

An application for Reconsideration

- by -

Gerhard Walter  
("Walter")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act R.S.B.C. 1996, C.113* (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2005A/210

**DATE OF DECISION:** March 7, 2006

## DECISION

### SUBMISSIONS

Gerhard Walter	on his own behalf
Peter J. Roberts	for Kispiox Forest Products
Amanda Welch	for the Director of Employment Standards

### INTRODUCTION

1. This is an application filed by Gerhard Walter (“Walter”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of a Tribunal Member’s decision issued on October 26th, 2005.
2. This application is being adjudicated based solely the parties’ written submissions. In that latter regard, I have a completed reconsideration application form (and attachments) from Mr. Walter (as well as a later submission) and submissions filed by legal counsel for Mr. Walter’s former employer and by the delegate of the Director of Employment Standards. In adjudicating this application I have also considered the previous decisions issued in this matter (by both the Tribunal and the Employment Standards Branch), the section 112(5) “record” and the various other documents and submissions that were filed with the Tribunal during the course of the appeal proceedings.
3. Although this application is timely, I do not consider it to be meritorious. In the following sections I shall summarize the prior proceedings and then set out my reasons for dismissing this application.

### PREVIOUS PROCEEDINGS

#### *The Determination*

4. On April 14th, 2005 the Director’s delegate issued a Determination and accompanying “Reasons for the Determination” (the “delegate’s Reasons”) dismissing a complaint that had been filed by Mr. Walter. The delegate dismissed Mr. Walter’s complaint on the ground that it was filed outside the “6-month complaint period” provided for in section 74(3) of the *Act*. The delegate dismissed Mr. Walter’s complaint pursuant to section 76(3)(a) of the *Act*. The relevant portions of sections 74 and 76 are set out below:

#### **Complaint and time limit**

74. (1) An employee, former employee or other person may complain to the director that a person has contravened
  - (a) a requirement of Parts 2 to 8 of this Act, or
  - (b) a requirement of the regulations specified under section 127 (2) (l).
- (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....

- (3.1) Subsection (3) applies to an employee whose employment is terminated following a temporary layoff and, for that purpose, the last day of the temporary layoff is deemed to be the last day of employment referred to in subsection (3).

### **Investigations**

76. (1) Subject to subsection (3), the director must accept and review a complaint made under section 74...
- (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
- (a) the complaint is not made within the time limit specified in section 74 (3) or (4),...
5. According to the information set out in the delegate's Reasons, Mr. Walter was laid off, on a temporary basis, on April 18th, 2003. A temporary layoff is deemed to be a termination if the person being laid off is not recalled to work before 13 consecutive weeks have elapsed. The "deemed termination" provision, section 63(5) of the *Act*, states that the termination date is deemed to be the original date of layoff. Thus, in this case, Mr. Walter was deemed to have been terminated on April 18th, 2003. However, by reason of section 74(3.1), the "6-month complaint period" did not commence running until the end of his temporary layoff period. Accordingly, Mr. Walter had until January 19th, 2004 to file his complaint; in fact, he filed his complaint on January 26th, 2004. The delegate thus summarily dismissed Mr. Walter's claim for compensation for length of service without inquiring into the underlying merits of his claim.

### ***The Appeal Proceedings***

6. Mr. Walter appealed the summary dismissal of his complaint, however, his appeal was not filed within the statutory appeal period (it was about one week late). In reasons for decision issued on August 17th, 2005 (B.C.E.S.T. Decision No. D127/05), a Tribunal Member extended the appeal period.
7. Subsequently, the merits of the appeal were adjudicated—those reasons for decision, issued on October 26th, 2005 (B.C.E.S.T. Decision No. D166/05) are the subject of the instant application—which resulted in the confirmation of the Determination.
8. Mr. Walter appealed the summary dismissal of his complaint on grounds that the delegate erred in law [section 112(1)(a)] and otherwise failed to observe the principles of natural justice in making the Determination [section 112(1)(b)]. The Tribunal Member concluded that there was no evidence before him that the delegate failed to observe the principles of natural justice (at page 3):

...The natural justice argument appears to have two elements. First, that it would be unusual and illogical to have required Walter to apply for severance from a company that intended to employ him in the future. Second, that it was somehow the Director's fault that he failed to file his claim before January 26, 2004.

In response to the first point, Walter may feel that such a requirement is illogical, but that result is not dictated by the Director, but, if the Director was correct on the law, by the effect of provisions in the *Act*. In response to the second point, even if the Director had some particular obligation to Walter to ensure his claim was filed in time, and I doubt there is, it does not alter the fact that his complaint was not delivered to the Director until January 26, 2004.

9. The alleged error of law arose from the fact that Mr. Walter worked for his employer after he was otherwise required to retire as a result of having turned 65 on February 7th, 2003. Mr. Walter continued

to work, despite having reached mandatory retirement age, during two separate time periods: February 7th to April 18th, 2003; and again from September 20th to October 18th, 2003.

10. The parties' separate positions are reproduced, below, from the Tribunal Member's reasons (at page 4):

...Walter says the work he did in September and October 2003 should be considered employment and should have the effect of extending his period of employment with Kispiox to October 18, 2003 and, by inference, sustaining his entitlement to claim length of service compensation. The Director says that Walter's employment was terminated on July 18, 2003 and the two weeks of work in September and October 2003 did not revive this employment, but represented a new period of employment in respect of which there was no liability on Kispiox for length of service compensation. Counsel for Kispiox substantially supports the argument of the Director, submitting that "an employee cannot 'breathe life' into a time barred claim by returning to work for the employer".

11. The Tribunal Member accepted the arguments advanced by the Director and counsel for the employer (at page 4):

...Subsection 63(5) of the *Act* provides that the employment of an employee who is laid off for more than a temporary layoff, a term which is defined in Section 1 of the *Act*, is deemed to have been terminated for the purposes of the *Act*. There is extensive authority in the decisions of the Tribunal that say an employer's liability for length of service compensation arises at the time of termination, including a deemed termination under subsection 63(5) or Section 66, and is not discharged because an employee is called back, or continues, to work following the deemed termination. It follows that Kispiox' liability for length of service compensation and Walter's right to claim against that liability arose on July 18, 2003. Accepting (without deciding) the work Walter performed in September and October 2003 can be considered as employment, it can only be viewed for the purposes of the *Act* as a new period of employment following termination and not a continuation or extension of employment that had already been terminated under the *Act*.

Walter was required to file his claim for length of service compensation no later than six months following the deemed termination of his employment on July 18, 2003 and he failed to do so. There was no error [of law] in the Determination.

## **THE REQUEST FOR RECONSIDERATION**

12. Mr. Walter's application was filed on December 20th, 2005. Mr. Walter, in his "Reconsideration Application Form" stated he is requesting reconsideration: "To look into the fraudulent behaviour and stalling tactics [the employer] showed against me, resulting in my claim being late". Mr. Walter's grounds for reconsideration are more fully particularized in an attached letter, dated December 16th, 2005 and addressed to the Tribunal Member who issued the decision now under reconsideration. In essence, Mr. Walter alleges that his former employer was "improperly distancing themselves from paying severance" and that the Employment Standards Branch somehow should have done more to assist him. Mr. Walter says that he "would like for the Tribunal to further check into [the employer's] fraudulent behaviour". In a later submission dated January 13th, 2006, Mr. Walter suggested that he did not immediately seek "severance pay" because he thought that filing a claim might prejudice his "potential for future work".

## FINDINGS AND ANALYSIS

13. This application is misconceived. The Tribunal is not an investigative body and Mr. Walter has not presented any evidence of fraudulent behaviour by his former employer or of any sort of improper behaviour by the Employment Standards Branch or any of its officers.
14. It may be that Mr. Walter did not file a timely claim for compensation for length of service because he thought that filing a complaint might have prejudiced his future employment opportunities with his former employer. Nevertheless, he was obliged to file a timely complaint. Neither the Director nor this Tribunal has the statutory authority to extend the time limit for filing complaints. If Mr. Walter had been subjected to some sort of retaliatory action after filing a timely complaint he would have had a remedy under section 83 of the *Act*.
15. As for the issues of law and natural justice raised by the Mr. Walter in his appeal documents, I wholly endorse the comments made by the Tribunal Member (reproduced, in part, above) in his reasons for decision.

## ORDER

16. The application to vary the decision of the Tribunal Member in this matter is **refused**. Pursuant to section 116(1)(b) of the *Act*, the Tribunal Member's decision (B.C.E.S.T. Decision No. D166/05) is **confirmed**.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**