Employment Standards TRIBUNAL

An appeal

- by -

Todd Coutts
("Coutts")

- 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 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2011A/39

DATE OF DECISION: July 5, 2011

DECISION

SUBMISSIONS

Ashley R. Ayliffe	legal counsel for Todd Coutts
Hugh J. McCallum	legal counsel for Quiring Motors (1994) Ltd.
Marc Hale	for the Director of Employment Standards

INTRODUCTION

1. Todd Coutts ("Coutts") appeals, pursuant to sections 112(1)(a) and (b) of the *Employment Standards Act* (the "*Act*"), a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 2nd, 2011 pursuant to which Mr. Coutts' unpaid wage complaint filed against Quiring Motors (1994) Ltd. ("QML") was dismissed as untimely (the "Determination"). Mr. Coutts says that the delegate erred in law (section 112(1)(a)) and otherwise failed to observe the principles of natural justice in making the Determination (section 112(1)(b)). Accordingly, he seeks an order from the Tribunal referring the matter back to the Director, presumably so that the Director will investigate the merits of the complaint.

2. I am adjudicating this appeal based on the parties' extensive written submissions. I have also reviewed the delegate's "Reasons for the Determination" (the "delegate's reasons") accompanying the Determination and the voluminous section 112(5) record that was before the delegate.

FACTUAL BACKGROUND

3. According to the information set out in the delegate's reasons, QML operates an automotive towing business and Mr. Coutts alleges that QML employed him as a tow truck driver from November 1999 until October 5th, 2009 when his employment was effectively terminated.

4. Throughout the entire history of this matter, both Mr. Coutts and QML have had legal counsel representation.

5. On February 15th, 2010 Mr. Coutts commenced an action in the Supreme Court of British Columbia (utilizing the Rule 66 "Fast Track Litigation" protocol) against QML and the attached Statement of Claim essentially itemized a claim for "wrongful dismissal" based on a without cause dismissal without proper notice or severance pay in lieu of notice on or about October 5th, 2009. Mr. Coutts claimed damages for "unjust enrichment" based on QML's alleged failure to pay "holiday pay and other statutory contributions". Mr. Coutts also claimed aggravated, punitive and "bad faith" damages presumably based on the Supreme Court of Canada's decisions in *Wallace v. United Grain Growers Ltd.*, [1997] 3 SCR 701 and *Honda Canada Inc. v. Keays*, [2008] 2 S.C.R. 362.

6. Mr. Coutts, at para. 12 of his Statement of Claim, "pleads and relies upon the [*Act*] and in particular Section 95 thereof". This provision, sometimes referred to as a "common employer" provision, permits the Director of Employment Standards (but not the civil courts) to treat two or more entities as one employer for purposes of the *Act*. Although the civil courts cannot make a section 95 declaration, there is an analogous "common employer" principle at common law: see *e.g.*, *Sinclair v. Dover Engineering Services Ltd.*, 1987 CanLII 2692 (B.C.S.C.) affd. 1988 CanLII 3358 (B.C.C.A.); *Downtown Eatery (1993) Ltd. v. Ontario*, 2001 CanLII 8538

(Ont. C.A.); *Vanderpol v. Aspen Trailer Company Ltd.*, 2002 BCSC 518; *Bartholomay v. Sportica Internet Technologies Inc. et al.*, 2004 BCSC 508.

7. On March 17th, 2010, QML filed its Statement of Defence to Mr. Coutts' action. QML asserted that there was no employment relationship between the parties; rather, Mr. Coutts was, at all times, an "independent contractor". Further, QML's position was that Mr. Coutts "quit" or otherwise abandoned his position with QML.

8. On April 1st, 2010, Mr. Coutts filed an Amended Statement of Claim. The principal thrust of the amendments was to advance a claim for "constructive dismissal" based on QML's repudiation of the parties' contract. QML's Amended Statement of Defence, filed April 15th, 2010, included a number of additional factual assertions regarding the breakdown of the parties' relationship and also contained a specific denial of the "constructive dismissal" allegations. QML also advanced the following assertion in para. 24 of its Amended Statement of Defence: "…[QML] says its business and [Mr. Coutts'] duties included the interprovincial and international transport of goods and vehicles, and consequently the [*Act*] does not apply to this case."

9. On April 21st, 2010, and by way of response to QML's Amended para. 24 noted immediately above, Mr. Coutts filed the following Reply: "…[Mr. Coutts] says that if [QML's] business is not subject to the [*Act*], then, [Mr. Coutts] pleads and relies upon the *Canada Labour Code*…and Regulations and amendments thereto."

10. I understand that the trial of the action was scheduled to proceed during the week of September 20th to 24th, 2010. On September 8th, 2010, QML's counsel wrote to Mr. Coutts' counsel advising that he proposed to apply, at the outset of the trial, to further amend the Amended Statement of Defence by pleading Mr. Coutts was "estopped" from claiming he was an employee since he had, for several years, held himself out to be an independent contractor in his dealings with QML and other third parties.

11. Shortly before the trial was to commence, Mr. Coutts applied to have it adjourned – although this is not entirely clear from the record, this application may have been made at a Trial Management Conference that took place on September 17th, 2010.

12. On September 23rd, 2010 – some 11.5 months (dating from October 5th, 2009) after Mr. Coutts claimed his employment with QML ended as a result of a wrongful or constructive dismissal – his legal counsel filed a complaint (by fax) against QML with the Employment Standards Branch's Richmond office under section 74 of the *Act*. By way of this complaint, Mr. Coutts sought $62,675 plus interest representing unpaid regular wages, overtime pay (dating from January 1st, 2001), vacation pay (dating from November 1st, 1999), statutory holiday pay (dating from November 1999) and compensation for length of service. I might parenthetically note that, by reason of section 80 of the *Act*, a large portion of Mr. Coutts' claim would be statute-barred.

13. Section 74 of the *Act* provides as follows:

> 74. (1) An employee, former employee or other person may complain to the director that a person has contravened
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> (a) a requirement of Parts 2 to 8 of this Act, or
> (b) a requirement of the regulations specified under section 127 (2) (l).

> (2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
>
> (3) *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.*
>
> (3.1) Subsection (3) applies to an employee whose employment is terminated following a temporary layoff and, for that purpose, the last day of the temporary layoff is deemed to be the last day of employment referred to in subsection (3).
>
> (4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.
>
> (my *italics*)

14. In light of the apparent fact that Mr. Coutts' claim was filed well outside the subsection 74(3) 6-month time limit, the delegate sought and received submissions regarding the timeliness of the complaint. As noted at the outset of these reasons for decision, the delegate ultimately determined that the complaint was, in fact, statute-barred and that it was not appropriate to continue investigating the complaint on its merits. The delegate ceased investigating the complaint pursuant to subsection 76(3)(a) of the *Act*:

> 76. (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> (a) the complaint is not made within the time limit specified in section 74(3) or (4), …

15. Although a federal/provincial jurisdictional issue was raised by the parties' pleadings in the civil action, the delegate did not dismiss Mr. Coutts' complaint under subsection 76(3)(b) – "this Act does not apply to the complaint". In addition, it should also be noted that the delegate did not dismiss Mr. Coutts' complaint under subsection 76(3)(f) – "a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator".

16. I shall now turn to issues before me, namely, whether the delegate erred in law or otherwise breached the principles of natural justice in dismissing the complaint.

FINDINGS AND ANALYSIS

Natural Justice

17. While it is clear that Mr. Coutts strongly disagrees with the delegate's decision to stop investigating his complaint, I am unable to find, based on the material before me, that the delegate breached the principles of natural justice in doing so. Mr. Coutts – through his counsel – was invited to make full submissions regarding the timeliness of the complaint and did so. The delegate's reasons explain why he decided to stop investigating the complaint and, in my judgment, meet the minimum legal requirements for a reasoned decision. There is no suggestion that the delegate was biased against Mr. Coutts or was improperly influenced

in his decision-making process. In short, I am not satisfied that there was a failure to observe the principles of natural justice in this case.

18. I shall now consider Mr. Coutts' principal argument, namely, whether the delegate erred in law in dismissing the complaint under subsection 76(3)(a) of the *Act*.

Error of Law

19. It is undisputed that Mr. Coutts' complaint was filed well after the 6-month time limit provided for in subsection 74(3) of the *Act* had expired. Clearly the complaint was late – and by many months. There is nothing in the *Act* giving the Director the *explicit* statutory authority to extend the complaint limitation period. The Tribunal has the express power to extend the time within which an appeal may be brought (section 109(1)(b)) but there is no comparable provision giving the Director the authority to extend the complaint periods established under section 74 of the *Act*.

20. However, subsection 76(3), by its very language, imports a discretionary element into decisions regarding the timeliness of complaints: "The director *may* refuse to accept, review, mediate, investigate or adjudicate a complaint or *may* stop or postpone reviewing, mediating, investigating or adjudicating a complaint if (a) the complaint is not made within the time limit specified in section 74(3) or (4)…" (my *italics*).

21. The thrust of Mr. Coutts' argument is that the delegate erred in law in failing to exercise his discretionary power in favour of continuing to investigate the complaint on its merits. The Supreme Court of Canada, in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR 2, made the following comments about the exercise of a statutory discretion:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

22. The governing legal principles with respect to the Director's subsection 76(3) discretion were established in *Karbalaeiali v. British Columbia* (*Employment Standards)*, 2007 BCCA 553. The unfortunate facts of this case are as follows. Mr. Karbalaeiali was employed as a school bus driver and claimed that he had not been paid in full for all hours worked and that his employer had also wrongfully terminated his employment (on June 11th, 2003). Mr. Karbalaeiali consulted legal counsel who advised him file a complaint with the Employment Standards Branch and he attempted to do so – in early August 2003 (by which time his complaint period had not yet expired) – but was rebuffed. The Branch's intake officer advised Mr. Karbalaeiali to file his complaint with the federal labour standards department since it appeared that he had been employed by a federal jurisdiction employer. He immediately attended the local Labour Canada office and obtained the necessary complaint forms; he was also apparently told that it could take up to 7 weeks before his complaint was reviewed at which time he would be contacted. He mailed in his completed complaint form the very next day after his attendance at the Labour Canada office. In about mid-March 2004 (by which time his 6-month *Act* complaint period had now expired), he once again attended the Labour Canada office only to be told that Labour Canada had no record of his complaint having ever been received. However, Labour Canada agreed to process a new complaint and assured him that he would not be prejudiced by any applicable limitation period. Although a new complaint was filed, on March 16th, 2004, Labour Canada advised Mr. Karbalaeiali, personally and by letter, that his complaint fell within the jurisdiction of the B.C. Employment Standards

Branch and that his federal complaint had been forwarded to the Employment Standards Branch for processing. On March 18th, 2004 Mr. Karbalaeiali met with an employment standards officer who had the federal complaint in hand. This same officer issued a Determination on April 8th, 2004 dismissing the complaint as untimely.

23. Mr. Karbalaeiali appealed the Determination to the Tribunal, however, this appeal was unsuccessful – the Tribunal member holding that 6-month complaint period was mandatory and not capable of being extended even where there might be a compelling explanation for the late filing. Mr. Karbalaeiali applied for reconsideration under section 116 of the *Act* but, again, was unsuccessful and so he applied for judicial review of the Tribunal's decisions.

24. Justice Morrison, who heard and decided the application for judicial review (*Karbalaeiali v. Deputy Solicitor General et al.*, 2006 BCSC 1798), rested her decision on narrow grounds. Justice Morrison did not say that the Tribunal's decisions regarding the scope of section 74 – and the absence of any express statutory authority to extend the 6-month complaint period – were incorrect as a matter of law. Rather, Justice Morrison observed that the Employment Standards Branch had a *duty* to accept a timely complaint and that the intake officer was not empowered under the *Act* to "pre-screen a complaint for its validity" (para. 33). Justice Morrison noted that section 76(1) of the *Act* obliges the Director to "accept and review a complaint". Justice Morrison's reasons continued (at paras. 34 and 36 – 40):

> [34] Surely the duty is to assist an employee who presents with a complaint, not to block the gate to entry of the process. But rather, to receive the complaint, and point out the necessary statutory requirements, including the proviso it be in writing. Lay persons are not expected to be familiar with the statute.
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> [36] It is up to the Director to accept and review, not the duty or intake officer.
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> [37] As counsel for the Branch pointed out, the question of jurisdiction, federal or provincial, in transportation cases can be very complex. I agree. So it would be totally improper for an intake officer to make an immediate decision on jurisdiction on receiving an initial complaint, as occurred here. Mr. Karbalaeiali was summarily sent off to Labour Canada, instead of having his complaint <u>accepted</u> and <u>reviewed</u> by the proper procedures at the Employment Standards Branch. As mandated by s. 76(1) of the Act. (original *underlining*)
>
> [38] That breach of duty caused the untimeliness. It was incorrect, and unfair to Mr. Karbalaeiali, to allow reliance on the effect to deny access to minimum remedies available under the *Act*. [sic]
>
> [39] Instead, the victim has been blamed. Wrongfully.
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> [40] The remedy for Mr. Karbalaeiali is to treat the complaint – regardless of the date – as if received when there was the refusal to initially accept the complaint.

25. Accordingly, the Tribunal's original appeal and reconsideration decisions were set aside and the matter was remitted to the Tribunal "for reconsideration in light of these reasons" (para. 41).

26. The Director of Employment Standards appealed Justice Morrison's decision. The Court of Appeal, by way of oral reasons issued on November 14th, 2007 (*Karbalaeiali v. British Columbia (Employment Standards)*, 2007

BCCA 553), dismissed the Director's appeal. The Court of Appeal unanimously held that while the Tribunal rightly concluded the *Act* contains no provision allowing the Director to extend the section 74(3) 6-month complaint period (para. 11), there remained a residual discretion – flowing from subsections 76(1) and (3) – to accept and review untimely complaints. The Court of Appeal held that the Director *must* accept and review all complaints and, insofar as a particular complaint may be out of time, to *consider* whether the complaint should nonetheless be more thoroughly investigated or adjudicated (paras. 11 and 12):

> [11] While the Tribunal rightly stated that the *Act* makes no provision for the extension of time, I am of the view it failed to consider the discretion afforded the Director under s. 76 and, in particular, subsections (1) and (3)(a). The Director *must* accept and review a complaint made under s. 74 and *may* refuse to do so if the complaint is not made within the time limit specified by s. 74(3). Thus, even though a written complaint is delivered more than six months after the termination of an employee's employment, the Director must accept and review the complaint unless in the exercise of his discretion he decides not to do so. In other words, s. 74 does not, as the Tribunal said, preclude the Director's discretion to accept a complaint. (original *italics*)
>
> [12] The question before the Tribunal was not whether the employee's complaint was statute-barred but whether the Director's delegate properly exercised her discretion in refusing to accept it, given it was not received in writing until about three months after the prescribed time. The delegate was required to exercise her discretion as she saw fit in determining whether acceptance of the complaint should be refused and the Tribunal was then required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate's discretion. But any consideration of the exercise of her discretion was foreclosed by the determination there was no discretion to be exercised.

27. Thus, although the B.C. Court of Appeal dismissed the Director's appeal, the court took a somewhat different path than that followed by Justice Morrison. As I read Justice Morrison's decision, she held that although Mr. Karbalaeiali attempted to file a *timely* complaint, he was frustrated in that endeavour by the wrongful decision of the intake officer (who had a statutory duty to accept the complaint provided it met the formalities of the *Act* – for example, the subsection 74(2) requirement that it be in writing). It was up to the Director or, under the administrative scheme of the *Act*, his delegate (but not an intake clerk), to review the complaint to determine if it properly fell within the ambit of the *Act*. The Court of Appeal appears to have taken a somewhat – and arguably broader – tack than Justice Morrison. Firstly, the Employment Standards Branch has a statutory duty to accept *all Employment Standards Act* complaints including those that appear to be statute-barred. Secondly, however, if a complaint *is* statute-barred the Director *may* refuse to continue investigating the complaint. The decision to continue or stop investigating the time-barred complaint requires the Director to exercise a statutory discretion. Once the discretion has been exercised (and this may be in favour of continuing or stopping the investigation), the Tribunal's role on appeal is to review Director's delegate's discretionary decision "to determine whether the complaint should [or in another case, should not] have been accepted and reviewed having regard to the factors it [i.e., the Tribunal] consider[s] properly [bear] on the exercise of the delegate's discretion".

28. In the case at hand, Mr. Coutts' complaint was not summarily refused. Nor is this a case akin to *Karbalaeiali* where a *bona fide* attempt to file a timely complaint was blocked because of the improper actions of an intake officer. Rather, Mr. Coutts' complaint *was* accepted and the delegate assigned to the file ultimately reviewed and dismissed the complaint without investigating its underlying substantive merit. While the delegate might have dismissed the complaint under subsection 76(3)(f) due to the parallel court proceedings, he rested his

decision solely on the fact that the complaint was filed outside (and in this case, well outside) the 6-month time limit set out in subsection 74(3) of the *Act*. Accordingly, I must consider whether the delegate properly exercised his discretion in deciding to stop investigating the complaint on its merits.

29. I have carefully reviewed the delegate's reasons and it appears that he considered the following factors in exercising his discretion to stop investigating the complaint:

- the delay in filing the complaint was "substantial";
- Mr. Coutts did not adequately explain why he failed to file a timely complaint;
- Mr. Coutts initially decided to pursue his unpaid wage claim by way of a civil action rather than by way of the complaint process available under the *Act* and, for a very considerable period of time, was seemingly was quite content to pursue the former avenue of recourse rather than the latter process;
- Allowing the complaint to proceed at this late date would force QML into having to defend itself before two entirely independent adjudicative bodies thereby incurring additional delay and expense;
- Mr. Coutts' complaint did not present a clearly obvious strong *prima facie* case; and
- the parallel court action, even if it did not constitute a complete duplication of the matters asserted in the complaint, nonetheless did advance overlapping claims.

30. In my view, each of the foregoing matters was a legitimate factor to be taken into account when the delegate was considering whether to continue investigating Mr. Coutts' complaint. I might further add that both parties – apparently from the outset of the civil action – have been represented by legal counsel and thus Mr. Coutts stands on a separate footing from the "layperson" who was the central figure in the *Karbalaeiali* decisions.

31. The delay in filing the complaint was substantial. I do not see anything in Mr. Coutts' counsel's submissions that adequately explains why the complaint was not filed within the 6-month time limit. I am left to simply speculate that Mr. Coutts' counsel believed that Mr. Coutts could obtain full redress via the B.C. Supreme Court action. Certainly, at least to a degree, the civil action could provide a superior remedy compared to the *Employment Standards Act* complaint process. For example, Mr. Coutts' complaint included a claim for section 63 compensation for length of service and in his civil suit he claims "severance pay in lieu of notice" – compensation for length of service is capped at 8 weeks' pay whereas, as the law now stands, severance pay in lieu of notice could range to as much as 24 months' pay (although, undoubtedly, given Mr. Coutts' circumstances, he would likely recover something well less than 24 months' pay). In addition, in his civil action Mr. Coutts' claimed compensation based on QML's "unjust enrichment" and this claim dates from November 1999 (although I presume at least some portion of this claim will be statute-barred). Under subsection 80(1)(a) the *Act*, a complainant can only recover "wages…that became payable in the period beginning (a) in the case of a complaint, 6 months before the earlier of the date of the complaint or the termination of employment." Thus, the civil claim arguably provides a wider scope for potential recovery compared to an *Employment Standards Act* complaint and this may have been a factor in Mr. Coutts' counsel's decision to file a civil action rather than an *Employment Standards Act* complaint. I note that at para. 3 of his Reply submission, Mr. Coutts' counsel states: "…the Statement of Claim filed February 5, 2010 expressly claims damages which encompass and exceed certain remedies available under the [*Act*]".

32. Mr. Coutts' legal counsel either knew, or should have known, that a complaint could have been filed under the *Act* with respect to at least some aspects of Mr. Coutts' claim against QML. Mr. Coutts' counsel could have filed a timely *Employment Standards Act* complaint so as to protect Mr. Coutts' legal interests and to stave off any limitation period argument but did not do so. I must therefore assume (since Mr. Coutts' counsel has not provided any explanation for failing to file a timely complaint) that Mr. Coutts' counsel made a strategic decision to pursue a civil action rather than filing an *Employment Standards Act* complaint. If Mr. Coutts' legal counsel negligently failed to pursue an *Employment Standards Act* complaint (and I am not suggesting that is the case here), Mr. Coutts is not without a remedy since he could pursue a legal action against his counsel for negligence or breach of contract.

33. At para. 19, Schedule B, of the submissions appended to his appeal form, Mr. Coutts' counsel says: "Mr. Coutts has a reasonable and credible explanation for his failure to file his complaint within the time limit set out in section 74", namely, that he had limited financial resources and that he expected to secure full recovery against QML by way of a "fast tracked" civil claim that would have been resolved within 6 months of filing. Mr. Coutts' counsel says: "Had Mr. Coutts known he would be unable to attain efficient and complete resolution of all his complaints against the Employer within six months of commencing a civil claim, he would have filed this Complaint under the *Act*." I am unable to conclude that this explanation satisfactorily accounts for the failure to file a timely complaint. The issue of financial resources is irrelevant – *Employment Standards Act* complaints do not involve any filing fees and the investigation proceeds at no cost to any party. Further, as noted above, it would have been a simple matter to file a "protective" complaint (*i.e.*, in order to protect Mr. Coutts' rights under the *Act*) at any time within the 6-month complaint period that could have been held in abeyance while Mr. Coutts pursued his civil action.

34. Mr. Coutts' legal counsel asserts that his client "had a genuine intention within the six month time period to file a complaint" (para. 21) and then details the procedural history relating to the civil action as evidence supporting this intention. This latter recitation, in my view, does not even remotely speak to whether Mr. Coutts had an *ongoing intention to file an Employment Standards Act complaint*. Indeed, the available evidence suggests Mr. Coutts never intended to file a complaint until shortly before the complaint was actually filed (by which the 6-month limitation period had long since passed).

35. What may have prompted the untimely complaint was counsel's recognition – as set out in para. 21 of the submission appended to the Appeal Form – that certain aspects of Mr. Coutts' claim might not be recoverable by way of a court action: "While the Supreme Court action is related to the subject matter of the Complaint, it is also the case that the claims made pursuant to the [*Act*] are likely claims the Supreme Court is without jurisdiction to consider, according to our Court of Appeal." The latter comment is undoubtedly a reference to *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 (leave to appeal to the Supreme Court of Canada refused on October 9th, 2008: *Cori Macaraeg v. E Care Contact Centers Ltd.*, 2008 CanLII 53790) where the Court of Appeal held that the civil courts should not generally be utilized to enforce purely "statutory" rights such as a claim for overtime based solely on the provisions of the *Act*. The Court of Appeal's decision was issued on May 1st, 2008 and leave to appeal to the Supreme Court of Canada was refused on October 9th, 2008. Accordingly, counsel for Mr. Coutts should have been aware of the possible legal hurdles posed by a civil action to recover statutory overtime pay, statutory holiday pay and statutory vacation pay as of February 15th, 2010 when the Writ of Summons and Statement of Claim were filed.

36. Overtime claims that are *contractual* in nature may be pursued by court action and, in the case at hand, I note that Mr. Coutts' Statement of Claim also includes a claim to recover overtime pay, statutory holiday pay and vacation pay based on "unjust enrichment" – an issue that was not addressed in *Macaraeg*. Thus, it is not entirely clear that Mr. Coutts' claims for overtime pay, statutory holiday pay and vacation pay are entirely foreclosed in the civil action (although they may well be).

37. Since I am not satisfied that the delegate improperly exercised his statutory discretion when he ceased investigating the claim under subsection 76(3)(a) of the *Act*, it follows that this appeal must be dismissed.

ORDER

38. Pursuant to section 115(1)(a) of the *Act*, this appeal is dismissed and the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal