

An appeal

- by -

Joung Ah Nguyen

- 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

ADJUDICATOR: Norma Edelman

FILE No.: 2001/786

DATE OF DECISION: January 25, 2002

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the Employment Standards Act (the "Act") by Joung Ah Nguyen ("Joung") of a Determination issued by a delegate of the Director of Employment Standards on November 1, 2001. The delegate found that Sung Fish Company Limited ("Sung Fish") owed Joung \$3,000.95 representing overtime pay, an adjustment for "32 hours free from work", statutory holiday pay and vacation pay. The delegate further found that Joung was not owed compensation for length of service. Joung appealed the Determination on the ground that she is owed additional overtime and holiday pay, and it would appear, compensation for length of service. This appeal was decided based on the written submissions of the parties.

ISSUE TO BE DECIDED

Is Joung entitled to additional wages from Sung Fish?

FACTS

On November 1, 2001, the delegate issued a Determination regarding complaints filed by Joung and her husband Thanh Tan Nguyen ("Thanh") that Sung Fish owed them wages. Joung's complaint was filed on May 7, 2001. Both Thanh and Joung appealed the Determination. I have issued a concurrent decision (BCEST #D049/02) regarding Thanh's appeal.

Respecting Joung's complaint, the delegate found the following:

- Joung was employed as a seasonal worker and her last two periods of the employment were from October 1, 1999 to May 27, 2000 and from October 1, 2000 to December 16, 2000. Given the period between the second to last layoff was in excess of 13 weeks, Joung's employment was terminated on May 27, 2000. As a result, Joung's first date of employment with Sung Fish was October 1, 2000 and she worked until December 16, 2000, a period of approximately 2 1/2 months.
- Joung was owed \$3,000.95 for overtime pay, an adjustment for "32 hours free from work", statutory holiday pay and vacation pay for the period October 1, 2000 to December 16, 2000.
- Joung was not owed compensation for length of service, as she did not complete three months of employment.

Joung appealed the Determination on November 7, 2001. She said as follows:

The payment for overtimes and holidays was not enough. This payment should belong to the period from October 1, 1999 to May 27, 2001.

...

I only got the payment for the period Oct 1, 2000 to Dec. 12, 2000. Please double check, calculate again, for my payment of the period from October 1, 1999 to May 27, 2001.

(Reproduced as written)

The delegate and Sung Fish were invited to reply to Joung's appeal. The Tribunal received a submission from the delegate dated December 21, 2001. The delegate said Section 74(3) of the Act requires that a complaint relating to an employee whose employment has been terminated must be delivered to the Employment Standards Branch within six months after the last day of employment. Joung filed her complaint on May 7, 2001, which is over five months after the date it should have been filed. Therefore, Joung's complaint about the period she worked from October 1, 1999 to May 27, 2000 was not filed within the time limit required under the Act and cannot be considered for the purposes of the Determination.

The delegate further stated that the last period that Joung worked, from October 1 to December 16, 2000, is under three months and therefore pursuant to Section 63 (1) of the Act she is not entitled to compensation for length of service.

Joung and Sung Fish were invited to reply to the delegate's submission. The Tribunal received no replies.

ANALYSIS

In an appeal, the burden is on the Appellant, Joung, to show the Determination is an error. In this case, I am not satisfied that the burden has been met.

A temporary layoff is defined under the Act as a layoff of up to 13 weeks in any period of 20 consecutive weeks. Further, Section 74 (3) of the Act states a complaint must be delivered to the Employment Standards Branch within 6 months after the last day of employment.

In *James Cullen* BCEST#D243/00, the Tribunal held that when an employee is on a temporary layoff, the employee's last day of employment is not when the employee last worked but when the temporary layoff ends and the employee has not been recalled back to work. Pursuant to Section 74(3) of the Act, the six-month time limit to file a complaint at the Branch commences at that point.

On May 27, 2000 Joung was temporarily laid off from work. She was not recalled within 13 weeks. As a result her employment ended at the time her temporary layoff period ended and she was not recalled back to work. That occurred on August 26, 2000. She had 6 months from that date to file a complaint, which would be February 26, 2001. She did not file her complaint until May 7, 2001. Thus, I agree with the delegate that Joung's complaint is out of time and she has lost her opportunity to claim wages for the period October 1, 1999 to May 27, 2000.

Section 63 of the Act states that an employee is entitled to compensation for length of service after 3 consecutive months of employment. I agree with the delegate that Joung was not employed for three consecutive months. Joung did not work during the period May 27, 2000 to October 1, 2000. Further, her employment was terminated during this period when her temporary layoff ended and she was not recalled back to work within 13 weeks after May 27, 2000. If Joung's employment had not been interrupted from October 1, 1999 to December 16, 2000, she may have been entitled to compensation for length of service. However, her employment was interrupted between May 27, 2000 and October 1, 2000. Her new start date for establishing any entitlement to compensation for length of service is October 1, 2000 and since she only worked to December 16, 2000, a period less than 3 months, she is not entitled to compensation for length of service.

For the above reasons, I find no basis to vary or cancel the Determination and the appeal is dismissed.

ORDER

Pursuant to Section 115 of the Act I order that the Determination dated November 1, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal