

An appeal

- by -

Robin Murray Gibson
("Gibson")

- 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: M. Gwendolynne Taylor

FILE No.: 2001/554

DATE OF DECISION: October 17, 2001

DECISION

This is an appeal brought by Robin M. Gibson (“Gibson”) pursuant to section 112 of the *Employment Standards Act* (the “Act”) from a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 10, 2001.

Gibson filed a Complaint with the Director on May 2, 2001, alleging that he was owed compensation arising from his employment with Finlay Navigation Ltd. (“Finlay”). He was employed from December 1993 until December 1998, at which time he was either terminated or temporarily laid off. The Director concluded that Gibson had not filed the complaint within the time limits set out in section 74(3) of the *Act* and ceased the investigation of his complaint pursuant to s. 76(2)(a).

Gibson appealed on the grounds that

- (a) the Director is empowered to investigate regardless of the statutory time limit (S. 76(3)),
- (b) in August 1999, when Gibson contacted the Employment Standards Branch and spoke with a receptionist, he was not told that the time limit for filing a complaint could be longer for a temporary lay-off than for employment termination,
- (c) the Director may have investigated the wrong employer, and
- (d) Gibson had attempted to provide additional information to the Director.

ISSUES

- 1) Did Gibson file a complaint within the statutory time limit?
- 2) If the answer to #1 is no, does the Tribunal have the authority to direct the Director to investigate the complaint under section 76(3)?

EVIDENCE AND SUBMISSIONS

Gibson commenced employment with Finlay as a pilot in December 1993. In June 1994, he also contracted to provide maintenance services. His was employed on an on-call basis. Gibson had been a friend of John Harding (“Harding”), the principal of the company, for many years and his contractual arrangements were made with Harding. Because Gibson was going through a divorce at the time, he asked Finlay to defer payment of his wages. He now seeks to recover compensation for his employment from December 1993 to December 1998.

The Tribunal received submissions from the Respondent, Williston Navigation Inc. (“Williston”), and from B.C. Rail, as an interested party. B.C. Rail purchased Finlay and it appears that the sale may have been the reason for the termination of Gibson’s employment. Finlay subsequently changed its name to Williston Navigation Inc.. The Director has named Williston as the Respondent. Harding is a principal of Finlay and Williston. Gibson submitted that B.C. Rail may be responsible for the unpaid wages as the purchaser of Finlay and submits that there should be further investigation to determine who is responsible as the employer.

The submissions from Williston and B.C. Rail are limited to requesting that the appeal be dismissed because Gibson did not file within the statutory time limit. If the Tribunal does not dismiss on that ground, both companies indicated that they would want to make submissions on the substantive issues raised.

Gibson presented considerable evidence to the Director and to the Tribunal on facts relating to his employment and in support of his compensation claim. He submitted that he telephoned the Employment Standards Office in August 1999 to determine whether he had grounds for a claim. He spoke with a receptionist and was advised the *Act* requires that a claim be filed within 6 months from the date of the employment termination. Later, he found out that if his situation was found to be a temporary lay-off, an additional thirteen weeks would be added to the date of termination, thus meaning he would have been within the 6 months filing requirement when he telephoned in August 1999. He stated that he found out in February 2001 that he might have had a claim. His complaint was filed in May 2001.

Gibson also made submissions on numerous issues arising from his compensation claim, and on his grounds of appeal.

The Director objected to some of the evidence Gibson presented to the Tribunal because it was not presented to the Director during the investigation. The Director also submitted that Gibson’s submission did not demonstrate any error in the Determination.

DECISION

It is clear that Gibson did not file within the statutory time limit under Section 74 of the *Act*. Even if he had been on temporary layoff at the end of December 1998, he did not meet the statutory time period. Nonetheless, he submitted that the Tribunal should either vary the Determination or send it back to the Director for further investigation because:

- (a) his complaint might have been in time had he not been given misinformation by the Director; and
- (b) the Director has the authority to investigate without receiving a complaint and that

Section 76 of the *Act* provides:

- (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
- (2) The director may refuse to investigate a complain 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),
 - ...
- (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

I have reviewed previous cases of the Tribunal, including cases referred to by counsel for B.C. Rail, *Miller* [2001] BCEST #D397/01 and *Kohnke* [2000] BCEST #D032/00. In *Miller*, Adjudicator Love stated:

The time limits set out in s. 74(3) of the *Act* are mandatory, and it is not open to an Adjudicator to relieve against a failure to file a written application within 6 months of the date the employee last worked. One of the purposes of the *Act* is to provide “*fair and efficient procedures for resolving disputes over the application and interpretation of the Act*”, just and speedy resolution to employment disputes, as set out in s. 2 of the *Act*.

In that case, *Miller* submitted that she had medical reasons for not filing in time. The Adjudicator noted that details of the medical reason had not been provided and found that, even if there was jurisdiction to extend the time limits, he would not do so. He stated:

It would be neither fair nor efficient to permit an employee an extension of time some 4 months after the deadline for filing an appeal.

In this case, Gibson asks that the time for filing be extended from October 1999 (assuming he was on temporary lay-off) until May 2001. His reason for not filing on time is that he got incomplete advice from the receptionist at the Director’s office. I do not accept this as a valid reason for not filing in time. If he had mentioned a possible lay-off, the receptionist may have provided further information. It may be that he got the information he did because of the way he worded his question. Regardless, in my view, it was incumbent on Gibson to make further inquiries on his own behalf and not rely on telephone information provided by the receptionist.

I also do not accept Gibson’s submission that the Tribunal should, or could, refer this case back to the Director. The Director has discretion to discontinue an investigation if the complaint was not filed within the statutory time limits. The Director also has discretion to conduct an

investigation without a complaint having been filed. I agree with Adjudicator Love that it is not open to an adjudicator to relieve against the failure to file a complaint in time. The relief for that lies with the Director. It follows that it is not open to an adjudicator to refer a case back to the Director for further investigation when the Director has exercised her discretion under section 76(2).

Even if an adjudicator had authority to refer the case back to the Director, it is my view that Gibson has not presented compelling reasons to do so, particularly in light of the lengthy delay since this employment terminated. I am not satisfied that the issues presented in this case also affect other employees, either from this employer or generally. To reopen this case t would be contrary to the stated purpose of providing “*fair and efficient procedures for resolving disputes over the application and interpretation of the Act*”.

I have determined that Gibson did not file within the statutory time limits and that the Tribunal does not have authority to direct the Director to investigate the complaint under section 76(3).

ORDER

Pursuant to section 115, I confirm the Director’s Determination dated July 10, 2001.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal