

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 -

Cheryl Ikeda
(“Ikeda”)

- of a Determination issued by -

The Director Of Employment Standards
(the “Director”)

ADJUDICATOR: David Stevenson

FILE No.: 98/249

DATE OF DECISION: June 23, 1998

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “Act”) by Cheryl Ikeda (“Ikeda”) of a Determination which was issued on April 3, 1998 by a delegate of the Director of Employment Standards (the “Director”). In that Determination the Director declined to investigate a complaint by Ikeda that sought to have a Human Rights Order enforced against the officers and/or directors of the company against whom the Human Rights Order was made.

ISSUES TO BE DECIDED

Two issues have been raised by Ikeda: first, whether the Director erred in concluding her complaint was out of time; and, second whether the Director erred by refusing to investigate the complaint, relying on Section 76(2)(f) of the *Act*.

FACTS

On August 12, 1997, a Human Rights Tribunal issued an Order in respect to a complaint filed by Ikeda against her former employer, FTI Magna Lighting Ltd. The Human Rights Tribunal found Ikeda had been discriminated against with respect to her employment, being her rate of pay, contrary to Section 8 of the *Human Rights Act* and her employer had contravened Section 7 by paying an employee of one sex less than an employee of the other sex for similar, or substantially similar, work. The Human Rights Tribunal ordered, among other things, that Ikeda be paid lost wages, plus interest, in an amount of \$2984.00. The Human Rights Order was filed in the Supreme Court of British Columbia on August 25, 1997.

On February 11, 1998 Ikeda filed a complaint under the *Act*. She noted in the complaint that she had been unable to enforce the Human Rights Order against FTI Magna Lighting Ltd. and sought to have the Director issue a Determination that the Human Rights Order was “wages” for the purpose of the *Act* and to enforce the claim for “wages” under Section 96 of the *Act* against the officers and/or directors of that company.

The Director refused to investigate the complaint and issued a Determination to that effect. There were four elements to the Determination. First, the Director noted that the employment in respect of which the complaint was made ended on June 3, 1994 and Ikeda was consequently out of time to file any complaint in respect of the employment. Second, the Director concluded the lost wages ordered to be paid by the Human Rights Tribunal did not constitute “wages” for the purposes of the *Act* and therefore were not “owing” under the *Act*. Third, the Director exercised her discretion under Section

76(2)(f) of the *Act* as the Human Rights Tribunal had made an award relating to her employment and Ikeda had invoked the jurisdiction of the Court to enforce that award.

Finally, the Director stated:

With respect to taking action against the corporate Directors/Officers, there is judicial authority which specifically precludes the Director from taking collection action on your behalf when a decision has been made under another statute.

ANALYSIS

On the issue of whether the Director was correct in concluding a complaint against the directors and/or officers of her former employer was out of time, Ikeda argues the complaint was one falling under Section 8, specifically Section 8(d), of the *Act*, which states:

8. *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*
 - (a) *the availability of a position;*
 - (b) *the type of work;*
 - (c) *the wages; or*
 - (d) *the conditions of employment.*

Accordingly, she submits, the time limit for filing a complaint did not begin to run until the Human Rights Tribunal found that the company had misrepresented a condition of her employment. There is no merit in that argument for two reasons. First, the Human Rights Tribunal made no determination that the company had misrepresented any conditions of employment to her. The Human Rights Tribunal dealt with a question of discrimination in the conduct of the company. That Tribunal has no jurisdiction to determine, for the purposes of the *Act* whether a contravention of Section 8 of the *Act* has occurred. That authority belongs to the Director.

Second, the focus of Section 8 is the act of “misrepresenting”. Even if it could be argued the company was “misrepresenting . . . conditions of employment”, any such “misrepresenting” could not logically have continued past the last day of Ikeda’s employment, which was June 3, 1994. The time limit for filing a complaint relative to a contravention of Section 8 commences from the time the misrepresentation takes place, or in some circumstances, from the time it last takes place.

In respect of the second issue, Section 76(2)(f) of the *Act* states:

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

...

(f) *a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint,*

The authority of the Director under Section 76(2) is discretionary. The Tribunal has expressed its view on a number of occasions about the circumstances under which they would interfere with an exercise of that discretion. In *Jody L. Goudreau*, BC EST #D066/98, the Tribunal said, at page 4:

The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

. . . a general description of things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”.

Associated Provincial Picture Houses v. Wednesbury Corp., [1948] 1 K.B. 223 at 229

Absent any of these considerations, the Director even has the right to be wrong.

The Director explained in the Determination the reasons for refusing to investigate the complaint. I find nothing in the decision of the Director that would allow me to interfere with that exercise of discretion. Simply put, Ikeda has acquired an order under the *Human Rights Act* against her former employer. That order has been filed and is enforceable in the Supreme Court as a judgment of the Court. That conclusion is clear from Section 39 of the *Human Rights Act*, which reads:

39. (1) *If an order is made under section 37(2)(a), (c), or (d) or (4), or under section 38(3), the party in whose favour the order*

is made, or, subject to subsection (2), the deputy chief commissioner, may file a certified copy of the order with the Supreme Court.

- (2) *The deputy chief commissioner may file an order made under section 37(2)(d) only with the consent of*
 - (a) *the complainant, if the complaint was filed on behalf of a group or class of persons, or*
 - (b) *the person in whose favour the order is made in any other case.*
- (3) *An order filed under subsection (1) has the same force and effect, and all proceedings may be taken on it, as if it were a judgment of the Supreme Court.*
- (4) *If the deputy chief commissioner files an order under subsection (1), that commissioner may take steps to enforce the order under subsection (3).*

The circumstances of this case fall squarely within Section 76(2)(f) of the *Act* and the Director has a discretion to refuse to investigate. While not stating it directly, the appeal suggests the Director has misconstrued the limits of her statutory authority by refusing to use Section 96 of the *Act* to extend the liability of the company under the *Human Rights Act* to the directors and/or officers of the company. In effect, Ikeda is asking the Director to do something the Human Rights Tribunal either could not or would not do. In her appeal, Ikeda says:

. . . it is only under the Human Rights Act and it is only a Human Rights Tribunal that can determine this discrimination with respect to pay.

That is a correct statement, but what seems to have been missed by Ikeda is that no order has been made by the Human Rights Tribunal imposing any liability under the *Human Rights Act* on the directors and/or officers of the company. Ikeda would have the Director use Section 96 of the *Act* to extend the human rights liability of the company to its directors and/or officers. As the Director correctly points out in the Determination, and Ikeda appears to acknowledge in her appeal, there is no jurisdiction in the *Act* for the Director to determine that discrimination under the *Human Rights Act* has taken place or to extend the order of the Human Rights Tribunal.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated April 3, 1998 be confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal