

An appeal

- by -

Wes Woo
("Woo")

- 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: David B. Stevenson

FILE No.: 2002/141

DATE OF HEARING: July 14, August 13 and 21, 2002

DATE OF DECISION: September 19, 2002

DECISION

APPEARANCES:

on behalf of the individual

Mr. Al Strachan

on behalf of Zellers Inc.

Enid Marion, Esq.

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) brought by Wes Woo (“Woo”) of a Determination that was issued on February 26, 2002 by a delegate of the Director of Employment Standards (the “Director”). The Determination concluded that Woo’s employer, Zellers Inc. (“Zellers”) had contravened Part 4, Sections 31, 32, 35 and 40 of the *Act* in respect of his employment and ordered Zellers to cease contravening and to comply with the *Act* and to pay an amount of \$54,766.48. Zellers also filed an appeal of the Determination and a separate award has been issued on that appeal.

Woo has appealed the Determination on the basis that Woo and his legal counsel had filed a civil action claiming overtime wages, unaware of the exclusive jurisdiction of the Director over this matter. Woo asks that the Tribunal exercise discretion and allow the wage recovery period to be changed to cover a different 24 month period.

ISSUE

The issue in this appeal is whether the Director was correct in limiting the recovery of wages to the period June 1, 1999 to June 15, 2001 and whether the Tribunal has any jurisdiction to change the wage recovery period.

THE FACTS

The appropriate starting point for any factual analysis is the Determination. The Determination set out the following background information:

Zellers Inc. operates a number of retail department stores in the province of British Columbia. The stores within the province are under the jurisdiction of the Act. Wes Woo commenced work for the company in 1994. His complaint was filed with our branch on June 15, 2001. At the time Mr. Woo filed his complaint, he was employed as the Pharmacy Manager, and was on medical leave. The complaint was filed in the time period allowed under the Act.

The representatives for the company and Mr. Woo have provided detailed written submissions regarding this matter. These have been very helpful in outlining the parties positions regarding the issues, relevant facts and application of the legislation. The submissions have been attached to the Determination as exhibits.

The Determination noted that the main issue in dispute was whether Woo was a manager under the *Act*. It also noted an issue relating to lunch breaks and a dispute concerning an annual performance bonus for the year 2000.

The findings of fact set out in the Determination are extensive and I do not intend to set them out in their entirety. For the purposes of addressing this appeal, the above statement from the Determination establishes the relevant facts.

ARGUMENT AND ANALYSIS

The relevant statutory provisions are Section 74(2) and 80 of the *Act*, which set out the filing requirements for complaints made under the *Act* and identify the wage recovery period on such complaints:

74. (2) *A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.*

...

80. *The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning*

(a) *in the case of a complaint, 24 months before the earlier of the date of the complaint of the date of the termination of the employment, or*

(b) *in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination,*

plus interest on those wages.

There is no dispute that the complaint was not delivered in writing to an office of the Employment Standards Branch until June 15, 2001. Woo suggests there is a discretion in the Tribunal to change the wage recovery period. I disagree for two reasons.

First, the Tribunal has consistently interpreted the requirements of Section 74 of the *Act* as being mandatory. Neither the Director nor the Tribunal have any discretion to avoid the mandatory requirements of Section 74 of the *Act* (see *Director of Employment Standards*, BC EST #D301/98; (Reconsideration of BC EST #D014/98)). As a result, the date of the complaint can only be treated as the day on which it was filed in writing at an office of the Branch.

Second, the provisions of Section 80 of the *Act* are clear and similarly allow for no discretion in their application. Simply put, in the circumstances of this case, calculating the wage recovery period must be taken from the date of the complaint - June 15, 2001.

Two things follow from the above: the Director was not wrong in refusing to adjust the wage recovery period as requested by Woo; and the Tribunal has no discretion or authority to do so.

This appeal is dismissed.

ORDER

My order on this appeal will reflect both the dismissal of this appeal and the partial success of an appeal filed by Zellers and issued as a separate award. Pursuant to Section 115 of the *Act*, I order the Determination dated February 26, 2002 be varied by deducting amount of \$13,982.05 plus the annual vacation pay and interest applied to that amount. The balance of the Determination is confirmed, together with any interest that has accrued pursuant to Section 88 of the *Act*.

David B. Stevenson
Adjudicator
Employment Standards Tribunal