EMPLOYMENT STANDARDS TRIBUNAL

In the matter of two appeals pursuant to Section 112 of the

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

City of Surrey
("Surrey" or the "employer")

- and -

Surrey Firefighters' Association, Local 1271,
on behalf of 24 bargaining unit members
(the "employees")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

PANEL:	Kenneth Wm. Thornicroft, Panel Chair Geoffrey Crampton, Tribunal Chair Norma Edelman, Tribunal Registrar
FILE No.:	97/251
DATES OF HEARING:	January 23rd, 1998
DATE OF DECISION:	March 4, 1998

DECISION

APPEARANCES

Adam Albright	Counsel for the City of Surrey
Allan E. Black & Elena Miller	Counsel for the employees
Adele Adamic	Counsel for the Director of Employment Standards

OVERVIEW

There are two appeals before us, both brought pursuant to section 112 of the *Employment Standards Act* (the "*Act*") from a Determination issued by the Director of Employment Standards (the "Director") on March 26th, 1997 under file number 59916 (the "Determination"). The Director determined that the City of Surrey ("Surrey" or the "employer") contravened sections 16, 17(1), 21(2), 58(1) and 58(2) of the *Act* and, accordingly, owed 24 named individuals a total sum of $186,505.68. This latter figure includes unpaid hourly wages at a rate of $7.00 per hour, vacation pay, reimbursement for course fees paid to the Fire Academy of the Justice Institute of British Columbia, and interest.

The Director held that 24 Surrey firefighters were "person[s] being trained by an employer for the employer's business" (see the definition of "employee" in section 1 of the *Act*) when they were students at the Fire Academy of the Justice Institute of B.C. (the "Fire Academy") and, as such, were entitled to be paid at the minimum wage rate set out in the *Employment Standards Regulation* ($7.00) for all of the hours they spent at the Fire Academy. Additionally, the Director held that the employees were entitled to be reimbursed for the $4,500 tuition they paid directly to the Fire Academy.

Both Surrey and the Surrey Firefighters' Association, Local 1271 (as the authorized representative of 24 complainant employees--the "employees") have appealed the Determination. In written reasons issued on September 25th, 1997 (BCEST #D411/97) this Panel confirmed the Director's Determination that the 24 complainants were employees of the City of Surrey while enrolled as students at the Fire Academy.

Following the issuance of the Decision with respect to the employment status of the complainant employees, we were advised by the parties that while they had, or were about to, settle a number of issues arising from the two appeals, there were still a number of outstanding issues. Accordingly, this Tribunal panel heard further submissions on two other issues raised by Surrey in its appeal and one issue raised by the employees in their appeal. This latter hearing took place on January 23rd, 1998 at the Tribunal's offices in Vancouver.

PRELIMINARY MATTER

As a preliminary matter, counsel for the employees took the position that in light of our earlier decision on the "employee status" question (*i.e.*, BC EST #D411/97), the only issues that could be dealt with by the Tribunal were those raised by the employees in their appeal. In his written submission, counsel put the employees' position in these terms:

> "Surrey's appeal was heard and decided by the Tribunal in its decision #411/97. The Tribunal rejected the City's appeal and upheld the Determination. That leaves only the Association's appeal of the quantum issue to be decided. The Association submits that the issue of whether the City is liable to pay wages is *res judicata* and cannot be re-argued at this hearing. The only issue at this hearing is how much the City is liable to pay in wages at this time, pursuant to the Determination dated March 26, 1997."

As we advised counsel for the employees at the January 23rd hearing, it was our understanding that the only issue dealt with in Decision No. D411/97 was whether or not the "Surrey recruits" were "employees" of Surrey while enrolled at the Fire Academy. The Tribunal heard evidence and submissions on this particular issue prior to hearing any other matters because, had Surrey prevailed, the Determination would necessarily have been cancelled. In other words, the status of the "Surrey recruits" was a threshold question that all parties agreed ought to be resolved before embarking on an examination of the other issues raised by Surrey and the employees' in their respective appeals.

ISSUES TO BE DECIDED

The issues now before us are as follows:

1. Does the Tribunal have jurisdiction to make an order with respect to other persons who may have attended the Fire Academy as "Surrey Recruits" notwithstanding that the Director has not yet issued any determination with respect to any complaints that such persons may have filed, or intend to file, under section 74 of the *Act*?

2. Are the complaints of four particular employees named in the Determination statute-barred?

3. Notwithstanding this Panel's finding that the complainants were Surrey employees while enrolled at the Fire Academy, are they nonetheless disentitled to any compensation because their activities while enrolled at the Fire Academy do not meet the statutory definition of "work" contained in section 1 of the *Act*?

ANALYSIS

Number of Complainants

The Determination specifically dealt with the complaints of 24 individuals. The Surrey Firefighters' Association submits that it would be "fair and expeditious" for the Tribunal to make a decision with respect to other similarly situated individuals even though their particular complaints have yet to be dealt with by the Director.

Both Surrey and counsel for the Director submit that our jurisdiction is limited to making an order with respect to the 24 individuals named in the Determination. We agree.

Our jurisdiction is triggered by an appeal by a "person served with a Determination" (see section 112 of the *Act*). While there may be some common issues between the 24 individuals named in the Determination and other "Surrey recruits" who may yet be named in another determination, that commonality cannot be used to, in effect, short-circuit the entire dispute resolution framework set out in the *Act*. Further, to the extent that there are common issues, our decision(s) in the present appeals should give the parties some guidance as to the proper resolution of such issues. Hence, if and when a further determination is issued, there may be no need to appeal that determination to the Tribunal.

Other than subsection 2(d), counsel for the employees was unable to direct our attention to any provision in the *Act* that authorized the Tribunal to make an order with respect to a party who is not named in the determination under appeal. In our view, the appellate function of this Tribunal cannot be transformed into an original "trial jurisdiction" using section 2(d) of the *Act* as a springboard.

Are Four Particular Complaints Statute-Barred?

It is conceded by all parties that four complainants named in the Determination--Calvin Davies, Kelly O'Brien, Michael Sabberton and Bruce Tetrault--completed their course of instruction at the Fire Academy by December 1994. All four complaints were filed with the Employment Standards Branch on April 23rd, 1996.

Counsel for Surrey submits that each of these four complaints was "statute-barred", that is, the complaints could no longer be adjudicated under the former *Act,* by no later than June 1996 (see section 80(1) of the *Employment Standards Act,* S.B.C. 1980, c. 10, as amended). Section 80(1) of the former *Act* provided for a six-month limitation period running from "the date on which the subject matter of the complaint arose". Section 80(2) of the former *Act* provided that the recovery of wages was limited to the wages that became payable in the 6 month period immediately prior to the date of the complaint.

It is not seriously disputed that these four complaints were "statute-barred" under the former *Act;* counsel for the Director concedes as much. None of these four complaints were filed under the relevant provisions of the former *Act* and, but for the repeal and reenactment of a new *Employment Standards Act* on November 1st, 1995, all four complaints would have been dismissed as being filed outside the six-month statutory time limit governing the filing of complaints.

On November 1st, 1995, the present *Act* came into force. Under the present legislative scheme, the time limits for the filing of complaints are set out in section 74(3) and (4):

> **Complaint and time limit**
>
> 74. (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.
>
> (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.

Under the current *Act,* the Director may issue a determination for the payment of wages that became payable 24 months before the earlier of the date of the complaint or the termination of employment (see section 80).

The four individuals' complaints may not be statute-barred under the present *Act* because their employment has not yet been terminated (arguably the "triggering event" for the commencement of the limitation period under the new *Act*) and sections 8, 10 and 11 are not in issue here. Thus, we have a situation where the four employees' complaints were never filed, and indeed, were statute-barred by reason of section 80(1) of the former *Act* but are not necessarily statute-barred under the present *Act.* Both counsel for the employees and counsel for the Director submit that section 74 of the present *Act* has retroactive or retrospective effect and that, accordingly, the four individuals' complaints are not statute-barred.

Section 128 of the current *Act,* which deals with a number of "transitional" issues arising from the repeal of the former *Act* and subsequent enactment of the current *Act,* is of no assistance to the present situation. Subsections 128(1) and (2) are irrelevant because no order was ever made in favour of these four individuals under the former *Act.* Subsection 128(3) does not apply because we are here concerned with complaints filed under the present, not the former, *Act.* The balance of the provisions of section 128 deal with the issue of compensation for length of service, an issue that does not arise in the present appeals.

The general principle of law is that once a limitation period has expired, the cause of action governed by that expired limitation period is not revived by a subsequent change in the governing limitation law, absent express statutory language (see e.g., *Martin v. Perrie* [1986] 1 S.C.R. 41).

A recent case in which our Court of Appeal found there was such express language is *P.(J.) v. Sinclair* and *A.(R.) v. The Children's Foundation* (June 1997, B.C.C.A). In our view, however, in the case at hand, the Legislature has not seen fit to, in effect, revive unfiled complaints that were statute-barred under the former *Act.*

It should also be noted that in British Columbia the *Limitation Act* preserves vested rights to defend causes of action on the basis of accrued limitation periods [see subsections 35(1)(a) and (c) of the *Limitation Act*].

Where the Legislature has seen fit to "revive" statute-barred claims it has only done so using express language, for example:

> **Limitation Act, R.S.B.C. 1996, c. 266**
>
> 3. (4) The following actions are not governed by a limitation period and may be brought at any time:...
>
> (k) for a cause of action based on misconduct of a sexual nature, including, without limitation, sexual assault,
>
> (i) where the misconduct occurred while the person was a minor, and
>
> (ii) *whether or not the person's right to bring the action was at any time governed by a limitation period;*
>
> (l) for a cause of action based on sexual assault, *whether or not the person's right to bring the action was at any time governed by a limitation period.*
>
> * * * *
>
> **Tobacco Damages Recovery Act, S.B.C. 1977, c. 41**
>
> 15. (1) No action that is commenced within 2 years after the coming into force of this section by
>
> (a) the government,
>
> (b) a person, on his or her own behalf or on behalf of a class of persons, or

> (c) a personal representative of a deceased person on behalf of the spouse, parent or child, as defined in the Family Compensation Act, of the deceased person,
>
> for damages, including the cost of health care benefits, *alleged to have been caused by a tobacco related wrong is barred under the Limitation Act.*
>
> (2) Any action for damages alleged to have been caused by a tobacco related wrong *is revived if the action was dismissed before the coming into force of this section merely because it was held by a court to be barred or extinguished by the Limitation Act.*
>
> (*italics* added)

In the present circumstance, there is no such clear legislative expression in the *Act* such that a complaint that was statute-barred in the sense that it could not have been filed under the old *Act* is somehow revived and may be filed under the current *Act.* As noted earlier, there is nothing in section 128, or in any other provision of the *Act,* that purports to effect such a revival.

In support of their argument of retroactivity/retrospectivity, both counsel for the employees and for the Director rely on the Tribunal's decision in *Rescan* (BC EST #D007/97; Reconsideration No. D522/97), *United Automotive Distributors Ltd.* (BC EST #D218/97) and *Traderef Software* (BCEST #D267/97). However, in our view, none of these decisions are relevant to the instant appeal.

In *Rescan,* the employee's complaint was not statute-barred under either the former or the current *Act.* In *United Automotive,* the employee was terminated after the new *Act* came into force and the complaint was filed well within the time frame set out in subsection 74(3) of the new *Act.* In *Traderef Software* the complaint was filed under the new *Act,* although the termination of employment took place on July 8th, 1995 when the former *Act* was still in effect. Nevertheless, unlike the present situation, the complaint in *Traderef* was not statute-barred under either the former or the current *Act.*

While a timely complaint can lead to recovery of wages beyond those which would have been recoverable under the former *Act,* such recovery is only permissible where the complaint was filed in a timely fashion either under the former or the present *Act.* If the complaint was filed under the former *Act,* but no decision was made by the Director before the present *Act* came into effect, then the complaint is, for all purposes, treated as a complaint under the present *Act* [see subsection 128(3) of the *Act* and subsection 36(1)(b) of the *Limitation Act*].

Similarly, in the case of a timely complaint under the present *Act,* that complaint will treated for all purposes as a complaint under the present *Act* provided the complaint would have been timely

had it been filed under the former *Act* (see *Rescan* and *Traderef,* supra.). Where the complaint was filed and dealt with by the Director under the former *Act,* that *Act* will govern the complaint for all purposes, including appeal [see subsections 128(1) and (2) of the *Act*].

Finally, if the time for filing a complaint had fully accrued under the old *Act,* that now statute-barred complaint cannot be revived by the simple act of filing the complaint under the present *Act.* While it is open for the Legislature to revive such a statute-barred complaint, it can only do so by express language; we cannot find any evidence of such a legislative intention in the language of the present *Act.*

Accordingly, it follows that the Determination must be varied by deleting the claims of the following four individuals: Calvin Davies, Kelly O'Brien, Michael Sabberton and Bruce Tetrault.

Does training at the Fire Academy meet the statutory definition of "work" contained in section 1 of the Act?

Counsel for Surrey submits that even though our earlier decision confirmed that the complainant employees were "employees" under the *Act* while they were enrolled at the Fire Academy, they are nonetheless not entitled to any wages because they did not perform "work" for Surrey while studying at the Fire Academy.

The relevant statutory definitions, all contained in section 1 of the *Act,* are as follows:

> "employee" includes
>
> (a) a person, including a deceased person, receiving or entitled to wages for work performed for another,
>
> (b) a person an employer allows, directly or indirectly, to perform work normally performed by an employee,
>
> (c) a person being trained by an employer for the employer's business,
>
> (d) a person on leave from an employer, and
>
> (e) a person who has a right of recall;
>
> "employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;
>
> "wages" includes

> (a) salaries, commissions or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,
>
> (c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,
>
> (d) money required to be paid in accordance with a determination or an order of the tribunal, and
>
> (e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefit, to a fund, insurer or other person,
>
> but does not include
>
> (f) gratuities,
>
> (g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,
>
> (h) allowances or expenses, and
>
> (i) penalties;
>
> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.

There is no longer any issue regarding whether or not the complainants were "employees" while enrolled at the Fire Academy since our earlier Decision (BCEST #D411/97) confirmed the Director's Determination that they were. However, counsel for Surrey now says that the complainants are not entitled to wages at the statutory minimum rate of $7.00 per hour (see section 16 of the *Act)* because, while studying at the Fire Academy, the complainants did not "perform labour or services for an employer".

Ingenious though it may be, we cannot accede to this submission. As we noted in our earlier decision, the *Act* specifically contemplates that a person may be trained away from an employer's normal place of operations and still be an "employee". Further, a employee who is being trained for an employer's business need not provide any immediate net direct economic benefit to the employer during the training phase. Further, training may take place at the "employer's residence or elsewhere" and still constitute "work" as that latter term is defined in section 1 of the *Act.*

The grievance arbitration award in *Re Gibraltar Mines* (1977) 15 L.A.C. (2d) 8 (Bird), relied on by counsel for Surrey, is of little assistance here. That award turned on the particular language of

a "Letter of Understanding" negotiated between the employer and the union. Thus, a number of apprentices who were studying at provincial government trade schools during the currency of a lawful strike, were not entitled to a wage supplement under the terms of a retroactive collective bargaining agreement.

In our view, under the *Act*, so long as the individual is subject to the employer's direct or indirect supervision and control during the course of his or her training, it follows that any labour or services undertaken during in the course of training are "perform[ed] for [the] employer". In this case, however, we need go no further than reiterate the testimony of Deputy Chief Barnard that the training of Surrey recruits at the Fire Academy was of benefit to Surrey (see BCEST #D411/97, p. 12 at third paragraph).

If we were to accept counsel for Surrey's submission that employee's time spent in employer-mandated and directed "training" is not compensable unless some sort of direct economic benefit to the employer (other than the training *per se*) can be identified, then it would follow that many trainees would not be entitled to any wages for their "training hours". We do not believe that such a result is consistent with either the language or the spirit of the *Act.*

ORDER

Pursuant to section 115 of the *Act*, we order that the Determination be varied by deleting the claims of the following four individuals: Calvin Davies, Kelly O'Brien, Michael Sabberton and Bruce Tetrault.

It is our understanding that all of the issues raised by Surrey in their appeal have now been dealt with. We understand that there are, however, still some outstanding issues arising from the employees' appeal. Accordingly, the employees are hereby put on notice that unless they advise the Tribunal in writing, on or before Friday, March 13th, 1998, that they wish the balance of the issues raised in their appeal to be heard, their appeal with respect to those other issues will be dismissed as abandoned.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal

Geoffrey Crampton, *Chair*
Employment Standards Tribunal

Norma Edelman, *Registrar*