

An appeal

- by -

Mark Laseur
(the "Appellant")

- 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: John M. Orr

FILE No.: 2001/332

DATE OF HEARING: August 14, 2001

DATE OF DECISION: August 15, 2001

DECISION

APPEARANCES:

Mark Laseur	On his own behalf
Ron Corrigal	On behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by Mark Laseur ("Laseur") pursuant to Section 112 of the Employment Standards Act (the "*Act*") from a Determination April 10, 2001 by the Director of Employment Standards (the "Director").

Laseur worked for Walker Systems Corporation ("Walker") from November 16, 1994 until he was placed on temporary lay-off on July 14, 2000. Laseur was not re-called to work and his employment was deemed to have been terminated. He was not paid his outstanding holiday of approximately \$3,000.00. Laseur did not file a complaint until March 6, 2001. In the Determination the Director ruled that the complaint was filed beyond the 6 months time limit setout in the *Act*.

Laseur appeals on the grounds that the time for filing claim has been miscalculated and that it should be considered to have been filed within time.

ISSUE

The issue raised in this appeal is whether the 6-month time for filing a claim commences to run from the start of a temporary layoff or from the date that the temporary layoff ends.

FACTS

This appeal was heard and adjudicated solely on the issue of whether the claim was barred by the passage of time. The facts stated herein represent the basis for this adjudication and are not intended to be binding upon any future investigation of the facts or future adjudications. As the respondent did not appear I have found the following facts for the purpose of this decision.

Laseur was placed upon a temporary layoff July 14, 2000 because of shortage of work. It was always his intent to return to Walker when his job was once again available. He was not recalled.

Laseur was owed a substantial amount of vacation pay and Walker kept promising to pay the amount owing. Walker never disputed that vacation pay was owed but simply said that there was insufficient revenue to pay it. Laseur was extremely patient and kept waiting until he was

advised by the company bookkeeper that perhaps he should consider approaching the *Employment Standards Branch*. Laseur filed his complaint March 6, 2001. Despite many promises made by Walker, Laseur has not received any payment of his accumulated vacation pay.

ANALYSIS

Section 1 of the *Act* provides that a temporary layoff means a layoff of up to 13 weeks in any period of 20 consecutive weeks and under section 62 a week of layoff means a week in which an employee earns less than 50% of the employee's weekly wages. Thus Laseur was on temporary layoff from July 14th to October 13th, 2000. His last day of temporary lay-off status would have been October 13, 2000.

In the Determination the Director's delegate applied section 63(5) to find that Laseur's employment terminated on July 14, 2000.

Section 63 (5)

For the purpose of determining the termination date, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

The Director's delegate then calculated the 6-month limitation period under section 74 from the beginning of the layoff, July 14th and found that the complaint was filed beyond the time limit.

Section 74 (3)

A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months of the last day employment.

The Tribunal has addressed this issue on previous occasions. In the case *Re: Ted Ramsay*, BCEST #D117/99 it is interesting to note that the Director's delegate urged the Tribunal to find that the time commenced to run at the end of the 13 week period following the commencement of the temporary layoff. The Tribunal agreed with this proposition but on the facts of that particular case used language that referred to knowledge of the employee of any final termination as follows:

"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 lay-off that becomes permanent, on the first day that the employee becomes eligible to file a complaint for compensation for loss (*sic*) of service under the Act. This will generally be 13 weeks after the date of the last employment. This complaint was therefore made within the six month time period."

This case was followed in *Re: DeRosier*, BCEST #D319/99 and in *Re: Cullen*, BCEST #D243/00. The facts in the *Cullen* case are very similar to those in this case. Cullen was placed on layoff on May 9 or 10 1999 and his 13 week period of layoff would have ended on August 9 or 10, 1999. He did not file his complaint until December 01, 1999. If the time limit commenced in May his complaint would have been out of time but if the 6 months did not start until August his complaint would be timely. The Adjudicator reviewed the findings in *Ramsay* noting in particular the following passages:

“In my view, a laid off employee is still an employee until the layoff becomes a termination by operation of s.1 of the *Act*.”

“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 the argument of the employer is accepted, an employee who is terminated outright by an employer has 6 months to file a complaint. 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.”

The Adjudicator in *Cullen* went on to conclude that when an employee is on a temporary layoff, the employment relationship does not cease until the temporary layoff ends. She concluded that the employee’s “*last day of employment*” (as referred to in section 74(3)) is not when the employee last worked but when the temporary layoff ends.

In *Cullen* the Adjudicator added the qualification that if, during the 13 week time period, the employee becomes aware that he has been permanently laid off, terminated or dismissed so that the temporary layoff becomes permanent then the time period would commence at the point that the employee has knowledge of the permanent nature of the layoff. It is also noted that temporary layoffs can often run as long as 20 weeks because of the nature of the definition.

Neither of these last two matters have application in this case and I find the previous three decisions (cited above) of this Tribunal to be persuasive and I agree that in the case of a temporary layoff the employee is still an employee until the layoff becomes permanent either through further action by the employer or by operation of s.1 of the *Act*.

The effect of this conclusion in this case is that Lasseur was on temporary layoff until October 13th, 2000 and therefore the time period for filing his claim would not have expired until April 2001. His complaint was therefore filed within time.

I must make note of the neutral but extremely helpful role played by the Director’s delegate at the hearing of this matter. Not only did he assist by clarifying the Director’s policy on this issue but also by referring the Tribunal to the various applicable authorities.

I also note again that not all the evidence that might be available was before this tribunal at this hearing and that there may be other issues that may arise during a subsequent investigation of the complaint that have not been addressed herein. This decision is limited to the specific facts set out herein and does not address the merits of any claim herein. It is limited to finding that the claim was filed within time.

I conclude that the determination that the claim was out of time must be cancelled and as the claim was filed within time the matter will be referred back to the Director to investigate the complaint on its merits.

ORDER

Pursuant to Section 115 of the *Act* the Determination dated April 10, 2001 is cancelled.

John M. Orr
Adjudicator
Employment Standards Tribunal