

Citation: Executive TFN Waterpark GP Ltd. (Re)
2022 BCEST 31

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Executive TFN Waterpark GP Ltd. carrying on business as Big Splash Waterpark
("Employer")

- 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: Carol L. Roberts

FILE No.: 2022/011

DATE OF DECISION: June 2, 2022

DECISION

SUBMISSIONS

Andrea Raso	counsel for Executive TFN Waterpark GP Ltd.
Dawn Sissons	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Executive TFN Waterpark GP Ltd. carrying on business as Big Splash Waterpark (the “Employer”) of a decision of a delegate (the “delegate”) of the Director of Employment Standards (the “Director”) made January 13, 2022.
2. On May 14, 2020, a former employee of the Employer filed a complaint with the Director alleging that the Employer had contravened the *ESA* in failing to pay compensation for length of service. On August 4, 2020, the former employee also filed a notice of civil claim against the Employer and several other entities related to the Employer in the Supreme Court of British Columbia (“BCSC”) seeking, among other things, damages for the Employer’s alleged failure to provide reasonable notice of termination of employment. The civil action is proceeding through the litigation process.
3. One of the issues in both matters is the former employee’s length of service. The former employee contends that the Employer is obliged to recognize his service with a previous employer (“Splashdown”) which he alleged began in January 2000. The Employer takes the position that the employee’s employment began on October 1, 2016 and that the Employer is not obliged to recognize the former employee’s prior service with Splashdown.
4. On December 8, 2021, the delegate notified the Employer that she would be investigating the former employee’s complaint.
5. The Employer asked the delegate to stop investigating the complaint under section 76(3) of the *ESA* on the grounds that the issue of the former employee’s length of service was also at issue in a civil claim currently before the BCSC. On January 13, 2022, the delegate denied the Employer’s request.
6. The Employer appeals this decision.
7. After reviewing the appeal submissions, I sought submissions from the former employee and the Director. Although the Director made submissions, the former employee did not.
8. This decision is based on the section 112(5) “record” that was before the delegate at the time the decision was made, the submissions and the delegate’s decision.

ISSUE

9. Whether the Director’s decision to continue with an investigation of the complaint is a “determination” that may be appealed under section 112 of the *ESA*.

BACKGROUND AND ARGUMENT

10. On December 21, 2021, the Employer asked the Director’s delegate to seek the former employee’s consent to stop the investigation. The Employer noted that because the former employee had initiated parallel court proceedings and that length of service was a key issue in both proceedings, the proceedings could have inconsistent findings of fact.
11. The former employee refused to consent to the stopping of the investigation and on January 10, 2022, the Employer applied to the Director to stop the investigation under section 76(3)(f) of the *ESA*, or, in the alternative, to convene a hearing to determine the complaint.
12. On January 12, 2022, the former employee emailed the delegate opposing the Employer’s application. The former employee cited the differences between the legal characterization of compensation for length of service under section 63 of the *ESA* and wrongful dismissal damages, and the preservation of the right to sue under section 118 of the *ESA*. Later that day, the Employer informed the delegate that it intended to respond to the former employee’s response within two or three business days.
13. On January 13, 2022, the delegate wrote to the Employer as follows:
- ...this matter will proceed by investigation and no complaint hearing will be held.
- Although I appreciate [the Employer’s] request to stop this investigation pursuant to Section 76(3)(f) of the Employment Standards Act (the Act), the [employee] has expressed a desire to proceed with this matter. Although I have heard your request, in order to be fair to all parties this matter will proceed.
- The interpretation contained under Section 118 of the Act states “Investigation of an Employment Standards Act complaint for compensation for length of service, which is wages under s. 63 of the Act, is a different proceeding than a wrongful dismissal action in court.” It also states that if there is an overlap between statutory and contractual claims, the employee must decide whether to pursue a claim through the courts or through the director. In this case it appears that there are two different possible entitlements, one is contractual (wrongful dismissal) and one is statutory (compensation for length of service) based on the interpretation referenced above. Therefore it appears that there is no overlap between statutory and contractual claims. ...
14. The delegate then referred to the Employment Standards Branch’s *Guide to the Employment Standards Act and Regulations* and in particular, section 118 of the *ESA*.
15. Counsel for the Employer asked the delegate whether she could expect to receive the “typical ‘Reasons for the Determination’,” and informed her that she anticipated receiving instructions to appeal the decision.
16. On January 20, 2022, the delegate informed the Employer as follows:
- Please note that written determinations are not issued for procedural decisions and are issued once the investigation has been concluded.

17. On January 21, 2022, following further communications with counsel for the Employer, the delegate confirmed that she would not be issuing a determination regarding her decision to proceed with the investigation of the former employee's complaint.
18. The Employer argues that the Director failed both to provide adequate reasons for her decision and to observe the principles of natural justice in making the Determination.
19. The Director contends that the delegate's discretionary decision is not a "determination" which attracts appeal rights under the *ESA*.
20. The Director submits that the section 1 definition of Determination "cannot be read in isolation from the rest of the [*ESA*]" and in particular, section 76. The Director contends that decisions made under section 76(1.3) - that is, a decision to continue investigating a complaint - does not constitute a determination which may be appealed. The Director further submits that requiring parties to wait until the investigation process is complete before filing an appeal is consistent with the purposes of the *ESA*. The Director argues that to permit appeals of discretionary decisions made in the middle of an investigation would have the effect of encouraging a multiplicity of proceedings, unduly delaying and prolonging the process, which is contrary to the purposes of the *ESA*.

ANALYSIS

21. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.

Is the Director's January 13, 2022 decision a "determination"?

22. Section 1(1) of the *ESA* defines a "determination" to mean "any decision made by the director under section 30 (2), 66, 68 (3), 73, 74 (5), 76 (1.1) or (3), 79, 80 (3), 100 or 119."
23. Section 76 of the *ESA* provides as follows:
- (1) Subject to subsection (1.1), the director must accept a complaint made under section 74.
 - (1.1) The director must refuse to accept a complaint if the complaint is not made within the applicable time period required by section 74(3) or (4), or any extension of the applicable time period granted under section 74(5)
 - (1.2) On accepting a complaint under subsection (1), the director must review the complaint and make a decision about whether any of the circumstances described in subsection (3) (b) to (i) apply to the complaint.
 - (1.3) If the director takes no action under subsection (3), the director must investigate the complaint, and this investigation may involve an alternative dispute resolution process.

...

- (3) The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if

...

- (f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator, ...

24. I find that the delegate's decision to continue investigating the complaint does not constitute a "determination" as defined by the *ESA*.
25. If the Director had exercised her discretion to stop or postpone reviewing or investigating a complaint or refused to investigate a complaint under section 76(3), this decision would have been a final decision in relation to this complaint, and that could have been appealed under section 112. That is not what occurred in this case. In this case, the Director proceeded under section 76(1.3), which is a procedural provision that sets out what must be done where "no action" is taken under section 76(3) – namely the "director must investigate the complaint".
26. The finding that the Director's decision to continue to investigate the complaint is not a "determination" is consistent with the purposes and scheme of the *ESA*. Decisions taken under the provisions set out in the section 1(1) definition of "determination" amount to a final determination or affects the rights or liabilities of a party. Accordingly, I find that the *ESA* permits appeals of determinations that impact the rights or liabilities of a party, but not interim procedural rulings during the course of an investigation. To do otherwise would have the effect of encouraging a multiplicity of proceedings and would unduly delay and prolong the process before the Director. This would be inconsistent with section 2(d) of the *ESA*, which 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*". Given that the decision to continue the investigation of a complaint is not a final decision and does not have a substantive impact on the outcome of the complaint, it does not deprive parties of the opportunity to appeal the ultimate determination.
27. Accordingly, I conclude that the Director's decision to continue to investigate the complaint does not constitute a "determination" under the *ESA*.

ORDER

28. Pursuant to section 114(1)(h) of the *ESA*, I dismiss the appeal.

Carol L. Roberts
Member
Employment Standards Tribunal