

An appeal

- by -

Gordon James Daniel Peregrym
(the “Complainant”)

- 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.: 2014A/97

DATE OF DECISION: September 25, 2014

DECISION

SUBMISSIONS

Gordon James Daniel Peregrym

on his own behalf

INTRODUCTION

1. Gordon James Daniel Peregrym (the “complainant”) appeals a Determination issued on June 20, 2014, on the ground that the delegate failed to observe the principles of natural justice in making the Determination. By way of the Determination, the complainant’s unpaid wage complaint was summarily dismissed on the ground that it was untimely.
2. At this juncture, I am examining the appeal to determine if it should be dismissed as having no reasonable prospect of success. In determining whether this appeal should be summarily dismissed, I have reviewed the delegate’s “Reasons for the Determination” that were issued concurrently with the Determination, the subsection 112(5) “record” that was before the delegate when he issued the Determination and the complainant’s appeal submissions.

BACKGROUND FACTS

3. The Director of Employment Standards is principally charged with enforcing the provisions of the *Employment Standards Act* (the “*Act*”). On a day-to-day basis, employment standards officers have primary responsibility for enforcing the *Act* based on their delegated authority from the Director (see section 117). Although the Director (and through her, her delegates) may undertake audits and conduct investigations in the absence of a formal complaint to ensure general compliance with the provisions of the *Act* (see subsection 76(2)), the *Act* is primarily a complaint-based legislative scheme.
4. A complaint may be filed under section 74 of the *Act* and there are some procedural requirements relating to *Act* complaints – the complaint must be in writing and delivered to an Employment Standards Branch office (subsection 74(2)) and, of critical importance to this appeal, a former employee is governed by the following limitation period (subsection 74(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”.
5. The complainant says he was employed by David Richard Bidal, carrying on business as a sole proprietor under the business name “David Lee Trucking”, as a truck driver from June 17 to September 18, 2013. On April 7, 2014 (over 6 ½ months after his employment ended), Mr. Peregrym filed a complaint with the Employment Standards Branch’s Prince George office in which he claimed over \$18,000 in unpaid wages. It would appear that the complainant was aware of the 6-month limitation period when he filed his complaint since in the “Details” section of the complaint form (Section D), he made the following comment: “Reason for filing late Tried to get ahold of him – Richard Bidal Worked 7 days a week Jan 11 – April 1 2014 for new employer First chance I had to get in” (*sic*).
6. Subsection 76(1) of the *Act* states: “Subject to subsection (3), the director must accept and review a complaint under section 74”. Subsection 76(3)(a) states: “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)...”. The *Act* does

not contain a provision similar to, for example, subsection 22(3) of the B.C. *Human Rights Code* that allows the Director to extend the time period for filing a complaint.

7. Notwithstanding the statutory provisions noted above, our Court of Appeal in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553 held that the Director has a discretion to accept and adjudicate a late complaint where it would be appropriate to do so (at paras. 10, 11 and 12):

...The Tribunal said the limitation is “mandatory” and does not give the Director “any discretion” to relieve from a failure to adhere to it. The question raised on the application for judicial review was whether what the Tribunal said in this regard is right...

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.

...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...

(italics in original text)

8. Although Mr. Peregrym’s complaint was admittedly filed outside the subsection 74(3) 6-month time limit, the delegate was nonetheless obliged to consider, as a matter of discretion, whether to accept and adjudicate the complaint. Since the delegate ultimately refused to accept the complaint, the issue now before the Tribunal is whether the delegate appropriately exercised his discretionary authority to refuse to accept and adjudicate the complaint.

FINDINGS AND ANALYSIS

9. As noted above, the complainant was well aware that it was late; he attributed his inability to file a timely complaint to the fact that he was having trouble communicating with his former employer (using the “Self-Help Kit” process pursuant to which the Employment Standards Branch directs potential complainants to first try and address their dispute with the employer directly) and his heavy work schedule.
10. The record before me shows that the delegate wrote to the complainant on April 17, 2014 – only about 10 days after the complaint was filed – advising him that the complaint was filed after the applicable 6-month time limit expired. The delegate asked the complainant to provide further details regarding why he was unable to file a timely complaint. The complainant responded by way of a 1-page handwritten letter dated April 25, 2014, in which he stated that he had spent “10 weeks trying to get in contact” with his former employer but that, ultimately, Mr. Bidal “had no interest in resolving things”. The complainant reiterated the information contained in his complaint that after leaving Mr. Bidal’s employ, he was very busy working for another company and “was unable to get into your office”.
11. The delegate ultimately dismissed the complaint under subsection 76(3)(a) because there was an unexplained gap in the complainant’s narrative. The complainant’s employment with Mr. Bidal ended on September 18, 2013, and he did not take up his new employment duties until January 11, 2014. The delegate noted that

complaints may be filed in a variety of ways including personal delivery to an Employment Standards Branch office (the complainant apparently resides in Prince George), regular mail, fax and through the Employment Standards Branch's website. Clearly, the delegate was not satisfied that the complainant's new work commitments (which did not commence until about mid-January 2014) prevented him from filing a complaint during the period after his employment ended and before his new duties commenced (approximately a 4-month time frame). I might also note that in his original complaint, the complainant indicated his new duties required him to work "7 days aweek" whereas in his April 25 letter, he stated that his new job required him to be on-duty "6 days aweek" (*sic*). I might further add that there is no independent corroboration that, in fact, the complainant was required to work such lengthy hours with his new employer.

12. The complainant says that the delegate failed to observe the principles of natural justice when he decided to dismiss the complaint under subsection 76(3)(a). However, in my view, the delegate did afford the complainant a reasonable opportunity to provide an explanation for his failure to file a timely complaint and, in the end result, simply found that the complainant's explanation did not constitute a "compelling reason" justifying the delegate to exercise his discretion in favour of adjudicating the complaint on its merits.
13. The complainant, in a handwritten note appended to his appeal form, says that he is a "conscientious, hardworking employee who deserves his pay" and that may well be true. However, his claim is not necessarily foreclosed, as he still might be able to pursue a Small Claims Court action in the B.C. Provincial Court (I pass no judgment whatsoever on the merits of such a course of action). However, complaints to the Employment Standards Branch must be filed within the applicable 6-month time period and late complaints will only be accepted as a matter of the Director's/delegate's discretion. I cannot say that, in this case, the delegate made a cavalier or otherwise unreasoned decision to refuse to adjudicate the complaint on its merits. The delegate asked for a compelling explanation justifying the late filing and, simply put, the delegate did not believe that such an explanation was provided. I cannot say that the delegate's decision was tainted by bad faith or that it lacked any principled justification.
14. The complainant, in his appeal materials, also advanced a personal attack on the delegate and, essentially, blames the delegate for the situation in which he now finds himself. In my view, the complainant is solely to blame for his current situation. The complainant notes that he spent several weeks trying to contact his former employer who, it would appear, had no interest whatsoever in a consensual resolution of the dispute. However, the Complaint Resolution factsheet accompanying the self-help kit states: "If you and your employer don't solve the problem, or if your employer does not respond to your request within 15 days, you may file a **complaint** with the Employment Standards Branch." (**boldface** in original text). The Self-Help Kit factsheet, which is found on the Employment Standards Branch's website, also states: "**If an employer does not respond to the employee within 15 days, the employee may file a complaint with the Employment Standards Branch.**" (**boldface** in original text). Further, the Self-Help Kit factsheet also contains the following notice:

Time limits for filing a complaint

If an employee is still employed by an employer, a complaint must be filed within six months of an alleged contravention. If the employee is no longer employed, a complaint must be filed within six months of the last day of work.

If an employee is nearly out of time for filing a complaint before using the Self-Help Kit, he/she should file a complaint. The Branch will not act on the complaint until the employee advises that he/she used the Self-Help Kit and was not successful.

15. The complainant apparently knew (since he said as much in his original complaint), or at the very least should have known, that he was under a strict time limitation insofar as the filing of a formal complaint was

concerned. For some reason, not fully explained to the delegate's (or, for that matter, my) satisfaction, he did not file a timely complaint.

16. This appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under subsection 114(1)(f) of the *Act* – "...the tribunal may dismiss all or part of the appeal if...(f) there is no reasonable prospect that the appeal will succeed".

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal