Employment Standards TRIBUNAL

An appeal

- by -

Mary O'Rourke

- 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.:** 2001/762

**DATE OF DECISION:** March 11, 2002

# DECISION

## OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") by Mary O'Rourke ("O'Rourke") against a Determination issued by a delegate of the Director of Employment Standards on October 10, 2001. The delegate found that the University of Victoria (the "University") did not owe any wages to O'Rourke. O'Rourke appealed the Determination on the grounds she is owed overtime wages and interest accumulated on termination pay.

## ISSUE TO BE DECIDED

Is O'Rourke owed wages by the University?

## PRELIMINARY MATTER

O'Rourke says that the University's submission dated December 7, 2001 should not be considered on the appeal as it is out of time. The University says that O'Rourke's December 18, 2001 submission was unsolicited and is out of time. I have decided to allow both of these submissions. Counsel for the University is correct that the Tribunal invited the University to make its December 7, 2001 submission. With respect to O'Rourke's submission, the University had an opportunity to file a reply to it, and did so. Accordingly, I find no prejudice will result to the University by considering O'Rourke's last submission on the appeal.

## FACTS AND ARGUMENTS

O'Rourke worked at the University from 1981 to December 8, 2000. In 1991 she became the Program Director of Conference Management in the Division of Continuing Studies. In 1994/1995, the Professional Employees Association (the "PEA") was certified to represent professional staff, including O'Rourke, at the University.

O'Rourke filed a complaint at the Employment Standards Branch (the "Branch") on April 23, 2001 regarding overtime wages. Her claim was for the period 1991 to 1994. On July 3, 2001 she filed another complaint concerning a contravention of Section 70(3)(b) of the *Act*, which concerns the payment of money to the Director of Employment Standards that an employee is entitled to receive for an individual termination under a collective agreement.

The delegate found that he did not have jurisdiction regarding O'Rourke's claim for overtime. The delegate said that Section 80(1)(a) of the *Act* restricts recovery of wages to the period 24 months before the earlier of the date of a complaint or the termination of employment. He determined that the 24-month recovery period for O'Rourke was restricted to December 8, 1998 to December 8, 2000, the date of her layoff from the University. However, O'Rourke was not

claiming wages for this period. She was claiming for work performed in l991 to l994. Furthermore, the PEA was certified as the bargaining agent during the 24-month recovery period and therefore pursuant to Section 43(1) of the *Act* any dispute concerning overtime had to be resolved via the grievance provisions in the collective agreement.

The delegate also found that he did not have jurisdiction regarding O'Rourke's complaint under Section 70(3)(b) of the *Act*. The delegate stated that the PEA grieved O'Rourke's layoff and on June 11, 2001 it accepted a settlement on her behalf. O'Rourke subsequently filed a complaint against the PEA pursuant to Section 12 of the Labour Relations Code. The delegate said it was his understanding a settlement conference between the parties was set for November 15, 2001 and in light of the matter proceeding before the Labour Relations Board (the "Board"), he declined to continue with an investigation pursuant to Section 76(2)(e) of the *Act*. The delegate also found O'Rourke's complaint to be out of time. Her complaint was filed on July 3, 2001. Her employment was terminated on December 8, 2000 as per Section 63(5) of the *Act*. This period is in excess of six-months and therefore under Section 74 (3) of the *Act* her complaint is out of time.

O'Rourke says her claim is for banked overtime that she was foreclosed from taking as "compensatory time off" as a result of her conditions of employment and layoff in December 2000. She says because the University made a commitment to her that she would be able to take time off, the overtime did not become payable until her layoff in December 2000. Moreover, she is of the view that the recovery period for overtime is in excess of the 24-month period as found by the delegate. In support of her position, she cited an excerpt from the Branch's Interpretation Guidelines Manual, which says that vacation pay and banked overtime appear to be recoverable beyond the 24-month period because they are earned up to 2 years before they become payable. As well, she relies on the following Tribunal Decisions: *Creative Screen Arts Ltd.* (BCEST #D024/98), where, she says, the Tribunal allowed a claim for vacation pay earned 6 years prior to the filing of the complaint, and *TBD Forestry Services Ltd*. (BCEST #D288/00 and #D452/00). O'Rourke does not accept that under Section 42(4) of the Act, which states that banked overtime must be taken or paid out within 6 months of being earned, only allows an additional six months of wages to be recovered beyond the 24 months as set out in Section 80 (1)(a) of *Act*. She say imposing such a limit allows an employer to benefit and a worker to suffer as a result of the employer's continuing breach of Section 42(4) and this is inconsistent with the characterization of the *Act* as "remedial legislation" as set out in *TBD* #D288/00*, supra* and contrary to the principle that a wrongdoer should not profit by the wrongdoing. O'Rourke also says that by allowing her claim, there is no prejudice to the University, as it has always been aware she was working overtime and expected to be compensated for it. Furthermore she says Section 43 of the *Act* is not applicable and the delegate erred in failing to allow her to respond during the investigation. She wants the Tribunal to order the University to pay her overtime as determined by the Branch following its investigation.

As for the Section 70(3) complaint, O'Rourke says she received her termination pay on July 27, 2001. However, the payment did not include interest that would have accrued as per Section

70(4) of the *Act* had the University paid the funds to the Director in accordance with the *Act*. Her appeal is only with respect to the interest. She says the delegate has erred in concluding the matter is proceeding before the Board. A settlement conference was scheduled regarding her Section 12 complaint, but no settlement was reached and moreover her Section 12 complaint did not include the termination pay issue. Furthermore, she says the Board has no jurisdiction to consider the termination pay issue within a Section 12 complaint. She cites the Board's decision in *Werhun* (BCLRB No. B105/2001) in support of her position. She further says she was not given an opportunity to respond to the issue of her Section 12 complaint being inclusive of the termination pay issue nor was she given an opportunity to respond to the delegate's conclusions regarding the timeliness of her complaint. She submits her complaint is not out of time because she had 12 months of recall rights and her layoff could not be permanent until the end of the 12 months or December 8, 2001. Alternatively, a reasonable interpretation of Section 63(5) of the *Act* would be that she had 6 months to file a complaint from the date of the purported settlement on June 11, 2001, in which case her complaint is in time. Moreover, the delegate has erred insofar as Section 63(5) refers to the calculation of pay and is not applicable to the interpretation of Section 73(4) of the *Act*. O'Rourke requests that the Tribunal order the University to pay her the interest that would have accrued had it paid the termination pay to the Director of Employment Standards as per the *Act*.

The University agrees with the delegate that under Section 42(4) of the *Act*, the Branch can only consider the period June 8, l998 to December 8, 2000 regarding O'Rourke's overtime claim and she is not claiming for this period. The University further says the Tribunal's decision in *Creative supra* can be distinguished from this case for two reasons. First it is concerned with a claim for vacation pay and not overtime. Second, during the 24-month period preceding O'Rourke's termination of employment, she was governed by the collective agreement between the PEA and the University and the administration of overtime was covered by that agreement. Therefore, no unpaid overtime under the *Act* became "payable" during that period. Further, any dispute with regard to overtime during that period must be brought under the grievance procedure in the collective agreement and the Tribunal has no jurisdiction to address such a complaint.

Regarding the issue of interest, the University says O'Rourke's reliance on *Werhun, supra* does not assist her because in that case the Board addressed issues related to the union's conduct, *inter alia*, in not advancing a claim for group termination pay under Part of the *Act*. O'Rourke's Section 12 complaint deals with the PEA's decision to accept the University's settlement offer pertaining to grievances she filed under the collective agreement. One grievance dealt with issues concerning her layoff and severance pay is at issue in this grievance. The other grievance pertains to a claim for overtime. O'Rourke's Section 12 complaint does not allege that the PEA has failed to advance a claim under Part 8 of the *Act* and thus the *Werhun* decision is distinguishable. In addition, implicit in O'Rourke's Section 12 complaint is a claim for interest. If she succeeds with her Section 12 complaint, her grievances could be referred to arbitration and an arbitrator seized with a layoff grievance would have the jurisdiction to award interest on a monetary award related to severance pay. Accordingly the delegate was entitled to refuse to investigate O'Rourke's complaint as permitted by Section 76(2)(e) of the *Act*. Moreover, her

claim for interest is out of time. Her employment was terminated on December 8, 2000 and she did not file her complaint until July 3, 2001, which is outside the 6-month time limit.

**ANALYSIS**

The burden is on the Appellant to show that the Determination should be varied, cancelled or referred back to the delegate for further investigation. I am not satisfied that O'Rourke has met that burden with respect to the overtime issue. However, I am satisfied she has met that burden as regards the interest issue. I am not convinced the delegate was correct in refusing to investigate that matter and I am referring it back for further investigation.

Section 77 of the *Act* provides that the Director of Employment Standards (or her delegates) "…must make reasonable efforts to give a person under investigation an opportunity to respond." O'Rourke claims the delegate failed to give her an opportunity to respond "…to his interpretation of the facts and the law…" regarding her overtime claim. However, I am not satisfied that is the case. Prior to the issuance of the Determination, O'Rourke sent a fax to the delegate dated May 18, 2001, which indicates she had previous contact with the delegate; he had asked her to review the legislation and give him her thoughts; they had discussed a "time limit" regarding her claim; and that she was aware there was an issue regarding the 2 year recovery period. In my view, this fax establishes that the delegate made "reasonable" efforts to give O'Rourke an opportunity to respond and I will not set aside the Determination, as it relates to the overtime issue, on the basis that the delegate did not comply with Section 77 of the *Act*.

The pertinent provisions of the *Act* respecting the overtime issue are as follows:

> 80. Limit on amount of wages required to be paid - (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
> (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of employment, and
> (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination.
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> 17. Paydays - (1) At least semimonthly and within 8 days after the end of the pay period, a employer must pay to an employee all wages earned by the employee in a pay period.
> (2) Subsection (1) does not apply to
> (a) overtime wages credited to an employee's time bank,
> (b) statutory holiday pay credited to an employee's time bank, or
> (c) vacation pay.
>
> 42. Banking of overtime wages -(4)The employer must ensue that all overtime wages credited to an employee's time bank are paid to the employee, or

> taken as time off with pay, within 6 months after the overtime wages were earned.

Section 80 (1) of the *Act* clearly states that the recovery period for wages is limited to the amount that became payable in the 24-month period prior to the earlier of the date of a complaint or the termination of employment. O'Rourke filed her complaint on April 23, 2000 and her last day of work was December 8, 2000. Accordingly, I agree with the delegate that the 24-month recovery period runs from December 8, l998 to December 8, 2000. Only those wages which are payable in this period can be recovered by the Branch.

Section 17 states that wages earned in a pay period must be paid at least semimonthly and within 8 days of the pay period. There are some exceptions. One exception concerns vacation pay and one is where there is a time bank for overtime. Section 42(4) of the *Act* states that overtime wages in a time bank are to be paid (or taken as time off) within 6 months after the overtime was earned. As a result, when considering Section 42(4) together with Section 80(1) of the *Act*, the recovery period remains at 24 months, but within that period the amount payable can include banked overtime earned up to 6 months prior to the recovery period.

In O'Rourke's case, I accept that she had a time bank for overtime. Neither the University nor the delegate disputes this. As a result, any overtime she earned in the 6 month period June 8, l998 to December 8, l998 would be payable in the recovery period of December 8, l998 to December 8, 2000. O'Rourke's claim, however, is outside this period. Overtime earned during the period l991 to l994 was not payable in December 2000. Overtime earned in the last pay period in l994, with no time bank, was payable within 8 days after the pay period. Overtime earned on the very last day in l994, with a time bank, was payable at the latest by the end of June l995. I agree with the delegate that he does not have jurisdiction to recover wages for the period l991 to l994, as they were not payable in the 24-month recovery period. O'Rourke says this is wrong and the University will not be prejudiced by having to pay her claim because it has known all along of its liability. Whether that is the case or not, the statute clearly prevents her from recovering wages for the period 1991-1994. The *Act* is remedial legislation, but the remedies set out in it have limits. O'Rourke's remedy under the *Act* is limited to recovering wages that were payable in her last 2 years of employment. I also agree with the delegate that given O'Rourke was covered by a collective agreement during the 24-month recovery period, the grievance procedures of the collective agreement would apply to any dispute about wages that might have been payable during this period (see *Rand Reinforcing Ltd.* BCEST#D123/01 upheld on reconsideration in BCEST#D612/01).

O'Rourke relies on the Tribunal's decision in *Creative supra* to support her views on the recovery period for overtime wages. In that decision the Adjudicator does not state, as O'Rourke claims, that the employee could claim vacation pay earned some six years prior to her complaint. Rather, he states the employee could only recover vacation pay that was payable in the last 24-months of employment. Under Sections 57 and 58 of the *Act* vacation pay is payable up to 12 months after it is earned. The Adjudicator specifically states that the vacation pay earned in the

employees second year of employment was not finally payable until the end of her third year of employment and the Director could collect that amount as it came within the 24-month recovery period. The Director could not collect the vacation pay earned in the employee's first year of employment as it was payable outside the recovery period. This analysis of the relationship between Sections 57 and 58 of the *Act* and Section 80(1) has been upheld by the Tribunal in several other decisions including *Tumbleweed Transport Ltd.* BCEST#D301/01 and *Cariboo Resorts Ltd.*BCEST#128/01. The analysis of the relationship between Sections 42(4) and 80(1) of the *Act* in this decision is consistent with the position taken by the Tribunal in the foregoing decisions respecting vacation pay. The focus is on what wages (whether vacation pay or overtime) are payable in the last 24 months of employment. As indicated previously, O'Rourke is only entitled to recover banked overtime wages that became payable in her last 24-months of employment. The Tribunal's decision in *TBD* #D452/00 *supra* also does not support O'Rourke's view of the recovery period. In that case the Adjudicator found that wages paid to an employee was for work performed in the 24-month recovery period and not for work prior to the period and thus could be deducted from the amount determined to be owing to the employee. This decision does not stand for the proposition that the Branch can collect any or all banked overtime earned prior to the recovery period.

O'Rourke also relies on the Branch's Interpretation Guidelines Manual to support her view. Having read the pertinent section, I find it unhelpful and incorrect insofar as, for example, overtime cannot be banked for 2 years but only 6 months. In any event, the Branch's Interpretation Guidelines Manual does not take precedence over Tribunal decisions.

For all of the above reasons, O'Rourke's appeal on the overtime issue must fail.

With respect to the issue concerning interest, as indicated earlier, I am convinced that this matter should be referred back to the delegate for further investigation.

O'Rourke's claim for interest relates to Section 70 of the Act which provides:

> 70. Individual layoff under collective agreement --(1) If an employee is covered by a collective agreement that includes individual termination and right of recall provisions and the employee is laid off, the employee must choose
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> (a) to be paid the amount the employee is entitled to receive for an individual termination under the collective agreement, or
>
> (b) to maintain the employee's right of recall under the collective agreement.
>
> (2) If the employee chooses to be paid the amount referred to in subsection (1)(a) the employer must pay that amount within 48 hours.
>
> (3) If the employee chooses to maintain the right of recall or does not after 13 weeks of layoff make a choice, the employer must pay the amount

> referred to in subsection (1)(a) to the director, in trust, within 48 hours after
> (a) the choice is made under subsection (1), or
> (b) the end of the 13 weeks.
>
> (4) An amount received in trust by the director earns interest at the prescribed rate from the date the amount is deposited in a savings institution to the date of payment to the person entitled.
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> (5) The director must pay the amount received under this section, plus interest earned on that amount,
> (a) to the employer, if the employee accepts employment made available under the right of recall, or
> (b) to the employee, if the employee renounces the right of recall or is not recalled to employment within the period specified in the collective agreement.
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> (6) On accepting money paid under this section, the employee is deemed to have abandoned
> (a) any right to be recalled to employment by that employer, and
> (b) any right to displace an employee of another employer covered by the same collective agreement as the employer who made payment.
>
> (7) On accepting employment under the right of recall, the employee is deemed to have abandoned the right to payment under this section.

O'Rourke claims that the University did not comply with Section 70(3)(b) of the *Act* in that it never deposited her termination pay with the Director of Employment Standards and, thus, when she finally did receive her termination pay, it did not include interest as per Section 70(4) above.

The delegate refused to investigate O'Rourke's complaint for two reasons. The first reason, in its entirety, is that O'Rourke commenced a Section 12 complaint against the PEA regarding a settlement it had accepted on her behalf as a result of her layoff. The delegate relied on Section 76(2)(e) of the *Act*, which states:

> The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if…a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator.

The other reason the delegate refused to investigate O'Rourke's complaint was that it was out of time insofar as her complaint was filed in excess of 6 months after her termination of employment on December 8, 2000. He relied on Sections 74(3) and 63(5) of the *Act*, which state:

> Section 74. Complaint and Time Limit
>
> (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.
>
> Section 63. Liability resulting from length of service
>
> (5) For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

In my view, it is not established that O'Rourke commenced another proceeding on the subject matter of interest. O'Rourke says she has not commenced a proceeding at the Board regarding termination pay and she says she has opted to pursue the matter of interest through the Branch. She further says that the delegate never gave her an opportunity to respond to his conclusion that she had commenced another proceeding on the same matter at the Board and there is absolutely nothing before which contradicts this claim. There is nothing in the Determination or in his submission to the Tribunal, which indicates the delegate considered O'Rourke's position, particularly as it relates to the interest issue. That is, for example, there is no analysis of whether he accepts the University's position, which was made on the appeal and is not found in the Determination, that interest forms part of her Section 12 complaint; there is no consideration of whether the settlement is void under Section 4 of the *Act* if interest was not factored in; and there is no determination concerning the issue of whether the University contravened the *Act* by failing to deposit the termination pay with the Director of Employment Standards in the first place. The delegate must consider and determine the relative merit of the both parties' assertions. In this case, it appears to me the delegate has not considered O'Rourke's position, it is not clear whether he fully explored the University's position and I am not satisfied he has turned his mind to other pertinent matters such as the Section 4 issue or whether there has been a violation of Section 70(3)(b) of the *Act* notwithstanding a Section 12 complaint before the Board. In these circumstances, it is appropriate to refer the matter back to the delegate. It is not for the Tribunal as an appellate body, to "investigate" the complaint. That is the responsibility of the delegate.

I am also not satisfied that O'Rourke's complaint is out of time. Section 63 of the *Act* concerns an employer's liability for compensation based on an employee's length of service. Section 63(5) of the *Act* says that at the end of a temporary layoff, the last day of work is the termination date. I agree with O'Rourke that this date of termination is for the purpose of calculating the amount of compensation that an employee is entitled to upon termination of employment. The termination date referred to in Section 63(5) of the *Act* does not establish the last day of employment, the date which triggers the time limit under Section 74(3) of the *Act*. As I stated in Tribunal Decision *James Cullen* BCEST#D243/00:

> …when an employee is on a temporary layoff, the employment relationship does not cease until the temporary layoff ends. The employee's last day of

> employment is not when the employee last worked but when the temporary layoff ends. Pursuant to Section 74(3) of the Act, the six-month time limit to file a complaint at the Branch commences at that point.

O'Rourke's last day of work was December 8, 2000. The delegate erred in concluding this was her last day of employment in order to establish the timeliness of her complaint. Rather, the last day of employment was when her lay off ended or when her employment status was finalized in some other manner. In my view, it is at that point she had up to 6 months to file a complaint.

A temporary layoff under the *Act* is defined as follows:

> Section 1. Definitions
>
> "temporary layoff" means
>
> (a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and
>
> (b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks

O'Rourke was covered by a collective agreement when she was laid off work. From the material on file it appears O'Rourke had recall rights. There are issues concerning the status of those recall rights. There is a question whether the date of the settlement (or "purported" settlement) was her last day of employment. There is also an issue about whether the delegate gave O'Rourke the opportunity to respond to the timeliness issue. Again, there is nothing before me, which contradicts O'Rourke's claim that the delegate never gave her an opportunity to respond to the timeliness issue. Consequently, I am also referring this matter back to the delegate to determine when O'Rourke's employment actually ended (rather than when she last worked) and from there to establish whether her complaint is timely.

**ORDER**

Pursuant to Section 115 of the Act, I order that the Determination is confirmed as it relates to the overtime issue, but the interest issue is referred back to the delegate for further investigation.

**Norma Edelman**
**Adjudicator**
**Employment Standards Tribunal**