

An application for Reconsideration

- by -

Mark Bridge

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2007A/140

DATE OF DECISION: May 12, 2008

DECISION

SUBMISSIONS

Mark Bridge	on his own behalf
Michelle J. Alman	on behalf of the Director of Employment Standards
Patrick Gilligen-Hackett	on behalf of the Friends of UVic Law Society and the University of Victoria

OVERVIEW

1. Mark Bridge sought a reconsideration of Tribunal Decision BC EST #D091/07 (the "Original Decision"), issued by the Tribunal on September 25, 2007. The history of the complaint, Determination and Original Decision are set out in my decision, issued February 26, 2008. (*Bridge* (BC EST #RD026/08))
2. After the Original Decision was issued, the British Columbia Court of Appeal released its decision in *Karbalaeeiali v. British Columbia (Employment Standards)*, 2007 BCCA 533 ("*Karbalaeeiali*"). The Court found that the *Employment Standards Act*, (R.S.B.C. 1996 c. 113) (the "*Act*") gives the Director discretion to accept a complaint delivered more than six months after the date of termination of employment. At the time the Determination and Original Decision were made, the Director and the Tribunal had long interpreted the *Act* as not granting such a discretion. After November 14, 2007, the law on the issue of whether the Director had the discretion to accept a late complaint was authoritatively settled.
3. I dismissed Mr. Bridge's reconsideration application subject to a consideration of the relevance, if any, of *Karbalaeeiali* on his application. I concluded that it was necessary to resolve the question of the Director's discretion to accept a complaint delivered more than six months after the date of termination of employment before I issued a final decision on the reconsideration application. I have now received submissions from the parties and this is my decision on that issue.

ISSUE

4. What is the effect of *Karbalaeeiali* on Mr. Bridge's reconsideration request?

ARGUMENT

5. Mr. Bridge contends that his reconsideration application should be allowed "on the basis that the Director's Determination of my case is patently unreasonable as well, for identical reasons, insofar as it dismissed my claim for unpaid wages on the basis of untimeliness, without regard to consideration of the Director's statutory discretion." He submits that the appropriate remedy is to remit his claim for unpaid wages to the Director for consideration as if it had been accepted by the Director when he first presented it "in the first quarter of 2004 at the Victoria Field Office of the Employment Standards Branch". Mr. Bridge's submission contains factual assertions about the circumstances surrounding the initial filing of

his complaint. For the reasons that follow, I conclude that I need not address those assertions as they have no bearing on my Order.

6. Mr. Bridge further argues that, if the complaint is remitted back to the Director, it be remitted on the condition that it not be considered “by a staff member who has previously mediated the claim”.
7. Counsel for the Director submits that the appropriate remedy is to remit the question of whether Mr. Bridge’s complaint was timely back to the Director for an exercise of his discretion whether to accept the complaint.
8. Counsel for the Friends of UVic Law School (“Friends”) and the University (the “University”) (collectively, the “Respondents”) adopts the submissions of the Director and further submits that, if the matter is remitted back to the Director, the Director should decide whether to exercise his discretion based on the record that was before the delegate at the time. Counsel for the Respondents contends that the delegate should also make a preliminary determination regarding whether the Respondents are associated employers. Finally, counsel for the Respondents also argues that the delegate’s findings of fact regarding when the Applicant’s employment with Friends ended should also stand.
9. In his reply submissions, Mr. Bridge contends that it is not necessary to limit or constrain the scope of the Director’s decision making as suggested by the Respondents. His reply submission contains additional asserted facts which I have not considered in light of my conclusion.

ANALYSIS

10. In my view, *Karbalaieali* is binding on the Tribunal and the Director from the date of the issuance of that decision.
11. After November 14, 2007, the interpretation of the Director and the Tribunal as to whether the Director had a discretion to accept a complaint filed later than the section 74(3) time limit of 6 months after the last date on which a complainant worked was found to be wrong by the Court of Appeal. However, at the time the Determination and Original Decision were issued, there was no basis to conclude that the interpretation of section 74(3) was in error. Therefore, I find the member did not err in dismissing Mr. Bridge’s appeal from the Determination dismissing his complaint on the grounds of timeliness.
12. Section 116 of the *Act* provides:
 - (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
13. I find that I need not cancel the Original Decision. Rather, I find that s. 116 grants me the power to vary the Original Decision.

14. In *Karbalaeeali*, the Court found that under section 76,
- ...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 the discretion he decides not to do so. (para. 11)
15. It is also clear that the decision as to whether or not a late complaint should be accepted at first instance is that of the Director, not the Tribunal:
- ...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. (para. 12)
16. Therefore, I find the appropriate remedy is to vary the Original Decision and refer the matter back to the Director to review Mr. Bridge's complaint and exercise his discretion as to whether or not it should be accepted.
17. I do not find it necessary to make an order that the Director assign the matter to a new delegate. I find no basis to conclude that the original delegate has pre-judged the question as to whether Mr. Bridge's complaint ought to be accepted since that had not been an issue before him.
18. I also do not find it necessary to make an order that the Director should decide whether to exercise his discretion based on the record that was before him at the time. The Director's exercise of discretion, and the facts upon which he exercises that discretion, are reviewable by the Tribunal in the event the parties appeal that decision.
19. Furthermore, it is my view that because the Original Decision concluded that the Respondents were not associated under s. 95 of the *Act* (at para. 54-57), that matter is already decided and I need not make an order in that respect.

ORDER

20. Therefore, I vary the Original Decision and refer the matter back to the Director to exercise his discretion as to whether or not Mr. Bridge's complaint should be accepted.

Carol L. Roberts
Member
Employment Standards Tribunal