



Citation: Maxim Fleischeuer and Karin Fleischeuer (Re)
2019 BCEST 139

An appeal

- by -

Maxim Fleischeuer and Karin Fleischeuer
(the “Appellants”)

- 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 (as amended)

PANEL: Maia Tsurumi

FILE NOS.: 2019/54 and 2019/64

DATE OF DECISION: December 30, 2019

DECISION

SUBMISSIONS

Maxim Fleischeuer	on his own behalf and on behalf of Karin Fleischeuer
Shannon Corregan	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Maxim and Karin Fleischeuer (together “the Appellants”) have each filed appeals of a determination (the “Determination”) issued by Shannon Corregan, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on May 6, 2019.
2. In the Determination, the Delegate found that the Director was barred from enforcing any determination made in respect of the Appellants’ complaints (the “Complaints”) and declined to take any further action with respect to the Complaints.
3. The Appellants appeal the Determination on the grounds that the Delegate erred in law.
4. While the Appellants filed separate appeals, both appeals relate to a single Determination and are identical appeals. As such, I have considered both appeals together.
5. I sought submissions from the parties on whether the Director erred in law in ceasing its investigation into the Complaints prior to the Plan Implementation Date of November 28, 2014.
6. This decision is based on the submissions made by the Appellants, the ESA sub-section 112(5) record (the “Record”), additional documents submitted as part of the record by the Appellants (the “Supplemental Record”), the Determination, the Reasons for the Determination, and submissions from the Director (“Director’s Submissions”).

ISSUE

7. The issue before the Tribunal is whether the Delegate erred in law in finding that the Director was barred from enforcing any determination made in respect of the Complaints.

BACKGROUND FACTS

8. Lemare Lake Logging Ltd. (“Lemare”) is a logging business within jurisdiction of the ESA. The Appellants worked as watchmen for Lemare from August 9, 2010, to January 28, 2011.
9. On January 17, 2011, the Appellants each filed the Complaints with the Director under section 74 of the ESA. They alleged that Lemare failed to pay them overtime, annual vacation pay, statutory holiday pay, and “watchman hours”.

10. A delegate of the Director (the “Prior Delegate”) attempted to mediate the complaints but they were not resolved.
11. On June 21, 2012, Lemare obtained an Initial Order (the “Initial Order”) from the British Columbia Supreme Court (the “BCSC”) under the *Creditors’ Companies Arrangement Act*, R.S.C. 1985, c. C-36 (the “CCAA”). Under the Initial Order, Lemare was to file a Plan of Arrangement with the court and restructure its business.
12. Under the Initial Order, Alvarez & Marsal Canada Inc. was appointed as Monitor for the CCAA proceedings. A Monitor is an independent third-party who is appointed by the court to monitor the company’s ongoing operations and assist with the filing and voting on a Plan of Arrangement.
13. The Initial Order stated that no action, suit, or proceeding in any court or tribunal against Lemare or affecting its business could be started or continued without the written consent of Lemare and the Monitor or leave of the court. Any action, suit, or proceeding against Lemare under way at the time of the Initial Order was stayed and suspended until further order by the court. All rights and remedies of any individual as against Lemare were stayed and suspended except with the written consent of Lemare and the Monitor or by leave of the court.
14. Regarding Lemare’s directors and officers, the Initial Order stated no action, suit, or proceeding in any court or tribunal may be commenced against the directors or officers regarding any claim against them that arose before the date of the Initial Order and where they were liable on behalf of Lemare as its director or officer. This stay would last until Lemare’s Plan of Arrangement was approved by the court.
15. The Initial Order stated that the stay and suspension of actions, suits, or proceedings did not affect investigations, actions, suits, or proceedings by regulatory bodies other than enforcement of any payment ordered by the regulatory body or a court.
16. On June 27, 2012, the Prior Delegate sent an e-mail to the Appellants stating:

I have just been notified that Lemare Lake Logging Ltd. has filed for protection from creditors under the Company Creditor’s Arrangement Act as of June 21, 2012.

This stays all legal proceedings against the Company, consequently we are unable to proceed to an adjudication Hearing with respect to your and Karin’s wage claims. We will monitor the proceedings in case things change.
17. This e-mail was not in the Record disclosed by the Delegate, although the June 27, 2012 e-mail is mentioned in the Record in other documents, including in the Chronology prepared by the Delegate. The Delegate states that the Record only includes documents the Delegate considered when the Determination was made and this e-mail is not germane to the question of whether the Prior Delegate erred in law by ceasing his investigation in 2012.
18. On October 26, 2012, the BCSC issued an order (the “Claims Process Order”) setting out a claims process and barring any new claims against Lemare after November 27, 2012.

19. The Claims Process Order said that the Monitor was to assist Lemare (and its related companies) with the Claims Process, including determining creditor claims and the referral of any claim to court, as requested by Lemare. The Claims Process Order set out the following process for creditors making claims against Lemare, including:
- a. The Monitor was to take prescribed steps to give notice of the Claims Process to creditors and potential creditors;
 - b. Any creditor who wanted to assert a claim against Lemare and/or any director or officer had to file a Proof of claim with the Monitor in the manner prescribed in the Claims Process Order;
 - c. The Monitor was to give Lemare's lawyers copies of all Proofs of Claim and Notices of Dispute filed with the Monitor;
 - d. The Monitor, in consultation with Lemare, was to review all Proofs of Claim and in consultation with Lemare was to accept, revise, or disallow each claim;
 - e. If Lemare wanted to revise or disallow a claim, Lemare and/or the Monitor had to send the creditor a Notice of Revision or Disallowance within a certain time period; and
 - f. Any creditor sent a Notice of Revision or Disallowance who wanted to dispute it had to deliver a Notice of Dispute to the Monitor within a certain time period.
20. At paragraph 27 of the Claims Process Order, upon receipt of a Notice of Dispute, "the Monitor, in consultation with [Lemare], may: (i) attempt to consensually resolve the disputed Claim with the Creditor, or (ii) bring a motion before the Court in these proceedings to determine the disputed Claim."
21. On November 16, 2012, the Prior Delegate told the Appellants that he could not do anything further to address the Complaints because of the CCAA proceedings. He said that the Appellants' files were "now considered closed".
22. There is no evidence that the Appellants requested the Director to issue a formal determination at that time.
23. The Appellants filed a Proof of Claim with the Monitor in relation to their unpaid wages.
24. On December 7, 2012, the Monitor rejected the Appellants' claims. As a result, the Appellants had until December 17, 2012, to file a Notice of Dispute with the Monitor.
25. On December 9, 2012, the Appellants filed a Notice of Dispute with the Monitor.
26. There is no evidence in the Record outlining how or if the Monitor responded to the Notice of Dispute.
27. On November 26, 2014, the BCSC issued a Sanction Order with a Consolidated Plan of Arrangement (the "Plan") under the CCAA. Paragraph 14 of the Sanction Order and 8.1 of the Plan (Schedule "B" to the Sanction Order is the Plan) state:

Permanent Injunction

14. from and after the Plan Implementation Date, all Trade Creditors and Creditors with Barred Claims shall be permanently and forever barred, estopped, stayed and enjoined from:
- (a) commencing, conducting or continuing in any matter, directly or indirectly, any actions, suits, demands or other proceedings of any nature of kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against the Petitioners or any of them and their respective successors, and assigns;
 - (b) enforcing, levying, attaching, collecting or otherwise recovering or enforcing by any manner or means, directly or indirectly, any judgment, award, decree or order against the Petitioners or any of them and their successors and assigns;
 - (c) commencing, conducting or continuing in any matter, directly or indirectly, any action, suits or demands, including without limitation, by way of contribution or indemnity or other relief, in common law, or in equity, or under the provisions of any statute or regulation, or other proceedings of any nature or kind whatsoever (including, without limitation, any proceeding in a judicial, arbitral, administrative or other forum) against any Person who makes a claim for contribution or indemnity from the Petitioners or any of them or might reasonably be expected to make such a claim for indemnity or contribution, in any matter or forum, against the Petitioners or any of them;
 - (d) taking any actions which would interfere directly or indirectly with the implementation or consummation of the Plan.

28. Paragraph 2 of the Plan states as follows:

- a. "Barred Claims" are "any Claim that has not been proven in accordance with the Claims Process Order";
- b. "Claim" includes a "Pre-Filing Claim". A Pre-Filing Claim covers possible claims based on events, acts, or omissions prior to the Filing Date of June 21, 2012, including claims based on a breach of statutory duty.;
- c. "Creditors" are any person with a Claim;
- d. "Disputed Creditor Claims" are Claims set out in Schedule "B" of the Plan;
- e. "Person" includes individuals and governmental authorities; and
- f. "Trade Creditors are Creditors listed in Schedule "A" of the Plan who have proven a Claim in accordance with the Claims Process Order and the Creditors with Disputed Claims once those Claims have been settled in accordance with the Claims Process Order.

29. Under paragraph 4.3 of the Plan, Disputed Creditor Claims were to be paid out as set out in the Plan once the dispute had been resolved and the amount of the claim was determined in accordance with the Claims Process Order. Once the claim was resolved, amounts that would otherwise have been paid prior to the resolution of the dispute were to be made and remaining payment was to be made in accordance with the Plan.

30. The Appellants' wage claims of \$34,561.01 were listed as a Disputed Creditor Claim in Schedule "B" of the Plan. The Appellants say the Monitor also informed them they were holders of a Disputed Creditor Claim.
31. On November 28, 2014, the Monitor filed the Plan Implementation Certificate, which meant it had finished its work as Monitor.
32. On January 25, 2018, the Appellants contacted the Branch to ask for assistance in getting payment of their wage claims from Lemare. The Branch reviewed its files on the Complaints.
33. On October 31, 2018, a delegate of the Director responded to the Appellants stating that in 2012 when Lemare went into creditor protection under the CCAA, this prevented the Director from enforcing the Complaints' wage claims. The e-mail goes on to say that "[a]t this point the Branch was legally prevented from pursuing your claim. As a result of the CCAA action, the Monitor became the administrator of all claims, and had jurisdiction over all claims, including your claim for wages."
34. On March 22, 2019, the Appellants were advised by a Regional Manager at the Branch that the Delegate was assigned to decide the preliminary issue of whether the Director was barred from enforcing a determination in respect of the complaints.

THE DETERMINATION

35. The issue before the Delegate was whether the Director of Employment Standards was now barred from enforcing any determination regarding the Appellants' Complaints because of the CCAA proceedings.
36. On May 6, 2019, the Delegate issued the Determination.
37. The Delegate found that on November 26, 2014, the BCSC issued a Sanction Order with a Consolidated Plan of Arrangement under the CCAA. Paragraph 14 of the Sanction Order said that as of the Plan Implementation Date (November 28, 2014), all Trade Creditors and Creditors with Barred Claims were permanently barred from continuing any proceedings (including court proceedings, arbitrations, administrative proceedings, or other forums) against Lemare. It also said that all Trade Creditors and Creditors with Barred Claims were barred from enforcing, levying, attaching, collecting, or otherwise recovering or enforcing any judgment against Lemare. Paragraph 8.1 of the Consolidated Plan of Arrangement repeated paragraph 14 of the Sanction Order.
38. The Delegate said that "Barred Claims" in the Sanction Order were defined as claims that had not been proven as required by the process set out by the October 26, 2012 Claims Process Order.
39. The Delegate found that paragraph 14 of the Sanction Order and paragraph 8.1 of the Plan barred the Appellants' Complaints. She stated that the evidence before her indicated that the Appellants' claims were not proven in accordance with the October 26, 2012 Order and therefore were "Barred Claims" even though the Appellants had filed a Notice of Dispute. She further found that the Employment Standards Branch was an administrative body and so fell within paragraph 14 of the Sanction Order and paragraph 8.1 of the Plan.

POSITIONS OF THE PARTIES

40. The Appellants disagree with the Delegate's conclusion in the Determination that their Complaints are "Barred Claims". They say that because the Monitor did not bring a Motion to the court to determine the Appellants' claims, their claims for wages are still live and can be investigated and enforced by the Branch. They rely on evidence that they filed their claims as required by the Claims Process Order.
41. The Appellants argue the Director erred in law in not investigating the Complaints.
42. The Director submits that there was no error in law in the decision to stop investigating the Complaints.
43. The Director states that while "it is uncertain whether the Director can continue to investigate a claim, the Director is stayed from enforcing a monetary determination, as the enforcement of such a determination is the enforcement of a payment. As of the date of the Initial Order, the Director was stayed from enforcing any monetary determination regarding the Appellants' Complaints during the stay period, though the Director may not have been stayed from investigating the Complaints."

ANALYSIS

44. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- a. the director erred in law;
 - b. the director failed to observe the principles of natural justice in making the determination;
 - c. evidence has become available that was not available at the time the determination was being made.
45. For the reasons that follow, I conclude that the Delegate made no error of law in finding that under Paragraph 14 of the Sanction Order and 8.1 of the Plan, the Director is now barred from enforcing any determination.
46. The standard of review of the Determination that the Branch is barred from investigating the Complaints is correctness. This was a question of law regarding the jurisdiction of the Branch.
47. I agree with the Delegate that the Sanction Order and the Plan bar any further action on the Complaints. The substance of the Complaints are the Appellants' wage claims against Lemare. These wage claims are either Disputed Creditor Claims or Barred Claims under the Sanction Order and Plan and both categories of claims are covered by the Sanction Order and the Plan.
48. "Trade Creditors" are defined in paragraph 2 of the Plan to include Creditors with Disputed Claims once those Claims have been settled in accordance with the Claims Process Order. Paragraph 2 of the Plan provide that "Barred Claims" are any claim not proven in accordance with the Claims Process Order.
49. It is arguable whether the Appellants' wage claims would be considered to have been settled in accordance with the Claims Process Order or not proven in accordance with that Order, but I do not need to determine that point to decide this appeal. Both categories fall under the Sanction Order and Plan.

50. Furthermore, an appeal from the Prior Delegate's decision to "close the files" is long out of time. The Appellants were notified that the files related to the Complaints were closed in November 2012. The Delegate says that after receiving this e-mail, the Appellants did not ask the Director to issue a formal determination.
51. The Delegate submits that as of the date of the Initial Order, the Director was stayed from enforcing any monetary determination regarding the Appellants' Complaints. The Director acknowledges, however, that the Director may not at that time have been stayed from investigating the Complaints.
52. The Delegate's position is that under sub-section 76(3)(f) of the *ESA*, the Director had the discretion to stop reviewing, mediating, investigating, or adjudicating the Complaints because a proceeding relating to the subject matter of the Complaints was commenced before a court (i.e. the *CCAA* proceedings). The Delegate relies on *Frank and Annemarie Varseveld*, BC EST # D028/15, as an application of sub-section 76(3)(f) in analogous circumstances to these appeals. The Tribunal in *Varsevelts* found that a delegate was correct in ceasing any further action regarding the Varsevelts' complaints because of sub-section 76(3)(f) and sub-section 69.3(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").
53. In my view, when the Initial Order was issued under the *CCAA*, the Prior Delegate did have the discretion to stop his investigation because of the *CCAA* proceedings under sub-section 76(3)(f), but he exercised his discretion unreasonably: *Jody L. Goudreau et al.*, BC EST # D066/98. The contemporary documentation, as well as the October 31, 2018 e-mail from the Branch to the Appellants, shows that the Prior Delegate's basis for exercising his discretion to stop investigation was that he had no jurisdiction to investigate because of the *CCAA* proceedings. This was a mistake in construing the limits of the Director's authority. As acknowledged in the Director's Submissions, while the Branch was prevented by the Initial Order from enforcing any determination about wages owed to the Appellants, the Initial Order did not affect investigations, actions, suits, or proceedings by regulatory bodies (other than enforcement of any payment ordered). Under sub-section 11.1(2) of the *CCAA*, the Branch's investigation into the Complaints was not barred by the *CCAA* proceedings: see also *Taubeneck et al.*, BC EST # D006/12 and *Worldspan Marine Inc., et al.*, BC EST # D103/11.
54. Despite my view that the Prior Delegate erred in deciding not to investigate the Complaints after the Initial Order was issued, an appeal from this decision has long since expired. The issue on appeal before me is whether the Delegate erred in finding that under Paragraph 14 of the Sanction Order and 8.1 of the Plan, the Director is barred from enforcing any determination and as I explained above, the permanent injunction ordered in Paragraphs 14 of the Sanction Order and 8.1 of the Plan prevent the Branch from taking any further action.

ORDER

55. The appeals are dismissed pursuant to sub-section 114(1) of the *ESA* and pursuant to section 115(1) of the *ESA*, the Determination is confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal