



An appeal

- by -

Gerhard Walter
("Walter")

- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2005A/146

DATE OF DECISION: October 26, 2005

DECISION

SUBMISSIONS

Gerhard Walter	on his own behalf
Peter J. Roberts	on behalf of Kispiox Forest Products Ltd.
Amanda Welch	on behalf of the Director

OVERVIEW

1. This is an appeal under Section 112 of the *Employment Standards Act* (the “*Act*”) by Gerhard Walter (“Walter”) of a Determination that was issued on April 14, 2005 by a delegate of the Director of Employment Standards (the “Director”).
2. Walter had filed a complaint with the Director claiming entitlement to length of service compensation from Kispiox Forest Products Ltd. (“Kispiox”). The Determination found that Walter had not filed his complaint within the time limits specified in Section 74 of the *Act* and refused to accept the complaint.
3. Walter says the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. In BC EST #D127/05, the Tribunal extended the time for filing an appeal of the Determination and sought the parties’ views on two issues that arose from the Record but were not addressed in the Determination or in the submissions on the appeal.
5. The Tribunal has reviewed the appeal and the materials submitted with it and the submissions of the parties and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue is whether the Director erred in concluding Walter’s claim for length of service compensation was filed out of time.

THE FACTS

7. The Determination includes the following facts:
 - Walter was laid off by Kispiox on April 18, 2003.
 - The lay-off exceeded thirteen weeks in a twenty week period.
 - Walter filed a complaint with the Director on January 26, 2004 claiming length of service compensation relating to his termination.

- Following confirmation of his date of lay-off, Walter was informed, verbally and in writing, that his complaint was filed out of time and the file was closed.
8. The submissions of the parties on the appeal identified other facts which appeared to complicate what was otherwise a reasonably straight forward case.
 9. Walter had turned 65 on February 7, 2003 and, based on Kispiox' company policy, was compelled to retire as an employee of the company. Walter expressed a desire to continue working and Kispiox accommodated that desire by providing him with "contract" work for a period of time. The Director found Walter continued to be an employee during this time.
 10. This work took place over two periods: from February 7 to April 18, 2003 and from September 20 to October 18, 2003.

ARGUMENT AND ANALYSIS

11. There is no basis on the facts of this case for alleging the Director failed to observe principles of natural justice in making the Determination. The Determination was based on a finding by the Director that Walter's employment with Kispiox had been terminated on July 18, 2003 and, applying subsection 74(3) of the *Act* to that finding, that Walter's claim was delivered outside of the time limited for making a claim for length of service compensation. The natural justice argument appears to have two elements. First, that it would be unusual and illogical to have required Walter to apply for severance from a company that intended to employ him in the future. Second, that it was somehow the Director's fault that he failed to file his claim before January 26, 2004.
12. In response to the first point, Walter may feel that such a requirement is illogical, but that result is not dictated by the Director, but, if the Director was correct on the law, by the effect of provisions in the *Act*. In response to the second point, even if the Director had some particular obligation to Walter to ensure his claim was filed in time, and I doubt there is, it does not alter the fact that his complaint was not delivered to the Director until January 26, 2004.
13. In that respect, it is clear that unless the work performed by Walter in September and October 2003 can be considered "employment" and can be found to have continued his employment with Kispiox and preserved his entitlement to claim for length of service compensation, the Director was correct in finding his claim for length of service compensation was out of time. That raises a question of law under the *Act*.
14. Section 74(3) of the *Act* states:

74 (3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within six months after the last day of employment.
15. It is well settled that neither the Director nor the Tribunal have authority to relieve against the mandatory time limits for filing complaints set out in the *Act*. The following statement from *Yvonne Padmore*, BC EST #D039.04 correctly summarizes the law on this point:

The wording of section 74(3) of the *Act* is mandatory, and there is no discretion in either the Delegate or the Tribunal to relieve against time limits: *Burnham*, BC EST #D035/96, and *Director of Employment Standards (Re Bunger)*, BCEST #D301/98. While section 76(3) provides some

discretion to refuse to accept, review, mediate, investigate, adjudicate, a complaint, the Delegate only has this discretion with respect to complaints which are filed in time.

16. Setting aside for the moment the possible impact of Walter “retiring” on February 7, 2003, the question in the circumstances of this case is whether the “*last day of employment*” for the purposes of Walter’s claim for length of service compensation is thirteen weeks following April 18, 2003 or thirteen weeks following October 18, 2003. If it is the latter, the complaint was not filed out of time.
17. On this question, Walter says the work he did in September and October 2003 should be considered employment and should have the effect of extending his period of employment with Kispiox to October 18, 2003 and, by inference, sustaining his entitlement to claim length of service compensation. The Director says that Walter’s employment was terminated on July 18, 2003 and the two weeks of work in September and October 2003 did not revive this employment, but represented a new period of employment in respect of which there was no liability on Kispiox for length of service compensation. Counsel for Kispiox substantially supports the argument of the Director, submitting that “an employee cannot ‘breathe life’ into a time barred claim by returning to work for the employer”.
18. I agree with the view of the Director and counsel for Kispiox on this question. Subsection 63(5) of the *Act* provides that the employment of an employee who is laid off for more than a temporary layoff, a term which is defined in Section 1 of the *Act*, is deemed to have been terminated for the purposes of the *Act*. There is extensive authority in decisions of the Tribunal that say an employer’s liability for length of service compensation arises at the time of termination, including a deemed termination under subsection 63(5) or Section 66, and is not discharged because an employee is called back, or continues, to work following the deemed termination. It follows that Kispiox’ liability for length of service compensation and Walter’s right to claim against that liability arose on July 18, 2003. Accepting (without deciding) the work Walter performed in September and October 2003 can be considered as employment, it can only be viewed for the purposes of the *Act* as a new period of employment following termination and not a continuation or extension of employment that had already been terminated under the *Act*.
19. Walter was required to file his claim for length of service compensation no later than six months following the deemed termination of his employment on July 18, 2003 and he failed to do so. There was no error in the Determination.
20. Based on this conclusion, I do not need to address the effect of Walter’s “retirement” on his entitlement to length of service compensation.

ORDER

21. Pursuant to Section 115 of the *Act*, I order the Determination dated April 14, 2005 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal