

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an application for reconsideration
pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

The Director of Employment Standards
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: John McConchie
Geoffrey Crampton
Mark Thompson

FILE NO.: 98/269

DATE OF DECISION: July 8, 1998

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Reconsideration of BC EST #D014/98

DECISION

OVERVIEW

This is an application by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "Act") for reconsideration of a decision of the Employment Standards Tribunal, BC EST No. D014/98 (the "Original Decision"), dated February 19, 1998.

The respondent, Merritt Sikh Society, supports the Director's application for reconsideration. The Tribunal also received a brief letter from the complainant supporting the Original Decision.

This appeal raises a straight-forward issue of interpretation of the *Act*: does Section 76 (2) of the Employment Standards Act provide the Director of Employment Standards with the discretion to investigate a complaint which has not been made within the time limit set out in Section 74 (3) of the *Act*?

The issue arises in the following way. After his employment was terminated, the complainant filed a complaint under the *Act*. The complaint was filed outside the time limits set out in section 74 (3) of the *Act* as it was filed more than six months after the complainant's last day of work. The Director's delegate dismissed the complaint on the basis that it was out of time. The Director did not investigate the complaint or make any determination as to whether it should have been adjudicated on its merits.

The complainant appealed successfully. The adjudicator in the Original Decision reviewed section 76 of the *Act* and concluded that subsection 2 provided the Director with a discretion to consider the complaint despite its lack of timeliness. The adjudicator's reasons were these:

"The Determination stated that because the complaint was not filed within 6 months, no investigation would take place. This argument is supported by the employer. But I do not agree with this interpretation of the Director's obligations to determine whether a complaint should be investigated where it has been filed later than six months after the last day of employment. The Director's obligations in such a case are also affected by section 76(2)(a):

- 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).

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The Director is not required to dismiss a complaint filed outside the six month time limit; while she may do so, it is not mandatory. Thus where it has been ascertained that the complaint was filed too late, the Director must then exercise her discretion under section 76(2) and decide whether the investigation should proceed. That was not done here; instead, the Determination dismissed the complaint simply because it was filed beyond the six month deadline. It does not say why the Director did not exercise her discretion under section 76(2) and investigate the complaint notwithstanding the filing date. And without this, the Determination is based on an incorrect interpretation of the Act. The appeal is thus allowed."

THE LEGISLATION

The issue in this application for reconsideration will depend on a construction of the following provisions in the *Act*:

- 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) (1).
- (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.
- 76. (1) Subject to subsection (2), the director must investigate a complaint made under section 74.
- (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),
 - (b) this Act does not apply to the complaint,
 - (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
 - (d) there is not enough evidence to prove the complaint,
 - (e) a proceeding relating to the subject matter of

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- the complaint has been commenced before a court, tribunal, arbitrator or mediator,
 - (f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or
 - (g) the dispute that caused the complaint is resolved.
- (3) Without receiving a complaint, the director may conduct an investigation to ensure compliance with this Act.

ANALYSIS

A reconsideration will only be granted where there is a demonstrable breach of the rules of natural justice, where there is compelling new evidence that was not available at the first hearing or where the adjudicator made a fundamental error of law: *Bicchieri Enterprises Ltd.* (BCEST #D335/96). This case involves an allegation that the adjudicator in the Original Decision made a fundamental error of law in interpreting the *Act* so as to provide the Director with a discretion to consider complaints which have been filed outside the time limits in section 74(3). This application therefore raises an issue which is appropriate for reconsideration.

Does section 76(2) of the *Act* provide the Director with a discretion to investigate and determine the merits of a complaint which is out of time under section 74? It is necessary to consider the above legislation as a whole in order to properly decide this issue.

Section 74(3) of the *Act* requires that a complaint relating to an employee whose employment has been terminated must be delivered under subsection (2) of section 74 within six months after the last date of employment. The Tribunal has consistently interpreted this provision as being mandatory: see for example, *Burnham* (BCEST #D035/98).

Section 76 (1) of the *Act* is a general legislative direction that the Director must investigate any complaint arising under section 74. However, section 76(1) is made expressly subject to section 76(2) which modifies the general grant of authority in section 76(1). It identifies a number of circumstances in which the Director is empowered to refuse to investigate a complaint or (if it is already under investigation) to discontinue or postpone the investigation. If the Director is aware that the complaint is not timely under section 74 (3), she is empowered to refuse to investigate it. If there is doubt about the matter at the outset of the investigation, or if the lack of timeliness only becomes apparent during the course of the investigation, the Director is empowered by section 76(2) to stop or postpone it (perhaps pending further submissions from the parties on timeliness) once the investigation has begun.

While section 76(2) expressly empowers the Director to refuse to investigate a complaint in certain circumstances, it does not grant the Director any authority that she does not

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already have under the *Act*. In other words, we do not read the use of the words "may refuse" as providing the Director with the authority to investigate a matter which she could not otherwise investigate. Timeliness under section 74(3) of the *Act* is only one of the issues mentioned in the listing contained in section 76(2). A more telling circumstance is contained in section 76(2)(b), where the *Act* does not apply to the complaint. Clearly, the Director has no authority to investigate a complaint to which the *Act* does not apply. In our opinion, the Legislature has put untimely complaints into the same category as complaints to which the *Act* does not apply.

We also note that one of the purposes of the *Act*, as set out in section 2(d), is to "...provide fair, efficient procedures for resolving disputes over the application and interpretation of this *Act*...". We consider that it would be neither fair nor efficient to interpret section 76 in a way which would require the Director to investigate complaints which were not filed within the six month time limit contained in section 74(3) of the *Act*.

Accordingly, it is our decision that the Original Decision erred in concluding that the Director has a discretion to investigate complaints which are filed beyond the time limits in section 74(3) of the *Act*. As such, we direct that the Original Decision must be reversed and the Determination in this case restored.

ORDER

We order, pursuant to Section 116 of the *Act*, that the Original Decision be cancelled.

John L. McConchie
Adjudicator
Employment Standards Tribunal

Mark Thompson
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal