

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 -

Ted Ramsey dba R & T Lead
("employer")

of a Determination issued by

The Director of Employment Standards
(the "Director")

ADJUDICATOR:	Paul E. Love
FILE NO.:	98/761
DATE OF HEARING :	March 17, 1999
DATE OF DECISION:	April 14, 1999

DECISION

APPEARANCES:

Ted Ramsey

Attaea Wagner

Kevin Molnar, for the Director

OVERVIEW

This is an appeal by the employer Ted Ramsey doing business as R & T Lead (the “employer”), of a Determination dated November 27, 1998 which found that the employer failed to pay wages to Attaea Wagner (the “employee”) in accordance with the *Act* and compensation for length of service. The issues on the appeal were whether the employee had complied with the 6 month limitation for filing the complaint after the termination of employment, and whether the Delegate erred in his findings with respect to the hourly rate of the employee and the hours worked. The final issue is whether a remedy should lie for a lengthy delay in the issuance of the Determination by the Delegate.

ISSUES TO BE DECIDED

1. Did the employee make the complaint within 6 months as provided in section 74(3) of the *Act*?
2. Did the Director’s delegate err in his finding that the employee was entitled to be paid at the rate of \$16.00 per hour?
3. Was there an error in the calculations of wages made by the Director’s Delegate?
4. Is the employer entitled to any remedy for a delay in the issuance of the Determination?

FACTS

The employer was engaged in providing services to the Ministry of Forests for improvement of forest recreational services in the Terrace area. The work was on a project basis, and there was some uncertainty in the budgets of the Ministry. He employed Ms. Wagner on various projects. There was an employment relationship between these parties which commenced on May 7, 1993. It was common for Ms. Wagner to be laid off during the winter months. Mr. Ramsey testified that generally there was no work during the winter months.

On or about November 28, 1995, the employer issued a record of employment to Ms. Wagner indicating that she was laid off due to a shortage of work. The date of recall was unknown. Mr. Ramsey was satisfied with Ms. Wagner's work, and did intend to recall her, if there was work available for her. Ms. Wagner was recalled to work and drove a truck down to Vancouver for the employer in March of 1996. Ms. Wagner was recalled by the employer for a one week period of May 17 to 23, 1996. Ms. Wagner stated that she had numerous contacts with Mr. Ramsey about work prior to May of 1996. She concluded by July that she was not going to be recalled by the employer, and in July of 1996 she filed a complaint with the Director of Employment Standards.

The employee was paid from the time that she arrived at the employer's house, until the time that she returned in the evening. She was required to be available to perform job duties in the morning before traveling to the work site. The employer was under the impression that he was not required to pay overtime wages on travel time, and that his legal obligation was to pay overtime wages just on actual time the employee performed job duties.

There was a substantial delay in the issuance of the Determination. The Director's delegate advised the Tribunal that the delay could be attributed to the lack of proper records submitted by the employer which delayed and frustrated the investigation, a new issue which related to the limitation period for the filing of complaints, and the work load of the Delegate.

The employer repeatedly volunteered during the course of the hearing that his records were in a mess, and admitted that certain documents were not disclosed to the Delegate prior to the making of the Determination.

ANALYSIS

In this appeal by the employer, the employer must demonstrate an error in the Determination such that I should vary or cancel the Determination. I have dealt with each of the issues below.

Issue # 1: The Six Month Limitation

The first issue in this case is whether the employee is out of time with regard to the complaint made. The employer says on any reading of the *Act* the complaint was made more than 6 months after the last day of work, and the employee is out of time.

The relevant section of the *Act* is section 74:

An employee, former employee or other person may complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of the *Act*,

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.

The employer is the person who is in the position to make known to the employee whether her status is terminated or laid off. It was open to the employer to advise Ms. Wagner that she was to be laid off with no prospect of recall. The employer says that this is something that might cause a problem with Employment Insurance. There is a distinction between a layoff with no prospect of recall due to lack of work and a termination for cause. It also appears that the employer was intending to recall Ms. Wagner to work, he was pleased with her work, but was uncertain whether there would be project funding available from the Ministry of Forests and was also uncertain whether he would be continuing on with this work given his back problem.

Ordinarily where an employee is advised that she is terminated, the time periods will run from the date of termination. In my view, a laid off employee is still an employee until the layoff becomes a termination by operation of s. 1 of the *Act*. Under the employment standards legislation an employee who was laid off on a temporary basis cannot make a complaint under the *Act* for compensation for length of service until 13 weeks after the date of last work. An employee who has an ongoing complaint, for example for breach of the overtime provisions, or a claim for non-payment of wages is not required to bring these complaints within 6 months of the date when the incident arose. The employee can elect to bring the complaint within 6 months after the date of termination. The *Act* encourages employees to make any complaints arising during an employment relationship within a reasonable time after termination.

The Delegate found that there was a temporary lay-off of Ms. Wagner, on the basis that she was laid off due to a shortage of work with an unknown date of return. The Delegate found that Ramsey lead Wagner to believe that Wagner would be recalled, and that Wagner was recalled. In section 1 of the *Act*, a temporary lay-off is defined as

(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

In section 1 of the *Act*, a termination of employment includes a layoff other than a temporary layoff.

In my view the purpose of section 63(5) of the *Act* is to provide the employer and employee, with some clarity in the event that the employer does not clearly specify that an employee is terminated. An employee is considered to be laid off after 13 weeks. The termination is considered to be effective as of the date of the layoff for the purpose of calculating the amount of the entitlement of the employee for compensation for length of service, and vacation pay. The compensation for length of service is calculated as of the date the layoff commenced. The amount of the compensation, therefore is not "muddied" by the period of layoff.

The intent of the *Act* also appears to be to provide for the employee to have six months to make a complaint under the *Act*. If the argument of the employer is accepted, an employee who is terminated outright by an employer has 6 months to file a complaint. If an employee is not told that she is terminated, she would have to wait 13 weeks before she can file a complaint and then would have to file the complaint within another 11 weeks. One half of the complaint period would be effectively removed from the complainant because an employer chose not to specify clearly whether the employee was permanently laid off or indefinitely laid off with a prospect of recall.

The Delegate urges that I interpret section 73(4) of the *Act* on the basis that the time commences to run at the end of the 13 week period following the termination where the employee is not recalled from a temporary layoff. This would be the earliest date on which an employee could pursue remedies under the *Act* where the employee had been subjected to a temporary layoff. On this interpretation of the *Act*, Ms. Wagner would have filed her complaint in time.

An alternative interpretation is that the time commences to run when the employee reasonable knows that she has been terminated. On the facts of this case, while the employee had no contractual right to recall, the employee still reasonably expected to be recalled after the 13 week period expired. On the facts of this case, Ms. Wagner was expecting to be recalled and was recalled from a temporary layoff in March and in May of 1996. She gave evidence that she filed her complaint when she became aware that she would not be recalled by the employer. This was sometime in July of 1996.

In my view, time does not commence to run until the employee becomes aware of the termination. Generally this will be on the date of termination, or in the case of a temporary lay-off that becomes permanent, on the first day that the employee becomes eligible to file a complaint for compensation for loss of service under the *Act*. This will generally be 13 weeks after the date of the last employment. This complaint was therefore made within the six month time period.

Issue # 2: Errors made with Regard to Amount of Wages Due and Owing

During the cross-examination of the employer by the Director's delegate, it became apparent that the employer had filed in its appeal submission documents which he had not produced to the Director's delegate during the course of the investigation. The employer failed to disclose the following records to the Delegate and included the following items in the appeal submission to the Tribunal:

- time cards prepared by the employee
- summary of time sheets
- pay cheques

In accordance with *Kaiser Stables Ltd.*, BC EST #D058/97 I decline to consider the records which were not disclosed to the Delegate to determine if the Delegate erred in the Determination.

An appellant is not permitted to lie in the weeds, and produce on appeal those documents which were within his possession and should have been produced at an earlier time.

The Hourly Rate

The employer submits that the entire Determination is in error because the Delegate assumed that the employee earned \$16.00 per hour rather than 13.50 per hour. The employer apparently kept no records as to the rate of pay of the employee. An employer is required to keep this record pursuant to s. 28 of the *Act*. In his appeal documents to the Tribunal the employer submitted a payroll summary, which was altered from the original provided to the Director's delegate. The unaltered version was marked as Exhibit "4". A time sheet for Ms. Wagner for the period May 10 to May 20 (part of Exhibit "2") was also altered by the employer. These documents were altered to insert \$13.50 per hour as the rate of pay.

It is apparent that the employee did earn \$16.00 per hour in 1996. Ms. Wagner told the Director's delegate that her rate of pay was \$16.00. At the time of this hearing she was uncertain whether her rate was \$13.50 or \$16.00 per hour. I note that almost 3 years has passed since the time period in issue in this Determination. The Delegate noted that the correct amount of the hourly pay appeared to be \$16.00 per hour.

The only evidence of the \$13.50 per hour rate was on the complaint form filled out by the employee. The employer pointed out that if the rate was \$13.50 per hour he would have overpaid the employee by an amount of almost \$3,000. I conclude that the amount of \$13.50 per hour was an error made by the employee in the completion of the complaint form. In light of the lack of evidence adduced and the altered evidence before me, I am not persuaded by the employer that the Delegate erred in his finding of fact concerning the hourly rate.

The Hours Worked

The employer disputes that the employee worked all the hours as found by the Director's delegate. The employer says that the Delegate should have used actual records, (time diaries) rather than making assumptions. The employer, however, did not disclose all the relevant documents. The Delegate did his best with the documents produced. Any assumptions that were made, appear to be reasonably made, based on the information before the Delegate. The Delegate admits to an error which arises from an assumption that work for "Cypress" was at a location rather than for a separate employer. The employee and employer confirm that Cypress was a separate employer. The Director's delegate made a further adjustment to the compensation for loss of service. I was not shown any errors by the employer other than errors that relate to Cypress, which are conceded by the Director's delegate and by the employee.

During the course of the hearing the employer volunteered, on numerous occasions, that his record keeping was a mess. He says that the reason his records were a mess was that he had a bookkeeper who received an undiagnosed head injury in a motor vehicle collision during 1994. This problem was not discovered until late 1995 or 1996.

I am not persuaded that the employer has established any error made by the Delegate in calculating the amount of hours and overtime hours worked.

Issue # 3: Compensation for Loss of Service

The Delegate determined that Ms. Wagner was entitled to compensation for length of service. The employer disputes this finding but offers no evidence from which I can conclude that an error was made by the Delegate, save and accept for an arithmetic error. The Delegate admits that the amount for compensation for length of service should not have included overtime amounts or vacation pay entitlements. At the hearing the Delegate provided me with corrected calculations. The amount determined to be due and owing by the employer to Ms. Wagner, corrected in accordance with the calculations of the Director's delegate, is \$2,351.57.

Issue #4: Remedy for Delay:

The employer suggests that I should cancel the Determination because of the delay by the Director's Delegate in coming to a Determination. I note that part of the problem in this case was the lack of record keeping by the employer, and the failure by the employer to transmit relevant evidence to the Delegate. The employer contributed to the delay. There is no evidence that the employee contributed to the delay. I am told that part of the reason for the delay is the backlog of decisions. The Delegate advised me that he handles 250 - 300/350 cases per year, and carries 194 - 200 cases at any particular time. There are two Employment Standards Officers in the Terrace office. It is unfortunate that this matter was not dealt with in a more expeditious fashion. There was no evidence of prejudice to the employer from the delay in this matter. The employee would be clearly prejudiced by the cancellation of the Determination. I am not prepared to cancel the Determination as requested by the employer.

I note that the employer did not make application pursuant to the Charter of Rights and Freedoms, and I have not considered jurisprudence in this area because the application was not framed as a Charter application.

Interest:

The employer has suggested that since there has been delay in the making of the Determination he should not have to pay interest on the award. The Tribunal is required to apply s. 88 of the *Act*. This section provides that interest is payable at the prescribed date. I have no jurisdiction to decline to award interest. I would not have declined interest in any event as the employee did not contribute to any delay in this matter, and she has been kept out of her money due to delays on the part of the Delegate and the employer. The employer has had the use of Ms. Wagner's money in the meantime.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination made November 27, 1998 is varied to provide that the employer shall pay the sum of \$2,351.57, together with interest calculated in accordance with Section 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal