

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act

-by-

Minh Y. Keu

(“Keu”)

-of a Determination issued by-

The Director of Employment Standards

(the “Director”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 96/434

DATE OF DECISION: September 17, 1996

DECISION

OVERVIEW

This is an appeal brought by Minh Y. Keu (“Keu”) pursuant to section 112 of the Employment Standards Act (the “Act”) from Determination No. ER 23381 issued by the Director of Employment Standards (the “Director”) on July 9, 1996. The Director determined that Keu’s claim for an additional two percent vacation pay was filed outside the statutory time limit for the filing of such complaints and, accordingly, refused to proceed with Keu’s complaint.

FACTS AND ANALYSIS

The original complaint was filed with the Employment Standards Branch on May 7, 1996. Keu’s complaint arises out of her employment by Datt Cases Ltd. Keu’s employment was terminated October 16, 1995 and although she says she worked with the firm for more than five years, the employer only paid her 4% vacation pay on termination. The Director, relying on section 76(2)(a) of the Act, refused to proceed with Keu’s complaint because it was filed outside the six-month statutory time limit for the filing of complaints set out in section 74(3) of the Act (I would parenthetically note that section 80 of the “old” Act also provided for a six-month limitation period). Keu then appealed this Determination to the Tribunal.

In her appeal form, and accompanying letter dated July 16, 1996, Keu does not allege that the Director erred in refusing to investigate her complaint; rather, Keu merely states that “I hope you can investigate my complaint”.

In my view, the Director, in refusing to investigate Keu’s complaint, merely complied with the statutory dictates of section 74(3) of the Act which states that a complaint “*must be delivered...within 6 months after the last day of employment*” (emphasis added). In this case, the complaint was filed about three weeks after the six-month limitation period had expired. There is no statutory discretion on the part of the Director to extend this limitation period.

In the case of a statute-barred complaint, the Director has a discretion concerning whether or not to investigate the complaint upon it being filed, or to dismiss the complaint out of hand without embarking on an investigation. The Director might,

for example, continue an investigation with respect to a complaint that was, on its face, filed beyond the six-month limit where there is some doubt as to whether or not the complaint was, in fact, statute-barred. An investigation might also be continued where, pursuant to section 76(3) of the Act, the Director wished to investigate to determine if, say, the employer had committed other violations of the Act with respect to the complainant, or some other employees. An investigation might also be continued with a view to effecting a settlement under section 78 of the Act. However, whether or not the Director chooses to investigate, if the complaint is statute-barred it must, ultimately, be dismissed.

I would note that, although Keu's complaint is statute-barred *under the Act*, her claim is not statute-barred if she was to file a claim in court (e.g., the Small Claims division of the Provincial Court of B.C.). Section 118 of the Act specifically preserves the right of a complainant to file a civil action in the courts. In this latter case, the applicable limitation period governing the particular claim (for example, two years for a tort claim and, typically, six years for a contract claim) would still apply. All that the Director has determined is that Keu's complaint is statute-barred only insofar as the Act is concerned. Whatever other remedies Keu may have, which might be pursued by way of a civil court action, remain unaffected by the Determination issued in this case.

ORDER

Pursuant to section 115 of the *Act*, I order that Determination No. ER 23381 be confirmed.

Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal