Citation: Molly B. Stevens (Re)
2021 BCEST 71

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Molly B. Stevens
(the "Appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2021/049

DATE OF DECISION: August 30, 2021

INTERIM DECISION

SUBMISSIONS

Molly B. Stevens	on her own behalf
Jonathan McNair	Bankruptcy trustee for Culinary Capers Catering, Inc.
Radu Popescu	on behalf of the Director of Employment Standards

INTRODUCTION & BACKGROUND FACTS

1. On April 23, 2021, Radu Popescu, a delegate of the Director of Employment Standards (the delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*") as well as his separate "Reasons for the Determination" (the "delegate's reasons") under section 81 of the *ESA*. The delegate determined that no wages were owed to any former employee of Culinary Capers Catering, Inc. (the "employer"). This appeal has been filed by one of the 80 former employees named in the Determination. The employer made a voluntarily assignment into bankruptcy on May 11, 2020, over 11 months prior to the Determination being issued.

2. The Determination was prompted by eight separate section 74 complaints filed by former employees of the employer. The complaints were filed on May 12 (two complaints), May 13, May 19, May 20, May 25, July 2, and July 3, 2020. The employer, prior to its bankruptcy, operated a seemingly successful catering business. According to the delegate's reasons, the employer "was one of the largest catering companies in western Canada" (page R5) with annual revenues of approximately $12 million and more than 100 employees. The delegate's reasons recount the swift and precipitous decline of the employer's fortunes during the first half of 2020 (pages R6 – R7):

> With the arrival of the pandemic in March 2020 and the mass cancellations which it was facing from its clients, [the employer] began to lay off its employees *en masse*. By March 17, nearly three quarters of its staff had been laid off or terminated. By the start of April, only 14 employees remained on payroll…
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> Certain administrative staff were kept on payroll and paid regularly until the date of bankruptcy…The owners [*sic*] of [the employer] looked at its situation and concluded by mid-April 2020 that there was no prospect for continuing the business. Ownership [*sic*] was particularly concerned that not only did the public health orders prevent [the employer] from accessing its meaningful business at that time, but they had no projected end date. There was no way to determine when business might be possible again in the future. There was no business case to keep the [employer] operational indefinitely while it had no meaningful business but continued to incur expenses, and in mid-April [the employer] sought professional insolvency advice. [The employer] ultimately filed for bankruptcy on May 11, 2020, bringing a de facto end to the employment of its remaining employees.

3. Five of the complainants noted in their written complaints that the employer was in bankruptcy. As noted, the employer made a voluntary assignment into bankruptcy on May 11, 2020, and Jonathan McNair of the firm Crowe Mackay LLP is the employer's bankruptcy trustee (the "trustee"). As detailed in the delegate's reasons, at page R2: "The Trustee provided a list of 108 employees, including full-time, seasonal, and casual employees, who were on [the employer's] payroll as of March 2020 and who the Trustee advised may have potential claims for compensation for length of service under the [*ESA*]." This information, in turn, prompted the delegate to conduct an investigation regarding "whether any or all of these 108 former employees are owed compensation for length of service or any other wages" (section 76(2) of the *ESA* authorizes investigations in the absence of a complaint).

4. Ultimately, the delegate issued the Determination in which he concluded: "I have determined that the [*ESA*] has not been contravened with respect to the employees named in Appendix 'A' to the Determination and no wages are outstanding". As set out in the delegate's reasons, it appears that all the employer's former employees were paid all earned wages with the possible exception of section 63 and section 64 compensation (individual compensation for length of service and group termination pay).

5. The delegate determined that no section 63 or section 64 compensation was owed by reason of section 65(1)(d) of the *ESA*: "Sections 63 and 64 do not apply to an employee…(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act". The delegate determined that the employer's operations were affected to such a degree by the unforeseen COVID-19 pandemic, and the ensuing public health orders, that it was not possible for it to meet its contractual obligations to its employees.

THE APPEAL

6. The present appellant (the only former employee, so far as I am aware, who has appealed the Determination) was not one of the original eight complainants, but she was listed in Appendix A to the Determination (page R16) as one of the former employees "to which the Determination Applies". The appellant says that the Determination should be set aside on the grounds that the delegate erred in law and failed to observe the principles of natural justice (subsections 112(1)(a) and (b) of the *ESA*). As will be seen, the appellant also submitted "new evidence" despite not having formally appealed the Determination on the "new evidence" ground of appeal (section 112(1)(c) of the *ESA*).

7. As previously noted, the appellant did not file a section 74 complaint. She provided the following explanation for having failed to do so: "I did not lodge a complaint with the Employment Standards Branch ("ESB") because the [employer] was already in bankruptcy by the time I was fired." The appellant says that she received a temporary layoff notice on March 17, 2020 and expected to return to work once the pandemic subsided. "However, I was notified by the Trustee on May 11, 2020 that it had taken possession of [the employer's] business assets and operations, and that my employment was terminated effective that day". The appellant says that a short time later "I appropriately received the vacation pay that the [employer] owed me".

8. The appellant provided the following additional information regarding her failure to file a section 74 complaint:

> With respect to filing a complaint with the ESB, I assumed that there was no use since the [employer] had already sought bankruptcy at the time that my employment was terminated, and therefore, the claim for unpaid length of service severance [section 63] and group termination compensation [section 64] that I expected to provide to the Trustee at some point during the bankruptcy proceedings would be treated as unsecured debt and share in the distribution of the [employer's] liquidated assets behind any secured debt regardless of whether or not I filed a complaint with the ESB.

9. As previously noted, the appellant says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. With respect to the "natural justice" ground of appeal, the appellant says that the delegate never contacted her prior to issuing the Determination. The delegate's reasons confirm this assertion (at page R4): "Other than the Complainants, I did not contact any other former employees of [the employer]." The appellant says that this failure to seek her evidence and argument regarding the employer's possible section 63 and section 64 obligations prior to the issuance of the Determination constituted a breach of the principles of natural justice:

> I believe that it is not fair that the [employer] seems to have been afforded ample opportunity to argue its case while I and the rest of the "Named Employees" listed on Appendix A of the [delegate's reasons] were not even made aware of the Director's investigation until after the "Determination" had been provided to the Trustee. We should have been informed that the [employer] was making an argument to the Director [of Employment Standards] in favour of the Trustee not paying the employees the typical obligations under Section 63 and 64 of the ESA and provided an opportunity to submit information and provide input against such unusual treatment prior to the "Determination" being made.

10. The appellant says that the delegate erred in law in interpreting section 65(1)(d) of the *ESA* so as to deny the former employees' section 63 and 64 compensation in this case. More particularly, the appellant says that the employer's voluntary decision to assign itself into bankruptcy cannot relieve it from its sections 63 and 64 obligations. The appellant says that prior to the date of the assignment, the employer was continuing to operate "albeit at a scaled-down level…but instead of soldiering on with a skeletal crew and finding innovative ways of adapting its service offerings during the pandemic, the directors simply shut down and bankrupted the [employer]." The appellant maintains that "once they decided to do that, Section 65(1)(d) should not apply".

11. The appellant also challenges certain of the delegate's findings of fact. In particular, the appellant says that the delegate's finding that it was "impossible" for the employer to continue operations, notwithstanding the pandemic and the impact of consequent public health orders, cannot be sustained. The appellant says that the employer was not compelled by exigent economic circumstances to file for bankruptcy. The appellant identified ten separate catering companies that "all pivoted and survived the pandemic". The appellant asserts:

> …I disagree with the [delegate's] finding that it was "impossible" for [the employer] to continue to provide catering services, remain a going concern and avoid bankruptcy in light of the fact that I am not aware of any catering company in direct competition with the [employer] that also

> declared bankruptcy due to the effects of the pandemic. It is simply conjecture to say that the [employer] would or would not have survived…

12. The appellant also provided a good deal of other information regarding how certain catering companies restructured their operations and were seemingly able to carry on business in some form despite the economic ravages of the pandemic on the catering sector. The appellant also provided information about the employer's finances in an effort to demonstrate that it had the financial wherewithal to continue operations. It should be noted that, in very large measure, the appellant's arguments and assertions constitute an attempt to introduce new evidence, even though the appellant has not formally appealed the Determination on the "new evidence" ground of appeal (section 112(1)(c) of the *ESA*). It should also be noted that all of this "new evidence" is presumptively inadmissible hearsay evidence, although the Tribunal does have the statutory authority to receive hearsay evidence under section 103(d) of the *ESA* and section 40 of the *Administrative Tribunals Act*.

13. The appellant summarized her position regarding the delegate's finding that the section 65(1)(d) exception applied in this case as follows:

> In summary, Section 65(1)(d) of the ESA does not apply in the event of a "proceeding under an insolvency Act" and [the employer] chose to puts [*sic*] itself into bankruptcy. It is clear that Section 65(1)(d) is not intended to apply in a bankruptcy scenario as the length of service claims of former employees should be protected in a bankruptcy. In any event, the ESA does not affect the common law claim for common law severance of former employees. Therefore, I am requesting that, if the Tribunal aggress [*sic*] with my assessment, it should effect an amendment or reversal of the "Determination" so that all of the cleaners and dishwashers, cooks and kitchen staff, drivers and event planners that sacrificed and worked so hard to make [the employer] a success can share in whatever amounts are available to the unsecured creditors, even if only cents on the dollar.

FINDINGS AND ANALYSIS

14. I will address the appellant's arguments, in turn, as well as another issue that I believe the delegate should have addressed, namely, the Director's jurisdiction to issue the Determination in light of the stay provisions set out in the federal *Bankruptcy and Insolvency Act*.

Did the Director Fail to Observe the Principles of Natural Justice in Making the Determination?

15. It is clear that the appellant was aware that she could have filed a section 74 complaint but made a deliberate choice not to do so in light of the employer's bankruptcy filing. The appellant was laid off on March 17, 2020 and formally terminated on May 11, 2020. The six-month time limit for filing a section 74 complaint has now expired. However, even though the appellant was not a "complainant", she was a person named in the Determination (in Appendix A) and, as such, had the statutory right to be served with a copy of it (section 81) and to appeal the Determination (section 112) – see *Aquilini et al.*, 2020 BCEST 90. I understand that the appellant was served, by registered mail, with a copy of the Determination (at an address provided to the delegate by the bankruptcy trustee).

16. The appellant says that since she was a former employee, by reason of that status, the delegate was obliged to inform her about his investigation, and that she should have been invited to provide evidence and argument during the course of that investigation. Section 77 states that a person "under

investigation" must be given an opportunity to participate in that investigation, but there is no such statutory provision in relation to employees whose entitlements under the *ESA* might be assessed as part of a larger section 76(2) investigation ("The director may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint").

17. In *Aquilini et al.*, *supra*, the Tribunal held (at para. 199):

> Although section 77 does not mandate an equivalent obligation toward complainants, in my view, fundamental fairness principles dictate that *complainants, or their representatives*, should be given an opportunity to reply to evidence that has been submitted by the employer during the course of an investigation, especially when that evidence and argument stands in marked contrast to the complainants' position (my *italics*).

18. Since the appellant was not a *complainant*, she was not entitled, under the *Aquilini* principle, to be afforded an opportunity to participate in the delegate's investigation. But this appeal raises a separate issue, namely, whether persons who are not complainants – but whose entitlements under the *ESA* might be affected by a determination – are entitled to notice of the delegate's investigation and to be afforded an opportunity to participate in it.

19. There is nothing in the *ESA* that expressly confers on employees, who have *not* filed section 74 complaints, a right to participate in an investigation that might result in a determination regarding their entitlements under the *ESA*. Section 2(d) states that one of the purposes of the *ESA* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act". In my view, it would inevitably lengthen and complicate section 76(2) investigations if the Tribunal were to impose (and in the absence of any enabling express statutory language) an obligation on the Director's delegates to contact, and seek submissions from, each and every employee whose rights under the *ESA* might be affected by a determination, even though they never filed a section 74 complaint.

20. It should be borne in mind that once a determination affecting such employees' rights is issued, each employee has a separate and independent right to appeal to the Tribunal and, that being the case, their right to be heard is preserved and protected. If an individual wishes to participate in an investigation regarding their rights and entitlements under the *ESA*, that employee can file a complaint, thereby ensuring that that they will be permitted to participate in the delegate's subsequent investigation.

21. While a delegate conducting an investigation certainly can seek submissions from a non-complainant employee (or anyone else who might have relevant information), I am not satisfied that a delegate has a *duty* to contact anyone whose rights might be affected by a determination other than the "person under investigation" (section 77) and the complainant(s). It follows that I do not accept the delegate breached the principles of natural justice by failing to seek submissions from the appellant prior to issuing the Determination. This ground of appeal is dismissed.

Error of Law

22. In my view, the delegate correctly identified the correct statutory test for determining if the section 65(1)(d) exception applied in this case. The appellant's attack on the delegate's ultimate conclusion that section 65(1)(d) applied (and thus section 63 and section 64 compensation was not payable to any former employee) is largely predicated on her assertion that the delegate did not fairly assess the evidence before

him regarding "impossibility" of contractual performance. The appellant also seeks to have other evidence – that was apparently not before the delegate – taken into account with respect to this question.

23. The appellant says, and I agree, that section 63 and section 64 compensation stand separate and apart from an employee's common law entitlement to severance pay in lieu of reasonable notice. However, neither the Director nor the Tribunal has any jurisdiction to adjudicate common law claims for severance pay. Thus, an issue concerning an individual's right to receive common law severance pay (or concerning its amount) cannot be brought to the Tribunal for adjudication.

24. The appellant also apparently seeks a remedy on behalf of *all* former employees. However, she has not been authorized to act on behalf of any of the other former employees. This appeal, assuming it is properly before the Tribunal, is solely concerned with the appellant's section 63 and section 64 entitlements under the *ESA*.

25. The delegate's finding regarding the applicability of section 65(1)(d) was a finding of mixed fact and law and, as such, can only be set aside if the delegate made a "palpable and overriding error" (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). That test sets a high bar for an appellant. I also note that the appellant's argument is substantially founded on "new evidence", even though she has not appealed the Determination on the "new evidence" ground of appeal. Nevertheless, in light of the Tribunal's decision in *Triple S Transmission Inc.*, BC EST # D141/03, it may be appropriate to consider whether the appellant's new evidence is admissible on appeal.

26. However, at this juncture, I prefer not to make a final decision regarding the appellant's error of law (or new evidence) ground of appeal, since there is, in my view, a fundamental jurisdictional question that must first be addressed. I now turn to this jurisdictional issue.

The Bankruptcy and Insolvency Act *Stay Provisions*

27. On May 11, 2020, the employer entered bankruptcy. The Determination was issued over 11 months after the employer entered bankruptcy. Although the actual bankruptcy documents are not before me, it appears that there was a voluntary assignment into bankruptcy. The delegate was well aware, from the outset of his investigation, that the employer was in bankruptcy (five of the original complaints referenced this fact); the section 112(5) record indicates that the delegate had many communications with the employer's bankruptcy trustee during the investigation.

28. The *Bankruptcy and Insolvency Act* (the "*BIA*") contains several "stay" provisions, including sections 69(1)(a), 69.1(1)(a), 69.1(1), 69.3(1), and 69.41(2). The language in each of these provisions is quite similar. By way of example, section 69.3(1)(a) states: "Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, *or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy*" (my *italics*). The former employees' claims for unpaid section 63 and section 64 compensation would appear to be claims "provable in bankruptcy", and thus caught by the *BIA* stay provisions.

29. The Tribunal has held, in several decisions, that once an employer enters into bankruptcy, any employee claims for monies that flow from *ESA* entitlements must be pursued in the bankruptcy proceeding if they

constitute "claims provable in bankruptcy" (see, for example, *Okrainetz*, BC EST # D354/97; *ICON Laser Eye Centres Inc. et al.*, BC EST # D649/01, confirmed on reconsideration: *Director of Employment Standards*, BC EST # RD201/02; *International Steelworks Industries Ltd*., BC EST # D294/02; *More Marine Ltd.*, BC EST # D078/08 and BC EST # D079/08, confirmed on reconsideration: *More Marine Ltd.*, BC EST # RD118/08; *Kovic*, BC EST # D048/09; *Varseveld*, BC EST # D028/15; *Dasilva*, 2019 BCEST 25; and *Morris*, 2019 BCEST 26).

30. The delegate did not address the stay provisions in the *BIA*. It also appears that the bankruptcy trustee never raised the possible application of the stay provisions with the delegate. There may be a valid reason why the stay proceedings are inapplicable here. However, on the face of things, it appears that the Determination was issued contrary to the stay proceedings contained in the *BIA*. Accordingly, I propose to exercise my discretion under section 114(2)(a) of the *ESA* and refer this issue back to the Director for further investigation.

31. If a *BIA* stay applies, there would be no reason to adjudicate the appellant's "error of law" ground of appeal (or the "new evidence" issue). However, in the interests of adjudicative efficiency, I will afford the delegate an opportunity to respond to the appellant's error of law ground of appeal, and the appellant's "new evidence", if he wishes to do so. Upon receipt of the Director's report, the appellant and the bankruptcy trustee will be provided with a copy of the report and will be given an opportunity to respond to it. I will then issue a final decision in this appeal.

ORDERS

32. Pursuant to section 114(1)(f) of the *ESA*, the appellant's "natural justice" ground of appeal is dismissed.

33. Pursuant to section 114(2)(a) of the *ESA*, the possible applicability of a *BIA* stay provision is referred back to the Director for further investigation. The Director shall prepare and file a report with the Tribunal regarding this latter matter within 30 days of the date of this decision. If the Director wishes to do so, this report may also address the appellant's "error of law" ground of appeal and the appellant's "new evidence".

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal