EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration

pursuant to Section 116 of the

Employment Standards Act S.B.C. 1995, C. 38

-by-

Robert Crawford Harris
("Harris ")

-of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE No.: 96/616

DATE OF DECISION: March 21 , 1997

DECISION

OVERVIEW

This is an application by Robert Crawford Harris pursuant to Section 116(2) of the *Employment Standards Act (the "Act")* for reconsideration of Decision No. D360/96 (the "Decision") which was issued by the Employment Standards Tribunal ("Tribunal") on December 22, 1996. The Decision dismissed Mr. Harris' appeal of Determination No. CDET 4168 which concluded that his complaint did not fall within the jurisdiction of the *Act* and thus was not the proper subject for an investigation by the Employment Standards Branch (the "Branch").

FACTS

Decision No. D360/96 concluded that because Determination No. CDET 4168 dealt solely with the question of jurisdiction, the appeal would also be limited to jurisdictional concerns; an investigation on the merits would proceed only if the complaint fell within the purview of the *Act.* The adjudicator concluded that the substance of Mr. Harris' complaint was that "he has been the victim of a concerted conspiracy to remove him from a particular teaching position, and indeed, the teaching profession." The adjudicator identified a claim "in the nature of a tort action for defamation and negligence" and found reference to only one Section of the *Act* in Mr. Harris' submissions, Section 8. He concluded that these complaints did not fall under Section 8 which "deals with pre- contractual misrepresentations"; he also found no other evidence which would *'prima facie,* trigger a complaint under any other provision of the *Act."* He concluded that any complaint under Section 8 was statute barred by Section 74(4) which provides a six month period "from the date of the contravention" to bring a complaint. Since the complaint arose some two years earlier, Mr. Harris' application was out of time. Finally, the adjudicator suggested that the proper forum for these complaints was either the courts or arbitration proceedings under the collective agreement governing Harris' employment with the Surrey School Board. Alternatively, he suggested that problems with the collective bargaining agent could be redressed under Section 12 of the *Labour Relations Code.*

The gist of Mr. Harris' criticism of Decision 360/96 is that the adjudicator wrongly concluded that the merits of the case are irrelevant until the jurisdictional question is determined. He also argued that the adjudicator erred in concluding that an investigation could not proceed until the jurisdictional question was settled; Mr. Harris asserts that an investigation must be carried out in a case as complex as his, to determine whether a breach was committed. He also argues that the adjudicator incorrectly found no breach of any provision of the *Act* and that Section 2, the "purposes" section of the *Act* had been violated. Mr. Harris also claims that his employer "repeatedly and flagrantly" breached Section 39 of the *Act* and Section 8:

> ...1 submit that D. Howard acted under false pretences when he changed the conditions of employment by claiming that he could not alter my teaching assignment for the '95/'96 school year .Similarly, he committed an even more obvious breach of this section when he gave me yet another flagrantly inappropriate timetable for the '96/'97 school year, while knowing full well that it would have been impossible for me to undertake such work and care for my elderly father at the same time.
>
> In the same vein, I submit that D. Howard acted under false pretences when he changed the conditions of employment by orderin2 me to remove all of the art posters, which I had been displaying in my classroom for 14 years, and then tried to claim that he had only reQuested that I do so. Similarly D. Howard and R. Taddei compounded this violation by pretending that they were unable to meet to resolve this issue for the next four months, in spite of the fact that they knew that my health had seriously deteriorated. By the same token, I submit that L. Hagglund, B. Bastien, and F. Renihan deliberately adopted the same strategy of evasion and deceit by contending that D. Howard did not violate the Collective Agreement or by ignoring my entreaties altogether.

Mr. Harris charges that by limiting his Section 8 inquiry to pre-hiring misrepresentations, the adjudicator endorsed an interpretation that means the vast majority of employees would have no protection at all under Section 8.1! Mr. Harris argues that the time limits in Section 74(4) should not apply to him as he has spent the last two years trying to obtain redress from the Surrey School Board. He also claims that a violation of Section 83 took place because the Surrey School Board (and B. Bastien) knew full well that my health has been seriously affected by the Board's protracted delay in resolving my concerns!. He cites Article E.7 in the collective agreement governing his employment with the School Board which prohibits workplace harassment. He also claims that the Board violated subsections 1 (b), (c), and (d) and 3(c)(ii) of the collective agreement.

Mr. Harris rejects the adjudicator's suggestion that some of his complaints are resolvable under the grievance procedure in the collective agreement and under Section 12 of the *Labor Relations Code.* He says he has tried both of those alternatives, with no success.

ANAL YSIS

The grounds for a reconsideration application are established by Section 116 of the *Act:*

> 116(1) *On application under subsection* (2) *or on its own motion, the tribunal may:*
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> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> (2) *The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> (3) *An application may be made only once with respect to the same order or decision.*

This Tribunal, in *Zoltan Kiss* (1996), BC EST # D122/96 set out some of the grounds for reconsideration: (1) a failure to comply with the rules of natural justice; (2) mistake of fact; (3) the decision is inconsistent with prior decisions indistinguishable on their facts; (4) significant new evidence coming to light that was not available before the first adjudicator; (5) mistake of law; (6) misunderstanding of or failure to deal with a serious issue; and (7) clerical error in the decision. An application for reconsideration, then, provides a narrower opportunity for intervention than the initial appeal to this Tribunal. The power granted by Section 116 is to be used with caution: it does not permit the reviewing panel to substitute its own opinion for that of the original adjudicator and is not merely an opportunity to reargue the merits of the Determination in the first instance or subsequent appeal Decision. Rather, it provides jurisdiction to examine the earlier Decision on certain, narrow grounds enumerated above.

Mr. Harris' involvement with the *Act* began with his September 17, 1996 complaint in which he alleged that the principal of the school where he was employed, along with the area superintendent,

> ...allegedly tried to force me from my teaching position at Semiahmoo by whatever means necessary and created and life-threatening situation for me and my elderly father.. ..[They] ...were apparently aided and abetted by a number of teachers at the school... ...and by various officials at the Surrey School Board, the ST A and the BCTF who repeatedly refused to act on my behalf and who eventually ignored my entreaties altogether .

He has since added a complaint that he was forced to use sick days and to remove certain posters from his classroom. He also alleges that through time tabling and scheduling of his classroom obligations by the principal and school board, he was placed in an untenable position vis-à-vis his obligations to his elderly, infirmed father. He also holds the School Board responsible for any deterioration in his father's health.

The Employment Standards Officer who was assigned to look into Mr. Harris' complaints concluded that they did not fall under the jurisdiction of the *Act* so that it was unnecessary to proceed with an investigation of the merits. This approach was endorsed by the adjudicator who added that there were no breaches of the *Act* on the facts as presented to him. While I can appreciate the frustration experienced by Mr .Harris over the lack of redress he has enjoyed to date, I nevertheless must agree with both the Employment Standards Officer and the adjudicator. They were correct to proceed with the jurisdictional question first and to delay the investigation on the merits until the jurisdictional question was resolved. It is not only a breach of Tribunal's obligation to comply with its enabling legislation, it is pointless to proceed with the investigation of a complaint outside of the *Act's* jurisdiction. Mr. Harris says that it is impossible for the officer to determine whether a breach was committed without a full investigation, but this argument misses the point of the officer's conclusion: even if she was to identify some type of "wrongdoing" she is powerless to assist Mr. Harris where the problem is outside the jurisdiction of the *Act*. Similarly, the Director's powers of investigation must not be used, except in conjunction with a power validly exercised under the *Act.* Thus, this does not provide grounds for the reconsideration.

I agree with the adjudicator--and indeed Mr. Harris did not take issue with this aspect of the Decision in his submissions on reconsideration--that the substance of Mr. Harris' complaints is that he is being forced out of his job and the teaching profession by a series of actions taken on behalf of the Surrey School Board by a number of officials and by some fellow teachers. These include scheduling problems that interfered with Mr. Harris' ability to care for his father and some problems with the display of certain posters from his classroom. In more recent submissions, Mr. Harris also complained that the School Board's failure to deal with his complaints in a timely way caused him to use his sick leave and have contributed to Mr. Harris senior's ill health. The adjudicator concluded that this did not breach Section 8 of the *Act* which is limited to pre-hiring misrepresentations. He also went on to point out that even if it did cover the substance of Mr. Harris' problems with the School Board, the complaint was outside the Section 74(4) time limit.

Mr. Harris says it is wrong of the adjudicator to limit the application of Section 8 to pre-employment misrepresentation because it means that employees are left without protection during the course of their employment. This is only partly right: they are left without protection under Section 8 of the *Act* but have recourse to other statutory protection including those in the *Labour Relations Code* and the *Worker's Compensation Act.* Unionized employees also have recourse to the grievance procedure in the collective agreement governing their employment. Limited protection from certain other workplace problems can also be found in civil proceedings for torts such as libel and negligence. The adjudicator was also correct in limiting Section 8 in this way as that section is located in that part of the *Act* which governs hiring practices only. The case law is also clear that the protection covers only pre-hiring practices. (See *Queen* v. *Cognos Inc.* (1993) 99 *D.L.R. (4th)* 626 *(S.C.CJ)* Moreover, the terms and conditions of his ongoing employment is governed by the collective agreement between his employer and his bargaining agent. Thus, there is no mistake of law or fact or other error in this aspect of the Decision.

He also says that certain aspects of this behaviour contravened the purposes of the *Act* as set out in Section 2. As the purposes of the *Act* simply outline the policy background of the legislation, they are an aid to interpretation and do not create substantive obligations which can be breached. Thus, this aspect of his argument does not succeed.

Mr. Harris also alleges a breach of Section 39 of the *Act* which prohibits an employer from requiring or allowing (directly or indirectly) "an employee to work excessive hours or hours detrimental to the employee's health or safety". Mr. Harris says that the Surrey Board has "repeatedly and flagrantly breached" Section 39 but does not outline specifics, beyond saying that his health has been detrimentally affected by the Board's delay in dealing with his complaints. He states that the Surrey Board has admitted that his health has been seriously affected by approving his sick leave and medical leave. This complaint was not dealt with by either the Employment Standards Officer nor the adjudicator so that it is not appropriate to raise it for the first time on reconsideration. Thus this aspect of the application is dismissed on this ground. Nevertheless, I will comment on the substance of Mr. Harris' argument under Section 39. That section prohibits an employer from allowing an employee to work excessive hours; Mr. Harris is not alleging that his health has been negatively affected by excessive hours. Rather it is the delay that has caused his problems. This is not covered by Section 39. He implies that his father's health may be detrimentally affected by his inability to devote as many hours as he would like, but Section 39 protection extends to the employee only. For these reasons, even if this argument was properly before me, I would have dismissed it.

Mr. Harris says he should not be bound by the six-month limitation since it took him approximately two years to unsuccessfully pursue the Surrey School Board. However, Section 74(4) is clear: a complaint under Section 8 of the *Act* mlls1 be made within 6 months of the contravention. It is mandatory, not permissive. While Mr. Harris may feel aggrieved by this time constraint, the legislation is unequivocal on this point. This aspect of the Decision does not contain grounds for reconsideration.

Mr .Harris cites numerous provisions in the collective agreement governing his employment that have been breached by his employer. This Tribunal has no jurisdiction over these complaints and urges Mr. Harris to take them up with his bargaining agent. He rejected the adjudicator's suggestion that these complaints are within the jurisdiction of the grievance procedure under the collective agreement and that problems with his bargaining agent fall under Section 12 of the *Labour Relations Code.* Mr. Harris says he has tried these alternatives Qut without success. However, I can only reiterate the suggestions of the earlier arbitrator in response to these points raised by Mr. Harris.

ORDER

Pursuant to Section 116 of the *Act,* I confirm Decision BC EST #D360/96.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal