

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Mary Zhao

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft
SUBMISSIONS: Mary Zhao, on her own behalf
FILE NUMBER: 2024/099
DATE OF DECISION: August 21, 2024

DECISION

OVERVIEW

1. This is an application for reconsideration filed by Mary Zhao (“applicant”) of 2024 Bcest 63, an appeal decision issued on July 22, 2024 (“Appeal Decision”). This application is filed pursuant to section 116 of the *Employment Standards Act (ESA)*.
2. I am dismissing this application since it does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). My reasons for dismissing this application now follow.

BACKGROUND FACTS AND RELEVANT ESA PROVISIONS

The relevant ESA provisions

3. A complaint alleging a contravention of the *ESA* must be “in writing and must be delivered to an office of the Employment Standards Branch” (section 74(2) of the *ESA*). Section 74(3) states: “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.”
4. In this case, the applicant’s employment ended on February 21, 2023, but she did not file her complaint until September 20, 2023. Section 76(1.1) of the *ESA* states: “The director [of employment standards] must refuse to accept a complaint if the complaint is not made within the applicable time period required by section 74(3) or (4), or any extension of the applicable time period granted under section 74(5) (my underlining).”
5. Although the complaint in this case was presumptively time-barred, section 74(5) enables a time-barred complainant to seek an extension of the 6-month complaint filing period:
 - 74 (5) On application, the director [of employment standards] 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 required under subsection (3) or (4), and
 - (b) an injustice would otherwise result.
6. An applicant seeking to have the complaint filing period extended must demonstrate two things. First, there are or were “special circumstances” that directly and causally accounted for the applicant’s failure to file a timely complaint (see, for example, *Cafe Fresh Franchising Corp.*, 2023 Bcest 30). Second, even if there are “special circumstances,” the applicant must *also* demonstrate that “an injustice” would result if the complaint filing period were not extended.
7. Determining whether a complaint is time-barred is essentially an arithmetic exercise based on the date of termination and the date the complaint was filed. Both the first and second dates are usually

readily ascertainable, but the first may be less so in some circumstances (for example, where there is a “constructive dismissal” or an allegation of “abandonment” of employment).

8. Assuming a complaint is time-barred, the alleged “special circumstances” must first be assessed as directed by section 74(5)(a). The “special circumstances” must have effectively prevented the complainant from filing a timely complaint. In other words, “but for” the special circumstances, the complainant would likely have filed a timely complaint. If “special circumstances” have been established, the decision-maker must then make a preliminary assessment of the underlying merits of the complaint. The complaint must have at least some presumptive validity, since no “injustice” flows from the summary dismissal of a complaint that is obviously without merit.

The applicant’s section 74(5) application

9. On November 30, 2023, the applicant applied to have the complaint filing period extended. The applicant predicated her application on an assertion that her deteriorated mental health prevented her from filing a timely complaint. Her application was supported by a physician’s note, dated September 3, 2023, that merely stated: “For medical reasons, [the Complainant] is unfit to work [and] she will be off for at least the next 20 weeks.” This vague and cursory report does not address the critical issue in this matter, namely, whether the complainant’s medical condition that apparently rendered her “unfit for work” also “precluded” her from filing a timely complaint.

The Determination

10. On February 12, 2024, a delegate of the Director of Employment Standards (“delegate”), issued a Determination (and her accompanying “Reasons for the Determination” – “delegate’s reasons”) refusing the applicant’s section 74(5) application. The delegate’s key findings were as follows (delegate’s reasons, page R3):

The Complainant was required to file the complaint on or before August 22nd, 2023. Although the Complainant provided a doctor’s note stating she was unfit to work, the steps to file a complaint with the Branch is not work to the level contemplated in the doctor’s note. The Complainant also filed her complaint within the 20 weeks that would have been covered by the doctor’s note. I find that there were no special circumstances that precluded delivering the complaint within the time period required. Given this finding, it is not necessary to consider whether an injustice would result as both conditions must be met in order to extend the time period. Accordingly, I am declining to exercise my discretion as the Director’s delegate to extend the time period to deliver a complaint pursuant to section 74(5) of the Act.

As the complaint was not received in the prescribed time period and I am not extending the time period, I must refuse to accept the complaint.

Accordingly, no further action will be taken.

The appeal decision

11. The applicant appealed the delegate’s refusal to extend the complaint filing period, arguing that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).

12. By way of the Appeal Decision, the member concluded that there had been no breach of the principles of natural justice (see para. 30), and that there was no legitimate basis for extending the complaint filing period in this case (see paras 47-49). The appeal was dismissed.

THE APPLICATION FOR RECONSIDERATION

13. The applicant now applies to have the Appeal Decision reconsidered.
14. The Tribunal reviews section 116 applications using a two-step process – the so-called *Milan Holdings* test. The applicant must, as a preliminary matter, show that there is a presumptively meritorious argument that the appeal decision should be varied or cancelled (for example: Is there a reasonable argument that the appeal decision is wrong in law?; or, Were there significant procedural justice failings relating to the adjudication of the appeal?). If the applicant cannot meet this initial burden, the application will be summarily dismissed. If there is some presumptive merit to the application, the Tribunal will, after hearing from all parties, engage in a more searching assessment of the merits of application.
15. In this case, the applicant essentially reiterates the same argument she advanced before the delegate, and then again on appeal, namely, that her serious mental health challenges prevented her from filing a timely complaint. However, that assertion was never adequately demonstrated to be factually accurate.
16. The applicant does not challenge, even in a rudimentary fashion, the reasons set out in the Appeal Decision. I am unable to find any error of law or other failing in the Appeal Decision, and the applicant has not provided any new evidence or argument that calls into question the correctness of that decision. That being the case, this application does not pass the first stage of the *Milan Holdings* test and thus must be dismissed.

ORDER

17. Pursuant to section 116(1) of the *ESA*, this application for reconsideration is dismissed and the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal