

EMPLOYMENT STANDARDS TRIBUNAL
In the Matter of an Appeal Pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

- by -

JACK W. SIRRS
("Sirrs")

- of a Determination issued by -

THE DIRECTOR OF EMPLOYMENT STANDARDS
(the "Director")

ADJUDICATOR: Ian Lawson

FILE No.: 97/785

DATE OF DECISION: April 7, 1998

DECISION

OVERVIEW

This is an appeal by Jack W. Sirrs ("Sirrs") pursuant to s. 112 of the *Act*. The appeal is from a Determination issued by Jennifer Ip, a delegate of the Director of Employment Standards on October 7, 1997. The Determination held that the Director refused to reopen a complaint filed by Sirrs against Assured Card Corporation ("Assured") on August 6, 1996

Sirrs filed an appeal on October 28, 1997 and the parties were allowed until December 3, 1997 to make submissions. The appeal is now decided without an oral hearing, on the basis of written submissions and the record before the Tribunal.

FACTS

Sirrs made a complaint with the director on August 1, 1996 that he had not been paid wages by Assured. This company was apparently in financial difficulty and had ceased operations, and Sirrs was so advised by the Director in October, 1996. Sirrs was also advised that in this situation the Director would likely pursue the company directors personally for the unpaid wages. According to Ms. Ip, Sirrs then stated to her the following, in her words:

"You then advised me that you are a personal friend of Jim Kovacs and Dokken Maynard, directors/officers of the company and that you were still seeing them. You also advised me that you would contact them directly to resolve the issue, instead of pursuing your claim through the Employment Standards Branch."

Ms. Ip then apparently advised Sirrs that she would discontinue the investigation of his complaint and his file would be closed. In the meantime, determinations were issued against the company and its directors/officers on behalf of other employees who were owed wages.

The Determination then sets out the following facts, addressed to Sirrs:

"Since our telephone conversation in October, 1996, you have not contacted me until September 12, 1997, approximately one year later. During our conversation of September 12, 1997, you advised me that you did try to contact Jim Kovacs and Dokken Maynard regarding the unpaid wages. You sent them certified mail and left phone messages. Since they did not respond to your letters or phone calls, you contacted me and requested this office to reopen your file."

For his part, Sirrs submits on the appeal that during the intervening period of time he was under the impression that the Director was making attempts to secure wages on behalf of other company employees, and as noted, he had attempted to contact the directors by mail.

I note that on August 6, 1996, the Director sent a form letter to Sirrs acknowledging his complaint and containing the following paragraphs:

Due to the volume of complaints being received in this office, we regret that it may be up to another twelve weeks before an investigation of your complaint can commence.

We encourage you to contact the employer directly and make every effort to resolve your complaint.

ISSUE TO BE DECIDED

This appeal requires me to decide whether the Director properly declined to reopen Sirrs's file and continue the investigation of his complaint.

ANALYSIS

Section 76 of the *Act* imposes a positive obligation on the Director to investigate a written complaint filed in time under section 74, and then identifies the circumstances under which an investigation may be stopped or postponed:

- 76.** (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
- (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
- (a) the complaint is not made within the time limit in section 74(3) or (4),
 - (b) this Act does not apply to the complaint,
 - (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
 - (d) there is not enough evidence to prove the complaint,
 - (e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,
 - (f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or
 - (g) the dispute that caused the complaint is resolved.

Common sense dictates that the Director may close a file at the request of a complainant and I do not interpret the omission of such power from section 76(2) as creating an obligation that the Director investigate contrary to a complainant's wishes. When the Director closes a file before the investigation is completed, however, common sense and administrative fairness dictate that this should not cause any disadvantage or prejudice to the complainant. If the Director closes a file at the request of the complainant who later requests that it be reopened, it is similarly reasonable to expect that the Director's decision should be based on common sense and fairness.

In the present case, Sirrs advised Ms. Ip that he wanted to try on his own to resolve his complaint directly with the company and its directors/officers. His efforts in this regard were encouraged by the Director, who advised Sirrs that 3 months could elapse before an investigation was even commenced. The precise content of Sirrs' conversation with Ms. Ip in October, 1996 has not been set out for me, and I am left only with Ms. Ip's relation of the conversation as set out above. Sirrs does not take issue with Ms. Ip's version. There is some ambiguity as to whether Sirrs advised Ms. Ip that he was abandoning the complaint, or whether he merely wished to try on his own for a while to collect the wages owing to him. I am satisfied that Sirrs was not abandoning his claim to unpaid wages, as he clearly was desirous of pursuing these on his own. He may have been

influenced in this regard by the Director's investigation to continue his own efforts to resolve the matter. He felt confident that his personal relationship with the directors/officers would produce results.

In his written submissions, however, Sirrs attaches a copy of a demand letter he sent to Maynard Dokken on August 2, 1996, which he notes was returned to him unopened on September 19, 1996. I can reach no other conclusion than that this single letter is the one Sirrs mentions as being part of his effort to collect his wages during the intervening year in question.

I am not prepared to accept that if a complainant advises the Director to discontinue a complaint, the Director may with impunity refuse to reopen it when later requested to do so. A refusal to reopen an otherwise valid complaint should be made fairly and reasonably. In the present case, however, I am satisfied the Director's decision is fair and reasonable. If Sirrs was aware in September, 1996 that his registered letter was returned unopened, and the next month he advised Ms. Ip he wished to continue his own efforts to collect the wages, it is fair and reasonable that the Director may decline to reopen the investigation after nearly a year has elapsed. The Director might rely in this regard on paragraphs (a), (c) or (g) of section 76(2) of the *Act*, which allows cessation of an investigation for lack of timeliness, frivolousness or if the dispute has been resolved. Had Sirrs's request to reopen been made sooner, it might have been fair and reasonable for the Director to recommence the investigation. A year, however, is twice the limitation period for filing complaints and in the circumstances is an unreasonably long period of time to elapse between the time a complaint is closed and reopened and defeats one of the express purposes of the *Act* in section 2, to provide fair and efficient procedures for resolving disputes under the *Act*.

ORDER

After carefully considering the evidence and argument, I find that the Determination made by Jennifer Ip is correct and the appeal should be dismissed. Pursuant to s. 115 of the Act, I order that the Determination dated October 7, 1996 is confirmed.

**Ian Lawson
Adjudicator
Employment Standards Tribunal**