

An appeal

- by -

Cyril Okoye

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/201

DATE OF DECISION: October 21, 2003

DECISION

SUBMISSIONS

Cyril Okoye	on behalf of himself
Paul D. McLean	on behalf of Sprott-Shaw Community College Ltd.
Victor Lee	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Cyril Okoye, pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued May 30, 2003. Mr. Okoye filed a complaint with the Employment Standards Branch alleging that Sprott-Shaw Community College ("SSCC") contravened the *Act* in failing to pay him commissions and bonuses in the amount of \$170,864.05. The delegate concluded that Mr. Okoye failed to file his complaint within the six month limit provided under section 74(3) of the *Act* and took no further action on the complaint.

No oral hearing was sought, and the Vice-Chair of the Tribunal has determined that this matter can be decided without an oral hearing. This decision is based on written submissions of Cyril Okoye, Paul D. McLean, Barrister & Solicitor, on behalf of Sprott-Shaw Community College, and Victor Lee on behalf of the Director of Employment Standards. The Tribunal received additional submissions from both parties after the date for final submissions was established by the Vice-Chair. Those submissions have not been considered.

ISSUE TO BE DECIDED

At issue on appeal is whether the delegate erred in law in dismissing the complaint, or failed to observe the principles of natural justice in making the determination.

Mr. Okoye alleges that the delegate failed to interpret subsections 74(2) and (3) of the Act in a manner consistent with the spirit of the Act. Mr. Okoye also alleged that the delegate pre-judged the complaint and never took evidence from him despite "repeated instructions from his superior to do so".

FACTS

Both Mr. Okoye and SSCC made submissions on appeal that contained information that was either not before the delegate or not considered by the delegate. Because that information provides a fuller context to the issues on appeal, I have incorporated that information, where it is not disputed, in this decision.

Mr. Okoye began working for SSCC in May 2000, and resigned on March 27, 2002 during an investigation SSCC was conducting into his external business activities. After Mr. Okoye's resignation, SSCC paid him \$19,378.50 representing all outstanding amounts it believed was owed to him, including bonus payments. In a letter dated April 8, 2002, Mr. Okoye acknowledged receipt of the money, but claimed that further amounts were owed to him. In his letter, he indicated that he would provide further

details of the claim after he returned to the city in two weeks. In an April 30, 2002 letter to the President of SSCC, Mr. Okoye set out the basis for his claim of \$170,864.05. SSCC denied it owed Mr. Okoye additional compensation.

On March 12, 2003, Mr. Okoye telephoned the Branch office in Burnaby inquiring into a complaint he said he had mailed to the Port Coquitlam office on July 30, 2002. Mr. Okoye was told that the Port Coquitlam office had relocated to Burnaby on July 31, 2002, and that the Branch had no record of his complaint. Mr. Okoye expressed the view that, because the envelope containing the complaint had not been returned to him, it was possible it had been misplaced by the Branch in the move.

At the request of Branch staff, Mr. Okoye faxed a copy of his complaint to the Branch on March 12, 2003. In his submissions, Mr. Okoye wrote that he was asked whether his former employer was aware of his complaint:

To this I replied positively. I also told [the intake officer] that I had earlier on two occasions apprised him both verbally and in writing about... the amount owing to me..."

On March 18, 2003, Mr. Okoye sent a letter to the President of SSCC indicating that, further to his letters of April 8, 2002 and April 30, 2002, he would "forward the matter to his lawyer if he did not receive his response within 7 days" of the date of the letter.

On April 1, 2003, the Director's intake officer replied to Mr. Okoye's inquiry as to the status of his complaint. She wrote that the Branch had no record that the complaint had been received, either in the Port Coquitlam office or the Burnaby office. She noted that, as of July 1, 2002, employees or former employees complaining about unpaid wages were required to send a Self-Help kit to their employer or previous employer before filing a complaint with the Branch. She wrote that, had the Branch received Mr. Okoye's complaint in the format it was in on March 12, 2003, it would have been returned to him with instructions on how to complete the Self-Help kit. She noted that the Branch had no evidence this occurred. The intake officer requested that Mr. Okoye provide what evidence he had that the complaint had been mailed to her.

On April 10, 2003, Mr. Okoye received a telephone call from the Branch indicating that his complaint would not be considered because there was no evidence it was mailed to the Branch in compliance with section 74(2) of the *Act*. According to Mr. Okoye, the delegate indicated that his complaint might be reconsidered if he could provide the Branch with proof that it had been mailed. Mr. Okoye indicated that he "might have on file a photocopy of the envelope bearing the post-mark." Mr. Okoye says that he found the photocopied stamped envelope that he said contained his complaint, and faxed it to the delegate. On the delegate's advice, he also checked with Canada Post to determine whether it had any delivery problems. Canada Post told Mr. Okoye that it had not experienced any delivery problems at that time.

The delegate advised Mr. Okoye that the post mark on the envelope was blurred and the date illegible, and asked him to mail the photocopy. Mr. Okoye sent a copy of the postmarked envelope to the Branch by registered mail on April 19, 2003. The postmark is a metered stamp bearing the date July 30, 2002, and a Coquitlam address identifier.

On May 20, 2003, Mr. Okoye spoke to the delegate who made the May 30 decision. According to Mr. Okoye, the delegate made disparaging comments about his complaint, which he then reported to the delegate's regional manager. Mr. Okoye contends that the regional manager indicated that she would have

the delegate contact him. Mr. Okoye says that the delegate did not contact him again prior to issuing the Determination.

In the Determination dated May 30, 2003, the delegate notes that Mr. Okoye claimed that he mailed the complaint to the Branch's Port Coquitlam address, and then went out of the country for a period of time. The delegate set out Mr. Okoye's evidence in respect of delivering the complaint. The delegate concluded that section 74 imposed a responsibility on a complainant to ensure that a document delivered by regular mail was delivered. The delegate noted that Mr. Okoye provided the Branch with a photocopy of a complaint form dated July 30, 2002, and an envelope addressed to the Port Coquitlam office, date stamped July 30, 2002 as evidence that the complaint was delivered. The delegate noted that the Port Coquitlam office closed July 31, 2002, and that all mail sent to that address was redirected to the Burnaby office. He noted that there had been no reports of mail being lost, or any record of Mr. Okoye's complaint being received in the Burnaby office.

The delegate gave little weight to Mr. Okoye's evidence that the complaint form was mailed on July 30, 2002. He wrote

...there is no evidence when the envelope stamp was made. It is common knowledge that the date stamp on a postage meter can be easily changed. This is not to suggest any impropriety on the part of the complainant. It is also unusual, in my opinion, for someone to photocopy envelopes. Moreover, the photocopy of the envelope was only produced after the branch had requested for (sic) proof that the complaint was mailed to us. The complainant had contacted the Regional Manager of the Burnaby branch and explained that his wife had access to a postage meter at her office and she had photocopied the envelope and its contents.

The delegate noted that Mr. Okoye was aware of the six month limitation period, having been advised of it when he picked up the complaint form. He noted that Mr. Okoye did not contact the Branch to determine the status of the complaint until eight months had passed since he allegedly filed the complaint. The delegate noted that, although Mr. Okoye indicated he had been out of the country, he had returned well within the six month period and that he could have inquired into the status of the complaint much earlier than he did.

The delegate noted that there was no deeming provision in the *Act* that a complaint mailed is presumed delivered, and further noted that the *Act* did not provide for exceptions to the section 74 time limits.

The delegate concluded that Mr. Okoye had not delivered the complaint to the Branch within the six month period provided by section 74, and determined that no further action would be taken with respect to the complaint.

In his reply submissions, Mr. Okoye provided an unsworn statement from his wife on the circumstances of the mailing of the complaint documents. Mrs. Okoye stated that on July 29, 2002, her husband gave her his claims package to mail the following day. She stated that he also asked her to photocopy the forms, including the metered envelope, for his file. Mrs. Okoye says that she took the envelope to her work the following day, and asked the individual who processed the mail to stamp the envelope and return it to her so that she could photocopy it before the mail was collected. She says that this was done, and that it was mailed from her work place with the full knowledge and consent of her employer.

ARGUMENT

Mr. Okoye argues that the delegate erred in finding that his complaint was filed out of time. He contends that the *Act* provides that a complaint may be delivered by post, including unregistered mail, by courier or in person. He says that he complied with this requirement, and provided “compelling evidence” that he had mailed the complaint within the statutory time frame. Mr. Okoye contends that the delegate erred in declining to investigate his complaint.

Mr. Okoye also alleges that the delegate failed to observe principles of natural justice. He contends that the delegate’s suggestion that date stamps can be easily changed was degrading and unnecessary, demonstrating a bias against him. He also claims that the delegate spoke with him on only one occasion and did not properly investigate his complaint.

Mr. Okoye wrote that he received the Determination, dated May 30, 2003, in an envelope post marked May 29, 2003. He alleges that this inconsistency in dates “raises the question of credibility in his Determination and points to the glaring omission of law and facts in the process.”

The delegate denied that there was a failure to observe the principles of natural justice. He states that Mr. Okoye had numerous discussions with staff at the Burnaby office and was given every opportunity to be heard. He submits that Mr. Okoye failed to meet the requirements of the *Act* and that the appeal should be dismissed.

SSCC denies that Mr. Okoye notified it of the complaint. It says that it never received a Self-Help kit, and that the first notice it had of Mr. Okoye’s purported complaint was when it received appeal material from the Tribunal.

In reply, Mr. Okoye submitted that, at the time he filed his complaint, there was no provision for mediation through a Self-Help kit, and that he was under no obligation to advise his employer of his intention to do so.

SSCC also argues that Mr. Okoye’s claim that his application was posted on July 30, 2002 is contrived. First, it contends that Mr. Okoye failed to provide any credible reasons why he waited for eight months to inquire into the status of the complaint.

SSCC also submits that because Mr. Okoye did not make any mention of a Branch complaint in his March 18, 2003 letter to SSCC’s President, he had not in fact filed one.

Counsel for SSCC further submits that it is not unreasonable to conclude that Mr. Okoye had easy access to a postage meter to back date an envelope. Counsel enclosed an envelope stamped with a July 30, 2002 date that he indicated staff had been instructed to prepare. He submitted that his staff was able to reset the date on the postage meter within 30 seconds.

SSCC argues that Mr. Okoye either did not properly mail the document, or is now trying to fraudulently revive the limitation period within which to file a complaint under the *Act*. It submits that the appeal should be dismissed.

ANALYSIS

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

- (a) the director erred in law
- (b) the director failed to observe the principles of natural justice in making the determination; or
- (c) evidence has become available that was not available at the time the determination was being made

The burden of establishing the grounds for an appeal rests with an Appellant. I am unable to conclude that the appellant has met this burden.

Mr. Okoye says that the delegate failed to interpret subsections 74(2) and (3) of the *Act* in a manner consistent with the spirit of the Act.

Subsection 74(2) of the *Act* provides that complaints filed under the *Act* must be in writing and delivered to an office of the Employment Standards Branch. Subsection 74(3) provides that 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.

The Act does not specify how the complaint is to be “delivered”. Although I do not agree with the delegate’s statement that, if a complainant chose to send a complaint by regular mail, he bears the responsibility to ensure that it was delivered, I do not find that he erred in concluding that Mr. Okoye had not delivered the complaint within the time frame established by the *Act*. The evidence is that the Branch did not receive Mr. Okoye’s complaint until March 12, 2003, well beyond the six month deadline for filing a complaint. Given that the delegate has no statutory discretion to extend the limitation period (see *Keu v. Director of Employment Standards* (BC EST #D257/96), I find no merit in Mr. Okoye’s argument in this respect.

Mr. Okoye’s submissions largely focus not on the delegate’s interpretation of section 74, but on his conclusion that Mr. Okoye’s explanation regarding the delivery of his complaint was not credible. In many respects, the delegate’s scepticism of Mr. Okoye’s version of events forms the basis for Mr. Okoye’s argument that the delegate failed to observe the principles of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker. As I understand Mr. Okoye’s submission, the delegate had a closed mind about whether the complaint had been delivered within the statutory deadline. Mr. Okoye relies on certain comments allegedly made by the delegate suggesting that he disbelieved Mr. Okoye’s version of events, the delegate’s failure to “interview” him regarding the circumstances of the delivery, and the fact that the Determination was mailed a day before it was dated as support for this ground of appeal.

In my view, the delegate’s scepticism was neither unwarranted nor demonstrated a closed mind. When it was determined that the Branch had no record of Mr. Okoye’s complaint, a number of staff persons, including an intake worker, two delegates and the regional manager all spoke with Mr. Okoye to gather information from him. Mr. Okoye faxed in a copy of the complaint. Because the Branch had no record of receiving the complaint, Mr. Okoye was asked, quite appropriately in my view, about the circumstances surrounding the delivery of it. Mr. Okoye was asked to provide whatever evidence he could, and inquire

with Canada Post about delivery problems. None of these actions, in my view, demonstrate a closed mind or prejudgement of the complaint. They suggest expressions of concern and attempts to determine why the complaint was not received as alleged.

Mr. Okoye had a number of conversations with a number of people in the Branch office between March 12, 2003 and May 21, 2003, all of whom recorded Mr. Okoye's version of events. A delegate wrote to Mr. Okoye on April 1, 2003 outlining the information that had been provided to date. The Branch had sufficient information for the delegate to make a decision by May 30, 2003. The delegate did not fail to observe principles of natural justice in not speaking with Mr. Okoye further.

I am not persuaded that the delegate erred in concluding that Mr. Okoye's explanation about the circumstances surrounding the delivery of his complaint was not credible. In my view, the additional information provided by the parties supports that conclusion.

Mr. Okoye originally provided the Branch with a photocopy of the envelope in which the complaint was allegedly sent. That envelope bears a metered postmark stamp of July 30, 2002. Photocopying a stamped envelope is not a usual business practise, and the delegate rightly questioned Mr. Okoye about it. Mr. Okoye told the delegate that his wife mailed the documents from his work place, and that, although she did not have access to the mail room, she photocopied the envelope after it was date stamped. Mr. Okoye did not provide the delegate with any information from either his wife or anyone else at her workplace regarding these unusual circumstances. Given that Mr. Okoye knew his credibility was at issue over the issue of the photocopied envelope, he ought to have provided the delegate with further evidence on this issue at the outset. However, Mr. Okoye waited until his final reply submission to the Tribunal to provide a statement from Mrs. Okoye.

I have had regard to Mrs. Okoye's statement, and place little weight on it for the following reasons. The statement is not sworn or affirmed. Mrs. Okoye is not a disinterested party, having been married to Mr. Okoye, according to her statement, for 23 years. Furthermore, Mrs. Okoye says that her husband gave her the documents, consisting of the complaint form and supporting material, as well as the envelope, on July 29, 2002, and instructed her to mail it the following day. Mr. Okoye's complaint is dated July 30, 2002. While I would not ordinarily place much weight on a one day difference in dates and could conclude that the discrepancy is simply the result of a mistake, I note that Mr. Okoye points to inconsistencies in dates on the part of the delegate to "raise the question of credibility". However, it is not necessary for me to determine whether either Mr. Okoye or Mrs. Okoye is untruthful, since I have decided that, in all of the circumstances, the delegate's determination of credibility was not without foundation.

According to his own submissions, Mr. Okoye told the delegate that he had advised his employer about his complaint before it was filed. SSCC denied any knowledge of Mr. Okoye's complaint. In reply, Mr. Okoye claimed that it was not necessary that he advise his employer of his complaint, and further, that the use of Self-Help kits was not required until after he filed his complaint. This is not only inconsistent with Mr. Okoye's earlier submissions, but wrong. The intake officer clearly indicated to Mr. Okoye in her April 1, 2003 letter that the Self-Help kits were to be used as of July 1, 2002. Mr. Okoye's complaint was allegedly filed on July 30, 2002.

Mr. Okoye's explanation for why he waited eight months to inquire into the status of his complaint was that he "felt no need to do so" since he was concurrently working with his lawyer on a much wider case of constructive dismissal, and "never doubted the success" of his complaint with the Branch. Given that Mr. Okoye's complaint was about a significant amount of money and that he was aware of the six month

statutory limitation period, his failure to inquire into the status of the complaint until March 2003 is not only unusual, but appears to be uncharacteristic. I also note that the timing of Mr. Okoye's March 13, 2003 inquiry with the Branch was approximately one week before he sent his "final" demand letter to the President of SSCC which makes no mention of his employment standards complaint.

In conclusion, I am unable to find that the delegate erred in his interpretation of section 74, or that the delegate failed to observe the principles of natural justice. Therefore, I deny the appeal.

Even if I am wrong in dismissing Mr. Okoye's appeal, his right to file a civil action is not statute barred and he is not without a remedy. (see *Keu*, section 118 of the *Act*)

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated May 30, 2003 be confirmed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal