Employment Standards TRIBUNAL

An appeal

- by -

Ismaeil Najar Karbalaeiali
("Karbalaeiali")

- 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

TRIBUNAL MEMBER: Matthew Westphal

FILE No.: 2004A/76

DATE OF DECISION: July 7, 2004

DECISION

OVERVIEW

This is an appeal by Ismaeil Karbalaeiali ("Karbalaeiali") under s. 112 of the *Employment Standards Act* (the "*Act*") of a Determination, dated April 8, 2004 (the "Determination"), issued by a delegate (the "Delegate") of the Director of Employment Standards. The Delegate dismissed Karbalaeiali's complaint on the basis that he had not filed it within the prescribed statutory time limit. Based on my review of the Determination and the written evidence and submissions of Karbalaeiali and the Delegate (the employer filed no submissions), I am dismissing Karbalaeiali's appeal for the reasons that follow.

ISSUE

Did the Delegate err in rejecting Karbalaeiali's complaint on the basis that he did not file it within 6 months of his last day of employment, as required by s. 74(3) of the *Act*?

BACKGROUND

Karbalaeiali was employed as a bus driver by Cardinal Transportation B.C. Incorporated ("Cardinal") until June 11, 2003. He believed that Cardinal had not paid him for all hours worked, so he went to the Burnaby office of the Employment Standards Branch (the "Branch"). There he discussed his case with a Duty Officer, who told him that his complaint fell under federal jurisdiction, and that he should consult the Labour Program of Human Resources Development Canada ("Labour Canada") for assistance. Karbalaeiali says that the officer was the Delegate who ultimately dismissed his complaint. The Delegate states that while she may have been the person who referred Karbalaeiali to Labour Canada, she cannot be sure. In my view, nothing turns on whether it was the Delegate, or a different person acting as Duty Officer, who referred Karbalaeiali to Labour Canada.

That same day, Karbalaeiali proceeded to Labour Canada and met with Newton Eng, Acting Labour Standards Officer. Mr. Eng provided Karbalaeiali with a complaint form, which Karbalaeiali says he completed and sent to Labour Canada that same day via regular mail. In the Determination the Delegate found, after meeting with representatives of Labour Canada, that Labour Canada has no record of receiving any complaint form from Karbalaeiali in 2003, and that if it had, it would have sent to Karbalaeiali a letter acknowledging receipt of his complaint, which it did not. Nothing in Karbalaeiali's evidence or submissions gives me any reason to doubt that Labour Canada received no complaint from him in 2003.

There is some dispute concerning the timing of these visits. Karbalaeiali says that he first contacted the Branch and Labour Canada in about the second week of August 2003, after consulting a lawyer, but the Delegate cites evidence from Mr. Eng's records that Karbalaeiali came to see him on June 12, 2003, and received a complaint form. I need not decide precisely when these meetings occurred, because the issue in this appeal is whether Karbalaeiali made timely delivery of a written complaint form to the Branch.

Although Karbalaeiali heard nothing from Labour Canada for more than 6 months after mailing his complaint form, he says that he made no effort to follow up on his complaint because Mr. Eng had told him that he would just have to wait for Labour Canada to process his complaint. He did finally contact

Labour Canada in March 2004, after hearing that an acquaintance had received a decision from Labour Canada even though he had filed his complaint several weeks after Karbalaeiali had filed his own. On March 11, 2004 Karbalaeiali met again with Mr. Eng, who said he had no record of Karbalaeiali's complaint, and gave him a new form to fill out. Karbalaeiali did so, and delivered it in person to Labour Canada on March 16, 2004. Mr. Eng telephoned Karbalaeiali later that day and told him that his complaint fell under provincial jurisdiction, and that he was forwarding his file to the Branch. On March 17, 2004 he received a letter from Nirmal Sidhu of Labour Canada, dated March 15, 2004, acknowledging receipt of his complaint and stating that it had been forwarded to the Branch.

After receiving Karbalaeiali's complaint form from Labour Canada, the Delegate determined that Karbalaeiali's complaint had been delivered outside of the time limit contained in Section 74(3) of the *Act* and, therefore, that no action would be taken on his behalf.

The Delegate states as follows at p. 2 of the Determination regarding the standard practice in handling files at the Branch and Labour Canada:

> It is standard practice that, when a complaint is filed at the ESB that ought to have been filed at Labour Canada and vice versa, the documents are forwarded to the proper office. A letter that this has happened is sent to the complainant so that s/he will know where his/her file will be handled.
>
> It is also standard practice that the ESB accepts the date that the documents were received at Labour Canada as being the date the complaint was filed, even if the papers arrive at the ESB office out side the time limit allowed in [the *Act*].

On April 26, 2004 Karbalaeiali launched the present appeal by sending an appeal form, with an attached letter, via certified mail to the Tribunal, which received it on April 28, 2004.

ANALYSIS

Is an oral hearing required?

In a letter to the parties dated June 2, 2004, the Vice-Chair of the Tribunal indicated that this appeal would be decided based only on written submissions. Karbalaeiali has repeatedly emphasized the need for an oral hearing to resolve this appeal. He says that "there are more details to my complaint that are better explained in person," and concludes his written submission by saying "…I do feel that my case wasn't handled properly and an oral hearing will answer all my unanswered questions." In my opinion, this appeal does not require an oral hearing.

Section 107 of the *Act* gives the Tribunal considerable latitude in governing its proceedings:

> **107** Subject to any rules made under section 109 (1) (c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.
> [emphasis added]

Although appellants might understandably prefer to have the benefit of a full oral hearing to present their evidence and arguments, to do so in every case could undermine one of the purposes set out in s. 2 of the *Act*, namely, "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act" (s. 2(d)).

Accordingly, the Tribunal has established guidelines for determining when an oral hearing is required. Generally, it will only hold an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly: see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)*, 2001 BCSC 575, [2001] B.C.J. No. 1142 (Q.L.).

Although Karbalaeiali has cited several factual discrepancies that he says support the need for an oral hearing, I am not persuaded that these issues are material to this appeal. First, as I have already noted, Karbalaeiali disputes the timing of his initial visits to the Branch and Labour Canada, and says that he did not do so until approximately the second week of August 2003. Even if that is so, it is irrelevant to the issue in this appeal, which is whether he delivered his complaint to the Branch within the statutory time limit. Second, Karbalaeiali notes that the letter from Nirmal Sidhu of Labour Canada, acknowledging receipt of his complaint, is dated March 15, 2004, even though Labour Canada did not receive any complaint until March 16, 2004. He argues that this could mean that the March 15, 2004 letter is really a very belated acknowledgment of the first complaint he says he mailed to Labour Canada. I find this very unlikely, and agree with the Delegate that there is no reason to suppose that this discrepancy was anything more than a typographical error in a form letter.

Since there is no serious question of credibility on the key issue in this appeal, and there is no indication that Karbalaeiali cannot state his case fairly using written materials, I have decided this appeal based on written submissions alone.

Did Karbalaeiali submit his complaint within the time limits prescribed by the Act?

Employees who believe that their employers have contravened the *Act* do not have an indefinite period within which to file complaints. Section 74 sets out the following requirements for the filing of complaints:

> **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.

Although s. 122 of the *Act* contains provisions governing deemed service of determinations and demands, the *Act* does not define "deliver" for the purposes of s. 74. According to s. 29 of the *Interpretation Act*, R.S.B.C. 1996 c. 238, that term, "with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business." Section 29 of the *Interpretation Act* also defines "mail" as referring "to the deposit of the matter to which the context applies in the Canada Post Office at any place in Canada, postage prepaid, for transmission by post, and includes deliver". Section 2 of the *Interpretation Act* provides that it applies to every enactment, unless a contrary intention appears in the legislation. One example of judicial consideration of this provision is *British Columbia (Assessor of Area No. 13 - Dewdney-Alouette) v. Maple Ridge (District)*, [1990] B.C.J. No. 789 (S.C.). The Court applied the *Interpretation Act* definition of "deliver" to a notice requirement in s. 74 of the *Assessment Act*, R.S.B.C. 1979, c. 21 to find that a statutory notice was timely as of the date it was mailed, even though it was not actually received until several days later. Harvey J. stated, at p. 6 (Q.L.):

> While some may argue that the purpose of s. 74(2)(b) is to ensure that all parties have at least 21 days' notice of a party's request for a stated case, I cannot ignore the clear definition provided by

> the *Interpretation Act*. Therefore, because the notice was mailed to the Respondents on November 23rd, I find that the notice requirement of s. 74(2)(b) was met in this case.

Since I discern no contrary intention in the *Interpretation Act* or the *Act*, I interpret s. 74(2) and (3) as requiring that complaints must be at least mailed to the Branch within 6 months of their last day of work.

This conclusion does not end the matter, however, because Karbalaeiali's evidence is that he mailed his complaint not to the Branch, but to Labour Canada. Had he mailed his complaint to the Branch within 6 months of his last day of work, then he might arguably have made a timely "delivery" of his complaint, but I need not decide this question. That is because even if I accept that Karbalaeiali did mail his complaint to Labour Canada in June or August 2003, this act would have constituted, at most, "delivery" to Labour Canada, and not to the Branch. In *Marshall*, BC EST #D639/01, the Tribunal declined to treat delivery of a complaint to the B.C. Human Rights Commission as constructive delivery to the Branch, and the same conclusion follows, in my view, with respect to delivery of a complaint to Labour Canada. Whatever practice the Branch and Labour Canada may have adopted in forwarding complaints outside their jurisdiction to one another, is not binding on me in interpreting the *Act.* Section 74(2) of the *Act* is explicit in requiring that complaints be "delivered to an office of the Employment Standards Branch." Since, even taking the most favourable view of Karbalaeiali's evidence, he did not deliver his complaint to the Branch within the applicable time limit, his appeal must fail.

It appears as though Karbalaeiali's failure to make a timely complaint to the Branch may be attributable to his having relied on the advice of a representative of the Branch in referring him to Labour Canada in the first place, but this unfortunate fact does not affect my decision. The Tribunal has held on numerous occasions that the 6-month time limit set out in s. 74(3) is mandatory, and gives neither the Tribunal nor the Director any discretion to relieve from a failure to adhere to it: see, for example, *Burnham*, BC EST #D035/96; *Director of Employment Standards*, BC EST #D301/98 (Reconsideration of BC EST #D014/98). The Tribunal has dismissed appeals where the reason for the failure to file a timely complaint is that the employee was seeking a remedy in another forum, such as through Labour Canada (*Lesiuk*, BC EST #D147/03) or a grievance procedure under a collective agreement (*Scott*, BC EST #D164/99). Nor is it open to the Tribunal to provide relief where the employee's failure to file his or her complaint in time is attributable to ignorance (*Akouri*, BC EST #D114/02) or to having received incorrect advice from Branch staff (*Lesiuk, supra*; *Gibson*, BC EST #D548/01). The scheme set out in the *Act*, as interpreted by the Tribunal, expects employees to be aware of the applicable time limits and to file their complaints with the Branch in time. Even if an employee is pursuing a remedy in another forum, he or she must also take steps to preserve his or her rights under the *Act*. Karbalaeiali did not, so I must dismiss his appeal.

ORDER

I order, pursuant to section 115(1)(a) of the *Act*, that the Determination be confirmed.

Matthew Westphal
Member
Employment Standards Tribunal