

An appeal

- by -

Jo-Ann Thompson

- 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: Carol L. Roberts

FILE No.: 2017A/97

DATE OF DECISION: October 16, 2017

DECISION

SUBMISSIONS

Marina Bosnjak and Ken Soe
Law Students' Legal Advice Program

on behalf of Jo-Ann Thompson

Andrea Damgajian

on her own behalf and on behalf of Patrick Damgajian

Kevin D'Souza

on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*ESA*”), Jo-Ann Thompson has filed an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 8, 2017. In that Determination, a delegate of the Director found that Ms. Thompson’s complaint was filed outside the six month statutory time limit established by section 74 of the *ESA* and stopped the investigation.
2. Ms. Thompson appeals the Determination on the grounds that the delegate erred in law. Ms. Thompson argues that the delegate erred in concluding that the reasons for the late submission of the complaint did not amount to sufficient circumstances in which the Director could utilize his discretion to consider the complaint.
3. This decision is based on the submissions of the parties, the section 112 (5) record, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Ms. Thompson was employed by Andrea and Patrick Damgajian (the “Employer”) as a nanny. After her employment was terminated on September 1, 2016, Ms. Thompson filed a complaint with the Employment Standards Branch alleging that the Employer had contravened the *ESA* in failing to pay her compensation for length of service and vacation pay.
5. Ms. Thompson and the Employer attended a mediation facilitated by the Branch on October 27, 2016, following which she withdrew her complaint.
6. On November 9, 2016, Ms. Thompson sought assistance from the Law Students’ Legal Advice Program (LSLAP) in pursuing a small claims action against the Employer.
7. On March 15, 2017, Ms. Thompson filed a second complaint with the Branch asserting the same contraventions of the *ESA* she had in her first complaint. Because the second complaint was filed outside the six month statutory time period established in section 74 of the *ESA*, the delegate investigated the timeliness of the complaint.
8. The delegate notified Ms. Thompson and her student representative, Adam Van Noort, that the complaint was filed outside the six month time limit, and asked Ms. Thompson for an explanation for her failure to file within the time period.

9. Mr. Van Noort informed the delegate that he had received instructions from Ms. Thompson to pursue the complaint and any delay in that filing was entirely his fault. He contended that Ms. Thompson should not be penalized for his mistake and submitted that the delegate should exercise his discretion to accept the complaint.
10. Mr. Van Noort informed the delegate that Ms. Thompson withdrew her complaint during the mediation because she understood from the mediator that her work was not covered by the *ESA*. Mr. Van Noort was of the opinion that Ms. Thompson's work was covered by the *ESA* and mistakenly believed that Ms. Thompson had six months from October 27, 2016, or the date of the mediation, to file the complaint. He said that it was not until March 9, 2017, following discussions with his supervising lawyer, that he learned he was mistaken.
11. After determining that Ms. Thompson's second complaint had been filed outside the six month statutory time period, the delegate considered whether there were exceptional circumstances justifying the exercise of his discretion to consider the complaint.
12. The delegate did not consider Mr. Van Noort's lack of experience or knowledge to constitute an exceptional circumstance, noting that three months had elapsed between the time Ms. Thompson initially sought LSLAP's assistance and Mr. Van Noort becoming aware of the statutory deadline on filing appeals. The delegate noted the wording of section 74 as well as the availability of information regarding the time deadlines on the Branch website.
13. The delegate also considered Ms. Thompson's assertions regarding her understanding of the application of the *ESA* on her complaint during the mediation and determined that was not a relevant factor in assessing whether to exercise his discretion in favor of accepting the complaint.
14. The delegate concluded that, in light of the fact that Ms. Thompson approached LSLAP less than two weeks following the withdrawal of her complaint, she had sufficient time to re-file her complaint within the statutory time limit.
15. The delegate determined that it was appropriate to refuse to investigate Ms. Thompson's complaint.

Argument

16. Ms. Thompson argues that the delegate erred in finding that the circumstances that led to the late filing of the complaint did not constitute sufficient circumstances for the delegate to exercise his discretion under section 76(3) of the *Act*.
17. Ms. Thompson's advocate says that LSLAP is a volunteer organization with limited resources, and the process to open and process files, conduct research, and secure time with a supervising lawyer is a slow one. She says that as a result of the scarcity of supervising lawyers and the large number of files and dozens of students who need to be supervised, it may take several weeks for a matter to be dealt with in its entirety.
18. Ms. Bosnjak says that Mr. Van Noort met with the supervising lawyer on November 24, 2016, the last day that LSLAP was operational for the year. She says that Mr. Van Noort met with the supervising lawyer in January once the program became operational again and drafted a letter to Ms. Thompson on January 19, 2017, advising her of the ways LSLAP could assist her. At that time, because Mr. Van Noort understood from Ms. Thompson that the *ESA* did not apply to her, he believed that she had a small claims action. In mid-February after conducting further research, Mr. Van Noort then formed the view that Ms. Thompson's

work did fall under the *ESA*. Shortly thereafter, there was another period during which the LSLAP was not in operation due to the University's reading week. Mr. Van Noort returned from his reading week break on February 28, 2017, which was the last day for filing the complaint.

19. On March 2, 2017, Mr. Van Noort contacted the Branch to inquire into the possibility of re-filing a previously withdrawn complaint. When he was informed that this was possible provided that it was within the six month period, Mr. Van Noort mistakenly believed that the six month period began to run from the date the complaint was withdrawn, that is, from October 27, 2016. When Mr. Van Noort realized his mistake after meeting with the supervising lawyer, he took immediate steps to file the complaint. The complaint was filed on March 15, 2017.
20. Ms. Bosnjak argues that Mr. Van Noort's mistake should not be held against Ms. Thompson, as Ms. Thompson took all necessary steps to pursue her action. Ms. Bosnjak submits that Ms. Thompson should not be denied a forum for her complaint to be heard because of Mr. Van Noort's error.
21. Ms. Bosnjak further argues that the Director did not adequately consider the factors contributing to the late filing of Ms. Thompson's complaint in arriving at his decision. She submits that because LSLAP is a not for profit organization with significant black-out periods, student workloads and supervising staff availability, the delegate ought to have exercised his discretion to allow the complaint, particularly because it was filed only two weeks after the statutory deadline.
22. The delegate submits that he considered the reasons for the lateness of the appeal, noting that a lack of knowledge of the *ESA* and its application was not a sufficient reason to warrant the continued investigation of a complaint filed outside the time limit.
23. The delegate also submits that he was not required to consider the merits of Ms. Thompson's complaint or to investigate the facts of the mediation. He found that Ms. Thompson had not provided any compelling reasons she could not file her complaint within the statutory time limit.
24. The delegate submits that Ms. Thompson is providing new evidence on appeal, including information regarding the "black-out" periods when LSLAP was closed as well as the limitations of supervising counsel in providing advice and direction to students, information that was not submitted for his consideration when Ms. Thompson filed her late complaint. He argues that Ms. Thompson cannot argue that he failed to consider relevant factors when none of those factors were set out in her original application.
25. The delegate further submits that he did not conflate the student's mistake with that of Ms. Thompson, as it was clear at all times that LSLAP was representing her. Furthermore, the delegate submits, the student's failure to understand the statutory deadline is not a defence for late filing.
26. The Employer submits that it ought not be subjected to the Branch's process due to the fact that neither Ms. Thompson nor her lawyer re-filed the complaint in a timely fashion. The Employer asks that the Determination be upheld.
27. In reply, Mr. Soe argues that not accepting the late filing of Ms. Thompson's complaint is not only against the purposes of the *ESA* but also causes Ms. Thompson significant prejudice.

ANALYSIS

28. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

29. I have considered whether there is any basis for the Tribunal to interfere with the decision. I have concluded that there is not.

Error of law

30. 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.

31. Section 74(3) of the *ESA* establishes a six month limit on the filing of complaints. Section 76(1) requires the Director to accept and review complaints, and section 76(3)(a) provides the Director with discretion to refuse to accept or continue investigating a complaint that is not made within the time limit. (see also *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 533)

32. In *Bridge* (BC EST # RD051/08), I concluded that *Karbalaeiali* required that the Director exercise his discretion to determine whether acceptance of the complaint should be refused. The Tribunal would then be “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” in accordance with the Court of Appeal’s decision.

33. In deciding not to accept Ms. Thompson’s complaint, the delegate noted that the time limits for filing a complaint were designed, in part, to provide for fair and efficient procedures for resolving disputes as well as promoting the fair treatment of both employers and employees (Section 2 of the *ESA*). He weighed the importance of the purposes of the time limit along with the reasons advanced for the lateness of the filing. The delegate concluded that ignorance of the law was not a sufficiently compelling reason for exercising his discretion in favor of extending the time limit.

34. I note that all of the circumstances outlined in LSLAP’s appeal submission which led to the delay were not before the delegate at first instance, and as such, constitute new information which does not meet the Tribunal’s test for new evidence. (see *Re Merilus Technologies* (BC EST # D171/03) I have consequently considered only the record that was before the delegate at the time he made his decision in my assessment of his exercise of discretion.

35. I find no basis to interfere with the delegate’s exercise of discretion.

36. In *Jody L. Goudreau et.al.* (BC EST # D066/98), the Tribunal set out the circumstances under which it would interfere with the Director's exercise of discretion:

The Tribunal will not interfere with the 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 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 is often said, to be acting unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

37. In *Joda M. Takarabe et. al.* (BC EST # D160/98), the Tribunal relied on *Boulis v Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] in which the Supreme Court held that statutory discretion must be exercised within "well established legal principles"; in other words, the discretion must be exercised for *bona fide* reasons, must not be arbitrary and must not be based on irrelevant considerations.

38. In *Maple Lodge Farms v. Government of Canada*, [1982] 2 S.C.R.2, the Supreme Court underscored these comments:

Where 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.

39. There is no evidence the delegate improperly exercised his discretion in deciding to cease investigating Ms. Thompson's complaint. There is no suggestion, or evidence, that he exercised his discretion arbitrarily, that he based his decision on irrelevant considerations, or that he acted in bad faith.
40. I find no basis to conclude that the delegate erred in law, and dismiss the appeal.

ORDER

41. Pursuant to section 115 of the *ESA*, I Order that the delegate's June 8, 2017, Determination to stop investigating the complaint, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal