

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 -

Greg Battler ("Battler"), Arthur Mountain ("Mountain"),
John Kim ("Kim"), Charlene Reeves (nee Daily) ("Reeves") and
Gabriel Orday ("Orday")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/60

DATE OF DECISION: July 2, 1998

DECISION

OVERVIEW

This is an appeal by Greg Battler ("Battler"), Arthur Mountain ("Mountain"), John Kim ("Kim"), Charlene Reeves (nee Daily) ("Reeves") and Gabriel Orday ("Orday") (the "employees") under Section 112 of the *Employment Standards Act* (the "Act") from a Determination dated January 7, 1998 by the Director of Employment Standards ("the Director").

They maintain that Petcetera Retailers Inc. ("Petcetera" or the "employer") falsely represented the conditions of employment by misrepresenting the compensation agreement, company structure and financial standing. Their complaints were dismissed by the Director's Delegate on the grounds that they did not meet the time limits in section 74(4) of the *Act*.

ISSUE TO BE DECIDED

The issue is whether complaints filed by the employees that the employer breached Section 8 of the *Act* were filed outside the time limit in Section 74(4) of the *Act*.

FACTS

The substance of the complaints need not be outlined here as the merits of the complaints are not at issue; this decision is limited to the time limits question and outlines only that evidence necessary to deal with it. The employees were formerly employed by Petcetera; they filed complaints with the Employment Standards Branch alleging that the employer breached section 8 of the *Act* when Dan Urbani, the employer's Chief Operating Officer, misrepresented certain aspects of the employment during precontractual negotiations. The misrepresentation related to the employer's funding and financing so that it alleged to have affected the employees' wages and conditions of employment.

Battler commenced employment on August 26, 1996, after precontractual negotiations with Urbani in June of 1996. Battler says that during meetings on May 16, 17, 19 and 21, 1997 he realized that Urbani had misrepresented funding of the business. He filed a complaint on August 29, 1997 and resigned on October 1, 1997.

Mountain commenced employment on September 2, 1996, after precontractual negotiations with Urbani in May of 1996. Mountains says that during meetings in May of 1997, he realized that Urbani had misrepresented key aspects of the business. He resigned on August 15, 1997 and filed a complaint with the Branch on August 29, 1997.

Kim commenced employment on September 29, 1996 after three precontractual meetings with Urbani. Kim was in attendance at the May meetings identified above where he says it became obvious that the funding had never been in place. He resigned on July 23, 1997 and filed a complaint with the Branch on August 29, 1997.

Reeves commenced employment on September 9, 1996 after precontractual discussions with Urbani. In meetings with suppliers in January of 1997, in Montreal, she observed Urbani making false statements to suppliers. She resigned her position on January 31, 1997 after returning from Montreal and filed a complaint on October 10, 1997.

Orday commenced employment on October 14, 1996, following precontractual discussions with Urbani. Orday attended the May meetings identified by Battler, Mountain and Kim and on June 1, 1997 wrote to Urbani expressing certain concerns about the company. There is some dispute about whether he was fired or resigned (and for the purposes of this decision, it is not necessary to determine which); it is common ground that his last day was June 12, 1997. He filed his complaint on October 10, 1997.

The Determination under appeal here dismissed the complaints on the basis of the six month time limit in section 74(4) of the *Act*. The Director's Delegate concluded that the complaints related to section 8 of the *Act* and were subject to the time limit in section 74(4) which she found began to run on the first day of employment.

Counsel for the employees, Clare Hauer argues that the Director's Delegate erred in equating the date of contravention with the date each employee commenced employment. She submits that the six month time limit runs from the "date of the *breach* of the employer's representations". She points to *Harris* BC EST#D360/96 (upheld on reconsideration by BC EST#D124/97) as an example of where the adjudicator did not equate the date of commencement with the date of contravention. She argues that the Director's Delegate is required to ascertain when the promises were made and the date they were broken. It is further argued that all complaints were filed within 6 months of the date of the section 8 contravention. She requests that the Determinations be cancelled and that the matter be referred back to the Director for a full investigation on the merits of the complaints.

In response, Melanie Samuels (counsel for Petcetera) argues that Section 8 applies to pre-contractual representations and not alleged to these breaches of terms and conditions of employment, so that the relevant date for the purposes of section 74(4) arises during the recruitment process:

The complainants cannot have it both ways. Either the alleged (sic) contravention and subject matter of the Section 8 claims happened at the time of hiring in the pre-contractual process of recruitment, in which case they are out of time. Or the claims are with respect to alleged breaches of terms and conditions of employment which do not fall within the ambit of Section 8 of the *Act*, per *Harris, supra*, in which case there is no valid basis for any claim under the *Act*.

Further she submits that the language of section 74 is mandatory and there is no discretion to allow an investigation to proceed where the complaint is filed out of time. Ms Samuels acknowledges that the date of contravention "does not necessarily" mean the first date of employment, but nonetheless submits that a misrepresentation made in relation to "wages" must be made within six months of the time the misrepresentation was made. In the alternative she argues that since the complaints relate to certain breaches of "terms and

conditions" of employment, they are outside the scope of section 8 which deals with "pre-contractual misrepresentations at the time of hiring".

Ms Hauer responds that section 8 prohibits an employer from misrepresenting the availability of a position, type of work, wages or conditions of employment and that the complaint must be filed within 6 months of the contravention, but the latter need not occur within 6 months of the representation in order for the complaint to be timely. She added that section 8 is breached when an employee becomes aware that the precontractual representation is untrue. Ms Hauer also submits that the substance of the complaints concern the funding of the store and this in turn directly affects the Complaints' wages.

On behalf of the Director, Leslie Christensen responded to Mr. Orday's appeal by maintaining that section 74(4) "is very clear" in imposing a 6 month time limit and that Orday's complaint, filed on October 19, 1997, was filed approximately one year after the alleged contravention of October 14, 1996. Catherine Hunt, counsel for the Director, subsequently advised the Tribunal that the Director agreed to cancel the Determinations because the timeliness issue requires further investigation.

In her final submission on behalf of Petcetera, Ms Samuels reiterated her earlier position about the interpretation of sections 8 and 74(4). She also outlined extensive factual background to dispute the allegations of misrepresentation and date when the employees first became aware of the financing arrangements. She argues that this evidence establishes earlier knowledge on the parts of Battler, Mountain, Kim and Orday; thus their complaints should be dismissed if it is accepted that the limitation period should run from the date the complainants first became aware that the representations were false. She points out that Reeves left the company in January of 1997 so that her complaint, filed in October 1997, should be dismissed without further investigation.

ANALYSIS

The employer is said to have breached section 8 of the *Act* which prohibits an employer from making false representations about terms and conditions of employment:

An employer must not induce, influence or persuade a person to become an employee or to work or to be available for work by misrepresenting
the availability of a position,
the type of work,
the wages, or
the conditions of employment.

Section 74 outlines the procedural and time limit requirements for filing a complaint under the *Act*. Section 74(4) deals with time limits for section 8 complaints:

- (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)

- A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.
- 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.
- 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.

The Director's delegate, in the Determination under appeal here, concluded that "date of contravention" in section 74(4) meant the first day of employment. The appellant employees maintain that the relevant date is when they became aware of the misrepresentation, while the employer urges the Tribunal to equate "date of contravention" with the date the representation (or misrepresentation) was made.

A literal interpretation of section 74(4) and "date of contravention" supports the conclusion urged by the employer as it suggests that the time limit is triggered by the wrongful act, regardless of when the employees became aware of this fact. While such an approach is superficially attractive, closer examination makes it problematic. Take for example, the case of an employee who is hired at a lesser rate of pay for the first six months (to reflect her newness on the job and attendant low productivity) but who is promised a raise at a higher rate of pay thereafter to recognize her increased skill. If the date of the wrongful act leading to the complaint triggers the time limits, this employee is effectively deprived of her recourse under section 8 even though the promise was made during precontractual negotiations. This approach works a hardship on the wronged employee and benefits the party who made the misrepresentation; indeed, it encourages an employer to conceal the misrepresentation until the time limit has expired. Not only does this interpretation create problems from a policy perspective, it is not necessarily implied by the wording of the section.

The wording of the section is ambiguous. Contravention is an infringement or breach of a statute so that, on the strict wording of section 74(4), the time limit would not run until the Director issued a Determination finding a breach. This means that the time limits would not begin to run until the Director found a breach and in cases where no breach was found, the time limit provision would not be operative. This is a nonsensical result which is, nonetheless, supportable on a strict interpretation of the *Act*.

A better approach is that urged in *Helping Hands* [(1995) 15 B.C.L.R.(3d) 217 (B.C.C.A.)] which found the *Act* to be remedial legislation that requires a "fair, large and liberal construction as best insures the attainment of its objects", namely to "afford protection to the payment of an employee's wages which may not be available to the employee at common law." This purposive approach calls for the recognition of several principles in interpreting section 74(4), including the necessity of knowledge on the part of the wronged employees before the time limit is triggered. In other words, the employees must know about the misrepresentation before the time limit that binds them begins to run. Thus, the date of contravention under section 74(4) is not triggered until the employees are aware of the misrepresentation.

This approach is taken in other areas of the law, most notably in tort law where the running of time in many kinds of civil actions (e.g. breach of trust by trustee; certain personal injury matters) does not begin until the plaintiff knows the identity of the defendant and the facts giving rise to the cause of action. (See *Limitation Act, R.S.B.C. ch. 266, s. 6(1) and 6(4)*).

Similarly in claims based on the defendant's fraud, or fraudulent concealment, the plaintiff cannot be prejudiced by passage of time: the time does not run until the point where the plaintiff discovers the true situation or, with due diligence, could have discovered it. (*Ontario (Public Trustee) v. Mortimer (1985), 49 O.R.(2d) 741 (H.C.)*; *Evans v. Crooks (1995), 31 Alta. L.R. 3(d) 433 (Q.B.)*)

It was also argued that the employees cannot rely on section 8 for any breach which arises in pre-contractual negotiations while at the same time claiming they are not bound by the six month time limit in section 74(4). I disagree that the purposive approach and reliance on section 8 are incompatible.

With respect to the specific conclusions about each complaint, I agree that there is insufficient evidence to ascertain precisely when the employees became aware of the employer's funding problems. Thus, I am not in a position to decide whether the complaints are in fact filed out of time. For this reason, all the appeals are referred back to the Director.

ORDER

Pursuant to Section 115(b) of the *Act*, I order that the Determination be cancelled .

Lorna Pawluk
Adjudicator
Employment Standards Tribunal