



Citation: Mary Zhao (Re)
2024 BCEST 63

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Mary Zhao
("Ms. Zhao")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2024/030

DATE OF DECISION: July 22, 2024

DECISION

SUBMISSIONS

Mary Zhao	on her own behalf
Erin Jackes	legal counsel for M.O.S.A.I.C. Multi-lingual Orientation Service Association for Immigrant Communities
Estella Knox	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (“*ESA*”) by Mary Zhao (“Ms. Zhao”) of a determination issued by Estella Knox, a delegate of the Director of Employment Standards (“deciding Delegate”), on February 12, 2024 (“Determination”).
2. On September 20, 2023, Ms. Zhao filed a complaint with the Director of Employment Standards (“Director”) alleging her former employer, M.O.S.A.I.C. Multi-lingual Orientation Service Association for Immigrant Communities (“MOSAIC”), had contravened the *ESA* by terminating her employment without cause, and was possibly influenced by factors that constitute discrimination.
3. The Determination found Ms. Zhao’s complaint was filed outside of the time period set out in section 74(3) of the *ESA* and the deciding Delegate refused to exercise her discretion to extend the time period for filing a complaint.
4. On March 7, 2024, the Tribunal received an appeal from Ms. Zhao alleging the deciding Delegate made an error of law and failed to observe principles of natural justice in making the Determination.
5. In correspondence dated March 21, 2024, the Tribunal, among other things, acknowledged having received an appeal, granted the requested time to provide additional reasons, arguments, and supporting documents, requested the section 112(5) record (“record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties, who have been provided with the opportunity to object to the completeness of the record.
7. No objection to the completeness of the record has been received and, for the purposes of this appeal, I accept it as being complete.
8. My review of the submission received with the appeal, the record, and the Determination indicated there was sufficient presumptive merit to the appeal to warrant seeking further submissions from the parties on that matter.
9. In correspondence dated May 28, 2024, the Tribunal invited the Director, MOSAIC, and Ms. Zhao to make submissions on the merits of the appeal.

10. The Tribunal received a submission from the Director and counsel for MOSAIC.
11. In correspondence dated June 12, 2024, the submissions from the Director and MOSAIC were provided to Ms. Zhao, who was invited to respond to that submission. Ms. Zhao was given June 26, 2024, as a deadline for response. No response was received from Ms. Zhao by that date.

ISSUE

12. The issue in this appeal is whether Ms. Zhao has shown errors in the Determination on either of the grounds raised in her appeal.

THE DETERMINATION

13. Ms. Zhao was employed by MOSAIC as an employment counsellor/facilitator. She was terminated from her employment on February 21, 2023. She filed a complaint in September 2023 alleging MOSAIC had contravened the *ESA* by terminating her employment without cause. The complaint also raised allegations of possible discrimination in her termination and discriminatory treatment during her employment.
14. The complaint was filed outside of the time period for filing a complaint. There is no dispute about that fact.
15. The reasons for Determination (“reasons”) indicate Ms. Zhao filed an application for an extension of time to the Director which was received on November 30, 2023.
16. Ms. Zhao’s application claimed she had been grappling with severe mental health issues, including depression and anxiety, that were having a debilitating effect on her daily life and hindering her ability to pursue any legal action in a timely manner. In her application she also stated:
- The wrongful dismissal and discrimination I experienced have not only affected my mental health but have also taken a toll on my physical well-being. The stress and emotional strain resulting from these unjust circumstances have manifested in both psychological and physiological symptoms.
17. Ms. Zhao provided a doctor’s note, dated September 3, 2023, with the application.
18. The complaint, including the application for an extension of time, was reviewed by the deciding Delegate, who decided not to extend the time period for filing and refused to accept the complaint. In the reasons, the deciding Delegate addressed the reason given by Ms. Zhao for filing the complaint after the six-month time period and the effect of the doctor’s note.

ARGUMENTS

19. In her appeal, Ms. Zhao requests the Tribunal review the Determination, “in light of the exceptional circumstance surrounding my delayed filing, specifically related to my severe mental health issues of depression and anxiety.”

20. Her appeal submission elaborates on what she describes as the “profound effect” her mental condition had on her capacity to accomplish administrative tasks such as filing a complaint. Within this argument is the assertion that the diagnosis contained in the doctor’s note is supported by “subsequent medical evaluations.”
21. The submission filed by the deciding Delegate, on behalf of the Director, notes the decision to reject the complaint was an exercise of discretion under section 74, which she submits was a correct decision on the facts and in the circumstances.
22. The Director says there was no failure to observe principles of natural justice. Ms. Zhao was given the opportunity to present her position on the late filing and to present evidence to support that position.
23. Counsel for MOSAIC echoes the Director’s position, saying the deciding Delegate accurately stated and applied the law, took a reasonable view of the facts, reasonably exercised her discretion on the evidence before her, and observed principles of natural justice in doing so.

ANALYSIS

24. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
- (a) *the director erred in law;*
- (b) *the director failed to observe the principles of natural justice in making the determination;*
- (c) *evidence has become available that was not available at the time the determination was being made.*
25. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
26. I shall address the grounds of appeal raised by Ms. Zhao in reverse order.

Natural Justice

27. A party alleging a failure to comply with principles of natural justice, as Ms. Zhao has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding the deciding Delegate failed to comply with principles of natural justice.
28. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to

be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST # D050/96.

29. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found.
30. There is nothing in the reasons, record, appeal forms, or submissions showing that the deciding Delegate failed to comply with the principles of natural justice in making the Determination. On the face of the material in the record, Ms. Zhao was made aware by the deciding Delegate of the concern with the lateness of her complaint and provided with the opportunity required by principles of natural justice to present her position on that matter. In the circumstances, providing Ms. Zhao with the opportunity to set out her position, and to provide supporting evidence, satisfies the procedural rights accorded by the principles of natural justice.
31. I find Ms. Zhao has not shown the deciding Delegate failed to observe principles of natural justice. This ground of appeal is dismissed.

Error of Law

32. 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.
33. The Tribunal has spoken extensively on the extent to which a discretionary decision of the Director may be varied on appeal.
34. The Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances, as noted in the following passage in the Tribunal’s decision in *Re: Jody L. Goudreau and Barbara E. Desmarais of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98:

The Tribunal will not interfere with that 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 a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matter 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 often is said, to be acting “unreasonably”. **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223, at 229.

35. The Tribunal has also reflected on the excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR, where the Court made the following comments about the exercise of a statutory discretion:

It is, as well, a clearly-established rule that courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. When 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.

36. In this case, the deciding Delegate referred to the purposes of the *ESA* and summarized the relevant provisions governing how late complaints are to be addressed.

37. The deciding Delegate addressed the doctor’s note provided by Ms. Zhao in support of her application, noting it was dated after the time for filing a complaint had passed and spoke only to her ability to “work” in a period 20 weeks from its date, September 3, 2023.

38. The deciding Delegate made the following findings of fact: that “the steps to file a complaint with the Branch is not work to the level contemplated in the doctor’s note,” and “there were no special circumstances that precluded delivering the complaint within the time period required.”

39. Until amendments to the language of sections 74 and 76 of the *ESA*, effective August 2021, the statutory framework for addressing late complaints, is summarized in *Karbalaieali v. British Columbia (Employment Standards)* 2007 BCCA 533, and captured in the comment that “the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so”: para. 11.

40. The amendments, while not entirely foreclosing the Director’s discretion to accept a complaint, have procedurally and substantively affected how late complaints are considered. On that point I agree with the submission of the Director; section 76(1.1) requires the Director to refuse to accept a complaint not made within the applicable time period unless an extension is granted under subsection 74(5), which reads:

- 74 (5) *On application, the director may extend the time to deliver a complaint under this section, including making an extension after the time to deliver has expired, if the director is satisfied that*
- (a) *special circumstances exist or existed that preclude or precluded the delivering of a complaint within the applicable time period under subsection (3) or (4), and*

(b) *an injustice would otherwise result.*

41. Consideration of an extension of time for late complaints is no longer part of the intake process; it must be initiated by an application. What follows is a two-step process. The first step is to determine whether special circumstances exist or existed that precluded the timely filing of a complaint and whether an injustice would otherwise result. This step is not a discretionary exercise; it is a matter of mixed fact and law.
42. The Director's discretion arises in the second step; that discretion must be exercised within the context of the evidence relating to paragraphs (a) and (b) and accord with the principles applicable to an exercise of discretion by the Director.
43. I have concerns about the findings made by the deciding Delegate – that the steps to file a complaint is not “work” to the level contemplated by the doctor's note and that there were no “special circumstances” precluding the filing – as there is no evidence for either finding.
44. As indicated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (Can LII), [2019] 4 SCR 653, at paras 14 and 126, decision-makers must exercise their discretion based on the facts and evidence before them and be able to justify their decisions in terms of rationality and fairness. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. A discretionary decision made without some objective evidence is unreasonable.
45. The deciding Delegate erred in law in making findings upon which she based her discretionary decision without evidence.
46. That conclusion does not, however, end the matter. That is because I agree with the submission of the Director that the amendments to section 76, to include subsection (1.1), establishes the default position – that late complaints must be refused.
47. The Legislature has provided, in subsection 74(5), an avenue to alter that result, allowing for an extension of the complaint period to be granted. On my reading, that provision contains both a procedural and evidentiary burden: procedurally, a complainant seeking an extension must initiate the request for extension by application; and the application must include some *objective* evidence showing special circumstances that precluded the filing of a complaint within the applicable time period and, if an extension were not allowed, that an injustice would result.
48. Ms. Zhao's assertions, which she describes as severe mental health issues of depression and anxiety afflicting her during the complaint period and which she says profoundly affected her capacity to accomplish administrative tasks such as filing a complaint, are unsupported by any objective evidence. The doctor's note speaking to her fitness to work for a period subsequent to the complaint period is not evidence of her inability to file a complaint within the appropriate period. More particularly, the doctor's note did not address her ability to file a complaint under the *ESA* during the six months preceding August 22, 2023. In her appeal, Ms. Zhao also refers to “subsequent medical evaluations,” but none are provided. There is no evidence that she was under any sort of medical care during the complaint period.

49. There is nothing in Ms. Zhao’s application that satisfies the evidentiary burden implicit in subsection 74(5) of the *ESA*. There was no evidentiary basis in the application for finding special circumstances and an injustice (which, I add here, is different from saying there are no “special circumstances”). In this circumstance I have no difficulty concluding that the deciding Delegate, properly instructed and considering the absence of any objective facts supporting the findings necessary for allowing an extension, would not have allowed the requested extension.
50. I find the result was right, even allowing for the error of law, and the purposes and objects of the *ESA* would not be served by referring the matter back to the Director.
51. I have one further comment, a caution to the Director, and her delegates, considering other applications for an extension of time. There is reference in the record to Ms. Zhao’s request for extension not fitting the “criteria for special circumstances” (record, page 7) and reference in the submission of the Director to the Tribunal decision in *Anna Maria Giannini*, BC EST # D061/17, arguing the result in that case should direct the result in this case. Approaching decisions under subsection 74(5) in such a way is ill-advised, as it has the appearance of fettering discretion.
52. Such decisions should be based on a consideration of the particular circumstances of the matter being decided. Each case will be different, and the goal is not to treat everyone the same – fairness requires that extensions be granted where warranted. The individual circumstances of each case should be considered. Automatically applying policy or the results of previous decisions should be avoided.

ORDER

53. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated February 12, 2024, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal