

An appeal

- by -

Dustin Kelly
("Kelly")

- 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: Norma Edelman

FILE No.: 2001/764

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the "*Act*") brought by Dustin Kelly ("Kelly") of a Determination that was issued on October 9, 2001 by a delegate of the Director of Employment Standards.

Kelly had filed a complaint at the Employment Standards Branch against his former employer, Steven Washington operating as Activities Plus Coupon Books ("Activities Plus"). The Determination concluded the complaint had not been filed within the time allowed in the *Act*.

In this appeal, Kelly asks the Tribunal to change the Determination and accept that his complaint was filed in a timely manner.

ISSUE

The issue in this appeal is whether Kelly has provided any reason for the Tribunal to cancel or vary the decision of the delegate to cease investigating his complaint.

FACTS

The complaint form indicates that Activities Plus from March 2000 to August 2000 employed Kelly. Kelly filed a complaint at the Employment Standards Branch on April 14, 2001 stating he was owed wages in the amount of \$1200.00.

The delegate concluded that Kelly's complaint was outside the 6 month time limit to file a complaint and as a result he was unable to proceed with the collection of any possible outstanding wages.

ARGUMENT AND ANALYSIS

In his appeal, Kelly says that he received 2 cheques, dated September 30, 2001 and October 15, 2001 respectively, from Activities Plus. He contends "...these cheques could possibly change the deadline that I did not make, and help in some way to change the decision."

In his reply to the appeal, the delegate says the appeal should be dismissed on the basis that the last day Kelly worked was in August 2000 and even if he was on a temporary layoff he would still be out of time.

The pertinent Sections of the *Act* to consider with respect to this appeal are Sections 74(2), 74(3), 74(4) and 76(2).

Section 74(2), (3) and (4) states:

- 74 (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.
- (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.

Section 76(2) of the Act states:

- 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)

Section 74(4) is not relevant to this appeal. Section 74(2) and (3) is relevant and it states, clearly and unambiguously, that a complaint must be delivered to the Employment Standards Branch within 6 months after the last day of employment.

The Tribunal has consistently interpreted Section 74(2) and (3) of the *Act* as being mandatory. In *Burnham*, BCEST #D035/96, the Tribunal said:

The language of section 74(2) and (3) of the *Act* is mandatory as it requires that a complaint must be delivered within 6 months after the last day of employment. There is no provision to permit the Director to investigate a complaint received after the time limit has expired.

Furthermore, the Tribunal has accepted that Section 76(2) (a) cannot be interpreted as giving the Director a discretion to ignore the mandatory filing requirements of the *Act* and to investigate a complaint that did not meet those requirements (see *Director of Employment Standards (Re Bunger)*, BCEST #D301/98; (Reconsideration of BC EST #D014/98).

Kelly's last day of employment was in August 2000. Kelly's complaint was not delivered to the Branch until one and one-half to two and one-half months after the statutory time limit for such delivery had passed.

Given it is a mandatory statutory requirement that a complaint must be delivered to the Branch 6 months after the last day of employment I cannot accept Kelly's argument that the date of the

issuance of cheques by Activities Plus can change the deadline to file a complaint under the *Act*. The critical date for the calculating the time limit for filing a complaint is the last day of employment and for Kelly this date occurred in August 2000. The intent of the statute is that the time limit should run from the date an individual's employment ended, not when some cheque has been issued.

The delegate was correct in concluding the requirements of Section 74 of the *Act* had not been met and was correct to have refused to investigate the complaint.

The appeal is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated October 9, 2001 be confirmed.

Norma Edelman
Adjudicator
Employment Standards Tribunal