Employment Standards TRIBUNAL

An appeal

- by -

James V. McCallum
("McCallum" or "Employee")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2003A/198

DATE OF DECISION: September 17, 2003

BRITISH COLUMBIA

DECISION

OVERVIEW

This is an appeal by an employee, James V. McCallum ("McCallum" or "Employee"), from a Determination dated May 28, 2003 (the "Determination") issued by a Delegate of the Director of Employment Standards ("Delegate") pursuant to the *Employment Standards Act, R.S.B.C. 1996, c. 113* (the "*Act*"). The Delegate refused to "re-open" the investigation of a complaint which was withdrawn by the Employee on or about November 26, 2001. The Employee sought to "re-open" the complaint after receiving the decision of the Tax Court of Canada on January 27, 2003. The Employee alleged that the Delegate had provided misleading information about the amount of his entitlement, particularly that the statutory deductions would be deducted from the Determination, which caused him to withdraw his appeal.

A complaint which is withdrawn, is a complaint which has, in effect, been settled. A complaint which is "re-opened" is in the nature of a new complaint. Section 74 of the *Act*, provides that a complaint must be made within six months after the date of the cessation of the employment relationship. In this case, the employment relationship ended on August 20, 2001, the initial complaint was made on October 1, 2001, and withdrawn on or about November 26, 2001. The Employee sought to re-open the complaint after the six month period prescribed for complaints by section 74 of the *Act*. There is no jurisdiction in either the Delegate or the Adjudicator to relieve against the mandatory time limits set out in section 74 of the *Act* for the making of a complaint. Further, one of the purposes of the *Act* is to provide for a fair and efficient method of resolving disputes. It is neither fair nor efficient, but rather uncertain, arbitrary and unfair, to re-open and investigate a complaint which was closed during the limitation period, and where the application to re-open was made more than a year after the complaint was withdrawn. I therefore found that the Delegate had not erred in her refusal to "re-open" the complaint.

ISSUE:

Did the Employee establish the Delegate erred in the Determination with regard to failing to re-open the investigation of the Employee's complaint?

FACTS

I decided this case on the basis of written submissions after considering the notice of appeal filed by the Employee, the written submissions of the Employer and Employee, and reading the Determination and the record supplied by the Delegate. The Delegate issued the Determination and written reasons on May 28, 2003.

During the course of the relationship, the parties treated the relationship as one of independent contractor and the Employer made no remissions to Canada Customs and Revenue Agency on behalf of income tax or Canada Pension Plan. The relationship terminated on August 20, 2001. On October 1, 2001, the Employee, James V. McCallum, filed a complaint alleging that he was an employee entitled to annual vacation, statutory holiday pay, compensation for length of service, and "minimum wages for poor months".

A Delegate commenced an investigation (the "investigating Delegate"). During the investigation, the investigating Delegate apparently advised the Employee that he was an employee, and entitled to statutory claims under the *Act*, but that he would be obliged to pay to the Employer, or would have to offset from wages otherwise owing, the amount of the statutory remittances. The Delegate apparently considered that there would be no benefit to the Employee from the issuance of a Determination, and appears to have advised Mr. McCallum accordingly. The Employee phoned the investigating Delegate advising that he did not wish to take any further action. As a result of the telephone call, the investigating Delegate closed Mr. McCallum's file. Both parties were notified of this decision in writing on November 26, 2001.

On January 27, 2003, the Tax Court of Canada gave a judgement dismissing the Employer's appeal of a decision requiring the Employer to remit Canada Pension Plan contributions for Mr. McCallum. This decision essentially confirmed that Mr. McCallum was an employee for the purposes of Canada Pension Plan contributions. Mr. McCallum wrote to the Director on February 18, 2003, asking the employment standards claim to be re-opened. He also appears to have contacted the Director, in January, after receiving the decision of the Tax Court of Canada. Mr. McCallum alleges that he cancelled the employment standards claim due to incorrect information from the investigating Delegate, that he would be obliged to repay the statutory remittances to the Employer.

A different Delegate than the Delegate assigned to the initial complaint, issued the Determination dated May 28, 2003. In the Determination, the Delegate found that Mr. McCallum withdrew his complaint and that there was no indication of coercion. The Delegate found that McCallum withdrew his complaint of "his own free will", and that it would be unfair to require an employer to participate in an investigation of this matter. The Delegate referred to *Sirrs v. Director of Employment Standards, BCEST #D 103/98*:

> ... it is fair and reasonable that the Director may decline to reopen the investigation after nearly a year has elapsed. The Director might rely in this regard on paragraphs (a), (c) or (g) of section 76(2) of the Act, which allows cessation of an investigation for lack of timeliness, frivolousness or if the dispute has been resolved. Had Sirrs's request to re-open been made sooner, it might have been fair and reasonable for the Director to recommence the investigation. A year, however, is twice the limitation period for filing complaints and in the circumstances is an unreasonably long period of time to elapse between the time a complaint is closed and reopened and defeats one of the express provisions of the Act in section 2, to provide fair and efficient procedures for resolving disputes under the Act.

The Delegate refused to re-open the complaint, and no further investigatory action was taken by the Delegate.

Employee's Submission:

The Employee has filed an appeal alleging that the Director erred in law and in natural justice. The Employee says that he withdraw his appeal as a result of erroneous information given by the former Delegate concerning his liability for statutory deductions not paid by the Employer. He says that this misleading information nullifies any decision made by him, and that this is an extenuating circumstance which "precludes any time factor". The Employee says that it was an error of law for the Delegate to rely on the Tribunal's decision in *Sirrs* as a reason for not permitting his case to be re-opened where there was misinformation provided by the Delegate. The Employee says that if he had proceeded with the complaint, the Employer would have been compelled to pay compensation for length of service, vacation

pay, and statutory holiday pay, and repayment of GST, retroactive to his hiring date. The Employee says that the correct information only came to light with the finding of the Tax Court of Canada.

Employer's Submission:

The Employer submits that complaint should not be re-opened. The Employer points out that it is nearly two years since he left employment, that he had ample time to file a complaint, that he withdrew his complaint, and that the Employer was advised that the complaint was withdrawn. The employer submits that it is unreasonable to expect it to address Mr. McCallum's concerns at this late date.

Delegate's Submission:

The Delegate provided the record, but did not provide a submission.

ANALYSIS

In an appeal of a Determination, the burden rests with the appellant, in this case the Employee, to demonstrate an error such that I should vary or cancel the Determination.

Section 112 (1)(c) of the *Act* provides for an appeal on grounds that:

(a) the director erred in law;

(b) the director failed to observe the principles of natural justice in making the determination;

(c) evidence has become available that was not available at the time the determination was made.

In viewing the scheme of the *Act*, it is apparent that a Delegate may issue a Determination. This is one method of resolving a dispute between the parties concerning the application or interpretation of the *Act*, but it is not the only method of resolving a dispute. Section 76 (3) empowers a Delegate to conduct a review, investigate, mediate or adjudicate a complaint. It is open to the parties to settle a dispute and enter into a written settlement agreement (section 78). The *Act* is complaint driven, and also the Delegate has the power to investigate in the absence of a complaint. Given that the *Act* is complaint driven, it must also be open to the complainant to withdraw a complaint. The Act does not expressly outline a "right to withdraw", but this can be implied from the scheme of the *Act*, and the language in section 76(3)(i) empowering a Delegate to cease action where the dispute that caused the complaint is resolved.

There is no indication here of any duress or compulsion in Mr. McCallum's decision to withdraw his complaint. It is apparent, however, that the Delegate advised Mr. McCallum, and the Employer, that Mr. McCallum was an employee, and not an independent contractor. Mr. McCallum was not mistaken concerning his status as an Employee. Presumably, Mr. McCallum thought it was to his advantage not to proceed with the employment standards complaint at the time he withdrew his complaint. After receiving a decision of the Tax Court of Canada, he has changed his mind. He alleges that he was mistaken as a result of information provided by the Delegate. He alleges that mistake did not come to light until after the ruling of the Tax Court of Canada.

It is apparent that the investigating Delegate ceased investigating as a result of the request of the Employee. Essentially, as of the date of the Employee's telephone call, the dispute between the Employer and the Employee was resolved, as the Employee did not wish the matter to proceed further. The

investigating Delegate ceased investigating, pursuant to the former section 76(2) of the *Act*. The complaint filed by the Employee on October 1, 2001 was "disposed" of by way of the "withdrawal of the complaint", albeit the Delegate did not issue a Determination.

The Employee asks that this complaint to be re-opened after the expiration of the six month limitation period. The investigation ceased as a result of the complainant's request. The matter was closed without the Delegate issuing a Determination. If the complainant had requested a "re-opening" of the matter within the six month limitation period, section 74(4) of the *Act* would not be a barrier to the re-opening of this matter. Section 74(4) of the *Act* provides that the complaint must be "delivered" within six months after the date of the contravention:

> A complaint that a person has contravened a requirement of section 8, 10 0r 11 must be delivered under subsection (2) within 6 months after the date of the contravention.

I note that this is mandatory language. The language does not create an exception where a complainant is mistaken as to his or her rights. There is no exception for "mistakes induced by a Delegate". In my view, there is no discretion in the Delegate to investigate a complaint filed six months after the end of the employment relationship. In my view, there is no jurisdiction in the Tribunal to order that the Delegate accept for filing, and investigate a complaint filed after the six month limitation period.

In section 2, the *Act* provides for the "fair treatment" of both employees and employers, and "fair and efficient procedures for resolving disputes over the application and interpretation" of the *Act*. One of the procedures that promotes efficiency is a "time limited" complaint requirement. These statutory purposes would not be achieved, if an Employee who withdrew a timely filed complaint, was permitted to "re-open" a complaint after the expiration of the limitation period. The *Act* gives no power to either Adjudicators or Delegates to relieve against the consequences of failing to comply with a limitation period. In my view, there would be a very great mischief and considerable uncertainty in the application of the *Act*, if Employees could re-open a complaint after the expiration of the limitation period set out in the statute. In my view, if the Legislature wished an Employee to have a right to re-open a complaint following the expiration of a limitation period, it would have set out that right expressly.

I note that in *Sirrs v. Director of Employment Standards, BCEST #D 103/98*, the Adjudicator considered that it to be reasonable for a party to be permitted to re-open a complaint provided that a request was made within a reasonable period of time. The Adjudicator in *Sirrs* did not address the time period, but inferred this from the obligation in the former section 76 (1), that the Director must investigate a complaint filed under section 74:

> 76. (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
>
> (2) 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),
>
> (b) this Act does not apply to the complaint,
>
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
>
> (d) there is not enough evidence to prove the complaint,
>
> (e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,

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

(g) the dispute that caused the complaint is resolved.

The Employee argues that *Sirrs* does not apply in the case of "mistake". In my view, the reasons for the "re-opening" are irrelevant. The complaint rights are set out in the *Act*. There is simply no jurisdiction, equitable or otherwise, to relieve against the consequences of failing to file a complaint in time.

I note that in *Sirrs*, the Adjudicator did not permit a re-opening of a complaint at a time after the six month limitation period under section 76(2) had expired. The language in *Sirss* seems to suggest that there is a discretion to relieve against the time limits, provided that the time delay in making the re-opening request is not "unreasonable". *Sirrs* was a case where the re-opening was sought after a complaint was withdrawn, after the six month limitation period expired. If the Adjudicator implied that there is a discretion to re-open after the six months has expired, I cannot agree. A "re-opened complaint" is really a new complaint. I am not dealing with a case where the Employee sought to "re-open" the investigation, within the six month limitation period following the cessation of employment. If the "re-opened complaint" is made within that six month period, the Delegate may consider whether to investigate the complaint, applying the criteria set out in section 76(3). It may be that section 74(4) would not pose a barrier in such a fact pattern. If that re-opened complaint is made after the six month period under section 74(3), the Delegate has no jurisdiction under the *Act* to consider the complaint.

For all the above reasons, I dismiss this appeal.

ORDER

Pursuant to s. 115 of the *Act* the Determination dated May 28, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal