

An appeal

- by -

Allan F. Pope
("Pope")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/193

DATE OF DECISION: January 7, 2005

DECISION

SUBMISSIONS

Allan F. Pope

on his own behalf

INTRODUCTION

This is an appeal filed by Allan F. Pope (“Pope”) pursuant to section 112 of the *Employment Standards Act* (the “Act”). Mr. Pope appeals a Determination that was issued by a delegate of the Director of Employment Standards (the “Director”) on September 21st, 2004 (the “Determination”). In the Determination, the delegate simply stated “that no further action will be taken with respect to the complaint filed [against Bombardier Inc.] by Allan F. Pope, dated September 5, 2001”. The delegate’s reasons for taking that position are set out in her detailed “Reasons for Determination” (“Reasons”) that are appended to the Determination.

By way of a letter dated December 29th, 2004 the parties were advised by the Tribunal’s Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). I note that none of the parties requested that an oral hearing be held in this matter. In addition to the Determination and Reasons, I have before me Mr. Pope’s originating appeal documents and the section 112(5) record. Neither the delegate nor Bombardier Inc. filed a written submission with the Tribunal with respect to Mr. Pope’s appeal.

BACKGROUND FACTS

On September 5th, 2001, Mr. Pope filed a complaint at the Employment Standards Branch office in Burnaby stating that he was employed by “Bombardier Transportation” (I shall hereafter refer to the employer as “Bombardier”) for slightly in excess of one year as an “assembler”. Mr. Pope further alleged that Bombardier wrongfully terminated his employment on or about August 31st, 2001 and he claimed compensation for length of service and “reinstatement”.

At this juncture, I should note that if Mr. Pope was terminated without just cause, he would have been entitled to two weeks’ wages as compensation for length of service under section 63(2)(a) of the *Act*. Although the Director has a statutory power to order reinstatement [see section 79(2)(b) of the *Act*], such an order can only be made if the employer has contravened one or more of sections 8 (employment-related misrepresentations), 83 (retaliatory action), or Part 6 (leave provisions) of the *Act*. Mr. Pope’s complaint does not, on its face, raise any factual issue that would bring his case within one of the exceptional circumstances where reinstatement might be an available remedy.

The record discloses that the first written communication forwarded to Mr. Pope from the Employment Standards Branch was a delegate’s (not the delegate who issued the Determination) letter to Mr. Pope dated June 13th, 2002 (*i.e.*, over 10 months after Mr. Pope’s complaint was filed). There is nothing in the material before me explaining why Mr. Pope’s complaint was seemingly held in abeyance for such an extended period of time. This delay may have been caused by institutional failings at the Branch level, by Mr. Pope’s lack of initiative, or by some combination of the two.

The delegate's June 13th, 2002 letter refers to two telephone messages left by the delegate (on June 4th and 13th) where she sought directions from Mr. Pope regarding whether Pope wished to withdraw his complaint and pursue a civil action for wrongful dismissal. The delegate's June 13th letter concludes: "If I have not heard from you within 10 days of the date of this letter, I will assume that you do not wish to pursue the complaint and will close the file accordingly."

On June 27th, 2002, the delegate wrote to Bombardier (this latter was copied to Mr. Pope) and advised that since Mr. Pope had not been in recent contact with the Employment Standards Branch: "I am writing to inform you that Mr. Pope has abandoned his complaint with our office."

On January 19th, 2003 Mr. Pope wrote to the Employment Standards Branch requesting information "under the freedom of information act" regarding "an investigation into my dismissal". Mr. Pope also states in his letter that: "I was told that a judgement in my favour was determined". There is nothing in the record before me to corroborate this latter assertion. The Employment Standards Branch received Mr. Pope's January 19th, 2003 letter on January 22nd, 2003. According to the Reasons (at p. 3): "On February 27, 2003, all documents that Mr. Pope was entitled to from the file were forwarded to him by staff from the Information and Privacy office in Victoria".

According to the Reasons (at p. 3), Mr. Pope telephoned the Employment Standards Branch once again on August 19th, 2003 inquiring about his file and he was apparently told that if he wished to have his file reopened, he needed to make a formal written request (with reasons) directly to the investigating delegate.

The next communication from Mr. Pope was again by telephone on June 29th, 2004 (*i.e.*, some two years after the Branch's letter confirming that his complaint was being treated as "abandoned"). At that time, he spoke with a receptionist and was apparently seeking some sort of written confirmation that the Branch had determined he had been dismissed without just cause. About one month later, on July 28th, 2004, the delegate who issued the Determination spoke with Mr. Pope by telephone. The delegate's recollection of their July 28th conversation is recorded in her Reasons at page 3--in essence, Mr. Pope wanted to have his file re-opened and he reiterated his view that the original delegate had expressed the view that there was no just cause for his dismissal. The delegate "told him that if he wanted his file to be re-opened that he should send me a letter to this effect".

By way of a letter dated July 28th, 2004 (received by the Branch on August 4th, 2004), Mr. Pope stated: "I would like my case with Bombardier re-opened". In his July 28th letter, Mr. Pope referred to various personal circumstances that, in his view, prevented him from taking appropriate action with respect to his complaint. On August 5th, 2004, the delegate wrote to Bombardier seeking their position regarding Mr. Pope's application to re-open his file and on September 1st, 2004 Bombardier responded by fax stating, simply (and wholly unresponsively), "The following confirms that our plant in British Columbia is closed".

As noted above, on September 1st, 2004 the delegate issued the Determination and Reasons stating that "no further action" would be taken regarding Mr. Pope's September 5th, 2001 complaint.

REASONS FOR APPEAL

In his appeal form, Mr. Pope requests that the Determination be varied because the Director erred in law [see section 112(1)(a)] and otherwise failed to observe the principles of natural justice in making the Determination [see section 112(1)(b)].

The only other material filed by Mr. Pope in support of his appeal is a handwritten 8-page letter appended to his appeal form. In this latter document, Mr. Pope asserts that he did not abandon his complaint; that Bombardier is still doing business in B.C.; that the original investigating delegate told him that “a determination was made in my favour”; and that he received “1 years worth of employment insurance benefits”.

FINDING AND ANALYSIS

Whether or not Bombardier continues to carry on business in B.C. is wholly irrelevant to this appeal.

There is absolutely no evidence before me that the Director ever made a formal section 79 determination that Mr. Pope was wrongfully terminated and, therefore, entitled to compensation for length or service and/or some other remedy.

Mr. Pope’s apparently successful application for employment insurance benefits is similarly not relevant to the issue before me.

The only issue that is properly before the Tribunal at this juncture is whether the Director’s delegate erred in law, or otherwise failed to observe the principles of natural justice, in refusing to re-open Mr. Pope’s “wrongful dismissal” complaint.

The purposes of the *Act* are set out in section 2 and include the provision of “fair and efficient procedures for resolving disputes over the application and interpretation of this Act”.

Section 76(3)(d) of the *Act*, as it now stands, states that the Director may refuse to investigate (or continue to investigate) a complaint if the complainant “has not taken the requisite steps...to facilitate resolution or investigation of the complaint”. Further, a complaint may be summarily dismissed for lack of evidence [section 76(3)(e); see also section 76(2)(e) of the former *Act*].

In my view, the record before me does not indicate that the Director’s delegate failed to observe the principles of natural justice. As recounted above, Mr. Pope was given fair warning regarding the likely consequences of his failure to provide a timely response to the delegate’s June 2002 request for directions. He has been extremely dilatory in pursuing his complaint. He has not convinced me that there were ongoing events in his life that prevented him from taking timely action with respect to his complaint. In this latter regard, I note his assertion that he successfully pursued his claim for employment insurance benefits over a two-year time period following his dismissal. One wonders why he was not as diligent with respect to his Employment Standards Act complaint.

The material that Mr. Pope did submit to the Director falls far short of proving any entitlement under the *Act*. In my view, his complaint might equally have been summarily dismissed for lack of evidence.

In June 2002, Mr. Pope was informed that he needed to make a timely response to the delegate’s request for information. He failed to do so and thus he was formally notified, in writing, that his file was closed and that his complaint was being treated as “abandoned”. I see no error in law in the delegate taking such a position. Thereafter, and as recounted above, Mr. Pope made sporadic requests for information but, in general, simply did not seriously and diligently attempt to have his complaint adjudicated on its merits.

It is now well over three years since Mr. Pope's employment with Bombardier ended. About 2 1/2 years ago, Mr. Pope was advised that his file was closed. He did not make a formal written request to have his file re-opened until the end of July 2004--over two years after he was first advised that his file was closed. In *Sirrs v. Director of Employment Standards* (B.C.E.S.T. Decision No. D103/98) the Tribunal held that an employee's attempt to re-open an investigation one year after it had been concluded was "unreasonable"; in this case, where the delay is over twice as long, I would equally characterize the employee's request as "unreasonable".

Further, as was noted in *McCallum*, B.C.E.S.T. Decision No. D275/03, a request to "re-open" a complaint that has already been dismissed (in this case, because it was deemed to have been abandoned) is, in effect, an entirely new complaint and if the "new" complaint is outside the statutory time limit for filing a complaint (as would be the case here), the "new" complaint (*i.e.*, the request to re-open) is statute-barred.

Finally, I should note that although his "wrongful dismissal" complaint is not being adjudicated under the *Act*, it does not follow that he cannot pursue—as apparently was his initial intention—such a claim in the civil courts. The legal doctrine of issue estoppel would not bar such a claim since there never has been, at the Branch level or by this Tribunal, a decision regarding the "merits" of his "wrongful dismissal claim. However, there may well be other legal obstacles that Mr. Pope will have to address and, accordingly, I pass no opinion regarding the prospects for success of any civil action that Mr. Pope might file.

The appeal is dismissed.

ORDER

Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal