Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Ismaeil Najar Karbalaeiali
("Karbalaeiali")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/136

DATE OF DECISION: September 29, 2004

DECISION

SUBMISSIONS

Ismaeil Najar Karbalaeiali on his own behalf

OVERVIEW

This is an application filed on July 29th, 2004 by Ismaeil Najar Karbalaeiali ("Karbalaeiali") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on July 7th, 2004 (B.C.E.S.T. Decision No. D123/04).

By letter dated September 13th, 2004 the parties were advised by the Tribunal's Vice-Chair that this application would be adjudicated based solely on their written submissions. The only written submission I have before me is from the applicant, Mr. Karbalaeiali. The Director's delegate advised, by letter dated August 4th, 2004, that the Director did not intend to file any submission with respect to Mr. Karbalaeiali's application and the respondent employer did not respond to the Vice-Chair's invitation to file a submission in this matter.

Although Mr. Karbalaeiali's application is timely, it is not, in my view, meritorious and accordingly, the application is refused for the reasons set out below.

PREVIOUS PROCEEDINGS

The Determination

According to the information contained in the "Reasons for the Determination" appended to the Determination issued on April 8th, 2004, a delegate of the Director of Employment Standards (the "delegate") summarily dismissed Mr. Karbalaeiali's unpaid wage complaint since it was not filed within the 6-month time limit set out in section 74(3) of the *Act*:

> 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.

Subsection 74(2) of the *Act* states that a written complaint must be delivered to an Employment Standards Branch office.

As noted in the delegate's reasons, Mr. Karbalaeiali was formerly employed by Cardinal Transportation B.C. Incorporated ("Cardinal") as a bus driver; his employment ended on June 11th, 2003. Although Mr. Karbalaeiali had some discussions with a staff member at the Burnaby office of the Employment Standards Branch within a day or so following his termination, he did not formally file a complaint with the Branch at that time because he was apparently advised (seemingly incorrectly) that his complaint would have to be adjudicated under federal, rather than provincial, employment standards legislation.

In any event, Mr. Karbalaeiali attended at the local federal office on June 12th, 2003, spoke with a federal officer and was given a complaint form. He subsequently filed a formal complaint with Human

Resources Development Canada ("HRDC") sometime between March 11th to 16th, 2004. Mr. Karbalaeiali says that he initially attended at both the Branch and HRC offices in mid-August 2003, however, that assertion is contradicted by a written log maintained by the HRDC officer which indicates he first spoke with Mr. Karbalaeiali on June 12th, 2003. Mr. Karbalaeiali also says that in mid-August 2003 he completed an HRDC complaint form and returned it to HRDC by mail. However, HRDC has no record of any complaint having been filed by Mr. Karbalaeiali prior to March 16th, 2004.

Mr. Karbalaeiali's March 16th complaint was, in turn, forwarded by HRDC directly to the Employment Standards Branch since HRDC took the (seemingly correct) position that Cardinal fell under provincial, rather than federal, law. On March 17th, 2004, Mr. Karbalaeiali was notified by way of a letter from HRDC that it was forwarding his complaint to the Employment Standards Branch since that latter agency had jurisdiction over his complaint.

The delegate noted in his Reasons (at page 3): "There is no evidence from anyone that Mr. Karbalaeiali filed a complaint with [the Employment Standards Branch] at any time". However, the delegate also noted (also at page 3): "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" and 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 outside the time limit allowed in the Provincial *Employment Standards Act*".

I would parenthetically note that the Director's practice of treating the filing date with the federal authorities as the applicable filing date under section 74(3) of the *Act* may not be lawful although, in such circumstances, it might be argued that the federal agency is acting as the agent of the Employment Standards Branch for purposes of receiving an unpaid wage complaint (for my part, I find it hard to accept that argument).

However, nothing turns on this latter point since the complaint was deemed, by the delegate, to have been filed on March 16th, 2004 (*i.e.*, the date the complaint was filed with HRDC; recall that, in fact, Mr. Karbalaeiali never formally filed an unpaid wage complaint with the Employment Standards Branch). Given that March 16th, 2004 was well past the 6-month time limit set out in section 74(3) of the *Act* (the complaint should have been filed by no later than December 11th, 2003), the delegate dismissed Mr. Karbalaeiali's complaint because it "was not filed within the time limits allowed by the [*Act*] [and] the *Act* does not provide for exceptions to those time limits".

The Appeal

Mr. Karbalaeiali appealed the summary dismissal of his unpaid wage complaint alleging that the Director failed to observe the principles of natural justice in making the Determination [see section 112(1)(b)]. The appeal was adjudicated on the basis of the parties' written submissions. Tribunal Member Matthew Westphal, in written reasons issued July 7th, 2004, dismissed the appeal and confirmed the Determination. The relevant portions of Member Westphal's reasons for decision are set out below (at page 5):

> ...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...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...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 REQUEST FOR RECONSIDERATION

Mr. Karbalaeiali set out his reasons for seeking reconsideration in a 1-page letter, dated July 27th, 2004 and appended to his "Reconsideration Application Form". Briefly, Mr. Karbalaeiali notes that he was directed by the Employment Standards Branch to HRDC and that his failure to file a timely complaint under the *Act* is, at least to some degree, attributable to the fact that the Branch initially (and apparently wrongly) advised him to file his complaint with "Labour Canada".

However, as my colleague, Member Westphal, quite rightly observed, there is simply no mechanism provided for in the *Act* to extend the time limit governing the filing of complaints. While the Tribunal can extend the appeal period under section 109(1)(b), there is no comparable provision permitting the Director to extend the 6-month limitation period set out in section 74(3) of the *Act.*

There is nothing in the material before me to indicate that Mr. Karbalaeiali filed a written complaint with the Branch in June 2003 or, indeed, at any other time. The simple fact is that, in this case, Mr. Karbalaeiali apparently *never* formally filed a written unpaid wage complaint with the Employment Standards Branch. Although the Director has the discretion to conduct an investigation to ensure compliance with the *Act* even in the absence of a formal complaint [section 76(2)], the Director obviously did not exercise her discretion in this case. Had she done so, Mr. Karbalaeiali would only have been entitled, under the *Act,* to recover those wages "that became payable in the period beginning...6 months before the Director first told the employer of the investigation that resulted in the determination" [section 80(1)(b)]. Since it would appear that Cardinal was not informed about the Director's investigation until the early spring of 2004, Cardinal would not have been obliged, under the *Act*, to pay any wages to Mr. Karbalaeiali in any event.

Even though Mr. Karbalaeiali never filed a formal complaint with the Employment Standards Branch, the Director's delegate nonetheless determined that the complaint filed by Mr. Karbalaeiali with HRDC would be accepted as a complaint under the *Act.* That being the case, the delegate then dismissed the complaint since the complaint was "not made within the time limit specified in section 73(4)" [see section 76(3)(a) of the *Act*]. Assuming that the HRDC complaint could be considered to be a complaint under the *Act*, I cannot say that the delegate erred in finding that the complaint was statute-barred.

If Mr. Karbalaeiali has any remedy at all, it now lies in a civil suit against those persons or entities that perhaps negligently advised him to file his complaint with HRDC. That claim may well have dubious merit; among other things, Mr. Karbalaeiali would have to show that the initial advice was given

carelessly or recklessly and that he did not contribute to the situation by his apparent lack of diligence following up with HRDC after his initial contact with that agency.

Alternatively, Mr. Karbalaeiali may have a valid civil claim against Cardinal should he choose to sue Cardinal in the British Columbia Provincial Court (Small Claims Division). Section 118 of the *Ac*t, preserves an employee's civil remedies should they wish to sue in court rather than invoke the complaint procedure contained in the *Act.* Mr. Karbalaeiali's civil claim would not, it would seem, be barred by the principle of *res judicata* or issue estoppel since the the Employment Standards Branch never adjudicated his unpaid wage claim on its merits. However, I am of the view that both the Director and Member Westphal correctly concluded that Mr. Karbalaeiali's claim is statute-barred under the *Act.*

ORDER

The application to reconsider the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal