Employment Standards TRIBUNAL

An appeal

- by -

Dick C. Fulbrook
("Fulbrook")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/324

DATE OF DECISION: September 16, 2002

DECISION

OVERVIEW

This is an appeal filed by Dick Fulbrook ("Fulbrook") pursuant to section 112 of the *Employment Standards Act* (the *"Act"*). Mr. Fulbrook appeals a Determination that was issued by a delegate of the Director of Employment Standards (the "Director") on May 22nd, 2002 (the "Determination").

By way of the Determination, the Director's delegate dismissed Mr. Fulbrook's complaint on two grounds, namely, that the complaint was untimely [see subsections section 74(4) and 76(2)(a) of the *Act*] and because the subject matter of the complaint had been resolved [see subsection 76(2)(g)]. Subsections 74(4) and 76(1)(a) and (g) of the *Act* are reproduced below:

> **Complaint and time limit**
> 74. (4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the contravention.
>
> **Investigation after or without a complaint**
> 76. (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),...
>
> (g) the dispute that caused the complaint is resolved.

In essence, Mr. Fulbrook says that the Director's delegate erred in dismissing his complaint and asks that the Tribunal "send this case back for further investigation" (see Fulbrook's June 9th, 2002 letter appended to his appeal form).

By way of a letter dated July 31st, 2002 the parties were advised by the Tribunal's Vice-Chair that this appeal would be adjudicated based on their written submissions and that an oral hearing would not be held (see section 107 of the *Act* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575).

BACKGROUND FACTS

Mr. Fulbrook has been employed by the Okanagan Similkameen School District No. 53 (the "School District") since March 15th, 1995. He is currently a "Grounds Lead Hand" and his employment is governed by a collective bargaining agreement between the School District and the Canadian Union of Public Employees, Local 523 (the "Union").

Mr. Fulbrook's original complaint, signed March 5th, 2002, was filed with the Employment Standards Branch ("ESB") office in Penticton on March 11th, 2002. The complaint related to a job posting dated January 20th, 1995 (No. 95-01) announcing an available "Leadhand Grounds" position; this position was posted in accordance with the provisions of the collective agreement. The posted wage for the position was "as per Collective Agreement ($19.94/hr as of July 1, 1993)". The closing date for the competition was January 27th, 1995.

In his original ESB complaint form, Mr. Fulbrook alleged that the posting amounted to a false representation within section 8 of the *Act:*

> **No false representations**
> 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 any of the following:
>
> (a) the availability of a position;
>
> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.

In a letter dated March 5th, 2002 addressed to the ESB office in Victoria Mr. Fulbrook particularized his complaint. In essence, he says that the job posting described a more sophisticated position (in terms of its functions/educational requirements) when, in fact, the pay for the actual position was based on lesser requirements. Mr. Fulbrook's dispute with the School District appears to have been initially formalized in a letter dated October 17th, 1999 whereby Mr. Fulbrook requested, in accordance with the provisions of the collective agreement, that his position be reevaluated (presumably, in the hope of securing an upwards pay adjustment).

In any event, after several discussions and interim proceedings the matter was finally resolved in the fall of 2001 (apparently on or about September 11th, 2001) on a "without prejudice" basis. Mr. Fulbrook received a two-step retroactive (to October 19th, 1999) pay adjustment. As a result of the settlement, the Union and Mr. Fulbrook agreed "that no further grievances will be advanced on Mr. Fulbrook's pay rate or Job Maintenance Committee rating unless substantial changes occur [in his job functions]" and that "Mr. Fulbrook and the Union agree that there will be no challenge, by either grievance or arbitration, of the Job Maintenance Committee decision which has been implemented".

In his March 5th, 2002 letter to the ESB, Mr. Fulbrook characterized this settlement in the following terms: "On September 11, 2001 my union and my employer came to an agreement to allow the false representation of my position described by Posting 95-01 to continue". On December 15th, 2001, Mr. Fulbrook (who was obviously dissatisfied with the settlement agreement reached between his Union and the School District) filed a complaint with the Labour Relations Board alleging that his Union breached its "duty of fair representation" codified in section 12 of the B.C. *Labour Relations Code.* Specifically, in his December 15th submission to the Labour Relations Board Mr. Fulbrook alleged, among other things, that:

- "...the union and the employer have conspired to deny me the right of fair representation and the right of protection from fraudulent misrepresentation"; and

- "...the union and the employer agree for the sake of job equity, that misrepresentations made on postings would be ignored and evaluations for jobs would be based not on postings or current qualifications of employees, but on the minimum requirements to do that job. *I became aware of this in December, 2000. This is in direct conflict with the Collective Agreement Article 12* (see Document 12, page 18) which states that postings shall contain, the 'nature of the position, required knowledge and education, ability and skills, shift and wage and salary rate or range'". (my *italics*)

Mr. Fulbrook's "duty of fair representation" complaint was dismissed by the B.C. Labour Relations Board in a decision issued on January 22nd, 2002 (BCLRB No. B26/2002). The Board's reasons for decision indicate that Mr. Fulbrook's position before the Board was that "...the Union and the Employer *contravened the collective agreement* when they chose to ignore the qualification set out on the posting and instead focused on the minimum requirements to do the job" (Board's reasons, page 3; my *italics*)

As noted above, on March 5th, 2002 (and following the dismissal of his "duty of fair representation" complaint), Mr. Fulbrook then took his dispute to the Employment Standards Branch in the form of a complaint under section 8 of the *Act.* This complaint was dismissed on the basis that it was untimely and because the subject matter of the dispute had previously been resolved.

FINDINGS

In my view, the delegate did not err in dismissing Mr. Fulbrook's original complaint. It follows that this appeal must be dismissed

My perusal of the material before me inexorably leads me to conclude that Mr. Fulbrook, having initially failed to secure the wage adjustment to which he feels entitled, has thereafter placed his dispute before whatever available tribunal or agency that might be prepared to adjudicate it in the hope that he will ultimately obtain his desired outcome.

Timeliness of the complaint

Turning first to the issue of the timeliness of the complaint. A complaint filed under section 8 of the *Act* must be filed "within 6 months after the date of contravention" [section 74(4)]. If the complaint is not filed within that latter time frame, "the Director may refuse to investigate a complaint or may stop or postpone investigating a complaint" [section 76(2)(a)].

The alleged contravention occurred *years*, not months, prior to the filing of the complaint. In a letter to his Union's president dated March 17th, 2001 (about one year prior to filing his complaint with the ESB), Mr. Fulbrook stated that "I can now focus my attention on the misrepresentation of the required qualifications for Job Posting 95-01". However, based on the material before me it would appear that as early as 1998 Mr. Fulbrook believed that the job posting contained "misrepresentations" (see Fulbrook's December 15th, 2001 submission to the Labour Relations Board, page 1). *By his own admission*, "I cannot dispute the six month contravention of Section 8" (Fulbrook's May 8th, 2002 submission to the Employment Standards Branch).

In light of the foregoing, it cannot be seriously contended that the delegate erred in exercising her discretion to dismiss Fulbrook's complaint based on it not having been filed in a timely fashion. This point, standing alone, is a sufficient basis for dismissal of the appeal. However, the delegate also relied on section 76(2)(g) of the *Act.*

Prior resolution of the dispute

The material before me clearly discloses that although Mr. Fulbrook's complaint about his wage rate and job classification (the essential core of this dispute) was not resolved to his entire satisfaction (although it was resolved in his favour), the dispute was, nevertheless, resolved. As Mr. Fulbrook himself states in his May 8th, 2002 submission to the ESB "...nor do I dispute that the Union CUPE investigated my initial

complaint and subsequently, the union and the employer, School District #53, reached an agreement regarding the matter in September, 2001".

Although one might be dissatisfied with a particular resolution of a particular dispute (so-called "settler's remorse"), such dissatisfaction does not change the fact that the dispute *was* resolved. This is not a situation where the resolution was arbitrary or otherwise tainted by fraud or bad faith (see the B.C. Labour Relations Board decision). It should be remembered that Mr. Fulbrook has already had one further opportunity to challenge the resolution of his dispute (via a section 12 application to the Labour Relations Board) and only filed his complaint with the ESB when the Labour Relations Board proceedings resulted in an adverse (to Mr. Fulbrook) finding.

In light of the foregoing, it is my view that the delegate properly exercised her discretion under section 76(2)(g) of the *Act.*

The ESB's jurisdiction

Quite apart from the application of subsections 76(2)(a) and (g) of the *Act,* in my view, even if Mr. Fulbrook's complaint was timely and had not been otherwise resolved, the complaint was not properly before the ESB. As the law now stands, disputes that "arise from the collective agreement" are within the exclusive jurisdiction of a grievance arbitrator appointed in accordance with the provisions of the governing collective agreement [see *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929; *New Brunswick v. O'Leary*, [1995] 2 S.C.R. 967; *Regina Police Association Inc. v. Regina (City) Board of Police Commissioners,* [2000] 1 S.C.R. 360].

A dispute is said to "arise" from a collective bargaining agreement if the "essential character" of the dispute involves the interpretation, application, administration or an alleged violation of the collective agreement. Section 82 of the *Labour Relations Code* provides that *all* such disputes must be determined by arbitration or by some other similar dispute resolution procedure agreed to by the parties and set out in their collective bargaining agreement.

In this particular case, the wage rate fixed for Mr. Fulbrook's position was set out in the collective agreement. Mr. Fulbrook's employment commenced in March 1995 and he was paid the applicable wage rate as set out in the collective agreement. Several years later, on October 17th, 1999, Mr. Fulbrook wrote to the Chair of the Job Maintenance Committee (established under the collective agreement) requesting a job review. Mr. Fulbrook's October 17th letter raises, in no uncertain terms, an issue under the collective bargaining agreement:

> "Under section 2.2 of the Job Evaluation Maintenance Procedures in the Letter of Understanding contained in the Collective Agreement effective July 1, 1996 - June 31, 1998, I am requesting a job review of my position as Leadhand Grounds for School District #53. I feel that the educational, skill and experience levels of my position are very different from the rated position as it is currently described."

The Job Maintenance Committee issued a decision, in writing, on December 14th, 2000. As was his right under the collective agreement, on January 22nd, 2001 Mr. Fulbrook appealed the Job Maintenance Committee's decision. This latter appeal was unsuccessful. Article 4 of the Job Evaluation Committee Maintenance Procedures (a "letter of understanding" forming part of the governing collective agreement) provides for mediation and then arbitration if the dispute cannot be resolved at the Committee level. Mr. Fulbrook pressed his Union to take the dispute to arbitration. As previously noted, the School District

and the Union reached a final settlement--sometime in September 2001--that provided, *inter alia*, for an upwards adjustment in Mr. Fulbrook's wage rate. Some three months later, Mr. Fulbrook filed his section 12 "duty of fair representation" complaint with the Labour Relations Board. It bears repeating that in his initial complaint to the Labour Relations Board, Mr. Fulbrook unequivocally asserted that his dispute concerned an interpretation or application of the provisions of the governing collective bargaining agreement:

> "...the union and the employer agree for the sake of job equity, that misrepresentations made on postings would be ignored and evaluations for jobs would be based not on postings or current qualifications of employees, but on the minimum requirements to do that job...*This is in direct conflict with the Collective Agreement Article 12* (see Document 12, page 18) which states that postings shall contain, the 'nature of the position, required knowledge and education, ability and skills, shift and wage and salary rate or range'" (my *italics*)

The material before me shows that Mr. Fulbrook, several years after his initial hiring, attempted to have his job re-evaluated with a view to substantially increasing the wage rate attached to it. This effort was successful but not to Mr. Fulbrook's entire satisfaction. The complaint under section 8 of the *Act* is, in my view, a (very) belated attempt to somehow reconfigure the essential character of the dispute so that the dispute might be adjudicated yet again.

In his ESB complaint form, Mr. Fulbrook clearly asks the ESB to remedy the dispute by, in effect, carrying out a form of job evaluation which would result in his receiving "the wages, status and type of work defined by the required qualifications of posting 95-01". In other words, Mr. Fulbrook seeks to have the ESB carry out the very same sort of job re-evaluation that the School District and Union have already agreed will be undertaken (and, in this case, has already been undertaken) in accordance with a protocol forming part of the parties' collective agreement.

In my view, this matter ought not to be revisited once again under the guise of a section 8 complaint.

ORDER

Pursuant to subsections 114(1)(b) and (c) and subsection 115(1)(a) of the *Act,* I order that the appeal be dismissed and that the Determination be confirmed as issued with respect to the application of subsections 76(2)(a) and (g) of the *Act.*

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal