

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 -

Jonathan R. Blair
("Blair")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorne D. Collingwood

FILE NO.: 1999/151

DATE OF DECISION: April 27, 1999

DECISION

OVERVIEW

Jonathan R. Blair (“Blair”, also, the “Complainant”) appeals, pursuant to section 112 of the Employment Standards Act (the “Act”), a Determination by a delegate of the Director of Employment Standards dated February 18, 1999. In that Determination, the delegate finds that Blair had separate periods of employment by Island Lake Mountain Tours Ltd. (“Island Lake”), one ending March 15, 1998, and another consisting of just over two weeks beginning September, 1998. The delegate also dismisses the Complainant’s claim for overtime pay for work in the first of the employment periods on the basis that it is out of time.

ISSUES TO BE DECIDED

Blair was employed for seasonal work. He was laid off on the 15th of March, 1998. The delegate found that his layoff was of such a length that his employment was terminated. And the delegate found that Blair’s claim for overtime pay for work prior to March 15, 1998, was outside of the time allowed for such a claim, namely, six months from the last day of work.

Blair argues that the six month time limit should not apply in his case: That it should be a year for all seasonal employees. He asks that the Tribunal change section 74 (3) of the Act. He goes on to suggest that the fact of his later re-employment is of importance. And, as matters are set out in his submission, he also speaks of an error in law, a violation of rights, and disputing facts.

FACTS

I find that Blair does not dispute the facts as they are set out in the Determination. While he speaks of facts in dispute, he just complains of the application of the six month time limit to his claim and then suggests that his later re-employment is of importance.

ANALYSIS

The delegate found that Island Lake would employ Blair for seasonal work, lay him off, and then re-employ him. And the delegate found that while Blair was employed for work over the winter of 1997/98, and then laid off on March 15, 1998, the layoff continued past the point of being a temporary layoff under the Act. On that basis he concluded that the employment was terminated on the 15th of March, 1998. I agree with those conclusions.

Blair's employer may have advised him that he was only being laid off but his layoff was without right of recall and it stretched beyond 13 consecutive weeks. As such, the layoff is not a 'temporary layoff' as that term is used in the Act. The definition is as follows:

"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;
- (my emphasis)

As Blair's layoff was longer than a temporary layoff, he was, legally speaking, terminated. It is section 63 (5) which is relevant and it sets the date of termination as the beginning of the layoff.

(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.

On finding that Blair was terminated on the 15th of March, the delegate goes on to conclude that his claim for pay for work prior to that date is out of time in that he delivered his claim to the Employment Standards Branch more than 6 months after the date of termination. Again, I find that he correctly applies the Act. If a complaint is delivered outside of the six month period for filing complaints, it is out of time, pure and simple. And contrary to what Blair might believe, neither a delegate, the Director, nor the Tribunal may exercise any discretion in that regard.

The filing of complaints is governed by section 74 of the Act. That section is as follows:

74 (1) 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 this Act, or
- (b) a requirement of the regulations specified under section 127 (2) (1).

(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.

(4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.

(my emphasis)

Blair complains that his rights have been violated. The delegate did not act to remove him from any of his rights so far as I can see. Blair simply has no right to have complaints considered

when they are outside of the six month filing period. Blair did not get around to making his complaint for overtime wages for the work to the 15th of March until November. But it was then too late. Blair could have acted earlier, but did not, and for that he has only himself to blame.

Blair claim's what he calls an error in law but no error is shown.

Blair calls for the Tribunal to amend the Act. He does not realize that the Tribunal does not have the power to do that. Only the Province's Legislative Assembly can amend the Act.

Finally, Blair suggests that his re-employment by Island Lake may have some important bearing on the matter of whether or not his claim should be dismissed. It does not. The fact that he was later re-employed by his former employer cannot somehow breath life into a claim that has long since expired.

Blair complains of various matters but he fails to show me that the Determination is in some way in error. Indeed, as matters are presented to me, I am satisfied that the Determination is fully consistent with the Act and that it should be confirmed.

ORDER

I order, pursuant to section 115 of the Act, that the Determination dated February 18, 1999 be confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal