

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 -

James Cullen
("Cullen")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Norma Edelman

FILE No.: 2000/248

DATE OF DECISION: June 20, 2000

DECISION

OVERVIEW

This is an appeal by James Cullen ("Cullen") pursuant to Section 112 of the *Employment Standards Act* (the "Act") of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on April 28, 2000. The delegate decided not to investigate Cullen's complaint as it was received outside the 6-month limit as set out in Section 74(3) of the *Act*. In his appeal, Cullen argues that his complaint was filed in time.

ISSUE TO BE DECIDED

The issue to be decided in this appeal is whether the delegate erred in finding that Cullen filed his complaint outside the 6-month time limit as provided in Section 74(3) of the *Act*.

FACTS

Cullen was employed by Kalhar Trucking (1988) Ltd. ("Kalhar Trucking") as a driver. His last day of work was May 9 or 10, 1999. According to Cullen, he commenced employment at Kalhar Trucking sometime in April 1994 and during his period of employment he was regularly laid off and then recalled back to work.

Kalhar Trucking issued Cullen a Record of Employment on May 13, 1999 indicating the reason for issuance as "shortage of work". The date of recall was unknown. The Record of Employment shows the first day worked as February 1, 1998 and the last day paid as May 10, 1999.

The Employment Standards Branch (the "Branch") received a complaint from Cullen on December 1999. Cullen claimed he was owed overtime wages for the period May 10, 1997 to May 10, 1999 and compensation for length of service. In his complaint, he said he was called on July 10, 1999 to start work July 12, 1999 but this was cancelled and he had not been called since.

The delegate issued a Determination on April 28, 2000. In her analysis she says:

When a temporary layoff becomes a termination, the date of layoff becomes the termination date and the employee becomes entitled to compensation for length of service. In this case, Cullen's date of layoff was May 10, 1999; therefore, the termination date was also May 10, 1999.

To meet the requirement of Section 74(3) of the *Act*, the complaint must have been delivered no later than November 10, 1999. The complaint was received at the Employment Standards Branch on December 1, 1999.

Cullen states that in September 1999, the employer told him that the business was sold. Although he was not recalled to work either in July 1999 or September 1999, he did not contact the Employment Standards Branch until after November 10, 1999.

Under Section 76(2) of the *Act*, the Director of Employment Standards may refuse to investigate a complaint or may stop or postpone investigating a complaint if the complaint is not made within the time limit in Section 74(3) or (4).

Based on the evidence received to date, the complaint was not received within the time limit in Section 74(3), therefore, an investigation will not be conducted.

In his appeal submissions, Cullen says that his complaint was made within the appropriate time frame. He says that his last day of work was May 9, 1999 and he was off work on May 10, 1999. On May 11, 1999, he was told the owner was parking the tractor temporarily and he could keep the company pager and the keys to the tractor as the layoff was to be short term. Over the next few months he made frequent visits to the dispatch office and he was told he would be recalled when business picked up. On July 10, 1999, he was asked to report for work on July 12, 1999, but he received a call on July 11, 1999 telling him he would not be needed on July 12, 1999 but they would call him that week. Cullen says it was not until he phoned Tanjit Kalhar ("Kalhar") on November 29, 1999 that he realized he was not going to be called back to work as had always happened in the past. When he asked about severance pay, Kalhar said he did not pay severance, and in any case, he had sold the company in July, 1999. Cullen says he then filed a complaint with the Branch. He says the delegate was wrong regarding the date that Kalhar told him of the sale. He says had he known in September that the company had been sold he would have filed a complaint at that time and would not have waited until the end of November.

In her reply to the appeal, the delegate appears to suggest that Cullen is raising new information on the appeal that was not before her when she made her Determination. If that is what she is saying, then the only information she may not have had at the time she made the Determination is Cullen's statement that she was wrong regarding the date Kalhar told him of the sale of the business. Cullen says the date was on November 29, 1999 and not sometime in September 1999. The delegate did not comment on this statement in her reply submission. In any event, as will be seen below, neither date has an impact on the issue of whether Cullen filed a timely complaint.

In his reply to the appeal, Kalhar says as follows:

1. Kalhar (Trucking) ceased operations in June.
2. Refused work during strike for KTL.
3. It was noticed on a phone bill that we were getting charged for a pager. We called the pager number and Diana stated, "we had the wrong number" and hung up.
4. We cancelled pager. It can be noted the pager was used for personal use.
5. Phone records could be obtained.
6. Keys - it was assumed that the keys were turned in. Tractor was being used (several sets of keys).

In reply to Kalhar, Cullen says that he was not aware until November 29, 1999 that the company had ceased operations and that he was told it had occurred in July and not June. He also says he did not refuse work during a strike and he was never told to return the pager and keys. Further, he asks if the tractor was being used, then why was he not recalled to work.

ANALYSIS

In this appeal the appellant, Cullen, must demonstrate an error in the Determination such that I should vary or cancel the Determination.

The issue in this case is whether Cullen is out of time with regard to the complaint he made to the Branch, which was received on December 1, 1999.

The relevant sections of the *Act* to consider in deciding this issue are Section 74(1), (2) and (3), Section 63(5) and Section 1. These sections provide as follows:

Section 74. Complaint and Time Limit

- (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.*

Section 63. Liability resulting from length of service

- (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.*

Section 1. Definitions

" temporary lay-off" 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.*

"termination of employment" includes

(c) *a layoff other than a temporary layoff.*

In my view, the following questions need to be addressed first in order to determine whether Cullen filed a timely complaint:

1. Has there been a temporary layoff?
2. If so, when did the temporary layoff end?
3. When was the complaint filed at the Branch?

In this case, I find that Cullen was temporarily laid off from work on May 9 or 10, 1999. That was the conclusion of the delegate and it is the position of Cullen. The Record of Employment issued by Kalhar Trucking supports the view that Cullen was temporarily laid off and not permanently laid off or dismissed on May 9 or 10, 1999. Further, Kalhar does not dispute that Cullen was on a temporary layoff.

I further find that the temporary layoff ended on August 9 or 10, 1999, which was 13 weeks after Cullen's last day of work. A temporary layoff is defined as a layoff of up to 13 weeks in any period of 20 consecutive weeks. Cullen was off work for 13 consecutive weeks. I am not satisfied that Cullen refused work during this period. Kalhar says Cullen refused work during a strike, but there is no indication when this occurred. Moreover, Cullen denies it. I am also not satisfied that Cullen was advised before August 9 or 10, 1999 that the business had ceased operations, with the implication being that Cullen knew he no longer had a job prior to the end of the 13 weeks of layoff. Kalhar claims the company ceased operations in June, but he does not say if or when he advised Cullen of this fact. Further, neither Kalhar nor the delegate dispute Cullen's statement that he first learned of the sale at the end of November, 1999. I, therefore, accept Cullen's evidence that the first time he became aware that he would not be recalled was on November 29, 1999.

Finally, there is no dispute that Cullen filed his complaint on December 1, 1999. His complaint was filed two days after he became aware that he would not be recalled; almost 4 months after the temporary layoff ended on August 9 or 10, 1999; and over 6-months after his last day of work at Kalhar Trucking.

The issue now is whether Cullen's complaint was filed in time.

The issue of the timeliness of an appeal where there has been a temporary layoff was considered by the Tribunal in *Ted Ramsey dba R & T Lead*, BC EST #D117/99. In that appeal, the employer argued, much like the delegate in this case, that the time period for filing a complaint commenced when the employee last worked. The Adjudicator made the following comments:

In my view, a laid off employee is still an employee until the layoff becomes a termination by operation of s.1 of the *Act*.

...

The intent of the *Act* also appears to be to provide for the employee to have six months to make a complaint under the *Act*. If the argument of the employer is accepted, an employee who is terminated outright by an employer has 6 months to file a complaint. If an employee is not told that she is terminated, she would have to wait 13 weeks before she can file a complaint and then would have to file the complaint within another 11 weeks. One half of the complaint period would be effectively removed from the complainant because an employer chose not to specify clearly whether the employee was permanently laid or indefinitely laid off with a prospect of recall.

...

In my view, time does not commence to run until the employee becomes aware of the termination. Generally this will be on the date of termination, or in the case of a temporary lay-off that becomes permanent, on the first day that the employee becomes eligible to file a complaint for compensation for loss of service under the *Act*. This will generally be 13 weeks after the date of the last employment.

I agree that when an employee is on a temporary layoff, the employment relationship does not cease until the temporary layoff ends. The employee's last day of employment is not when the employee last worked but when the temporary layoff ends. Pursuant to Section 74(3) of the *Act*, the six-month time limit to file a complaint at the Branch commences at that point

I further agree that the time period for filing a complaint starts at the end of the 13 week period, but only if the employee is unaware she/he has been permanently laid off or dismissed prior to the end of that period, and there has been 13 consecutive weeks of layoff. If, for example, the employee knew at the end of the 6th consecutive week of a layoff that she/he was never going to be recalled, then the time period for filing a complaint would start at the end of the 6th week. As well, there may not be a termination of employment until the end of the 20th week. For example, if an employee is laid off for 10 weeks, then is recalled to work for 7 weeks, and then is laid off again for 3 weeks, the employee has been laid off for 13 weeks within 20 consecutive weeks resulting in a termination of employment. The time period for filing a complaint in that set of circumstances would commence at the end of the 20th week.

In this case, the delegate, using the language of Section 63(5) of the *Act*, contends that Cullen filed his complaint out of time because his termination date is the date he last worked at Kalhar Trucking. In my view, this is an error. Section 63 of the *Act* concerns an employer's liability for compensation based on an employee's length of service. Section 63(5) of the *Act* says that at the end of a temporary layoff, the last day of work is the termination date. This date of termination is for the purpose of calculating the amount of compensation that an employee is entitled to upon termination of employment. The termination date referred to in Section 63(5) of the *Act* does not establish the last day of employment, the date which triggers the time limit under Section 74(3) of the *Act*. Cullen's last day of work was May 9 or 10, 1999. His layoff ended on August 9 or 10, 1999. That is, Cullen's employment status did not become final until the expiration of the 13 consecutive weeks of layoff on August 9 or 10, 1999. As indicated above, I accept that Cullen did not refuse work prior to the expiration of the 13 week period, nor was he aware that he was permanently laid off or dismissed from his employment until November 29, 1999. Accordingly, he

had until February 9 or 10, 2000 to file a complaint. His complaint was filed on December 1, 1999 and therefore it is timely. Given his complaint was filed in time, the complaint should be investigated by the delegate.

Order

Pursuant to Section 115 of the *Act*, I order that the Determination dated April 28, 2000 be cancelled.

NORMA EDELMAN

Norma Edelman

Vice-Chair

Employment Standards Tribunal