

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 -

Morton Reid Wilson
("Wilson")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 2000/190

DATE OF DECISION: May 15, 2000

DECISION

OVERVIEW

This is an appeal brought by Morton Reid Wilson (“Wilson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on February 25th, 2000 under file number 098-991 (the “Determination”).

By way of the Determination, the Director’s delegate advised Wilson that the Employment Standards Branch did not intend to proceed with an investigation of Wilson’s unpaid wage complaint because the substance of that complaint would be addressed in a pending Supreme Court of British Columbia action.

The delegate exercised her discretion in accordance with the provisions of section 76(2)(e) of the *Act* which provides as follows:

76. (2) The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if...

(e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator...

The relevant portion of the Determination reads as follows:

“I have reviewed the complaint that you recently filed with this office...

Information received indicates that a proceeding related to the subject matter of the complaint has been commenced before the Supreme Court of British Columbia...The complaint you filed with this branch alleges you have not been paid wages owed to you by Pacific Northwest Distributions Inc. The information received (attached) indicates that the matter before the courts is directly related to the non-payment of your wages by your former employer, Pacific Northwest Distributions Inc. As this matter is before the Supreme Court, the director refuses to investigate this complaint and no action will be taken in regards to this complaint.

Your file with the Branch is now closed.”

ISSUE TO BE DECIDED

Did the Director’s delegate properly exercise her discretion in refusing to continue to investigate Wilson’s complaint?

FACTS AND ANALYSIS

In a complaint filed with the Employment Standards Branch sometime in early January 2000 (the actual complaint has not been provided to me), Wilson alleged that his former employer, Pacific Northwest Distributions Inc. (“PND” or the “employer”), owed him certain unpaid commissions, vacation pay and severance pay.

As noted in the Determination, there is an ongoing lawsuit between the parties relating to Wilson’s employment (and termination thereof) by PND. This latter action was commenced by a Writ of Summons filed in the Vancouver Registry of the B.C. Supreme Court (No. S000004) on January 4th, 2000 by PND; the endorsement to that Writ states that PND seeks an injunction and “damages for breach of an employment contract, breach of duty of care and breach of fiduciary duty” as against Wilson. PND’s claim was more fully particularized in an accompanying Statement of Claim also filed on January 4th.

According to the information set out in PND’s Statement of Claim, Wilson was employed by PND from May 1997 until his termination, allegedly for cause, on December 31st, 1999. When he was terminated, Wilson was PND’s “Vice-President, Sales”; PND’s principal business activity is selling telephone headsets. PND alleges that Wilson breached fiduciary duties and absconded with certain confidential information that he intended to use for his own private commercial purposes.

On January 28th, 2000, Wilson filed a Statement of Defence and Counterclaim. In his Defence, Wilson denies being a fiduciary and that he inappropriately absconded with any confidential information or “trade secrets”. In his Counterclaim, Wilson says that PND has refused to pay him certain earned commissions totalling some \$19,100 and that he was “wrongfully dismissed”; in his prayer for relief Wilson seeks, *inter alia*, unpaid commissions and damages for wrongful dismissal.

It is clear that the relief sought by Wilson in his Counterclaim is essentially identical to the relief he sought in his complaint filed with the Employment Standards Branch. Indeed, at least insofar as severance pay is concerned, even if he was entirely successful in his complaint filed under the *Act*, he would only be entitled to, at most, 2 weeks’ wages as compensation for length of service (see section 63) whereas--assuming he was dismissed without notice or cause--his entitlement under the common law to severance pay in lieu of “reasonable notice” would undoubtedly exceed 2 weeks’ pay. Thus, even if his unpaid wage complaint was investigated and adjudicated, there remains the strong likelihood that his Counterclaim would still proceed.

One of the tenets underlying the Director’s discretion to refuse to investigate a complaint under section 76(2)(e) is to prevent overlapping or duplicative proceedings. It should be noted that in refusing to continue with the investigation of Wilson’s complaint, the Director’s delegate was exercising a *statutory discretion* (see *Ludhiana Contractors Ltd.*, BC EST #D361/98).

The appeal now before me is very different from the typical sort of appeal to the Tribunal that follows the Director’s investigation and adjudication of a dispute between an employer and an employee (say, for example, concerning the employee’s entitlement to overtime pay or compensation for length of service). In such appeals, the Tribunal reviews a decision made by the Director in her capacity as the arbiter of the parties’ (employer and employee) respective

rights and obligations under the *Act*. As a general rule, if the Director's determination is not "correct", the appeal will succeed.

However, in the instant appeal, the Tribunal is called upon to review the exercise of the Director's discretionary authority. In refusing to proceed with a complaint, the Director is exercising a power more akin to an administrative rather than an adjudicative function. The use of the word "may", rather than "must" or "shall", in subsection 76(2) connotes a permissive or discretionary power--see section 7 of the *Interpretation Act*. In exercising her discretion, the Director and her delegates must not act capriciously or in bad faith and it follows that the Tribunal should only interfere with the Director's exercise of her discretionary power if it can be shown that the Director acted in bad faith or took into account irrelevant considerations--see *Glover v. Plasterer et al.*, Victoria Registry No. V02973, February 27th, 1998 (B.C.C.A.).

Wilson--in his appeal documents and other submissions--does not even suggest, let alone attempt to prove, that the delegate's refusal to continue to investigate his complaint was motivated by some sort of personal animus or some other improper or irrelevant consideration. Not only am I satisfied that the delegate acted in good faith, in the circumstances of this case, I am of the view that her refusal to continue with an investigation of Wilson's complaint was entirely appropriate.

The appeal is dismissed.

ORDER

Pursuant to section 115 of the *Act*, I order that the Determination be confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal