

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Harbhajan S. Bunge
("Bunge")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/839

DATE OF DECISION: February 19, 1998
DECISION

OVERVIEW

This is an appeal by Bunger pursuant to Section 112 of the *Employment Standards Act* (the "Act") against a Determination dated October 27, 1997 by the Director of Employment Standards ("the Director").

ISSUE TO BE DECIDED

The issue is whether Director correctly refused to investigate a complaint because it was not made within the time limits in section 74(3).

FACTS

Bunger was employed as a priest with the Merritt Sikh Society ('the Society'), a respondent in this appeal. In late January or early February 1997, the Society sent Bunger a letter terminating his services. The letter indicated that he had done excellent work for the Society for the past five years, but that an individual who could perform all the services of a priest had been hired to replace him. (Bunger did not have all of the qualifications necessary to fulfill all functions of a priest.) At the time the letter was served, Bunger was on a pre-arranged leave of absence from the temple on a visit to India. His last day of work before the leave was November 25, 1996 (this was the date which he cited in his complaint) and he was not scheduled to return to Canada until May 1, 1997. (In fact, he did not return until that date.)

Bunger consulted legal counsel at Merritt Legal Services ("MLS") prior to June 24, 1997 and MLS, on Bunger's behalf, attempted to negotiate the terms of his termination with the Society. Those negotiations did not produce a settlement and in a letter dated July 18, 1997, MLS advised Bunger that he could sue for wrongful dismissal and that an action could be brought in Small Claims Court.

On October 2, 1997, Bunger filed a complaint at the Kamloops offices of the Employment Standards Branch, claiming he had been dismissed without cause. In a Determination dated October 27, 1997, the Director's delegate refused to take action on Bunger's complaint as it was filed outside the six month time limit in section 74(3). Aside from discussing the relevant sections of the *Act*, the Determination gives no reason why the investigation did not proceed.

Bunger appeals, arguing that his complaint was filed late because he was out of the country for 5 months and was not familiar with the laws governing the termination of his employment. He also claims that he was wrongfully dismissed and that he and his wife have been harassed and embarrassed by the actions of the respondent.

On behalf of the respondent, Mr. Hawes urges me to set the final day Bunger carried out his job duties, November 25, 1997, as the critical date for the limitation period. Alternatively he says that the date of the letter of termination or the date it was delivered, sets the commencement of the limitation period. Regardless of which date is selected, however, he submits that Bunger is outside the six month limitation period in section 74. He argues that there are no grounds upon which to exercise the discretion granted to the Director by section 76. Bunger returned to Canada within the six month time period and had ample

opportunity to file a complaint. He also argues that Bunger's failure to understand the applicable laws is "for want of a better expression . . . ignorance of the law" and that "it is no excuse". Finally, he argues that this Tribunal has no jurisdiction to grant a remedy for the termination of employment, humiliation or other intangible losses.

Submissions on behalf of the Director essentially repeat the contents of the Determination, pointing out that whether Bunger's last day at work or the date of the termination letter (January 23, 1997) was used to calculate the time limits, the complaint was filed too late.

ANALYSIS

Section 76(2)(a) of the *Act* provides:

76 (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
(a) the complaint is not made within the time limit in section 74(3) or (4).

Sections 74(3) applies to a complaint arising from a termination of employment:

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.

The Determination stated that because the complaint was not filed within 6 months, no investigation would take place. This argument is supported by the employer. But I do not agree with this interpretation of the Director's obligations to determine whether a complaint should be investigated where it has been filed later than six months after the last day of employment. The Director's obligations in such a case are also affected by section 76(2)(a):

76(2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
(a) the complaint is not made within the time limit in section 74(3) or (4).

The Director is not required to dismiss a complaint filed outside the six month time limit; while she may do so, it is not mandatory. Thus where it has been ascertained that the complaint was filed too late, the Director must then exercise her discretion under section 76(2) and decide whether the investigation should proceed. That was not done here; instead, the Determination dismissed the complaint simply because it was filed beyond the six month deadline. It does not say why the Director did not exercise her discretion under section 76(2) and investigate the complaint notwithstanding the filing date. And without this, the Determination is based on an incorrect interpretation of the *Act*. The appeal is thus allowed.

I would like to emphasize that this Decision deals only with the validity and adequacy of the Determination as it pertains to the Director's duty under section 76(2). I have specifically declined to comment on the adequacy of the notice given to Bunger by the

employer in light of certain provisions in the *Act* or whether the employer can now successfully allege just cause.

ORDER

Pursuant to section 115 of the Act, I cancel the Determination in this matter, dated October 27, 1997.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal