appeal has challenged the above factual findings, but has not shown these findings raise an error of law. The evidence clearly, and uncontrovertibly, showed Ms. Binuhe had made no payment to Alienna’s since September 2011. As well, there was evidence from which the Director could reasonably and logically conclude Alienna’s had made no request for payment since April 1, 2013, which was longer than six months prior to the filing of the complaint. While the representative for Ms. Binuhe takes issue with that finding, there is no evidence in the section 112(5) “record” that would justify concluding the Director committed an error of law in reaching that conclusion. In fact, Ms. Binuhe’s complaint submission on that point makes no reference at all to any “request” for payment to her from Alienna’s. That is acknowledged in the appeal submission. In respect of that time period, her appeal says:

On my behalf sometime in *March 2013*, it is *my understanding* that Ms. Bahiwal tried to contact Ms. Sabando to request for copies of our employment contracts and LMOs. Ms. Sabando reacted angrily to Ms. Bahiwal’s request and accused her of helping our colleagues file employment standards complaints against her. (emphasis added)

28. It is also apparent that Ms. Binuhe’s complaint and claim relate only to the \$1,030.00 she paid in September 2011. That is the “contravention” alleged and its return is the remedy sought. As indicated above, there is simply no disputing that alleged “contravention” occurred well outside the six month limitation on such claims found in section 74(4) of the *Act*. The Director made no error in that regard.

29. The arguments concerning a meeting, or meetings, which allegedly occurred in May 2013 add nothing to the appeal. In my view, if the Director did not make a finding that those meetings constituted “requests”, it was because there was no evidence on which such a finding could be based.

30. I find no merit whatsoever in the assertion the Director erred in law in the application of sections 10 and 74(4) of the *Act* to the facts.
31. The appeal is also grounded in an alleged failure by the Director to observe principles of natural justice in declining to investigate the complaint before deciding Ms. Binuhe's complaint was out of time.
32. The decision of the Director to investigate or refuse to investigate a complaint that is time barred is a discretionary one. The Tribunal's authority over an exercise of discretion by the Director is limited: see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98. While the exercise of that discretion is reviewable by the Tribunal, the circumstances in which the Tribunal would do so would require it to 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: *Jaeger*, BC EST#D244/99, *Jody L. Goudreau*, BC EST # D066/98; and *Takarabe and others*, BC EST # D160/98. The Director must exercise discretion for *bona fide* reasons, it must not be arbitrary and it must not be based on irrelevant factors: *Takarabe, supra*.
33. It seems to bear repeating that Ms. Binuhe's complaint, which asked the Director to find the payment of \$1,030.00 to Alienna's in September 2011 was a contravention of the *Act* and should be ordered to be repaid, was clearly outside of the statutory time limit for making such a complaint. That was apparent on the face of the complaint; there was no further "investigation" necessary. The submission on this aspect of the appeal effectively says that, notwithstanding the obvious deficiency on the face of the complaint, the Director is required to expend the resources of the Employment Standards Branch investigating whether other, undisclosed, facts exist that might support a complaint. That is an unreasonable and untenable proposition.
34. The Complaint and Information Form asks a complainant to identify what they believe they are owed, to provide the details of their complaint and to attach all available information supporting their complaint. The Director is not required to presume there may be relevant information that has not been included in the complaint. Rather it is a primary responsibility of a complainant to set out sufficient detail to make clear the substantive basis for their complaint. In the absence of such detail, showing there is some basis for a complaint under the *Act*, it is appropriate for the Director to conclude no valid complaint exists and may exercise discretion under section 76 of the *Act*.
35. If the argument on this aspect of the appeal was valid, the Director could never refuse to investigate a complaint under section 76 of the *Act*. Such a result does not accord with the wording or the statutory objective of section 76 and has no merit as an acceptable view of the effect of that provision.
36. Accordingly, there is no basis for the natural justice ground of appeal raised by the representative for Ms. Binuhe.
37. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
38. The appeal is dismissed.

ORDER

39. Pursuant to section 115 of the *Act*, I order the Determination dated June 13, 2014, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal