

COPY

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20060518
Docket: L040753
Registry: Vancouver

In the Matter of the *Judicial Review Procedures Act*, R.S.B.C. 1979, c.241
And In the Matter of the Decisions of the Employment Standards Tribunal dated
July 17, 2003 (BC EST #RD 231/03) and March 4, 2003 (BC EST #D076/03)
And Determination of The Director of Employment Standards dated November 25, 2002

Between:

Grant Howard

Petitioner

And:

**British Columbia (Employment Standards Tribunal),
British Columbia (Director of Employment Standards),
and Kirk Capital Corporation**

Respondents

Before: The Honourable Mr. Justice Pitfield

Oral Reasons for Judgment

In Chambers
May 18, 2006

The Petitioner, acting on his own behalf:

G. Howard

Counsel for the Respondent, British Columbia
(Director of Employment Standards):

M. Alman

Counsel for the Respondent, British Columbia
(Employment Standards Tribunal):

S. Basarab

Counsel for the Respondent,
Kirk Capital Corporation:

R. Pearce

Place of Trial/Hearing:

Vancouver, B.C.

[1] **THE COURT:** Mr. Howard proceeds by way of petition seeking review of a decision made by an Employment Standards Tribunal, the effect of which was to deny his right to proceed with an appeal from a decision of the Director, or the Director's delegate, of the Employment Standards Branch.

[2] I must say that, surprisingly to me, none of the Director, the tribunal, the employer, or Mr. Howard, was aware at the time of appeal to the Tribunal that the legislation extending or enlarging an appeal period in relation to a decision of the Director from 15 days to 30 days had been brought into force by a regulation prescribed by the Governor in Council.

[3] The Employment Standards Tribunal rejected the application made by Mr. Howard for an extension of the time within which to appeal on the basis that the delay on his part had not been adequately explained. In the course of an application for a reconsideration of that ruling, an additional ground was advanced, namely, there did not appear to be sufficient merit or public importance associated with the points raised by Mr. Howard on appeal to compel the tribunal to exercise its discretion in favour of extending time.

[4] The result was that Mr. Howard commenced a proceeding by way of petition under the *Judicial Review Procedure Act* in which he sought to challenge both the Director's decision and the decision of the Tribunal to refuse his appeal. Suffice to say that voluminous argument has been prepared by Mr. Howard and voluminous materials have been filed in support of the application.

[5] In the course of the petition process the parties became aware, quite how I am not sure, that the appeal period had been enlarged, and became aware that if the Tribunal, Mr. Howard, the Director, or indeed the employer, had been aware of the fact that the amendment to the *Employment Standards Act* had been proclaimed in force, his appeal would have been filed on a timely basis and all of the proceedings before the Tribunal, other than to deal with the merits of the appeal, something which has not yet been done, would have been unnecessary.

[6] I have been advised by counsel for the Tribunal and the employer that neither takes any objection to the petition being allowed or granted, to the extent that the appeal from the decision of the Director should be remitted to the Tribunal for a determination on the merits in accordance with the provisions of the *Employment Standards Act*. That follows from the fact that, properly construed, Mr. Howard's appeal from the Director's decision, or that of the Director's delegate, was filed with the Tribunal on a timely basis.

[7] I am not prepared, or indeed empowered, to deal with any of the substantive issues raised by Mr. Howard in relation to the appeal or grounds for appeal from the Director's decision. As I have taken great pains to explain to Mr. Howard, the process is governed by the *Employment Standards Act* which contemplates first, the making of a complaint; second, a review and investigation of the complaint by the Director at the Employment Standards Branch; third, a ruling in respect of the complaint; and fourth, an appeal to the Tribunal by a complainant who feels aggrieved at the Director's decision. Only when the Tribunal has ruled on the merits in accordance with a lawfully instituted appeal, could it possibly be said that this

court should have any involvement in, or concern about, the manner in which the Tribunal has gone about its business.

[8] It follows that the petition, in all respects but one, is dismissed. The single exception is that the matter is remitted to the Tribunal for a consideration of Mr. Howard's appeal from a decision of the Director, the date of which was, as I recall, November 25, 2002, with the appeal to be determined on its merits.

[9] I turn, then, to some subsidiary issues. The first is a request by the employer Kirk Capital Corporation that I include a term in the order compelling the Tribunal to consider what would have been a cross-appeal filed by Kirk had the Tribunal accepted the Howard appeal, or agreed to accept the Howard appeal as validly and timely-filed. I am not prepared to make any order in that regard for a number of reasons, not the least of which is that I do not believe there is any formal application before me to do so. It might be possible to broadly construe the *Judicial Review Procedure Act* to permit such orders, but I am satisfied that the question of whether or not appeals which have not been commenced on a timely basis should be heard by the Tribunal, on the basis that time will be extended is a matter for that Tribunal, and not for this court.

[10] The second request made by Kirk Capital is that funds which it was ordered to pay as a result of the Director's decision, and which were in fact paid and then released to Mr. Howard, should be returned by him to the Tribunal as that is where they would have been kept had his appeal proceeded. Again, this is not a matter in respect of which I construe this court to have any jurisdiction whatsoever, and that

application is dismissed. The question of whether there is to be any restitution to the Tribunal on an interim or any other basis, and if so, on what terms, is a matter for the Tribunal.

[11] The final issue pertains to costs. That is an issue which is not without difficulty. I recognize that the employer has been burdened by considerable costs in this matter. I must say that I am very much troubled by the fact that those who are responsible for the administration of the legislation did not seem to be able to keep abreast of changes in their legislation that would affect the right of appeal. Neither the Tribunal at the initial application stage nor at the reconsideration stage was self-apprised of the change in the legislation, nor was any party to the proceeding minded to determine whether or not the legislative provision which had been enacted some time previously but not yet proclaimed in force had, in fact, been brought into force by regulation prescribed by the Governor in Council.

[12] That said, I am also concerned by the fact that, for whatever reason, Mr. Howard has pursued an application which pertains to the merits of the Director's decision, which, on the best view one can take out of it, is premature if it is authorized at all. I do not know and I do not want to know of the circumstances that transpired, but it is clear from the discussion I have had with Mr. Howard throughout the morning that there has been some difficulty on his part in appreciating that in respect of which this court has jurisdiction at this point in time, and that in respect of which it does not have jurisdiction.

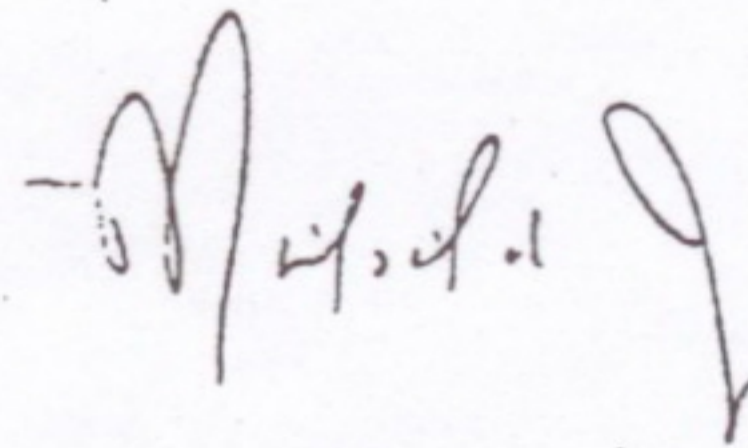
[13] I am of the view that the appropriate award in this case is to provide an order that Mr. Howard recover his costs on a limited basis, that is, on the basis of part of a proceeding only. His costs will be limited to the tariff amounts that he may recover at Scale 3, or may be permitted on the rules to recover it at Scale 3, in respect of the petition as filed, the filing costs in respect thereof, and the preparation of affidavit material that pertains to the question of whether or not the Tribunal was bound to accept his notice of appeal as lawfully filed within the statutory appeal period and nothing more. In other words, any of the affidavit material that has been prepared in relation to any of the other issues except the question of whether, by virtue of the amendment of the legislation, he was entitled to file his appeal or his appeal should be entertained on the merits, is not to be included in the taxation of costs.

[14] The award that I will make is an award against the Tribunal. Those costs will be payable by the Tribunal and they will be subject to taxation in the event that Mr. Howard and the Tribunal, or counsel on its behalf, are not able to come to some reasonable understanding of the limit that I have imposed on the right to recover costs. The only reason I do so is that I take it to be the Tribunal's responsibility to know of the legislation by which it is governed and the rules under which it is to operate. For whatever reason it appears not to have been mindful of the fact that legislation directly bearing on this issue had been proclaimed in force.

[15] Any of the remaining requests for relief by any of the parties is dismissed.

[16] I will also order that the form of order shall be prepared by counsel on behalf of the Tribunal. It shall be mailed in draft form to Mr. Howard, and indeed to other

counsel, for their notation of approval as to form. For that purpose, Mr. Howard will be obliged to provide to the court on the record the mailing address at which the material is to be sent. If Mr. Howard does not respond within 10 business days of the date of mailing with an order approved as to form, then the requirement of his approval as to form will be dispensed with and the order may be tendered for entry in the court registry.

A handwritten signature in black ink, appearing to read "M. Howard", is located in the lower right quadrant of the page. The signature is written in a cursive style with a long, sweeping tail on the final letter.