

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Munchang Choi
("Mr. Choi")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson
SUBMISSIONS: Munchang Choi on his own behalf
FILE NUMBER: 2024/090
DATE OF DECISION: November 5, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act (ESA)* by Munchang Choi (“Mr. Choi”) of a determination issued by Yannie Tai, a delegate of the Director of Employment Standards (“deciding Delegate”), on July 17, 2024 (“Determination”).
2. On October 21, 2023, Mr. Choi filed a complaint with the Director of Employment Standards (“Director”) claiming wage loss, bonus payments, medical and other expenses, and compensation for length of service against his former employer, Lloyd’s Register Canada Limited (“Lloyd’s”). His complaint alleged harassment, bullying, work exclusion, threats, intimidation, defamation, humiliation, and false accusations at his workplace, and retaliatory dismissal.
3. The Determination found Mr. Choi’s complaint was filed outside of the time period set out in section 74(3) of the *ESA* and refused to exercise discretion to extend the time period for filing a complaint.
4. On July 17, 2024, the Tribunal received an appeal from Mr. Choi alleging the deciding Delegate made an error of law and failed to observe principles of natural justice in making the Determination. Mr. Choi has also submitted additional supporting material, which he says is evidence that “has become available [but] was not considered during the original determination process.”
5. In correspondence dated August 12, 2024, the Tribunal, among other things, acknowledged having received an appeal, 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. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the Reasons for Determination (“Reasons”), the appeal, the written submission filed with the appeal, any new evidence that might be added to the record, and my review of the material that was before the deciding Delegate when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
 - (a) *the appeal is not within the jurisdiction of the tribunal;*
 - (b) *the appeal was not filed within the applicable time limit;*

- (c) *the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
- (d) *the appeal was made in bad faith or filed for an improper purpose or motive;*
- (e) *the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
- (f) *there is no reasonable prospect that the appeal will succeed;*
- (g) *the substance of the appeal has been appropriately dealt with in another proceeding;*
- (h) *one or more of the requirements of section 112(2) have not been met.*

9. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Lloyd's will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal can succeed.

ISSUE

10. The issue in this appeal is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

BACKGROUND FACTS

11. Mr. Choi was employed by Lloyd's as a Marine Surveyor. As indicated above, he filed a complaint on October 21, 2023, alleging, among other things, he had been terminated, his last day of employment being March 27, 2023.
12. On June 25, 2024, the deciding Delegate notified Mr. Choi by email that this complaint was filed past the 6 months' deadline, which was September 27, 2023. Mr. Choi responded on the same day, submitting an application to extend the time period to deliver a complaint. His application stated there were special circumstances – a diagnosis of Major Depressive Disorder – and family circumstances relating to the medical condition of his son and the emotional and mental state of his wife following his termination.
13. Mr. Choi supported his application with a copy of the psychologist's evaluation report, dated October 23, 2023, which was based on interviews that took place on September 29 and October 4, 2023, and correspondence from Canada Revenue Agency dated April 23, 2024, advising Mr. Choi of his eligibility for a Disability Tax Credit (DTC).
14. The complaint was filed outside of the statutory time period for filing a complaint. There is no dispute about that fact.
15. The complaint, including the application for an extension of time, was reviewed by the deciding Delegate, who chose not to extend the time period for filing and refused to accept the complaint. In

the Reasons, the deciding Delegate addressed the reasons given by Mr. Choi for filing the complaint after the six-month time period, indicating she could not find any “special circumstances” existed that precluded Mr. Choi from filing a complaint with the Employment Standards Branch at any time during the 6 months after March 27, 2023.

16. The deciding Delegate also noted that Mr. Choi was able to pursue various other claims, which are set out in the Determination, during that time.
17. The deciding Delegate found it was unnecessary to consider whether an injustice would result, as Mr. Choi had not established there were special circumstances for an extension of time.
18. The application was denied, and the complaint was not accepted.

ARGUMENTS

19. In this appeal, Mr. Choi has challenged the Determination under each of the grounds of appeal set out in section 112(1) of the *ESA*.
20. Under the error of law ground, he argues the deciding Delegate erred by “failing to recognize” there were special circumstances that prevented him from filing his complaint within the 6-month statutory period.
21. Under the natural justice ground of appeal, Mr. Choi submits the deciding Delegate erred on this ground by “not providing a fair hearing and disregarding critical evidence presented during the investigation”.
22. Under the “new evidence” ground of appeal, Mr. Choi has submitted “recent medical reports and assessments” and an additional piece of correspondence from Revenue Canada relating to his eligibility for a DTC, all of which he asserts “provide a more comprehensive view of my condition and its impact on my ability to file the complaint within the statutory period.”
23. His submission also refers again to the health of his son as a “special circumstance.” Some of the material provided as “new evidence” relates to assessments and medical treatment for his son.
24. Mr. Choi asks that the Tribunal reconsider the Determination and grant the requested extension.

ANALYSIS

25. 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.*

26. 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.

27. I shall address the grounds of appeal raised by Mr. Choi in reverse order.

New Evidence

28. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations: whether such evidence was reasonably available and could have been provided during the complaint process; whether the evidence is relevant to a material issue arising from the complaint; whether it is credible, in the sense that it be reasonably capable of belief; and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies et al. (Merilus Technologies Inc.)*, BC EST # D171/03.

29. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

30. Applying the test for admitting “new evidence” on appeal, I find there is no merit to this ground of appeal; it has not been made out and, accordingly, I will not exercise my discretion to accept the material submitted under this ground.

31. Some of the “evidence” which Mr. Choi seeks to introduce, is not “new”; it existed while the investigation was being conducted and the Determination was being made. This observation relates to some of the information relating to Mr. Choi’s son’s health and the material relating to Mr. Choi from the Lions Gate Medical Clinic, which appears to be a collection of information from medical appointments for Mr. Choi between August 2021 and February 2024, a medical certificate (for employment insurance purposes) dated July 23, 2023, letters from the North Shore CBT Centre dated April 25, 2023, August 28, 2023 and February 8, 2024, and a letter from Sun Life dated May 9, 2023. I also note, some of this information is found in the record.

32. More importantly, however, none of this new “evidence” is probative to the question of whether the health issues that are described for Mr. Choi and his son, and which were not disputed by the deciding Delegate, “precluded” him from filing his complaint within the statutory period.

Natural Justice

33. A party alleging a failure to comply with principles of natural justice, as Mr. Choi 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.
34. 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.
35. 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.
36. 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, Mr. Choi was made aware by the deciding Delegate of the concern with the lateness of his complaint and provided with the opportunity required by principles of natural justice to present his position on that matter. In the circumstances, providing Mr. Choi with the opportunity to set out his position, and to provide supporting evidence, satisfies the procedural rights accorded by the principles of natural justice.
37. Mr. Choi has not provided any support for his contention that the deciding Delegate disregarded or failed to give due consideration to critical evidence.
38. I find Mr. Choi has not shown the deciding Delegate failed to observe principles of natural justice. This ground of appeal is dismissed.

Error of Law

39. 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.

40. Under this ground, Mr. Choi challenges the decision of the deciding Delegate that she could not find there were “special circumstances” that precluded him for submitting a timely complaint. The Tribunal has indicated in a recent decision, a conclusion on whether special circumstances exist or existed that precluded the timely filing of a complaint and, where necessary, a conclusion about whether an injustice would otherwise result, are questions of mixed fact and law: see *Re Mary Zhao*, 2024 BCEST 63.

41. In this case, the deciding Delegate correctly identified the applicable law, referring to the purposes of the *ESA*, summarizing the relevant provisions governing how late complaints are to be addressed, and correctly indicating that section 76(1.1) requires the Director to refuse to accept a complaint not filed 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.*

42. There is no legitimate argument that the deciding Delegate committed an error on a question of law by misapplying or misinterpreting relevant provisions of the *ESA*. Section 74(5) clearly gave the deciding Delegate the authority to decide whether, on the facts as found, special circumstances existed that precluded Mr. Choi from filing his complaint with the statutory time period.

43. What is being challenged in this appeal – whether there were “special circumstances” – is a finding of fact. Whether or not the deciding Delegate erred in law in respect to the facts, *simpliciter*, is a question over which the Tribunal has no jurisdiction. In other words, under section 112 of the *ESA*, the Tribunal has no authority to consider an appeal such as this which seeks to have the Tribunal reach different factual conclusions than were made by the deciding Delegate, unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

44. The test for establishing findings of fact constitute an error of law is very stringent. In this case, in order to establish the deciding Delegate committed an error of law on the facts, Mr. Choi is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see 3 *Sees Holdings Ltd. carrying on business as Jonathan’s Restaurant*, BC EST # D041/13 at paras. 26 - 29.

45. The deciding Delegate addressed the material and arguments provided by Mr. Choi in support of his application to extend the filing period and made findings on the contention by him that there were special circumstances that precluded delivering the complaint within the statutory period. I have read the evidence of the parties in the record and as summarized by the deciding Delegate in her reasons and am not persuaded by Mr. Choi's arguments that the findings of fact and conclusions and inferences the deciding Delegate reached in this case are without a rational basis or are perverse or inexplicable.
46. In sum, I find the conclusions of the deciding Delegate were adequately supported on the material before her. Mr. Choi has not shown any basis upon which the Tribunal may interfere with the factual findings of the deciding Delegate.
47. This ground of appeal has not been made out and is also dismissed.

CONCLUSION

48. For the above reasons, I find there is no reasonable prospect this appeal will succeed; the purposes and objects of the *ESA* would not be served by requiring the other parties to respond to. The appeal is, accordingly, dismissed.

ORDER

49. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated July 17, 2024, be confirmed.

/S/ David B. Stevenson

David B. Stevenson
Member
Employment Standards Tribunal