

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Shannon Wetselaar

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Carol Roberts

**FILE NO.:** 2023/088

**DATE OF DECISION:** January 25, 2024

## DECISION

### SUBMISSIONS

Ryan Macklon/Dan Balkaran	counsel for Shannon Wetselaar
Jennine Punzalen	counsel for Lucky Paws Enterprises Inc.
Shane O’Grady	delegate of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Shannon Wetselaar (“Employee”) of a decision of a delegate of the Director of Employment Standards (“Director”) made on May 26, 2023 (“Determination”).
2. On April 6, 2022, the Employee filed a complaint with the Director alleging that Lucky Paws Enterprises Inc. carrying on business as Dane Creek Capital Corp United Raw Pet Foods (“Employer”) had contravened the *Employment Standards Act* (“ESA”) in failing to pay her a bonus at the end of her employment contract.
3. In the Determination, the Director’s delegate decided to exercise her discretion to stop investigating the complaint pursuant to section 76(3)(f) of the *ESA* because the Employee had also filed a Notice of Civil Claim on August 8, 2022, in respect of the same bonus.
4. The Employee appeals the Determination on the grounds that the Director erred in law and failed to observe the principles of justice in making the Determination.
5. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I sought submissions from the Director and the Employer.
6. This decision is based on the section 112(5) “record” that was before the delegate at the time the Determination was made; the submissions from the Employee and both her former and her current counsel, the Director, and the Employer; as well as the Reasons for the Determination.

### ISSUE

7. Whether the Employee has established grounds for interfering with the Director’s decision.

### BACKGROUND

8. The Employer operates a retail store that primarily manufactures and sells pet food. The Employee was contracted by the Employer to work as the General Manager from July 2021 to January 31, 2022. The employment agreement provided for the payment of a bonus at the end of the contract. The Employee filed a complaint under the *ESA* as well as a civil action in the Supreme Court of British Columbia when she did not receive the bonus. The subject of both the *ESA* complaint and the Supreme Court claim was in relation to the unpaid bonus.

9. The Employee took the position that because the Director had exclusive jurisdiction to determine claims for unpaid wages, the Employment Standards Branch was required to investigate the complaint regarding the unpaid bonus.
10. The delegate determined that section 118 of the *ESA* allowed an employee who had the right to pursue a statutory claim through the Director to also pursue another action in the courts. The delegate continued:
- If there is an overlap between the statutory claim before the Director and the civil claim in the courts, the employee must decide whether to pursue that particular aspect of the claim through the courts or through the director. An employee may split a claim into separate parts and pursue one part through the courts, and another part under the Act. For this to occur there should be no overlap between the two claims and the director may decline to act on any portion of the claim that is before the courts.
- As a civil claim was filed regarding the bonus, I gave the Complainant the option to withdraw, postpone until a resolution of the civil claim was complete, or withdraw the portion of the civil claim dealing with the bonus and continue with the investigation. The Complainant refused to withdraw their complaint, did not want the investigation postponed and refused to drop their claim for the bonus that is before the courts.
11. The delegate observed that the purposes of the *ESA* discouraged forum-shopping and re-litigation. After noting “policy considerations arising from the risks of duplicative proceedings – in other words, that parallel proceedings could lead to divergent findings,” the delegate determined that because the Employee was seeking a remedy from the Supreme Court that was identical to the remedy, she was pursuing through her *ESA* complaint, it was appropriate for her to exercise her discretion to stop investigating the complaint. The delegate determined that no further action would be taken by the Branch in respect of the complaint.

## **ARGUMENT**

12. The Employee contends that the delegate erred in law. She argues that the original complaint was a claim for unpaid wages, over which the Director has exclusive jurisdiction. She submits that the delegate erred in finding that an individual may take steps to enforce their statutory rights through civil action and that it is “a near certainty” that the courts will decline jurisdiction to hear that portion of her civil claim related to unpaid wages. If that occurs, she submits, there is a “material and substantial risk” that she will be left with no legal avenue under which she can seek to enforce her statutory rights.
13. The Employee argues that the delegate erred in interpreting section 118 of the *ESA* to mean that if there is an overlap between the statutory claim and a civil claim, a complainant must decide whether to pursue the overlapping aspect of the claim through the courts or the Tribunal (sic), and that the delegate’s narrow interpretation of section 118 is inconsistent with the objectives of the *ESA*.
14. The Employee also argues that the delegate erred in denying her the opportunity to fully present her case and to have a proper hearing of her complaint, denying her the benefits and protections of the *ESA*. She says that the Determination is incorrect in stating that she refused the option to postpone her complaint until the civil claim was resolved. The Employee says that neither she nor her counsel were informed of the option to postpone the complaint.

15. Finally, the Employee contends that the delegate provided inconsistent reasons to stop investigating the complaint. She says that the delegate states firstly that the Employee is seeking additional remedies in the civil claim and secondly, that the Employee is seeking an identical remedy before the Supreme Court as she is seeking in her complaint to the Branch. She submits that both cannot be true. For clarity, the Employee says that she is seeking an additional remedy before the Supreme Court, and the nature of that remedy requires that she plead facts related to the unpaid wages to support the claim for damages arising from breach of contract. The Employee contends that the delegate's factual error leads to a result that is both inconsistent and unfair.
16. The Director submits that while the Director has the exclusive jurisdiction to enforce statutory rights that arise under the *ESA*, the payment of a bonus is a statutory entitlement as well as a contractual wage claim that may be addressed by either the Branch or the courts, but not both. The Director argues that stopping an investigation in these circumstances avoids the mischief caused by contradictory findings in a different forum. The Director says the Employee's bonus claim is the same as her civil action even though the claim was advanced before the Director as a wage claim while it is being advanced in the civil action as a contractual obligation. The Director submits that both claims arise out of the same provision in the employment contract and that the decision to cease investigating the complaint was an appropriate exercise of discretion. The Director further submits that:
- [w]hile the Record does not indicate that the Complainant was offered postponement as an option as incorrectly noted in the Determination, and postponement of the investigation was the preferable option for the Complainant, the decision, based on the information provided by the Complainant, was that it was appropriate to stop the investigation as the subject matter of the complaint had been commenced before a court. If a postponement had occurred, one of two outcomes would have occurred with regards to the Complainants bonus claim. One, the bonus would have been found owing by the courts, in which case the Branch would have closed the investigation as the wages would no longer be owing or two, the investigation would be ended, pursuant to section 76(3)(g) when the court made a decision or award relating to the subject matter of the complaint. Given the two outcomes would result with the same result, the investigation being ended, a postponement would not have been appropriate in the circumstances. [Reproduced as written]
17. The Employer also submits that the Director's delegate properly exercised her discretion to stop investigating the complaint. The Employer notes that the Employee's argument is that the Employer breached a term of her employment contract, rather than a statutory claim. The Employer submits that the Branch does not have exclusive jurisdiction over common law rights and remedies (*Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182 and *Cheetham v. Bank of Montreal*). The Employer contends that the terms of the Employee's bonus is outlined in the employment agreement and that, unlike the facts in *Macaraeg*, where the employment agreement was silent on the question of overtime pay, there is no basis to rely on the *ESA* to impute statutory obligations into the contract. Consequently, the Employer contends, *Macaraeg* is not a bar to the Employee's civil claim.
18. Further, the Employer contends that the delegate observed the principles of natural justice by exercising her discretion to stop investigating, since there is a high risk of double recovery.

## ANALYSIS

19. 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.
20. The Director's submission concedes that the Determination erroneously stated that the Employee was offered the option of postponing that portion of her complaint until the civil action was resolved. I find, therefore, that the Employee was not offered that option. As I understand the Director's submission, even if the Employee had been offered that choice, the delegate's decision would have not been any different.
21. Section 76(3)(f) of the *ESA* provides that the Director may stop or postpone reviewing or investigating a complaint if a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator, or a mediator.
22. The Employee filed a notice of civil action in Supreme Court for damages arising from a breach of contract at the same time as she filed her complaint with the Employment Standards Branch. Counsel for the Employee informed the delegate that the Employee's Employment Standards complaint was for unpaid wages, which was within the exclusive jurisdiction of the Director. In counsel's view, it was necessary for the Employee to pursue both the *ESA* complaint as well as the civil action concurrently because the Employee was not permitted to enforce her statutory rights in the civil action.
23. Section 118 of the *ESA* provides that, subject to section 82, nothing in the *ESA* or the regulations affects a person's right to commence and maintain an action that, but for the *ESA*, the person would have had the right to commence and maintain. This section preserves the right of a party to pursue a civil claim for breach of contract. I find no error in the delegate's interpretation of this provision.
24. In exercising her discretion to stop investigating the complaint, the Director's delegate considered that the Employee's complaint under the *ESA* represented a claim that could be advanced either before the Branch or in a civil action and found that the Employee had to decide which forum was most appropriate. The delegate decided to stop investigating the complaint to avoid duplicative proceedings with potentially divergent findings.
25. Both the Employer and the Employee rely on *Macaraeg*. In that decision, the Court of Appeal held that:
- [w]hen a statute provides an adequate administrative scheme for conferring and enforcing rights, in the absence of providing for a right of enforcement through civil action expressly or as necessarily incidental to the legislation, there is a presumption that enforcement is through the statutory regime and no civil action is available. (para. 102)
26. The Court went on to find that the *ESA* provided a "completed and effective administrative structure for granting and enforcing rights to employees," and as such, there was no "intention that such rights could be enforced in a civil action." The Court determined that because the *ESA* provides complete code for the enforcement of statutorily conferred benefits, they cannot be enforced through a civil proceeding.

27. Section 76(3)(f) of the *ESA* involves an exercise of discretion by the Director. The Tribunal has been reluctant to interfere with the Director's exercise of discretion, only doing so in exceptional and very limited circumstances. For example, in *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.* (BC EST # D066/98), the Tribunal stated it would not interfere with the Director's exercise of discretion unless it could be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity, or the decision was unreasonable.
28. The Tribunal has also referred to the Supreme Court of Canada's decision in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 SCR 2, where the Court made the following comments about the exercise of a statutory discretion:
- It is, as well, a clearly established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.
29. There is no dispute that the Employee's complaint to the Branch as well as her civil action both relate to the same subject matter – that is, her entitlement to the payment of a bonus pursuant to a clause of her employment agreement.
30. In my view, the Employee's allegation that the Employer breached a term of her employment contract is primarily a dispute about a contractual right or obligation arising out of the employment agreement rather than a breach of a statutory obligation. Unlike the facts in *Macaraeg*, there is no presumption that the enforcement of that contractual right or obligation is exclusively within the jurisdiction of the Director of Employment Standards though the *ESA*. *Macaraeg* does not, in my view, prohibit the Employee from advancing a claim for a breach of contract, as opposed to a breach of a statutory duty, in a civil action. (see *Cheetham v Bank of Montreal*, 2023 BCSC 1319)
31. The delegate decided to stop investigating the complaint to prevent potential "contradictory findings" and to prevent "the waste of resources." Although courts would be able to consider the double recovery argument and set off any potential *ESA* wage award, I find no error in the delegate's exercise of discretion to ensure that the claim, which is rooted in a contractual obligation, is addressed in one rather than two venues.
32. I am not able to conclude that the Director erred in law.
33. I am unable to conclude that the delegate's decision to stop investigating the Employee's complaint was an improper exercise of discretion. The delegate considered section 76(3) and the purposes of the *ESA*, and acted within the scope of her authority. There is no evidence, or allegation, that the delegate abused her power. I find that the delegate's reasons for stopping the investigation were reasonable and I decline to interfere with the Determination.
34. I dismiss the appeal.

**ORDER**

35. Pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated May 26, 2023.

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**Carol Roberts**  
**Member**  
**Employment Standards Tribunal**