Citation: Maxim Fleischeuer and Karin Fleischeuer (Re)
2020 BCEST 22

Applications for Reconsideration

- by -

Maxim Fleischeur

- and –

Karin Fleischeur

(the "Applicants")

- 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)

PANEL: Kenneth Wm. Thornicroft

FILE Nos.: 2020/018 and 2020/020

DATE OF DECISION: March 13, 2020

DECISION

SUBMISSIONS

Maxim and Karin Fleischeuer — on their own behalf

INTRODUCTION

1. I have before me two identical applications filed by Maxim Fleischeuer (EST File No. 2020/018) and Karin Fleischeuer (EST File No. 2020/020). I will refer to these latter two individuals as the "Applicants". The Applicants apply, pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), for reconsideration of 2019 BCEST 139, issued on December 30, 2019 (the "Appeal Decision").

2. By way of the Appeal Decision, the Tribunal dismissed the Applicants' appeal of a Determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the "delegate"), on May 6, 2019. The Appeal Decision confirmed the Determination.

3. In my view, this application is not meritorious and, therefore, does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # 313/98). Accordingly, this application is dismissed. My reasons for dismissing this application are set out in greater detail, below.

PRIOR PROCEEDINGS

4. On January 17, 2011, the Applicants filed separate unpaid wage complaints against their former employer, Lemare Lake Logging Ltd. ("Lemare"). On June 21, 2012, Justice Grauer of the B.C. Supreme Court issued an order under the federal *Companies' Creditors Arrangement Ac*t and the *Canada Business Corporations Act* regarding several separate, but affiliated, business corporations, including Lemare.

5. On November 21, 2012, the Applicants filed a joint proof of claim with the Monitor appointed by Justice Grauer's June 21 order. The Applicants claimed a total of $34,565.01 as unsecured creditors. On December 7, 2012, the Monitor rejected the claim for the following reasons:

    1. The Proof of Claim as submitted is not sufficient to establish a claim, nor permit the Petitioners to respond to it. In any event:
    2. Ms. Karin Fleischeuer was never an employee of the Petitioners.
    3. Mr. Maxim Fleischeuer was a salaried employee and not entitled to any of the amounts claimed.
    4. Maxim Fleischeuer was terminated for cause; there is no money owing to him.
    5. Both Mr. and Mrs. Fleischeuer's *Employment Standards Act* claims are unsubstantiated and without merit.

The Applicants had until December 17, 2012, to dispute the Monitor's Notice of Disallowance of their claim, and they did so on December 9, 2012.

6. On November 26, 2014, Justice Grauer issued a "Sanction Order" pursuant to which, among other things, a "Consolidated Plan of Arrangement" was approved and the Monitor would be discharged following certain events. The Monitor completed its work and filed a Plan Implementation Certificate in the B.C. Supreme Court on November 28, 2014.

7. Various "Trade Creditors" were listed in Schedule A to Justice Grauer's November 26 order and "Disputed Creditor Claims" were listed in Schedule B. The Applicants' $34,561.01 claim was listed as one of four disputed claims. Paragraph 4.3 of the "Consolidated Plan of Arrangement" provided that the disputed claims would be "paid out as set out in this Plan once the dispute has been resolved and the amount of the Disputed Creditor Claim has been determined in accordance with the Claims Process Order". However, the Plan also defined "Barred Claims" as "any Claim that has not been proven in accordance with the Claims Process Order". As of November 26, 2014, so far as I can determine, the Applicants' claim had not been proven. Thus, as provided by the November 26 order, any person with a "Barred Claim" was permanently enjoined, as provided in paragraph 14 of the order, from attempting to enforce their claim other than through the court approved claims process.

8. Having reviewed the section 112(5) record, I am unable to determine if the Monitor ever formally addressed the Applicants' dispute regarding the initial disallowance of their claim, but it is clear that the Monitor never *accepted* the Applicants' claim before the insolvency proceedings in the B.C. Supreme Court ended via the November 26, 2014 Sanction Order. The record includes an e-mail sent from the (by then discharged) Monitor on August 14, 2018, to the Employment Standards Branch concerning the Applicants' claim. The relevant portions of that e-mail read as follows:

> The Plan was approved despite having disputed claims as plan proceedings cannot be stalled for minor creditors. If subsequently the disputed creditors prove their claim is valid then they would be treated in accordance with the provisions of the Plan. It is possible that the disputed creditor claims are never resolved.

The Determination

9. On May 6, 2019, the delegate issued a Determination indicating that "no further action will be taken" regarding the Applicants' complaints because "the Director of Employment Standards is barred from enforcing any determination regarding [the Applicants'] complaints".

10. The delegate appended written reasons to the Determination (the "delegate's reasons") setting out, in greater detail, the factual background and the relevant legal considerations leading him to conclude that the Applicants' complaints could not be adjudicated on their merits under the *ESA*'s dispute resolution process. In essence, the delegate concluded that, by the terms of the Sanction Order issued by the B.C. Supreme Court on November 26, 2014, the Applicants' claims were barred and subject to a permanent injunction.

11. Although the Determination was not issued until May 6, 2019, the Applicants were advised by electronic mail sent on November 16, 2012, that by reason of the insolvency proceedings in the B.C. Supreme Court, their complaint files were being closed:

> Further to my earlier email confirming Lemare's insolvency means that all claims against Lemare must be put through the insolvency monitor, I am attaching instructions on how claimants can

> file. As I indicated, this Branch can do nothing further to address wages under the Act because the federal insolvency is paramount to our legislation.
>
> Your files are now considered closed.

12. Section 76(3) of the *ESA* sets out various reasons why the Director of Employment Standards may "refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint" including: (b) "this Act does not apply to the complaint", (f) "a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator", and (g) "a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint".

13. A "determination" is defined in section 1 of the *ESA* as follows: "means any decision made by the director under section 30 (2), 66, 68 (3), 73, 76 (3), 79, 80 (3), 100 or 119" (my underlining). Accordingly, the Branch's e-mail communication dated November 16, 2012, could be characterized as a determination for purposes of an appeal to the Tribunal (in which case, the Applicants' May 29, 2019, appeal was time barred). This appears to have been an alternative ground for the dismissal of the Applicants' appeal (see Appeal Decision, para. 50).

14. In any event, the Applicants appealed the May 6, 2019, determination to the Tribunal on the ground that the delegate erred in law (section 112(1)(a) of the *ESA*). Essentially, the Applicants maintained that their claim was not a "barred claim" as defined in the court orders and the arrangement plan.

The Appeal Decision

15. The Applicants' appeal was dismissed under section 114(1) of the *ESA*. Although the Tribunal Member did not specify the particular subsection that she relied on, it appears from her reasons that she was relying on one or more of subsections (a) [appeal outside Tribunal's jurisdiction], (b) [the appeal was time barred], (f) [no reasonable prospect that appeal will succeed], and (g) [subject of appeal addressed in another proceeding].

16. The Member also found that the delegate did not err in law. The Tribunal Member held that the delegate correctly determined that the Applicants' complaints were subject to the permanent injunction issued by Justice Grauer on November 26, 2014 (the Sanction Order). In particular, regardless of whether the Applicants' claims were characterized as "disputed creditor claims", or "barred claims", the effect was the same – they could not be adjudicated under the *ESA* because of the permanent injunction. The Member also held that the Applicants' appeal was time barred.

THE APPLICATION FOR RECONSIDERATION – FINDINGS AND ANALYSIS

17. The Applicants say that the delegate erred in characterizing their unpaid wage claims as "barred claims" as defined in the B.C. Supreme Court orders. The Applicants maintain that the proper characterization of their claim was as a "disputed creditor claim".

18. The Tribunal Member did *not* make an affirmative finding that the Applicants' unpaid wage claim was a "barred claim". Rather, the Member held that whether the claim was characterized as "disputed" or

"barred", it was nonetheless addressed in the Sanction Order and by the Consolidated Plan of Arrangement (Appeal Decision, para. 47).

19. As is clear from the record, the Applicants jointly submitted an unpaid wage claim within the insolvency proceedings, and that claim was rejected by the Monitor. Whether the Monitor was legally correct in so doing is not a matter that is properly before the Tribunal, either by way of appeal or on reconsideration. Claims against Lemare Logging (or any of the other affiliated firms involved in the insolvency proceedings) were required to be addressed by the Claims Process Order issued on October 26, 2012, by Justice Grauer.

20. The Applicants filed a Proof of Claim with the Monitor on November 21, 2012. The Monitor, in accordance with paragraph 25 of Justice Grauer's October 26 order, disallowed their claim and advised them of that decision on December 7, 2012. Paragraph 26 of Justice Grauer's October 26 order set out a form of appeal process. The Applicants filed their dispute regarding the Monitor's disallowance of their claim on December 9, 2012. As I read paragraph 27 of Justice Grauer's October 26 order, if a disputed claim could not be "consensually resolved", then it could be referred to the B.C. Supreme Court for resolution "in a summary manner" – something that did not occur in this case.

21. I express no view regarding why the Applicants' claim was not referred to the B.C. Supreme Court, or whether that avenue of recourse is even now available under the terms of the October 26 order. However, it seems clear that under the October 26 order, no mechanism existed for the Applicants' claim to be adjudicated by the Employment Standards Branch. The Applicants' claim had to be adjudicated by the Monitor, with the possibility of a summary appeal or review in the B.C. Supreme Court.

22. The B.C. Supreme Court Sanction Order was issued on November 26, 2014. As of this date, the Monitor had disallowed the Applicants' claim, but had not taken any steps to have their dispute regarding that latter decision addressed, "in a summary manner", by the B.C. Supreme Court as provided for in Justice Grauer's October 26 order. Under paragraph 21 of the Sanction Order, the Monitor (and perhaps the Applicants as well, as "interested parties") could have applied to the B.C. Supreme Court for directions regarding the Applicants' claim, but no such application appears to have been made. There was no mechanism provided for in the Sanction Order that allowed the Applicants to have their disputed claim adjudicated by the Employment Standards Branch. Indeed, the Branch was specifically enjoined from doing so.

23. Since the Applicants' claim stood as "unproven" as of November 26, 2014, it could perhaps be characterized as a "barred claim" as defined in paragraph 2.1 of the Consolidated Plan of Arrangement. However, the Applicants' claim was specifically listed as a Schedule B claim and, on that basis, clearly qualified as a "disputed creditor claim" as defined in the paragraph 2.1 of the Consolidated Plan of Arrangement.

24. Paragraph 4.3 of the Consolidated Plan of Arrangement addressed "disputed creditor claims". These latter claims were required to be addressed under the Claims Process Order – in other words, consensual resolution or possible summary adjudication in the B.C. Supreme Court. Subject to that latter adjudicative avenue, the Permanent Injunction (paragraph 8) clearly prohibited the Employment Standards Branch from adjudicating the Applicants' claim (as was determined by the delegate).

25. In my view, the Tribunal Member correctly held, at para. 54 of the Appeal Decision, that "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." Accordingly, it follows that this application for reconsideration of the Appeal Decision must be dismissed.

ORDER

26. The Applicants' application for reconsideration of the Appeal Decision is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal