



An appeal

- by -

Sushil Kumar Mehta
(“Mr. Mehta”)

- 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.: 2015A/83

DATE OF DECISION: August 12, 2015

DECISION

SUBMISSIONS

Sushil Kumar Mehta

on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Sushil Kumar Mehta (“Mr. Mehta”) has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 11, 2015 (the “Determination”).
2. The Determination was made in respect of a complaint filed by Mr. Mehta, who alleged his former employer, Vectrance Canada Inc. (“Vectrance”), had contravened the *Act* by failing to pay him 8 weeks’ termination pay in the amount of \$26,000.00 (the “Complaint”).
3. The Determination found that Mr. Mehta did not file the Complaint within the time limit specified in section 74 of the *Act* and, as a result, the Director decided not to proceed with the Complaint pursuant to section 76 of the *Act*.
4. The deadline for filing an appeal of the Determination was June 18, 2015. On June 15, 2015, the Employment Standards Tribunal (the “Tribunal”) received an email from Mr. Mehta requesting an extension of time of seven (7) to ten (10) days to file his appeal as he was away on summer vacation, and only returned to his home, in India, late at night on June 14, 2015, when he received the Determination. He states in the email that he needs to “deep study” the Determination to be able to file his appeal submissions. He attaches an Appeal Form to his email that says little more than his name in the space provided for the Appellant’s name. He also attaches a copy of his bus ticket in support of his submission that he was out of the city until June 14, 2015.
5. By way of correspondence dated June 16, 2015, the Tribunal notified the parties that Mr. Mehta was requested to provide the Tribunal with written reasons and argument for the appeal, as well as any additional supporting documents, no later than 4:00 p.m. on June 30, 2015, and that, once received, the Tribunal would forward the same to Vectrance and to the Director.
6. On June 29, 2015, the Tribunal received appeal submissions from Mr. Mehta totalling 385 pages. Included in Mr. Mehta’s appeal submissions are 23 video files, which were submitted to the Tribunal electronically, and 16 pages of written submission. The appeal submissions also include a new Appeal Form of Mr. Mehta setting out his grounds of appeal, namely, that the Director erred in law and breached the principles of natural justice in making the Determination. In the Appeal Form, Mr. Mehta also requests the Tribunal to cancel the Determination.
7. On July 3, 2015, the Tribunal sent a copy of the appeal submissions and video files to the Director for information purposes only, but not to Vectrance, as the Tribunal does not have their current contact information. The Tribunal advised the Director that no submissions from the Director were being requested at this time.
8. On June 30, 2015, the Director provided the section 112(5) “record” (the “Record”) to the Tribunal.

9. On July 3, 2015, the Tribunal disclosed the Record to Mr. Mehta, and afforded him the opportunity to object to its completeness.
10. On July 6, 2015, Mr. Mehta sent the Tribunal his submissions objecting to the completeness of the Record. He submitted three (3) emails with attachments. The Tribunal did not include, nor print, the attachments as they were previously disclosed to the Director, or submitted to the Director, or were additional copies of documents included in Mr. Mehta's submissions.
11. On July 21, 2015, the Director responded to Mr. Mehta's July 6 submissions stating that copies of all documents that were before the Director at the time the Determination was made were submitted as part of the Record. The Director also added, although not invited to make any submissions on the merits, that Mr. Mehta's submissions show that he is re-arguing his case on the merits of the Determination and, therefore, his appeal should be dismissed.
12. On July 21, 2015, the Tribunal disclosed the Director's submissions to Mr. Mehta, and afforded the latter an opportunity to make a final reply in response to the Director's submissions no later than July 28, 2015.
13. On July 22, 2015, Mr. Mehta replied with a short email to the Tribunal advising that the "Record is ok".
14. By way of correspondence dated July 30, 2015, the Tribunal notified the parties that the matter would now be reviewed by a Tribunal Member who may, without seeking submissions from the parties, dismiss all or part of the appeal and/or confirm all or part of the Determination. The Tribunal also added that no written submissions on the merits of the appeal are being sought from Vectrance or the Director.
15. In accordance with the July 30, 2015, correspondence of the Tribunal, I have reviewed the appeal, including Mr. Mehta's extensive submissions, and the Record. I find that this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based on the Reasons for the Determination (the "Reasons"), the Appeal Form and submissions of Mr. Mehta and my review of the Record that was before the Director when the Determination was being made. If satisfied the appeal should not be dismissed under section 114(1) of the *Act*, Vectrance and the Director will be invited to file their reply submissions to the question of whether to extend the deadline to file the appeal, and provide their submissions on the merits of the appeal. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

16. The issue, at this stage of the proceeding, is whether there is any reasonable prospect the appeal can succeed.

THE FACTS

17. Vectrance, a federally-registered company based in Paris, London, and Vancouver, provides international consulting services, expertise and technical assistance in geoscience and engineering services to oil/gas and mining companies for their global operational and development projects.
18. Mr. Mehta was hired by Vectrance and worked for the latter as a Health, Safety and Environment Consultant and Manager from June 2013 to April 2014.
19. On January 1, 2015, Mr. Mehta emailed the Employment Standards Branch (the "Branch") advising that he started working for Vectrance in June 2013 when he joined a cement plant project in Nigeria. After

successfully completing this project, in February 2014, he joined another cement plant project in Iraq, on a one-year contract. He provides a copy of his employment contract with Vectrance, dated January 5, 2014, signed by himself and Sylvie Seghier (“Ms. Seghier”), Chief Executive Officer of Vectrance. Mr. Mehta states that in April 2014, he received a notice of dismissal from Vectrance and his employment was terminated “without any genuine reason”. He claims that he is entitled to “two months notice pay” [*sic*] pursuant to his employment agreement. He also contends that the employment agreement is governed by “Canadian Labour Law” and falls within the scope of the *Act*.

20. On January 16, 2015, the Director informed Mr. Mehta that, based on an initial assessment, his Complaint appears to fall outside the jurisdiction of the *Act*, but if he believes the *Act* applies, then he should follow the process for filing a complaint set out on the Branch’s website.
21. Subsequently, on February 10, 2015, Mr. Mehta sent a complaint form to the Branch, which he followed up with two (2) more complaint forms on February 11 and March 4, 2015. As noted by the delegate in the Reasons, the complaint forms and their attachments do not contain any new information Mr. Mehta had not previously provided to the Branch in his email.
22. On March 19, 2015, a delegate of the Director wrote to Mr. Mehta informing him that his Complaint appears to have been filed outside the six-month time limit in the *Act* for filing a complaint, and asked him to provide, in writing, the following information: (i) the date when he was terminated from his employment; (ii) the reasons why he failed to file his Complaint within the six-month time limit under the *Act*; and (iii) details of any contact he had with the Branch prior to his initial email of January 1, 2015.
23. On April 9, 2015, Mr. Mehta provided the delegate with a written response containing several enclosures pertaining to his employment with Vectrance, including correspondence with Vectrance wherein he is requesting termination pay of two months pursuant to his employment agreement. Mr. Mehta also provided the delegate with his start and end dates of employment with Vectrance, namely, June 26, 2013, in Nigeria and April 7, 2014, in Iraq respectively.
24. Also noteworthy in the documents Mr. Mehta provided the delegate is an email, dated May 2, 2014, from Ms. Seghier notifying Mr. Mehta that Vectrance had no other current missions to offer him. There is also a further email from Ms. Seghier, dated October 8, 2014, in which she asks Mr. Mehta to stop emailing her.
25. While Mr. Mehta did not explain in his written submissions to the delegate why he was delayed in filing the Complaint against Vectrance, he instead took the position that because his last communication from Vectrance was on October 8, 2014, his Complaint, filed with the Branch on January 1, 2015, was within the six-month time period to file a complaint. He also added that since Vectrance is registered in Canada and has a Vancouver office address, his Complaint falls within the jurisdiction of the Branch.
26. Based on the submissions and materials Mr. Mehta provided, the delegate went on to consider two (2) questions, namely:
 - (i) Was Mr. Mehta’s complaint filed within the time limit required by section 74 of the *Act*?
 - (ii) If Mr. Mehta’s complaint was filed outside the time limit allowed, should the Director exercise discretion to refuse to investigate the complaint under [section] 76(3) of the *Act*?

27. With respect to the first question, in concluding that the Complaint was filed outside the time limit required by section 74 of the *Act*, the delegate reasoned as follows:

Mr. Mehta states that the last day that he performed work for Vectrance was 7 April 2014 in Iraq. Even though he initially submits that he received a notice of dismissal of his services in April, he provides an e-mail dated 2 May 2014 from Ms. Seghier in which she tells him that there is no more work for him. All communication from that point onwards revolves around Mr. Mehta's claim of payment in lieu of notice of termination of employment and Vectrance's responses to him. Thus, in the absence of evidence showing Mr. Mehta received written notice before the date of this e-mail, I find that Mr. Mehta's employment was terminated on 2 May 2015 [sic]. In order to meet the requirements of section 74, a complaint had to be filed in writing with the Branch not more than six months later, by or before 2 November 2014. I find that the Branch received Mr. Mehta's written complaint on 1 January 2015, when he sent his first email to the Director. This was almost two months after the deadline of 2 November 2014.

The last email from Vectrance to the Complainant is on 8 October 2015 [sic]. Mr. Mehta cites this date to support his claim that his complaint is within the six month time limit. An employer's last date of communication with their former employee cannot be regarded as the employee's last day of employment.

I find that Mr. Mehta's complaint was filed outside of the time limit required by section 74 of the *Act*.

28. After concluding that Mr. Mehta's Complaint was filed outside the time limit required by section 74 of the *Act*, the delegate then went on to consider the second question and reasoned as follows in exercising his discretion to refuse to investigate Mr. Mehta's Complaint under section 76(3) of the *Act*:

Section 2(d) of the *Act* identifies that one of the purposes of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*". One method of attaining this purpose is to require complaints to be submitted to the Branch within the time limit specified in Section 74 (3) of the *Act*. This provides all parties, including an employer, complainant and the Branch, with a consistent and reasonable period of time to deal with complaints.

The Complainant was required to file the complaint on or before 2 November 2014. As he did not file the complaint until 1 January 2015, there has been a substantial delay. The requirements to file a complaint are very explicit and available publicly on the Branch's website. In addition, if employees or employers have questions about the Branch's process or the requirements of the *Act* they may contact the Branch for clarification. In this case, the complaint has been filed out of time and the Director gave opportunities to the Complainant to explain why that was the case. The Complainant provides no compelling reason to continue the investigation.

I find, pursuant to section 76(3) of the *Act*, that it is appropriate for the Director to exercise her discretion and stop investigating this complaint.

29. The delegate also observed that although Vectrance is registered in Canada and has an address in Vancouver; Mr. Mehta performed work in Nigeria and Iraq. This, therefore, raises the question of whether Vectrance falls within the jurisdiction of the *Act*. However, in light of the Director's decision not to proceed with Mr. Mehta's late filed Complaint pursuant to section 76(3) of the *Act*, the question of whether Vectrance falls within the jurisdiction of the *Act* is moot and need not be decided.

SUBMISSIONS OF MR. MEHTA

30. I have reviewed all of Mr. Mehta's appeal submissions totalling 385 pages, including 23 video files. While I do not propose to reiterate Mr. Mehta's entire submissions here, I will make some general observations about the nature of the submissions and focus particularly on those submissions that pertain to the grounds of appeal invoked by Mr. Mehta.

31. The great majority of Mr. Mehta's submissions, including the 23 video files, describe the nature of the work in which he was engaged in for Vectrance in the projects in Nigeria and in Iraq and some safety issues he encountered. Mr. Mehta also includes his lengthy CV and some timesheets from some his period of employment. I do not find any of the foregoing information particularly relevant to the issues in this appeal, namely, whether the Director erred in law or breached the principles of natural justice in concluding Mr. Mehta's Complaint was filed out of time under the *Act* and deciding not to proceed with the Complaint pursuant to section 76 of the *Act*.
32. With respect to submissions that may be relevant to the issues in the appeal, I note that, under the error of law ground of appeal, Mr. Mehta suggests that the delegate appears to have miscalculated the six-month time limit for filing his Complaint after the last day of employment. Mr. Mehta appears to argue that the six-month period for filing his Complaint against Vectrance should run as of July 30, 2014, or August 10, 2014. July 30, 2014, is when Ms. Seghier sent Mr. Mehta an email advising that no compensation is due to him and he has been paid for all his missions. August 10, 2014, is when Mr. Mehta responds to Ms. Seghier's July 30 email.
33. With respect to the natural justice ground of appeal, Mr. Mehta argues that he was neither intentional nor negligent in filing the Complaint late. He states that he is a family man with a wife and two children. He usually has only one or two hours' time on the internet in the evenings and when he discovered "the Minister of Jobs, Tourism and Skills Training" website, he then submitted his Complaint on January 1, 2015. He reiterates that the delay on his part "is only a circumstance/innocence, not intentional and not a negligence" [*sic*].
34. Mr. Mehta refers to section 22 of the *Human Rights Code* and, particularly, subsection 22(2) to argue that Vectrance was involved in a "continuing contravention" by virtue of Ms. Seghier's correspondence of July 30, 2014, and his response to that correspondence on August 10, 2014. He submits that, therefore, his Complaint should have been accepted by the Director, and the Director's failure or refusal to investigate his Complaint was both an error of law and a breach of natural justice.

ANALYSIS

35. The relevant parts of the *Act* with respect to this appeal are sections 74(2) and (3) and 76(3)(a).
36. Section 74(2) and (3) of the *Act* state:

Complaint and time limit

- 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.

37. Section 76(1) and (3)(a) of the *Act* state:

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)....

38. While section 74(3) of the *Act* requires that a complaint must be delivered to the Branch within six (6) months after the last day of employment, the British Columbia Court of Appeal, in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553 (“*Karbalaeiali?*”), determined that the *Act*, in section 76(1) and (3)(a), gives the Director *discretion* to accept a complaint delivered more than six (6) months after the date of termination of employment:

[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.

[12]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.

39. In this case, I do not find any fault or error in the delegate’s conclusion of fact that Mr. Mehta received a notice of dismissal of his employment on May 2, 2014, when Ms. Seghier, by email, advised him that there was no more work for him. Therefore, Mr. Mehta’s Complaint against Vectrance should have been filed by or before November 2, 2014. Instead, Mr. Mehta filed the Complaint approximately two (2) months later, on January 1, 2015. While Mr. Mehta contends that the Complaint was filed within the time limit specified in section 74(3) of the *Act* because the six-month time limit commenced as at July 30, 2014, when Ms. Seghier sent her email to him, or, alternatively, August 10, 2014, when he responded to her email, I do not share Mr. Mehta’s interpretation of the time limit specified in section 74(3) of the *Act* for filing the Complaint. I agree with the delegate that an employer’s last date of communication with a former employee cannot be regarded as the employee’s last day of employment (although, in this case there were some further exchanges between the parties subsequently). In these circumstances, I do not find the delegate erred in law in concluding that the date of Mr. Mehta’s termination of employment was May 2, 2014, and the Complaint should have been filed by November 2, 2014.

40. Having said this, under section 76(1) and (3) (a) of the *Act*, the delegate has the discretion to refuse to investigate a complaint. In this case, the delegate opted to exercise this discretion and refuse to investigate the Complaint. In making this decision, the delegate also relied on one the purposes of the *Act* set out in section 2(d), namely, “to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act”. One way of achieving this purpose, the delegate reasoned, is to require complaints to be submitted to the Branch within the time limit specified in section 74(3) of the *Act*. Mr. Mehta failed to do this and, although afforded an opportunity by the delegate to explain why he failed to file his Complaint in a timely fashion, Mr. Mehta failed to offer any “compelling reason” to persuade the delegate “to continue the investigation”.

41. While Mr. Mehta is seeking the Tribunal to cancel the Determination, the Tribunal is generally disinclined to interfere with the exercise of discretion by the delegate, and will only do so in exceptional and very limited

circumstances, as indicated in the following passage in the Tribunal's decision in *Re: Jody L. Goudreau and Barbara E. Desmarais, Employees of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98):

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.

42. Also instructive on the subject is the following passage in the Supreme Court of Canada's decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR 2:

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 have exercised 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.

43. In this case, I find the delegate's exercise of his statutory discretion in section 76(3)(a) to refuse to investigate or proceed with the Complaint was in accordance with the principles set out in *Maple Lodge Farms Limited v. Government of Canada*, *supra*, and *Jody L. Goudreau and Barbara E. Desmarais*, *supra*. Further, Mr. Mehta has not discharged the burden on him to show that the delegate, in the exercise of his discretion, abused his power, made a mistake in considering the limits of his authority or engaged in a procedural irregularity or made an unreasonable decision. To the contrary, the delegate properly interpreted and applied the relevant sections of the *Act*, and his analysis, in principle, was correct. I do not find he erred in law and therefore, there is no basis for me to interfere with the Determination.
44. I also do not find that there is any evidence of breach of natural justice on the part of the delegate in making the Determination.
45. Having said this, I note that Mr. Mehta, under both the natural justice and error of law grounds of appeal in his written submissions, relies on section 22 of the *Human Rights Code*, R.S.B.C. 1996, c. 210, which governs the time limit for filing a Human Rights complaint, and not an Employment Standards complaint. Therefore, I do not find that section 22 of the *Human Rights Code* applies in this appeal or to the Complaint.
46. In the result, I find that this appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under subsection 114(1)(f) of the *Act*.

ORDER

47. Pursuant to subsection 114(1)(f) of the *Act*, this appeal is dismissed. In accordance with subsection 115(1)(a) of the *Act*, the Determination is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal