

An appeal

- by -

Frank and Annemarie Varseveld
(the “Varsevelds”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2014A/167

DATE OF DECISION: March 16, 2015

DECISION

SUBMISSIONS

Frank Varseveld and Annemarie Varseveld on their own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), Frank and Annemarie Varseveld (the “Varsevelts”) have filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 10, 2014 (the “Determination”). By way of the Determination, the Varsevelts were advised that the Director did not intend to take any further action with respect to their unpaid wage complaints because the *Act* did not apply to their complaints.
2. The deadline for filing the appeal of the Determination was December 18, 2014. While the Varsevelts filed their Appeal Form on December 18, 2014, they did not set out any grounds of appeal nor submit any substantive written submissions.
3. On December 22, 2014, the Employment Standards Tribunal (the “Tribunal”) requested the Varsevelts to provide a complete copy of the appeal and to deliver it to the Tribunal by 4:00 p.m. on January 8, 2015. On January 8, 2015, the Tribunal received a request for an extension of time and granted the Varsevelts an extension until 4:00 p.m. on January 12, 2015. Subsequently, on January 12, 2015, the Tribunal received a further extension request from the Varsevelts, and the Tribunal granted another extension to the Varsevelts until 4:00 p.m. on January 26, 2015. On January 26, 2015, the Varsevelts provided the requested documents, which included their submissions on the merits of their appeal.
4. Having reviewed the appeal materials, including the late-filed written submissions of the Varsevelts and the section 112(5) “record” (the “Record”), I have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, at this stage, I will assess the appeal based solely on the Reasons for the Determination (the “Reasons”), the written submissions of the Varsevelts and my review of the Record that was before the Director when the Determination was being made. If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Employer, Ocion Water Sciences Group Ltd. (“Ocion”), will be invited to file a reply to the question of whether to extend the deadline to file the appeal. In such case, the Varsevelts will be given an opportunity to make a final reply to the submissions, if any.

ISSUE

5. The issue in this appeal is whether there is any reasonable prospect that the Varsevelts’ appeal will succeed.

THE FACTS

6. Ocion was incorporated on February 22, 2005, pursuant to the laws of British Columbia, and operates a water purification technology business.
7. Ocion employed Frank Varseveld (“Mr. Varseveld”) as a President/Chairman from February 2005 to November 8, 2013, at an annual rate of pay of \$98,511.00. Ocion also employed Mr. Varseveld’s wife,

Annemarie Varseveld (“Ms. Varseveld”), as an Office Manager/Corporate Secretary from February 2005 to November 8, 2013, at an annual rate of pay of \$60,000.00.

8. On April 30, 2014, the Varsevelts both filed their complaints against Ocion, alleging that the latter contravened the *Act* by failing to pay them overtime, vacation pay and compensation for length of service (the “Complaints”).
9. The Director’s delegate investigated the Complaints and, during the course of the delegate’s investigation, the parties appear to have participated in mediation with the assistance of the delegate in or about July 2014. However, the mediation was unsuccessful, and the parties could not arrive at a settlement.
10. Subsequently, in mid-August, 2014, the delegate set the matter for a hearing on October 21, 2014 (the “Hearing”).
11. On October 18, 2014, two days before the Hearing, counsel for Ocion in a separate matter before the Supreme Court of British Columbia involving Mr. Varseveld, advised that a receiver had been appointed over all of the affairs of Ocion pursuant to the provisions of the *Bankruptcy and Insolvency Act* (“*BLA*”) effective October 17, 2014, and that counsel’s email was being sent as a matter of courtesy since there was no one authorized by Ocion to give counsel instructions.
12. On October 21, 2014, on the Hearing date, the delegate sent an email to two (2) of Ocion’s four (4) directors, namely, Rick Cox (“Mr. Cox”) and Rob Chisholm (“Mr. Chisholm”), asking for confirmation of Ocion’s status, and whether there was a receiver or trustee in place. Moments later, the delegate received an email from Kristin Gray (“Ms. Gray”) of the Bowra Group Inc. (“Bowra”), advising that the latter had been appointed Receiver-Manager of the assets, collateral and undertakings of Ocion, effective October 20, 2014.
13. Subsequently, on November 13, 2014, the Employment Standards Branch (the “Branch”) received a Notice of Bankruptcy, First Meeting of Creditors (Form 68) (the “Notice”), which confirmed that Bowra was appointed as trustee of the estate of the bankrupt, Ocion, by the official receiver or the Court. This was followed by a letter from Bowra to all creditors of Ocion, dated December 8, 2014, advising that Bowra, as Receiver-Manager of Ocion, has made an application to the Supreme Court of British Columbia with the intention of obtaining various orders, including approval of sale of Ocion’s assets and authorizing Bowra to pay net proceeds of the sale of Ocion’s assets to secured creditors in accordance with the various priorities.
14. However, before the December 8 letter of Bowra, on November 10, 2014, the delegate of the Director issued the Determination without reasons stating that no further action would be taken with respect to the Complaints, as the *Act* did not apply to the Complaints.
15. Subsequently, on November 16, 2014, the Varsevelts requested reasons for the Determination, and the Director issued Reasons on December 17, 2014.
16. In the Reasons, the Director made note of the notice, dated October 20, 2014, from the appointed trustee, Bowra, advising that Ocion had entered into bankruptcy, as well as Bowra’s subsequent submission to the Director on November 13, 2014, of the Notice of Bankruptcy, First Meeting of Creditors (Form 68) confirming Bowra’s appointment as trustee of the estate of the bankrupt Ocion by the official receiver. The delegate then goes on to consider and rely upon section 76(3)(b) and (f) of the *Act*, as well as section 69.3(1) of the *BLA* to support his decision to stop investigating the Complaints, and to take no further action in respect of them.

SUBMISSIONS OF THE VARSEVELDS

17. Mr. Varseveld and Ms. Varseveld filed written submissions in support of their appeal on January 26, 2015. I have reviewed those submissions, including all of his email exchanges with the delegate he attaches in support of the written submissions.
18. I note that in the written submissions, under the heading “BACKGROUND INFORMATION”, Mr. Varseveld provides background into his relationship with Ocion, and the termination of that relationship, leading to the filing of the Complaints. I do not find it necessary to reiterate those submissions here.
19. I also note that Mr. Varseveld reviews the failed mediation of the Complaints and expresses his disappointment with the delay in the process leading to the Hearing and his frustration against Ocion for engaging in “delay tactic”. He further expresses his disappointment with the failure of the Hearing proceeding as scheduled because the adjudicator advised him and Ms. Varseveld that Ocion’s legal counsel informed the delegate that a receiver had been appointed to deal with the assets of Ocion, and this effectively stayed the proceedings.
20. Mr. Varseveld contends that on the date scheduled for the Hearing, Bowra advised all parties involved that it had been appointed by a creditor to collect an amount owing to them of approximately \$105,000.00 but it did not have authority to take any other action. He states that Ocion was not bankrupt at that time and only declared bankruptcy on November 5, 2014. He further submits that it was on November 13, 2014, that Ocion appointed Bowra as trustee and filed for bankruptcy. Bowra then solicited offers to purchase Ocion’s assets and then petitioned the Court to approve the sale, but the Court objected to Bowra’s procedures and refused to authorize the transfer of assets, and Bowra withdrew the petition. Mr. Varseveld argues that the case or matter is still pending further action.
21. Mr. Varseveld then goes on to submit, under the heading “REASON AND ARGUMENTS SUPPORTING OUR APPEAL”, the following:

Our complaint lies in the application of natural justice namely procedural fairness to ensure a timely decision is reached without bias and with full consideration of the unique circumstances surrounding this matter.

1. ES have confirmed the Employment Standards Act does apply to this complaint and can be enforced at any time until the complaint has been commenced before a court. The time span from the initial filing of our claim until OCION filed for bankruptcy on November 5th, 2014 spans a period of 6 months.
2. The expectation of OCION’s bankruptcy was shown to all parties from the date of the original claim against OCION as Employer. Written evidence was provided. Repeated requests to expedite the claim were made in order to have the Employer meets [*sic*] its obligations prior to bankruptcy.
3. Due to prolonged delays of hearing process and stalling tactics by Employer, the Varsevelts’ [*sic*] were unable to obtain a settlement agreement or obtain status as a secured creditor.
4. An adjudication was stayed by ES on the basis that OCION was not represented at the hearing yet the hearing was not subject to a stay of proceedings. Bowra as receiver has no authority to force such a delay on behalf of OCION. Bowra was obliged to represent OCION at the hearing.

5. The Employer and its agent (Bowra) defaulted by denying us proper access to our recourse under the act [sic] through delay tactics that were not reversed by ES.

We require the right to have our lawyer represent us in regard to any further action to resolve our claim or its appeal.

ANALYSIS

22. The thrust of the Varsevelds' appeal is grounded in the natural justice ground of appeal. The Varsevelds argue that they were denied natural justice or procedural fairness because their Complaints were not dealt with in a timely manner by the Director "without bias and with full consideration of the unique circumstances surrounding this matter". More particularly, Mr. Varseveld argues that there has been a failure on the part of the Director in adjudicating the Complaints prior to the bankruptcy of Ocion despite repeated requests by him to the Branch to expedite the Complaints so that Ocion could meet its obligations to them prior to Ocion's bankruptcy.
23. Mr. Varseveld indicates that the time spent from the initial filing of the Complaints until Ocion filed for bankruptcy on November 5, 2014, is six (6) months, which, he suggests, is inappropriate in the circumstances.
24. He further argues that the Director should have proceeded with the Hearing and not stayed the Hearing when Ocion failed to appear or was unrepresented at the Hearing. He states that Bowra, as receiver, had no authority to force "a delay on behalf of Ocion" but rather it was obligated to represent Ocion at the Hearing.
25. Mr. Varseveld also submits that he and Ms. Varseveld were denied "recourse under the [A]ct through delay tactics" by Ocion and Bowra, and the Director did not challenge such action.
26. Having reviewed the Reasons and the Record, as well as the submissions of Mr. Varseveld, I am not convinced that Ocion was involved in any delay tactics and that the delegate condoned any delay tactics or took inordinate time to deal with the Complaints such that the alleged delay affected the outcome of the Complaint proceedings. While the Varsevelds, undoubtedly, desired a speedy resolution of their Complaints, the Director's delegate had an obligation to properly investigate the Complaints and, based on my review of the Record, did so by talking to both parties. There is also evidence that the delegate, during the investigation process and before scheduling the Hearing date, in July and continuing into August, 2014, attempted to achieve a settlement between the parties through mediation. The delegate appears to have been in discussions with Ocion's representative, Mr. Cox, after speaking with the Varsevelds, during this time and there is evidence that the Varsevelds were agreeable to settle for \$44,000.00, which Ocion did not accept. Ocion appeared to have desired a global settlement that would have involved a global release from the Varsevelds, but the parties were not able to come to an agreement. As a result, on August 15, 2014, Mr. Varseveld admits in his submissions, the Branch contacted him and advised him, *inter alia*, that the matter "must move forward to a hearing" as Ocion's Mr. Cox did not get back to the delegate with an offer of an amount Ocion was willing to pay to settle the Complaints. Mr. Varseveld suggests that the time it took to get this stage was a "delay tactic" by Ocion, and was not challenged by the Director, but I am not persuaded that there is sufficient evidence to support this conclusion.
27. It appears to me that the delegate, having concluded in mid-August, 2014, that a settlement was not achievable between the parties, suggested to the Varsevelds that the matter should move to a hearing and shortly thereafter, on August 20, 2014, sent a Notice of Complaint Hearing for both Complaints scheduling the Hearing date two (2) months hence on October 21, 2014. On the same day, August 20, 2014, the delegate also sent a Demand for Employer Records to Ocion with respect to both complainants. I do not

find there was inordinate delay on the part of the delegate or the Director in moving the matter to a hearing once the delegate concluded that a settlement was not achievable without a hearing.

28. While it would have been preferable for the Varsevelds if the Complaints were adjudicated earlier than the Hearing date, and before Ocion filed an assignment under section 41 of the *BLA* resulting in an appointment of Bowra as trustee of Ocion, I do not find there is convincing evidence that Ocion was using “delay tactic” and the delegate condoned it resulting in prejudice to the Varsevelds. I also do not think there was inordinate delay between the filing of the Complaints and the unsuccessful mediation and the scheduling of the Hearing. Therefore, I do not find there to have been a breach of natural justice on the part of the Director.
29. Having said this, I note that when Ocion’s counsel in the Supreme Court action sent a “courtesy” email to the delegate on October 18, 2014, two (2) days before the Hearing, advising that a receiver had been appointed over all of the affairs of Ocion pursuant to the *BLA* effective October 17, 2014, it was incumbent on the delegate to further investigate the status of Ocion before the Hearing. The delegate, on the Hearing date, requested a status update on Ocion from two (2) of Ocion’s directors, Mr. Cox and Mr. Chisholm, which resulted in an email from Ms. Gray of Bowra advising that the latter had been appointed as Receiver-Manager of the assets, collateral and undertakings of Ocion effective October 20, 2014. In these circumstances, I find that the delegate was correct in staying the Hearing and subsequently deciding that no action would be taken with respect to the Varsevelds’ Complaints.
30. I also find the subsequent Reasons for the delegate’s decision to take no further action with respect to the Complaints persuasive. The delegate relied upon section 69.3(1) of the *BLA*, as well as section 76(3)(b) and (f) of the *Act* in his Reasons in support of his decision. Section 69.3(1) of the *BLA* provides for a stay of other proceedings:
- 69.3 (1) 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.
31. Section 121(1) of the *BLA* defines “claims provable in bankruptcy” as follows:
- (1) All debts and liabilities, present or future, to which the bankrupt is subject on the day on which the bankrupt becomes bankrupt or to which the bankrupt may become subject before the bankrupt’s discharge by reason of any obligation incurred before the day on which the bankrupt becomes bankrupt shall be deemed to be claims provable proceedings under this Act.
32. Since the delegate was informed by Ocion’s counsel of the appointment of a receiver under the *BLA* on October 18, 2014, before the Hearing date, and the appointment was subsequently confirmed by Ms. Gray of Bowra in her email to the delegate of October 21, 2014, proceeding with the Hearing of the Complaints in the face of this information would arguably run afoul of section 69.3(1) of the *BLA*, as any order against Ocion to pay the Varsevelds by the Director would have constituted an “action, execution or other proceeding” against the debtor, Ocion, under section 69.3(1) of the *BLA*.
33. It is also noteworthy that in *Vachon v. Canada Employment and Immigration Commission*, [1985] 2 S.C.R. 417 (S.C.C.), Beetz J. states of the predecessor legislation to the *BLA* (at page 426):

The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the *Act* could be attained.

34. Therefore, the delegate's decision to rely upon section 69.3(1) of the *BLA* and to stay the Hearing and to cease any further action in respect of the Varsevelds' Complaints was correct, in my view.
35. I also find the Director's reliance on subsections (b) and (f) of section 76(3) of the *Act* appropriate as these subsections provide that the Director may refuse to accept, review, mediate, investigate or adjudicate a complaint, or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if the *Act* does not apply to the complaint or a proceeding related to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator. In the case at hand, the *BLA* supersedes the *Act*, and once an assignment was filed under the *BLA*, the Varsevelds could not carry on their claim under the *Act* but their remedy lay under the *BLA* as creditors of Ocion.
36. In these circumstances, I do not find the Varsevelds' appeal has any reasonable prospect of succeeding.

ORDER

37. Pursuant to section 114(1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115(1) of the *Act*, the Determination, dated November 10, 2014, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal