Employment Standards TRIBUNAL

An appeal

- by -

Dr. Thomas A. Routledge Inc.
("Routledge")

- 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: Michelle Alman

FILE No.: 2000/716

DATE OF DECISION: February 13, 2001

DECISION

OVERVIEW

This is an appeal brought pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Dr. Thomas A. Routledge Inc. ("Routledge") from a Determination issued September 21, 2000 by a delegate of the Director of Employment Standards ("the Director"). The Determination concluded that Routledge had contravened section 63 of the *Act* by failing to give its former employee, Kristine Merrifield ("Merrifield"), one week's written notice of termination or one week's pay in lieu of that notice.

Routledge appeals from the Determination on the ground that it has no liability for compensation for length of service to Merrifield because Merrifield did not work for it for three consecutive months. Routledge also raises vaguely an argument of unfairness in the information supplied to it by the Employment Standards Branch's ("the Branch") publications.

The parties made written submissions in these appeals. Routledge offered no reply submissions further to the Director's and Merrifield's submissions.

ISSUE

The issue to be decided is whether Merrifield worked for Routledge for more than three consecutive months and therefore entitled to one week's pay pursuant to section 63 of the *Act.*

THE FACTS AND ANALYSIS

Routledge operates the Coquitlam Dental Clinic. Merrifield worked for Routledge as a Certified Dental Assistant from March 20, 2000 until the end of her shift on June 19, 2000. Routledge alleges that it hires all of its employees subject to a three-month probationary period. During her probationary period, Merrifield took an approved period of two weeks of unpaid vacation leave. Routledge terminated Merrifield's employment at the end of her first day back at work. Routledge alleged that it understood June 19, 2000 to be the last day of the three-month period in which it could so act without incurring liability to Merrifield for length of service.

In its submissions Routledge asserts that its employment practices, and specifically its decision to terminate Merrifield's employment at the end of her workday on June 19, 2000, were guided by its review of the Branch's publications. Because it understood "three months is three months," Routledge believed that it had no obligation to pay Merrifield any severance pay or to give her any notice in lieu if she was dismissed before June 20, 2000.

The Director's delegate took the position in both the Determination and her submissions that Merrifield had completed three months of continuous employment at the end of her shift on June

19, 2000. The Director's delegate looked to provisions of the *Interpretation Act*, R.S.B.C. 1996, c. 238, in order to analyze how to count periods of time undefined in the *Act.* I agree that the *Act* has no definition of "after" or "month," and that it is proper to apply the *Interpretation Act* in such situations. I reproduce here those sections of the *Interpretation Act* which apply to the issue in this case:

> ***Definitions***
>
> ***1*** *In this Act, or in an enactment:*
>
> ***"Act"*** *means an Act of the Legislature, whether referred to as a statute, code or by any other name, and, when referring to past legislation, includes an ordinance or proclamation made before 1871, that has the force of law;*
>
> ***...***
>
> *"**enactment**" means an Act or a regulation or a portion of an Act or regulation;*
>
> ***Application***
>
> ***2*** *(1) Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.*
>
> ***Calculation of time or age***
>
> ***25*** *(1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.*
>
> ...
>
> (4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.
>
> (5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.
>
> ***Expressions defined***
>
> ***29*** *In an enactment:*
>
> ...
> ***"month"*** *means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day...*

The applicable portion of Section 63 of the *Act* states:

Liability resulting from length of service

> ***63*** *(1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.*

Routledge is unhappy that the Branch does not refer to the *Interpretation Act* in its publications, asserting that this omission left it in the position of acting without "Informed Consent." Routledge also states, "Of course ignorance is not a very good defense." In fact, ignorance is no defense at all at law. Routledge has no legitimate complaint with the Branch because it took steps in reliance upon its own understanding of the *Act* without reference to the *Interpretation Act.* The Branch is not required to give legal advice, and the fine line that Routledge chose to walk was not forced upon it. There is no merit in Routledge's argument that they were entitled to rely on their interpretation of the Branch's publication.

On the other hand, Routledge is correct in its assertion that it had no liability to Merrifield for length of service because it terminated her employment on June 19, 2000. I say this for two reasons. The first is that the combined effect of the *Interpretation Act's* section 25(5) and the definition of "month" in the *Interpretation Act's* section 29 results in the end date of Merrifield's three consecutive months of employment being June 19, 2000.

The counting of the three consecutive months begins on March 20, 2000, the first day Merrifield worked. Pursuant to the method required in the *Interpretation Act's* section 25(5), "...the first day must be excluded, and the last day included," one must exclude March 20, 2000 from the counted period of three months. March 20, 2000 remains the defining date for commencing the calculation of three months of continuous employment, but is itself excluded from the count.

According to the *Interpretation Act* definition of "month," one counts three months from March 20, 2000 by looking ahead three months to June 20, 2000, and then deducting a day. This is because a month does not end on its anniversary date, but at midnight of the day before. June 19, 2000 is therefore the end date for Merrifield's three consecutive months of employment. The first day *after* Merrifield's three consecutive months of employment would be June 20, 2000.

The second reason Routledge escapes liability under section 63(1) of the *Act* is that the *Act* specifically states that the liability for length of service arises "after" three consecutive months of work, and the *Act* specifically defines the term, "day." "After" is a simple word, and statutory interpretation principles require that plain words are to be given their plain meaning. "After" does not mean "simultaneously" or "as of" or "on." It means later than a given event or date. In the context of section 63(1) of the *Act*, "after" means that liability for length of service arises not **on** the last day of the three months of employment but on the first moment of the following day. This is in accordance, too, with the *Act's* section 1(1) definition of "day:"

1. Definitions--(1) ***In this Act:***

...

"day" *means a 24 hour period ending at midnight...*

Delivery of notice of termination on the last day of the section 63(1) required period of three months of consecutive employment, no matter how harsh an experience for the employee in receipt, is still effectively within the three month time span which precludes employer liability for length of service.

Our courts have wrestled with the application of section 25(5) and the section 29 definition of "month" in the *Interpretation Act* in several cases, and have found that "after" a certain event or time period means that the counting of time does not commence on the day of the cited event or during the time period itself: *Jim Pattison Industries Ltd. v. 1854 Holdings Ltd.* (1990), 52 B.C.L.R. (2d) 279, 76 D.L.R. (4th) 119, [1990] B.C.J. No. 2755 (B.C.C.A.)--notice to terminate a commercial lease was not given too early to be valid, as it was given after the expiry of the specified time period; and *Brant v. Brant*, [1986] B.C.J. No. 2133 (B.C.S.C.)--dismissal of a wills variation lawsuit which was commenced in error one day after the end of the time limit of 6 months after probate issued. The counting of the last day of a time period as within that time has led to the upholding of service of a writ of summons where it was served on the last day of its 12-month period of validity: *Findlay v. Briggs*, 55 B.C.L.R. (2d) 307, [1991] B.C.J. No. 962, 47 C.P.C. (2d) 20 (B.C.S.C.). To do otherwise would be to discount the last day, which is specifically to be included pursuant to section 25(5) of the *Interpretation Act.* So, too, has the Tribunal previously held that delivery of a complaint under the *Act* was validly made to the Branch on the last day of the 6-month limitation period for making a complaint: *Lonnie W. Schermerhorn*, B.C. E.S.T. #D205/98.

ORDER

Pursuant to section 115 of the *Act*, I hereby cancel the Determination issued September 21, 2000.

Michelle Alman
Michelle Alman
Adjudicator
Employment Standards Tribunal

MA/bls