EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Donald Baxter Caverly
("Caverly or employee")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/664

DATE OF DECISION: January 8, 1999

DECISION

OVERVIEW

This is an appeal by Donald Baxter Caverly ("Caverly or employee") of a Determination dated September 28,1 998. The Delegate found that in relation to a complaint made by June 8, 1995, Mr. Caverly had commenced civil action in the Supreme Court of British Columbia, against the employer, without the consent of the Director and had obtained judgment in the amount of $66,4401.00 plus interest of $10,445.87 and costs. The Delegate exercised his discretion to cease to investigate the complaint pursuant to Section 76(2)(f) of the *Act*, when Mr. Caverly renewed his complaint on May 26, 1998. There was no error demonstrated in the Determination and I confirmed the Determination.

ISSUES TO BE DECIDED

Can an Employee continue a complaint under the Act, for the purposes of enforcing an unsatisfied judgement, after the employee has sought and obtained judgement against the employer in the Supreme Court of British Columbia?

FACTS

On June 8, 1995 Caverly filed a complaint with the Director relating to the non-payment of wages. Printed on the front of the complaint form were the followings words:

> NO OTHER PROCEEDINGS MAY BE TAKEN TO ENFORCE YOUR CLAIM WITHOUT THE WRITTEN CONSENT OF THE DIRECTOR OF EMPLOYMENT STANDARDS.

The complaint was assigned for investigation by a Delegate. On August 15, 1995 the Delegate noted that the employee was pursuing other action to recover wages that were claimed in the complaint.

The employee retained counsel and commenced a civil action for wrongful dismissal against the employer. He was successful in recovering a judgement in the amount of $66,441.00, interest in the amount of $10,446.87, and costs at scale 3. Apparently that judgement has not been satisfied.

The employee then renewed his complaint with the Director on May 26, 1998. In the meantime the first investigating Delegate had left the employment of the Director. The complaint was re-assigned to the Delegate that issued the Determination.

The Delegate found that Mr. Caverly had obtained judgement in the Supreme Court of British Columbia against a former employer. The Delegate found that the action was

commenced by Mr. Caverly against the employer without the consent of the Director. The Delegate issued a letter to Mr. Caverly on September 16, 1998 indicating that he did not intend to investigate further the complaint and invited comment from Mr. Caverly. After the letter was issued, the Delegate discussed in some detail with Mr. Caverly the facts surrounding the case, and issued the Determination.

ANALYSIS

The complaint was made within 6 months of the time of termination or contravention of the *Act* as set out in Section 74 of the *Act*. I do not view the resumption of the complaint in 1998 as a fresh complaint which was made out of time. At all material times there was only one complaint before the Branch for investigation. It is clear, however, that the employee was content to have the investigation of his claim suspended while he litigated his employment issues in the Supreme Court of British Columbia.

It appears to me, that Mr. Caverly was content to abandon his complaint under the *Act*, and pursue a civil action against his employer. He pursued his rights at common-law, and clearly he was entitled to do so. Under the present *Act*, the employee need only seek the consent in writing of the Director to commence a civil action once a Determination is made until 1998.

This case concerns the application of Section 76(2) of the *Act*. The Section reads as follows:

> The director may refuse to investigate a complaint or may stop or postpone investigating a complaint if
>
> (a) the complaint is not made within the time limit in section 74 (3) or (4),
> (b) this Act does not apply to the complaint,
> (c) the complaint is frivolous, vexatious or trivial or is not made in good faith,
> (d) there is not enough evidence to prove the complaint,
> (e) a proceeding relating to the subject matter of the complaint has been commenced before a court, tribunal, arbitrator or mediator,
> (f) a court, tribunal or arbitrator has made a decision or award relating to the subject matter of the complaint, or
> (g) the dispute that caused the complaint is resolved.

In my view this matter is *res judicata*, or alternatively the doctrine of issue estoppel applies to this case. A further concern is that complaints under the *Act* ought to be resolved in a timely manner. There was a delay of 2years and 9 months from the date of the suspension of the complaint under the *Act*, until the date on which the complainant chose to

renew the complaint. The *Act*, provides for a discretion in the Director in the case of complaints more than 6 months old. There is a limit on obtaining compensation for wages of more than 24 months from the date of the complaint. The *Act* also provides a discretion to the Director where the complainant has commenced proceedings in another venue. The employer has a right to have this matter concluded in a timely manner, and without being exposed to "double jeopardy: by two subsisting causes before different courts or tribunals.

This matter was argued in an elegant manner in a written submission filed by counsel for the Director, Ms. Adamic as follows:

> When an individual has a legal claim, they are often faces with a number of options as to how to pursue that claim. As they examine the options as to how to pursue that claim. As they will eventually come to a "fork in the road". At that point they commit to course of one action or another. As a result of that commitment they are deemed to have made an "irrevocable election" as to the course of action that they will pursue. Subsequent to the making of this irrevocable election, there is no way back. The legal basis for this is that it avoids a duplication of process regarding substantially the same or identical subject matter. Such a duplication is repugnant to fair judicial process as it results in a corporation or losing party being placed in jeopardy over the same cause of action on two separate occasions.

The issue raised in this case has been dealt with be the British Columbia Court of Appeal in *McBurney v. BC Director of Employment Standards* (1998) B.C.L.R. (2d) p320. This case held that petitioners who had obtained an order for the Labour Relations Board against a bankrupt company for unpaid wages were unable to use the enforcement mechanisms of the *Act* to recover amounts ordered by the Board.

A similar issue (enforcement of a Human Rights Tribunal Decision using the mechanisms of the *Act*) has also been dealt with by the Tribunal in *Cheryl Ikeda*, BC EST #D523/98 (Stevenson). The Adjudicator in that case considered that the authority of the Director under Section 76(2)(f) of the *Act* was discretionary. The Adjudicator noted that a very heavy burden was on the applicant to overturn the exercise of discretion.

In my view the Appellant has made no such compelling case for the overturning of the Delegate's exercise of discretion. This appears to be a case where the Appellant renewed his claim under the *Act* after it became apparent to him that his civil judgement would remain unsatisfied. There is no basis for his allegation that he was not properly advised by the Delegate in 1995 concerning limitation periods for pursuing his claim.

Mr. Caverly says in his written submissions that:

> I would like to preface my remarks by stating that I am not a lawyer and therefore will not comment on any perceived error(s) in law as it pertains to my appeal.

Mr. Caverly further states that he held his matter in suspension as a result of the suggestion of the Director. He further states that he was aware of the six month limitation. Mr. Caverly apparently wants some acknowledgment that the original investigation Delegate erred in advising him to hold his claim open, and in failing to advise him of the effect of Section 76(2)(f) of the *Act*. There appears to be no basis for his suggestion.

It is also my view, that this case falls in to the "frivolous appeal" category of cases as set out in the case of *Sammi S. Ali operating as Roti Kabob House*, BC EST #D439/97. A frivolous appeal is defined as one in which no justiciable question has been presented and the appeal is devoid of merit in that there is little prospect that it can ever succeed. While it is no doubt frustrating to Mr. Caverly that his civil judgement against his former employer remains unsatisfied, it is clearly not open to him to use the *Act* to enforce his civil judgement.

ORDER

Pursuant to Section 115 of the *Act*, I order that the Determination in this matter, dated September 26, 1998 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal

PL:sa