

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 -

Lonnie W. Schermerhorn
("Schermerhorn" or the "appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Sherry Mackoff

FILE NO.: 98/162

DATE OF DECISION: May 13, 1998

DECISION

OVERVIEW

This is an appeal by Lonnie Schermerhorn pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination, dated February 23, 1998, issued by a delegate of the Director of Employment Standards. The Determination found that Schermerhorn’s complaint against former employer Wagg & Hambleton Architects (the “employer”) was untimely and therefore the Employment Standards Branch did not have jurisdiction in the matter.

The essence of the Determination is that the complaint was not delivered to the Employment Standards Branch within 6 months after Schermerhorn’s last day of employment as is required by section 74(3) of the *Act*.

The Tribunal did not receive any submissions from the employer on this appeal. This appeal has proceeded by way of written submissions.

FACTS

The appellant was employed by the employer from August 23, 1993 to February 14, 1997 as a project manager/senior technician. His last day of employment with the employer was February 14, 1997.

The appellant filed a complaint with the Employment Standards Branch on August 14, 1997. The complaint was received by fax. In the complaint the appellant claims payment of overtime pay and vacation pay.

In the determination the delegate refers to section 74(3) of the *Act*. On the second page of the determination the delegate states, among other things, the following:

The *Interpretation Act* defines the word “month” as a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day.

Taking into consideration the definition of the word month, the complaint filed by Mr. Schermerhorn is untimely. The Employment Standards Branch does not have jurisdiction in this matter.

Your complaint will now be closed on our file.

ISSUE TO BE DECIDED

Was the complaint delivered within the six month time limit set out in section 74(3) of the *Act*?

ARGUMENTS

Briefly stated the appellant's main arguments in support of the appeal are as follows. First, that the Determination wrongly calculated the time for making a complaint under the *Act* and that the complaint was received by the Employment Standards Branch in time. The appellant submits that:

... the cut-off for submission of a complaint against an employer is “*within 6 months after the last day worked*” ... The allowable *time period* is 6 months, and the *start* of the time period is *after* the last day worked. Since a day ends at midnight or 24:00:00 p.m., and my last day worked was February 14, 1997, the 6 month time period would start at 00:00:00 a.m. on February 15, 1997 and end at 24:00:00 p.m. on August 14, 1997. ...

Second, that the appellant “... intended to pursue this matter from the outset.” Third, the appellant claims that he was advised on August 14th by the Employment Standards Branch that August 14th was the last day he could initiate a claim against his former employer. Fourth, that if the calculation of the time period for making a complaint depends on a definition contained in an *Act* other than the *Employment Standards Act* (i.e. the definition of “month” in the *Interpretation Act*), a complainant should be made aware of this.

ANALYSIS

The sections of the *Act* relevant to this appeal are sections 74(2), 74(3), and 76(2)(a).

Sections 74(2) and 74(3) of the *Act* state:

74(2) A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

*74(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.*** (emphasis added)

Section 76(2)(a) of the *Act* provides:

The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if

(a) the complaint is not made within the time limit in section 74(3) or (4),

The appellant's last day of employment with the employer was February 14, 1997. The complaint was received by the Employment Standards Branch on August 14, 1997. Was the complaint out of time?

To answer that question I must apply the *Interpretation Act*, R.S.B.C. 1996 c.238. The *Interpretation Act* applies to the *Employment Standards Act*, (see: section 2 of the *Interpretation Act*) and contains sections dealing with the calculation of time.

Sections 25(1), 25(4) and 25(5) of the *Interpretation Act* read as follows:

Calculation of time or age

(1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.

I note that in section 1 of the *Interpretation Act*, "enactment" is defined as follows:

"enactment" means an Act or a regulation or a portion of an Act or regulation;

Sections 25(4) and 25(5) of the *Interpretation Act* read as follows:

25(4) In the calculation of time expressed as clear days, weeks, months or years, or as "at least" or "not less than" a number of days, weeks, months or years, the first and last days must be excluded.

25(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included. (emphasis added)

Section 25(4) of the *Interpretation Act* clearly has no application because section 74(3) of the *Employment Standards Act* does not speak of six "clear" months, or "at least" six months or "not less than" six months. However, section 25(5) of the *Interpretation Act* does apply to the calculation of the six month time limit contained in section 74(3) of the *Employment Standards Act*. In computing the six month period, the wording of section 25(5) of the *Interpretation Act* means that the first day must be **excluded** and the last day must be included.

The appellant's last day of employment with the employer was February 14, 1997. I am assuming for the purposes of this decision that February 14th, not February 15th as is submitted by the appellant, is the "first day" of the six month period. Applying section 25(5) of the *Interpretation Act*, February 14th is not to be counted because the first day must be excluded. Accordingly, the time for filing this complaint did not begin to run until February 15th.

When did the six month period end? I have concluded that the six month period for delivering the complaint ended on August 14, 1997. I reached this conclusion for several reasons. First, in section 29 of the *Interpretation Act* "month" is defined as follows:

"month" means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day;

Second, because section 25(5) of the *Interpretation Act* is applicable, the last day of the six month period must be included.

Third, I find support for this conclusion from the decision of Southin J.A., writing for the majority, in *Jim Pattison Industries Ltd. (Overwaitea Foods) v. 1854 Holdings Ltd. and others* (1991), 52 B.C.L.R. (2d) 279 at page 289 (B.C.C.A.) and from the decision of Hogarth L.J.S.C. (as he then was) in *Brant v. Brant and others* [1986] B.C.J. No. 2133.

In conclusion, by virtue of section 25(5) of the *Interpretation Act*, the six month period for delivering a complaint under section 74(3) of the *Act* did not begin to run until February 15, 1997. The six month period ended on August 14, 1997. As the complaint was received by the Employment Standards Branch on August 14, 1997 it was in time.

By applying section 25(5) of the *Interpretation Act*, I have concluded that the complaint was delivered in time. It is, therefore, not necessary to address the specific points raised in the appellant's submission.

ORDER

I order, pursuant to Section 115 of the *Act*, that the Determination dated February 23, 1998 (File No. 085684) be cancelled. There will be a referral back to the Director for an investigation of the appellant's complaint.

Sherry Mackoff
Adjudicator

Employment Standards Tribunal