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 -

Gary DeRosier
("DeRosier")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/326

DATE OF DECISION: August 5, 1999

DECISION

OVERVIEW

This is an appeal by Gary DeRosier ("DeRosier") under Section 112 of the *Employment Standards Act* (the *"Act"*), against a Determination dated May 4, 1999 issued by a delegate of the Director of Employment Standards (the "Director"). DeRosier alleges that the delegate of the Director erred in the Determination by concluding that the complaint filed by DeRosier was not filed within the prescribed 6 month time limit pursuant to Section 74 (3) of the *Act* and therefore no further investigation would take place.

The delegate of the Director also maintains that certain documents submitted by DeRosier on this appeal should not be considered by the panel as those documents were not provided by DeRosier to the delegate during the investigation prior to the Determination being issued.

This decision was rendered on the basis of the written submissions on file, and no oral hearing was required.

ISSUES

The issues to be decided in this appeal are:

1. Is DeRosier entitled to submit documents on appeal that were not provided to the delegate of the Director during the investigation ?

2. Did the delegate of the Director err in concluding that DeRosier's complaint was not received within the time limits prescribed pursuant to Section 74 (3) of the *Act* ?

FACTS

With regard to issue number 1, the issue raised by the delegate of the Director in respect to certain documents provided on appeal, the following are the documents in dispute:

- Revenue Canada document dated May 27, 1999
- WCB Letters dated March 12, 1998, June 2 and June 30, 1998
- Letter dated February 11, 1999 from DeRosier to WCB
- Undated and unaddressed letter
- Doctors letters dated February 10, 1999 and March 29, 1999

- Human Resources Development Canada document dated May 29, 1999

With regard to issue number 2, the timeliness of DeRosier's complaint, the following facts are not disputed:

- DeRosier's last day of actual work for James Westerlaken operating as Westerlaken Trucking ("Westerlaken") was February 24, 1998 at which time he went on WCB;
- the Record of Employment ("ROE") confirms February 24, 1998 at DeRosier's final day of work;
- letter from DeRosier's doctor dated March 29, 1999 which states in part "My patient was unable to work from February 24, 1998 to June 23, 1998;
- DeRosier commenced employment with another employer on July 5, 1998;
- DeRosier filed his complaint with the Employment Standards Branch (the "Branch") on February 10, 1999;
- DeRosier stated in his submission dated March 17, 1999 that "I and other drivers were not informed he was going back to work because obviously he had hired other drivers. In my mind this constitutes unlawful dismissal."
- letter from DeRosier's doctor dated February 10, 1999 which states in part "...he was unable to work from September 15, 1998 until January 15, 1999."

Further to the undisputed facts, DeRosier states that:

- he had no way to contact Westerlaken except to accept work that would take him to the area where Westerlaken was working;
- his Employment Insurance claim started September 20, 1998 which proves that he was not terminated by Westerlaken while on WCB or afterwards;
- a previous decision of the Tribunal, BCEST No. D117/99, supports his contention that he was still an employee of Westerlaken until he met Westerlaken at the North end of Williston Lake sometime in August 1998;

ANALYSIS

The onus of establishing that the delegate of the Director erred in the Determination rests with the appellant, in this case, DeRosier.

With respect to issue number 1, that is:

1. Is DeRosier entitled to submit documents on appeal that were not provided to the delegate of the Director during the investigation ?

The burden in this matter is on DeRosier to show some reason why the Tribunal should allow him to challenge the conclusions reached in the Determination with information he

failed or refused to provide during the investigation by the delegate of the Director. DeRosier did not provide any reasonable explanation to this panel as to why the documents in question were not supplied during the investigation. The documents in dispute, with the exception of 2 letters, were all dated prior to the Determination being issued. The 2 letters dated after the date the Determination was issued are not related to the issue of timeliness, which is the only issue before the panel on this appeal.

On the evidence before me, there are no facts and/or circumstances that would justify the Tribunal relaxing its approach in cases such as this, where an appellant seeks to challenge conclusions of fact in the Determination with material that it failed or refused to produce during the investigation.

That approach is stated in several cases that have come to the Tribunal, including *Tri-West Tractor Ltd.* BCEST No. D268/96 and *Kaiser Stables Ltd.* BCEST No. D058/97. There are sound policy reasons for limiting the material before the Tribunal in an appeal to what has been disclosed during the investigation, unless there is a valid reason shown for allowing the additional material to be submitted Those reasons are grounded in the purposes and objects of the *Act.* Section 2 of the *Act* states, in part:

> *2. The purposes of this Act are to:*
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

An approach that, in effect, treats appeals to the Tribunal as a trial *de novo* , where the parties are free to ignore the statutory requirements to disclose information during an investigation and add any material to the appeal is not consistent with the above stated purpose.

Additionally, the Tribunal is not intended to be the decision maker of first instance under the *Act* and it is not the function of the Tribunal to investigate complaints. That authority is given by the *Act* exclusively to the Director under Part 10. As this case clearly demonstrates, the investigative role of the Director is frequently adversarial. One of the primary objectives of the *Act* is to establish and maintain the Tribunal as an adjudicative body independent of the Branch and of the authority, duties and responsibilities of the Director outlined in Parts 10 and 11 of the *Act.* An approach that avoids compromising the statutory function of the Tribunal and its impartiality as an adjudicative body is consistent with that objective.

For all of the above reasons, I conclude that DeRosier is not entitled to present evidence before this panel that he failed or refused to provide during the investigation by the delegate of the Director.

I now turn to the next issue to be decided in this appeal.

2. Did the delegate of the Director err in concluding that DeRosier's complaint was not received within the time limits prescribed pursuant to Section 74 (3) of the *Act* ?

Section 74 (3) of the *Act* provides:

> *(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.*

The evidence is that DeRosier, while working for Westerlaken on February 24, 1998, suffered an injury which resulted in DeRosier going on WCB benefits. The ROE issued to DeRosier dated March 25, 1998 indicated that the reason for issuing the ROE was "D" which, I believe, is the code for illness/injury and further indicated that the expected date of recall was "unknown". DeRosier's doctor indicated that DeRosier was not able to work from February 24, 1998 to June 23, 1998. DeRosier states that he attempted to contact Westerlaken on several occasions after June 23, 1998 and, being unsuccessful, he accepted employment with another employer commencing July 5, 1998.

The fact that DeRosier was on WCB benefits from February 24, 1998 to June 23, 1998 does not mean his employment relationship with Westerlaken was terminated, in fact, the ROE merely states that the reason for issuing was illness/injury, not "layoff-shortage of work".

The *Act*, in Section 67 (1) clearly prohibits the issuing of layoff notice to an employee unless that employee is at work. Section 67(1) provides:

> *(1) A notice given to an employee under this Part has no effect if*
>
> > *(a) the notice period coincides with a period during which the employee is on annual vacation, leave, strike or lockout or is unavailable for work due to a strike or lockout or medical reasons, or*
> >
> > *(b) the employment continues after the notice period ends.*

Given the requirements of Section 67 (1) *supra*, Westerlaken was not in a position to "lay off" DeRosier until after the WCB claim was concluded on June 23, 1998. It follows therefore, that DeRosier was still an employee of Westerlaken on June 23, 1998 and, in the absence of any evidence to the contrary, I conclude that the period of layoff of DeRosier therefore commenced on June 23, 1998. There was no evidence of any attempt by Westerlaken to recall DeRosier to work either on June 23, 1998 or at any time thereafter.

The layoff of DeRosier at this point in time, June 23, 1998 would be considered a temporary layoff as the ROE clearly indicated that the date of recall was "unknown".

A temporary layoff is defined in Section 1 of the *Act* as:

> *"temporary layoff" 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;*

When a layoff exceeds the period defined as a "temporary layoff" the employee is then considered to have been terminated. Section 1 of the *Act* defines termination of employment as:

> *"termination of employment" includes a layoff other than a temporary layoff;*

There is no evidence that Westerlaken recalled or even attempted to recall DeRosier to work during the period of temporary layoff, therefore, at the expiry of 13 weeks from June 23, 1998, that is September 22, 1998, DeRosier's employment was deemed to be terminated.

With respect as to when the 6 month 'clock' for filing a complaint begins to run, I have reviewed the position of the Tribunal as set forth in ***Ted Ramsey dba R & T Lead*** **BC EST No. D117/99** , and I agree with the adjudicator when he states:

> 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 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 off 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 layoff 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 conclude that DeRosier would then be entitled, pursuant to the provisions of Section 74 (3) of the *Act* to file a complaint with respect to his employment with Westerlaken, a period of 6 months from September 22, 1998, that is, until March 21, 1999. DeRosier's complaint was filed on February 10, 1999. This complaint was therefore made within the six months time period.

With respect to the submission of the delegate of the Director that DeRosier terminated his employment with Westerlaken by accepting employment with another employer, that position is, with respect, without merit in the circumstances of this case. In the absence of evidence that DeRosier quit his employment, the mere acceptance of employment with another employer while on "temporary layoff" from his regular employer does not in and of itself constitute termination of employment. There must be some evidence that the employee either advised his "regular" employer that he quit or alternatively, the employee refused a recall to work because of his new job. There is no such evidence before me.

For all of the above reasons, I conclude that the complaint filed by DeRosier was filed within the time periods as set forth in Section 74(3) of the *Act*.

It follows therefore, that the delegate of the Director must now investigate DeRosier's complaint and make a Determination with respect to the merits of that complaint.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 4, 1999 be cancelled and I further order that the Director commence an investigation with respect to the merits of DeRosier's complaint filed February 10, 1999.

Hans Suhr
Adjudicator
Employment Standards Tribunal