

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 -

South Surrey Hotel Ltd.
operating as Best Western Pacific Inn Resort & Conference Center
("the Employer")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Hans Suhr

FILE NO.: 1999/349

DATE OF HEARING: August 24, 1999

DATE OF DECISION: Septebmer 9, 1999

DECISION

APPEARANCES

Salim Bharmal	on behalf of South Surrey Hotel Ltd. operating as Best Western Pacific Inn Resort & Conference Centre
Daniel S. Tuominen	on his own behalf
Angela Szabo	on behalf of Daniel S. Tuominen
Lynne Egan	on behalf of the Director (teleconference only)

OVERVIEW

This is an appeal by South Surrey Hotel Ltd. operating as Best Western Pacific Inn Resort & Conference Centre (“the Employer”) under Section 112 of the *Employment Standards Act* (the “Act”), against a Determination dated May 11, 1999 issued by a delegate of the Director of Employment Standards (the “Director”). The Employer alleges that the delegate of the Director erred in the Determination by concluding that the complainant Daniel S. Tuominen (“Tuominen”) was entitled to compensation for length of service and annual vacation pay in the total amount of **\$1,052.66** (includes interest).

PRELIMINARY ISSUES

1. Salim Bharmal (“Bharmal”) requested a postponement due to the relapse of ill health of Fareed Pirani (“Pirani”) President of the Employer. Bharmal states that this relapse occurred a couple of days ago.

The panel, after reviewing the file noted that Bharmal, who is the comptroller for the Employer, has been involved in authoring and providing submissions on behalf of the Employer from the filing of the appeal on June 2, 1999 to the last submission on July 6, 1999. The panel felt that Bharmal was more than sufficiently conversant with the issues in dispute and there was no need to postpone the hearing.

ISSUES

The issues to be decided in this appeal are:

1. Was the complaint of Tuominen filed within the time limits set forth in the *Act* ?
2. Did the delegate of the Director exhibit bias in her conduct of the investigation and issuance of the Determination ?

3. Does the Employer owe compensation for length of service to Tuominen ?
4. Is Tuominen entitled to annual vacation pay in the amount calculated by the delegate of the Director and set forth in the Determination ?

I must first consider the issue of time limits with regard to filing of the complaint as that issue goes directly to the jurisdiction of the Director to investigate the complaint and issue a Determination.

FACTS

With respect to the issue of time limits in regard to filing the complaint, it was necessary to convene a post hearing conference call between Tuominen, Bharmal and the delegate of the Director to clarify the circumstances surrounding the filing of this complaint.

The evidence of Tuominen was that when he decided he might as well make a complaint, he filled out the complaint form on December 22, 1998 and delivered it to the Surrey office of the Employment Standards Branch on December 29, 1998. He further states that he was assured by the Surrey office that it would be OK to wait until December 29, 1998 to file his complaint.

Tuominen further sent a unsolicited submission after the conclusion of the teleconference. I have not taken that submission into consideration in my deliberations in respect to this matter.

The information from the delegate of the Director was that the Surrey office was open for 1/2 day on Thursday December 24, 1998 as per policy, closed on Friday December 25, closed Monday December 28, (to recognize Saturday December 26 - Boxing Day) and then reopened December 29.

There is no dispute that Tuominen's last day of work coincided with his last day of vacation, June 24, 1998.

ARGUMENTS

Tuominen argues that his complaint was filed on December 29, 1998 in accordance with the verbal instructions he received from the Surrey office of the Employment Standards Branch on December 22, 1998. Tuominen further argues that he filed his complaint within the 6 months time limit as required.

Bharmal argues that the complaint was not filed in accordance with the requirements and therefore it should be dismissed. Bharmal further argues that he first became aware of the timeliness issue when he was reviewing the file prior to the hearing and he did raise the matter with the Tribunal at the earliest opportunity.

The delegate of the Director states that she received the complaint through the normal administrative process of the Surrey office. The delegate of the Director reviewed the normal process which is that when a completed complaint form is received by the clerical staff of the office, the complaint form is firstly stamped with a date stamp to reflect the date received. The complaint form is then subject to the normal intake processing and is then subsequently assigned to a delegate of the Director for the investigation.

The delegate of the Director states that the record clearly indicates the complaint form filed by Tuominen was received on December 29, 1998.

ANALYSIS

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

The whole issue surrounding timeliness was extensively reviewed by adjudicator Mackoff in **BCEST No. D205/98 Schermerhorn**.

The sections of the *Act* relevant to this issue are Sections 74(2) and 74(3). Those Sections state:

(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.** (emphasis added)*

These requirements are brought to the attention of a complainant as they are summarized on the actual complaint form used. The relevant portion of that summary provides :

“...You must give us your complaint no later than 6 months after the end of your employment with this employer; or if your complaint concerns ss.8, 10 or 11 of the Act, we must receive your complaint no later than 6 months after the date of the alleged contravention.....”

Tuominen's last day of employment with the Employer was June 24, 1998. The complaint was received by the Employment Standards Branch office in Surrey on December 29, 1998. Was the complaint filed within the time limits set forth in the *Act* ?

To answer that question I must apply the *Interpretation Act*, R.S.B.C. 1996 c.238. The *Interpretation Act* applies to the *Employment Standards Act*, and contains sections dealing with the calculation of time.

Section 25(1) of the *Interpretation Act* reads as follows:

Calculation of time or age

(1) This section applies to an enactment and to a deed, conveyance or other legal instrument unless specifically provided otherwise in the deed, conveyance or other legal instrument.

I note that in section 1 of the *Interpretation Act*, “enactment” is defined as follows:

“enactment” means an Act or a regulation or a portion of an Act or regulation;

Sections 25(4) and (5) of the *Interpretation Act* read as follows:

(25(4) In the calculation of time expressed as clear days, weeks, months or years, or as “at least” or “not less than” a number of days, weeks, months or years, the first and the last days must be excluded.

(25(5) In the calculation of time not referred to in subsection (4), the first day must be excluded and the last day included.

(emphasis added)

Section 25(4) of the *Interpretation Act* clearly has no application because section 74(3) of the *Employment Standards Act* does not speak of six “clear” months, or “at least” six months or “not less than” six months. However, section 25(5) on the *Interpretation Act* does apply to the calculation of the six month time limit contained in section 74(3) of the *Employment Standards Act*. In computing the six month period, the wording of section 25(5) of the *Interpretation Act* means that the first day must be **excluded** and the last day must be **included**.

Tuominen’s last day of employment with the Employer was June 24, 1998. Applying section 25(5) of the *Interpretation Act*, June 24 is not to be counted because the first day must be excluded. Accordingly, the time for filing this complaint did not begin to run until June 25 1998.

When did the six month period end ? I have concluded that the six month period for delivering the complaint ended on December 24, 1998. I reached this conclusion for several reasons. First, section 29 of the *Interpretation Act* defines “month” as:

“month” means a period calculated from a day in one month to a day numerically corresponding to that day in the following month, less one day;

Second, because section 25(5) of the *Interpretation Act* is applicable, the last day of the six month period must be included.

In conclusion, by virtue of section 25(5) of the *Interpretation Act*, the six month period for Tuominen to deliver his complaint under section 74(3) of the *Act* did not begin to run until June 25, 1998. The six month period ended on December 24, 1998. As the complaint was received by the Employment Standards Branch on December 29, 1998, it was not in time.

It is unfortunate that the complaint filed by Tuominen was permitted to proceed to this point before the issue of timeliness was raised, however, the facts are clear; Tuominen had the opportunity from June 25, 1998 to December 24, 1998 to file his complaint but did not file until December 29, 1998.

By applying section 25(5) of the *Interpretation Act*, I have concluded that the complaint of Tuominen was not filed within the time limits set forth in section 74(3) of the *Act*.

It is, therefore, not necessary to address the other issues raised in the Determination.

The appeal of the Employer is granted.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination dated May 11, 1999 be canceled.

Hans Suhr
Adjudicator
Employment Standards Tribunal