

An appeal

- by -

Collin Brown
(the "Appellant")

- 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: Wayne R. Carkner

FILE No.: 2003A/37

DATE OF DECISION: April 15, 2003

DECISION

OVERVIEW

This is an appeal by Colin Brown (the “Appellant”) pursuant to Section 112 of the *Employment Standards Act* (the “Act”) from a Determination, dated January 10, 2003 (the “Determination”), by a Delegate of the Director of Employment Standards (the “Director”).

In the exercise of the Tribunal’s authority under Section 107 of the *Act* and, at the request of the Appellant, this appeal can be addressed through written submissions.

The Director determined that Bayside Forming Ltd, (the “Employer”) had not contravened the *Act* as a result of a complaint not having been delivered to an office of the Employment Standards Branch (the “Branch”) within the 6 month, period following the Appellant’s last day of employment with the Employer, pursuant to Section 74 of the *Act*.

The Appellant alleges that his Union Representative delivered the complaint to an office of the Branch within the time limits and that the Branch had mishandled or misplaced the complaint. The Appellant requests that the Determination be cancelled and that the Director be directed to process the complaint.

ISSUE

Did the Director err when it was determined that no authority existed to process the Appellant’s complaint?

EVIDENCE

The Determination under appeal here was a result of a complaint filed by the Appellant on October 17, 2002.

The Appellant worked for the Employer from August 1, 2001 until March 20, 2002. The Appellant stated, in his submission, that he had received the complaint application forms, filled them out and delivered them to his union representative to process. Based on a letter contained in the Director’s record, Jan Noster, the Appellant’s Union Representative, alleges that he and another representative delivered complaints to the Burnaby Branch Office on March 7, 2002. Mr. Noster’s letter stated that he had then called the Branch several days later and was informed that the Surrey Branch Office would handle the investigation of the complaint, as the Employer was located in that district. Mr. Noster’s letter went on to state that he delivered the rest of the complaints to that office and that in total 8 complaints were delivered to the Branch.

The evidence of Mr. Noster, outlined in the Determination, was that he originally informed the Delegate that he had copies of the original complaint that he alleged to have filed on the Appellant’s behalf, but later stated that he could not find the copy.

The Delegate, in his written submission, outlined all the complaints received from the Appellant’s union in the first six months of 2002, there were a total of four. The first complaint was received in the Burnaby

office on March 7, 2002. The second and third complaints were received in the Surrey office on April 22, 2002. The fourth complaint was received in the Vancouver office on June 24, 2002. The Delegate submits that the complaints received by the Branch in the first six months were not received in the timeframe or method alleged by the Union.

The Appellant's submission stated that the Union had processed his complaint on March 7, 2002 and that the Branch must have misplaced the complaint and that he should not be penalized for the Branch's mistake. The Appellant further stated that the October 17, 2002 complaint was filed within one month of the time limits and that he should be granted relief from the time limits in this instance.

ANALYSIS

In this appeal the burden of proof falls to the Appellant to demonstrate that the Delegate has erred to the extent that I should vary or cancel the Determination.

The issue before me is to determine whether or not a previous complaint was filed on behalf of the Appellant by his union representative within the specified timeframe under Section 74 of the *Act*. If the answer to this question is in the negative the second issue to be determined is whether or not I should grant relief from the time limits to the Appellant as the second complaint was filed within one month of the expiry date of the time limits.

Turning to the 1st issue, the evidence is contradictory. The union representative's letter dated October 16, 2002 clearly outlines the position that more than 1 complaint was delivered to the Burnaby Branch office on March 7, 2002 and that the rest of the complaints were delivered to the Surrey Branch office, totaling 8 complaints. The Delegate's submission stated that after reviewing the Employment Standards Branch records for all complaint applications from the union for the first six months of 2002 the Delegate found that only four complaints were received; one on March 7, 2002 at the Burnaby office, two on April 22, 2002 at the Surrey office and one on June 24, 2002 at the Vancouver office. The union failed to produce any copies of the complaints or any other hard evidence to substantiate the existence of the four alleged complaints that weren't processed. The Appellant also failed to produce any evidence of his original complaint stating only that he had delivered it to his union representative.

I find that the Employment Standards Branch records are credible and that these records substantially negate the credibility of the evidence provided by the union as the time frames of the complaints and the locations the complaints were filed differ from the union evidence. Applying the test of "the balance of probabilities" I must conclude that the Appellant's complaint was not delivered to the Branch's office until October 17, 2002.

I now turn to the 2nd issue, whether or not I should grant the Appellant relief from the time limits under Section 74 of the Code.

Section 74 (2) & (3) of the code read:

"(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(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."

The language in subsections (2) & (3) contain the word “must” and are therefore mandatory in nature. Based on this language I find that I have no jurisdiction to grant the Appellant relief from the mandatory time limits established under the *Act*.

The Delegate properly found that he had no jurisdiction to process the Appellant’s complaint.

The appeal is denied.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated January 10, 2003 be confirmed.

Wayne R. Carkner
Adjudicator
Employment Standards Tribunal