

Citation: Director of Employment Standards
2024 BCEST 114

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 -

Director of Employment Standards

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft
SUBMISSIONS: Laurel Courtenay, legal counsel for the Director Employment Standards
FILE NUMBER: 2024/128
DATE OF DECISION: November 14, 2024

DECISION

OVERVIEW

1. This is an application by the Director of Employment Standards (“Director”) for reconsideration of 2024 BCEST 81, an appeal decision issued by Tribunal Member Roberts on September 11, 2024 (“Appeal Decision”). The application is made pursuant to section 116 of the *Employment Standards Act (ESA)*.
2. This application concerns section 74(5) of the *ESA*, a provision giving the Director the discretion to extend the 6-month unpaid wage complaint filing period if there are “special circumstances,” and an injustice would otherwise result if the complaint filing period were not extended.
3. In this case, a complainant’s application to extend the complaint filing period was dismissed. However, on appeal, the Tribunal referred the matter back to the Director so that the complainant’s alleged “special circumstances” could be properly and fully addressed.
4. In my view, the Director’s application is premature since, at this juncture, the Director has not finally adjudicated the complainant’s section 74(5) application. At best, the complainant’s application has only been partially addressed. Accordingly, it is not appropriate to reconsider the Appeal Decision at this stage of the proceedings where no final Tribunal order has been issued.
5. Further, and in any event, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98). There is nothing in the material before me that legitimately calls into question the correctness of the Appeal Decision, or that raises a serious question of law, fact, principle, or procedure which demands that the decision be reviewed because of its importance to the parties or because of its potential implications for future cases (see *Milan Holdings* at page 7).

PRIOR PROCEEDINGS

6. On October 16, 2022, DH (“complainant”) filed an unpaid wage complaint against his former employer under section 74 of the *ESA* seeking unpaid wages and unreimbursed expenses. The complainant’s last day of employment was March 8, 2022. 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.”
7. Since the complaint was filed approximately 5 ½ weeks after the section 74(3) 6-month limitation period expired, the complaint was statute-barred, subject to the provisions of section 74(5):
 - 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 required under subsection (3) or (4), and

- (b) an injustice would otherwise result.

The investigation into the complaint

8. Approximately 5 ½ months after the complainant filed his complaint, an Employment Standards Branch officer first spoke with him by telephone. There is nothing in the record to account for this delay. In any event, the investigation continued and the complainant was asked to provide an explanation for having failed to file his complaint within the 6-month complaint filing period.
9. As recounted in the Appeal Decision (at paras. 11 and 17), the complainant had several reasons why he had failed to file a timely complaint:

...The reasons [the complainant] outlined for not filing his complaint on time included promises made by his employer to pay him; challenges he had with finding housing; and medical issues, including a broken back, a brain injury, and vision problems. In the correspondence, [the complainant] indicated that he had filed two previous complaints (“my files were sent in two times”) before July 17, 2022, and that when he called to determine if his complaint was received, he was told he would not know because of COVID-related issues. [The complainant] further stated that he was unaware that he had to file the complaint within six months, as that was not clearly stated on the Employment Standards website. He also explained that he needed to add up his receipts to calculate how much he owed before making his complaint...

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- After being laid off, [the complainant] had not been paid for five months, collected social assistance and was denied Employment Insurance;
 - [The complainant] contacted Service BC and was directed to the “Government Web Site” and did not obtain any assistance from Service BC;
 - He had to gather receipts and calculate what was owing to him;
 - There was no information on the Branch’s website advising him that there was a six month time period in which to file a complaint;
 - He submitted two complaints and telephoned the Branch to ensure his complaints had been received. After calling the Branch yet another time to follow up on his complaints, he was “brushed off”;
 - He spoke with a Branch representative and was never told of the six month deadline.

The Determination and Reasons

10. Section 76(1.1) of the *ESA* states: “The director 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).” On November 16, 2023 – approximately 13 months after the initial complaint was filed – a delegate of the Director of Employment Standards (“delegate”) issued the following Determination:

I have determined that the complaint was not made within the time period specified in section 74 of the *Employment Standards Act* (the Act) and that the time to deliver a complaint should not be extended. Accordingly, I will not proceed with the complaint pursuant to section 76(1.1) of the Act.

11. The delegate issued her “Reasons for the Determination” (“delegate’s reasons”) concurrently with the Determination. In her reasons, the delegate referred to one, but only one, of the purposes of the *ESA* – section 2(d): “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.” The delegate concluded that the 6-month complaint period was a provision supporting this statutory purpose. I agree with that observation.
12. On the other hand, if legitimate complaints (and I am not suggesting that the complainant’s complaint is meritorious) are dismissed for having been filed only a month or so after the 6-month complaint filing period expired, that circumstance can frustrate two other statutory purposes, namely, that employees receive at least the basic standards of compensation and conditions of employment provided in the *ESA*, and be given fair treatment (see sections 2(a) and (b) of the *ESA*).
13. The delegate, while characterizing the complainant’s personal circumstances as “unfortunate,” ultimately concluded that the complainant appeared to be familiar with the Employment Standards Branch’s website and generally did not “lack knowledge about the [*ESA*] and process for filing a complaint.” That being the case, the delegate held that no “special circumstances” existed (see section 74(5)(a)). In light of that finding, the delegate never turned her mind to whether “an injustice” (see section 74(5)(b)) would result if the complaint filing period were not extended.

The Appeal Decision

14. The complainant appealed the Determination. Tribunal Member Roberts allowed the appeal. At this juncture, I think it important to stress what Tribunal Member Roberts actually ordered, and equally importantly, what she did not order. The Determination was not cancelled outright. Tribunal Member Roberts did not vary the Determination by way of an order extending the complaint filing period. Tribunal Member Roberts did not find that there were “special circumstances” justifying an extension of the complaint filing period, nor did she find that if the complaint filing period were not extended, an injustice would result. Tribunal Member Roberts did not make any decision with respect to the underlying merits of the complaint.
15. Tribunal Member Roberts, as provided for in section 115(1)(b) of the *ESA*, simply referred the matter back to the Director to be considered by a different delegate. In essence, Tribunal Member Roberts issued an interim decision referring the matter back to the Director so that a complete review of the complainant’s evidence and argument regarding the alleged “special circumstances” could be undertaken.
16. And why was a referral back order necessary? The delegate’s decision rested on two, and only two, considerations: first, the 6-month complaint period is consistent with, and generally supports, the section 2(d) purpose of the *ESA* (“fair and efficient dispute resolution”) and second, the complainant did not lack knowledge about the *ESA* complaint filing process.

17. Tribunal Member Roberts concluded that the delegate failed to consider all the possibly relevant statutory purposes and otherwise failed to examine the complainant's unique personal circumstances which may have impaired his ability to file a timely complaint. As noted in *Zhao, 2024 BCEST 63* (reconsideration refused: *Zhao, 2024 BCEST 76*): "Such decisions [i.e., about whether "special circumstances" exist] 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*" (para. 52; my italics).
18. In particular, Tribunal Member Roberts noted, at paras. 42-46 of the Appeal Decision, the following circumstances that the delegate did not address in her reasons:

[The complainant] says, and I accept, that he is 70 years old and has a Grade 9 education, and...he suffers from serious disabilities (one of which is a broken back that he sustained after his employment ended). He also has vision problems, has only intermittent access to the internet and limited facility with computers. As a fisherman, he does not have, nor is he likely expected to have, those skills for his employment. [The complainant] explained that, because of his unfamiliarity with government services and procedures, as well as the issues already identified, he was unaware of the six month deadline before he filed his complaint. I am unable to understand how the delegate arrived at her conclusion that [the complainant] did not "...[lack] knowledge about the Act and process for filing a complaint with the Branch." While [the complainant] may well have educated himself to some degree about the *ESA's* requirements, there is insufficient evidence, in my view, to support the delegate's conclusion that he was aware of those requirements before he filed his complaint.

While [the complainant] informed the delegate that he needed to add up receipts to determine how much he was owed before filing the complaint, he also informed her that he had filed a complaint on two occasions, at least one time of which was within three months of the last day of work. When he telephoned the Branch to follow up on whether his complaint had been received, he suggested that he was told that there was no way to confirm whether his complaint was received because of COVID-related issues. It appears the delegate either did not follow up on that assertion or did not believe [the complainant] based on his inability to furnish proof of having delivered the complaint earlier.

[The complainant's] circumstances, including his level of education, being only marginally housed, his age and serious medical issues including vision problems and his unfamiliarity with online procedures could, in my view, be considered 'special circumstances,' as set out in section 74(5). The delegate did not identify any of these factors in deciding whether to extend the time for [the complainant] to file his complaint. Rather, she focussed on the fact that he had eventually filed a complaint as evidence no special circumstances existed.

Furthermore, the delegate did not appear to consider [the complainant's] assertion that he had filed two complaints within the statutory time period but because they were done online, he had no ability to confirm receipt of them. She also did not appear to consider his response to questions about the possible impact of the COVID-19 pandemic on the processing of that complaint.

The delegate also did not appear to consider the question of fairness to [the complainant] if his complaint was not investigated – that is, the possible impact on him if he received no compensation at all for approximately 130 days of work plus his assertion that he was entitled to expenses in excess of \$5,000.

19. The purpose of the referral back order was to allow the Director to examine the complainant’s several personal circumstances that had not been addressed in the delegate’s reasons, and to then provide transparent and intelligible reasons regarding whether there were “special circumstances” in this case. As matters presently stand, there is no final order in place which determines the complainant’s section 74(5) application.

THE DIRECTOR’S APPLICATION FOR RECONSIDERATION

20. Insofar as the first stage of the *Milan Holdings* test is concerned, the Director says that Tribunal Member Roberts’ decision “is out of step with the Tribunal’s jurisprudence on extension of time requests [and that] in the past the Tribunal has required objective evidence to show that an applicant was precluded from filing a complaint within the time periods set by the ESA.” The Director submits that Tribunal Member Roberts “overturned the Delegate’s exercise of discretion based only on the subjective submissions of the complainant.”
21. The Director also says, in reference to the first stage of the *Milan Holdings* test, that since section 74(5) is a comparatively recent addition to the *ESA*, and with only a few Tribunal decisions interpreting it to date, this application “provides an opportunity to clarify when the Tribunal will interfere with the Director’s exercise of discretion under that provision.”
22. If a section 116 application passes the first stage of the *Milan Holdings* test, the Tribunal will then undertake a more searching analysis of the issues raised in the application. In this regard, the Director says that the Appeal Decision should be set aside, and the Determination confirmed. The Director submits that the Tribunal has only a limited role when reviewing a discretionary power exercised by the Director, and has “consistently declined to interfere with the Director’s exercise of discretion to extend the time where there has been insufficient evidence or lack of objective evidence to show that a complainant was prevented from filing a complaint in time.”
23. In this instance, and while conceding that the delegate did not address the many asserted barriers that the complainant faced which may have adversely affected his ability to file a timely complaint, the Director nonetheless says “the fact that the Determination did not recite all of the many facts asserted by [the complainant] does not make the Determination unreasonable.”
24. In the Appeal Decision, Tribunal Member Roberts noted that the delegate appears to have considered only one of the six section 2 statutory purposes. The Director says that this omission was not “fatal” and that “[c]learly, decision-makers in the employment standards system must have all the purposes of the *ESA* in mind when they are interpreting and applying the *ESA*.”

FINDINGS AND ANALYSIS

25. In *Milan Holdings*, the Tribunal cautioned that it should not reconsider a decision if the section 116 application “arises out of a preliminary ruling made in the course of an appeal.” Further, “the

Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay” (page 7).

26. It must be emphasized that the Appeal Decision is *not* a final order with respect to the Determination – the Determination has not been confirmed, cancelled, or varied. The section 115(1)(b) order issued in this case – a referral back to the Director so that matters that appear not to have been considered by the delegate can be evaluated – might equally have been issued under section 114(2)(a) of the *ESA* (i.e., a referral back to the Director for further investigation before considering the merits of the appeal).
27. There are two paths that flow from Tribunal Member Roberts’ order.
28. First, after considering the various circumstances that the delegate did not appear to have considered, the Director might decide to allow the complainant’s section 74(5) application and extend the complaint period. If this were the outcome, the Director would then make further inquiries of the parties and issue a determination with respect to the merits of the complaint. Of course, either party would have the right to appeal such a determination to the Tribunal.
29. Second, the Director, after fully considering all the matters raised by the complainant, might conclude that there is no proof of any “special circumstances” justifying the late filing of the complaint. The Director might equally conclude that the allegations made by the complainant, even if proven, do not constitute “special circumstances.” Either way, a decision would be issued dismissing the complainant’s section 74(5) application. In this event, the complainant could then either abandon his appeal or ask the Tribunal to make a final order with respect to it.
30. Tribunal Member Roberts’ decision does not constitute an attempt to fetter the Director’s discretion. Rather, this matter has been returned to the Director so that the complainant’s application can be fully considered. Since the Tribunal has not issued a final order, and the Director has yet to complete its task in terms of adjudicating the complainant’s section 74(5) application, in my view, it would not be appropriate for the Tribunal to hear and decide the instant application on its merits.
31. Section 74(5) clearly places an evidentiary burden on the applicant to demonstrate that there were “special circumstances” that impaired the applicant’s ability to file a timely complaint (*Zhao*, 2024 BCEST 76). The phrase “special circumstances” is not defined in the *ESA* or in the *Interpretation Act*. Presumably, as was stated in *Zhao*, these circumstances must have “directly and causally accounted for the applicant’s failure to file a timely complaint” (para. 6). There is nothing in the Appeal Decision that undermines this principle. However, the question of whether there are “special circumstances” must be examined in light of all the circumstances that are advanced to justify the failure to file a timely complaint. The Director might ultimately conclude that some of the circumstances advanced by the complainant have not been proven, or even if proven, are not sufficiently consequential. There is nothing in the Appeal Decision that dictates any particular outcome regarding the complainant’s section 74(5) application.
32. Clearly, the delegate failed to expressly consider all the evidence and arguments that were advanced by the complainant as constituting “special circumstances.” The Director concedes this point, albeit while also asserting that it is irrelevant.

33. I agree with Tribunal Member Roberts that the delegate refused to extend the complaint filing period based on an incomplete evaluation of the complainant's position and on a truncated analysis of the *ESA*'s purposes. I am not persuaded by the Director's submission that even though the delegate did not address many (indeed, virtually all) of the circumstances advanced by the complainant, that failing does not impact the reasonableness of the delegate's reasons.
34. In my view, the complainant was entitled to a transparent and intelligible assessment of his entire submission. The Tribunal also requires such an assessment before it can properly undertake its appellate function. The Tribunal simply cannot evaluate a discretionary decision unless it has before it a clear sense as to why the discretion was exercised in a particular manner.
35. I also reject the Director's submission that it should be assumed that the delegate considered all the relevant statutory purposes even though she only referred to one. I agree with Tribunal Member Roberts that given the complainant's submission, it was incumbent on the delegate to consider other purposes such as "fairness" (especially given the complainant's many apparent unique personal challenges and his former employer's alleged promises to pay his unpaid wages).
36. Finally, with respect to section 2(d) of the *ESA*, it should be noted that while this complaint was filed about 5 ½ *weeks* late, to a large degree the complaint was not adjudicated in an "efficient" manner due to what appears to be systemic delay within the Employment Standards Branch, commencing with the approximate 5 ½ *month* delay between the time the complainant filed his complaint and an Employment Standards Branch officer first communicated with him.

ORDER

37. The Director's application for reconsideration of the Appeal Decision is dismissed. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

/S/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal