

In the matter of
an application

- by -

Actton Transport Ltd. (“ATL”) and
Super Save Disposal Inc. (“SSDI”)
(collectively, the “Applicants”)

VICE CHAIR: Norma Edelman

FILE No.: 2005A/100

DATE OF DECISION: June 15, 2005

DECISION

The Applicants seek to have the Employment Standards Tribunal (the “Tribunal”) stay an investigation by a Delegate of the Director of Employment Standards (the “Director”) into complaints filed against them under the *Employment Standards Act* (the “Act”), either by issuing an order staying the investigation or by hearing an appeal of the Delegate's decision not to stay his investigation. I have concluded the Tribunal does not have jurisdiction to do either of these things.

BACKGROUND

On May 5, 2003, the Director issued four Determinations in respect to complaints brought by four individuals (Cardinal, Smith, Norberg and Catt) against the Applicants. The Determinations found Actton Transport Ltd. (“ATL”) and Super Save Disposal Inc. (“SSDI”) to be “associated corporations” under s. 95 of the *Act*, and ordered them to pay amounts to the four complainants for unpaid wages and interest. In June 2003 the Applicants appealed those four Determinations to the Tribunal, alleging among other things that the employer of the complainants was ATL alone, that ATL is a federally regulated entity, and that accordingly the Director had no jurisdiction over the complaints. The Applicants further alleged that the Director erred in associating ATL with SSDI and in finding liability for unpaid wages without deciding who was the employer of the complainants. The Applicants also raised other grounds of appeal.

The Applicants' appeal of the four Determinations has taken an unusual length of time to be heard, largely due to the need to resolve disagreements between the Applicants and Director over the appeal process. The Tribunal has issued several decisions resolving procedural issues and attempting to move the matter forward to a decision on the merits. In his most recent decision (BC EST #D050/05), Member Thornicroft determined that an oral hearing was not necessary to decide most of the grounds for appeal, including the jurisdictional issues raised, and he set out a timetable for exchange of written submissions on those issues. A written decision determining those issues will follow in due course after the close of submissions.

In the meantime, three other individuals have filed complaints with the Employment Standards Branch (the “Branch”) against the Applicants: McNeilly (filed April 11, 2003), Kurek (filed August 16, 2004), and Dhillon (filed August 25, 2004). The Applicants take the same position with respect to these newer complaints as they took with respect to the four earlier complaints: among other things, they say the Branch is without jurisdiction as the employer of the complainants is federally regulated. The Applicants asked the Delegate assigned to investigate the complaints of McNeilly, Kurek and Dhillon to stay his investigation pending a “full and final” determination by the Tribunal of the Applicants' appeal of the four earlier Determinations.

In a letter dated June 1, 2005, the Delegate declined to stay his investigation and advised that he would begin with a view of the work sites of ATL and SSDI in Surrey, B.C. on June 22, 2005. In light of this advice, the Applicants request that the Tribunal respond to their application to stay the investigation on an urgent basis.

THE APPLICATION

The Applicants take the position that the Delegate's letter of June 1, 2005 is a “determination” within the meaning of the *Act* and therefore subject to appeal under s. 112. The Applicants further rely on s. 113 of the *Act*, which permits a person who “appeals a determination” to request the Tribunal to suspend the effect of the determination. With respect to the merits of their appeal, they submit the Director and his Delegate had jurisdiction to order a stay under ss. 76(3) of the *Act*, and they further submit the Delegate erred in not exercising his discretion under that provision to grant a stay. The Applicants also cite s. 37 of the *Administrative Tribunals Act* (the “ATA”), which states that if two or more applications before the Tribunal involve the same or similar questions, the tribunal may “(d) stay one or more of the applications until after the determination of another one of them”. The Applicants seek a stay order under either or both of s. 113 of the *Act* and s. 37 of the *ATA*.

In addition to seeking an order staying the Delegate's investigation (or a s. 112 decision reversing the Delegate's decision not to grant a stay), the Applicants seek an order from the Tribunal that the Director provide them with a copy of the three new complaints and related documentation. In his letter of June 1, 2005, the Delegate declined to provide copies of the complaints before beginning his investigation, stating that he had already disclosed “the general nature and subject matter of the complaints” and that disclosing the complaints “could be viewed by the complainants as compromising the integrity of the investigation”. The Delegate further stated that “copies of the complaints will be provided to your clients when I find it appropriate to do so in terms of my investigation and your client will have ample opportunity to respond to information in the complaints as well as all other information the Branch will consider in arriving at a decision concerning compliance with the Act”.

The Applicants argue that the Delegate's refusal to disclose the complaints and his decision not to stay the investigation until the “full and final” determination of the Applicants' appeal constitute breaches of natural justice. They submit the Director should not have proceeded with the investigation of the three newer complaints, and should be directed to hold the investigation and adjudication of those complaints in abeyance, until the Tribunal has completed its adjudication of their appeal of the Determinations of the four earlier complaints.

ANALYSIS

This application raises questions as to whether the Tribunal has jurisdiction to either (a) issue an order under s. 113 of the *Act* or s. 37 of the *ATA* staying an investigation of a complaint by the Director; or (b) hear an appeal of a decision by the Director not to stay an investigation under s. 112 of the *Act*.

On the first question, I note that while the *Director* has jurisdiction under ss. 76(3) to “postpone” or stay the investigation of a complaint, that provision does not give jurisdiction to the *Tribunal*. The Applicants do not suggest the Tribunal has jurisdiction to stay an investigation by virtue of ss. 76(3); rather, they submit the Tribunal has jurisdiction to do so by virtue of s. 37 of the *ATA* or s. 113 of the *Act*.

Section 103 of the *Act* provides that a number of provisions of the *ATA*, including s. 37, apply to the Tribunal. Section 37 of the *ATA* states that if two or more “applications” before the tribunal “involve the same or similar questions”, the tribunal may “(d) stay one or more of the applications until after the determination of another of them”. In my view, this provision does not give the Tribunal power to stay the Director's investigation. The only “applications” before the Tribunal are the Applicants' appeal of the four Determinations and this application. The Applicants do not seek to have the Tribunal stay either of

those applications. Although the *subject* of this application is the Director's decision to proceed with the investigation of the newer complaints, that decision is not an *application* before the Tribunal. Accordingly, s. 37 cannot be relied on as a source of jurisdiction to stay the Director's investigation.

Section 113 of the *Act* provides that a person who appeals a “determination” may request the Tribunal to suspend the effect of the determination. In relying on this provision, the Applicants submit that the Delegate's letter of June 1, 2005 which denied the Applicants' request for a stay under ss. 76(3) and declined to disclose copies of the complaints to them is a “determination” within the meaning of *Act*. Accordingly, they submit, as persons who have appealed a “determination”, they can request the Tribunal to suspend the effect of the determination under s. 113, i.e., request the Tribunal stay the Delegate's decision to proceed with the investigation.

This brings me to the second question: is a decision to proceed with an investigation (or to refuse to stay an investigation under ss. 76(3), which comes to the same thing) a “determination” within the meaning of the *Act*? If it is a “determination”, then the Tribunal has jurisdiction under s. 112 to hear an appeal of it, and the Applicants would indeed be persons who have appealed a determination and may therefore request the Tribunal to stay the effect of the determination under s. 113. However, if the decision to proceed with an investigation is not a “determination” within the meaning of the *Act*, then jurisdiction under s. 112 and s. 113 is not triggered, and the Tribunal would have no jurisdiction to make the orders sought by the Applicants.

Under s. 112 of the *Act*, the Tribunal has jurisdiction to hear appeals of Director's “determinations”. Section 1(1) of the *Act* defines “determinations” as decisions made by the Director under a number of specified provisions, one of which is ss. 76(3). At first blush, this reference to ss. 76(3) decisions appears to support the Applicants' contention that the Director's decision not to stay an investigation under ss. 76(3) is a “determination”. However, a closer examination of s. 76 reveals that a decision to *proceed* with an investigation is not a decision under ss. 76(3).

Subsection 76(1) states that “subject to subsection (3)”, the Director “must” accept and review a complaint. Subsection 76(3) states that the Director “may refuse” to investigate a complaint “or may stop or postpone” investigating a complaint in certain specified circumstances, set out as (a) through (i) of ss. 76(3). Thus, although the general thrust of s. 76 is to require the Director to investigate complaints, there are certain specified circumstances in which the Director has a discretion to refuse to do so. To complete the picture, ss. 76(2) states that the Director “may conduct an investigation to ensure compliance with this Act and the regulations, whether or not the director has received a complaint”.

The Director's jurisdiction to investigate complaints is set out in s. 76; however, by no means all decisions made under s. 76 are “determinations” subject to appeal. The definition of “determination” is very specific: it only refers to decisions made under ss. 76(3). Subsection 76(3) gives the Director a discretion to *refuse* to investigate a complaint or to *stop or postpone* an investigation in certain specified circumstances. By necessary implication, the legislative intent is that decisions made under s. 76 other than those made under ss. 76(3) are not “determinations” within the meaning of the *Act* and therefore are not subject to s. 112 appeal.

When one considers the nature and purpose of the *Act* as a whole, it is not surprising that appeal under s. 112 is limited to decisions to *refuse* to investigate or to *stop or postpone* an investigation under s. 76(3). The broad power and direction to investigate complaints given to the Director under s. 76 furthers the purposes of the *Act* set out in s. 2, which include ensuring that employees in British Columbia receive at

least basic standards of compensation and conditions of employment, promoting fair treatment of employees and employers, and providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*.

While there are circumstances where it is appropriate for the Director to refuse to investigate a complaint or to stop or postpone an investigation, such circumstances are exceptional, and are set out exhaustively in ss. 76(3). Other than in those circumstances, the Legislature has directed that the Director “must” accept and review complaints. It is consistent with such a legislative direction that the Director's decision to investigate is not subject to appeal: any appeal must await the Director's determination under s. 79 that a contravention of the *Act* has or has not occurred. The only exception is a decision by the Director under ss. 76(3) to *refuse* to investigate or to *stop or postpone* an investigation. Those decisions are “determinations” and therefore are subject to appeal.

Decisions under s. 79 that a person has contravened a requirement of the *Act* or the *Employment Standards Regulation* are “determinations” that can be appealed. But a decision to proceed with an investigation, and not to stay a decision under s. 76(3), is not a decision under s. 79. As the Tribunal has noted recently in *R.J. Somers Enterprises Ltd., (Re)* [2004] B.C.E.S.T.D. No. 50, s. 79 decisions are all decisions that would be made following the completion of an investigation, hearing or some other process. I agree with the observation of Member Falzon in that decision that “it would be contrary to the plain language of the word ‘determination’ to expand it to include any preliminary process decision that the director makes along the way to making a decision listed in section 79” (para. 28). I also agree with and adopt the observations of Member Falzon at paragraphs 29-31 of that decision.

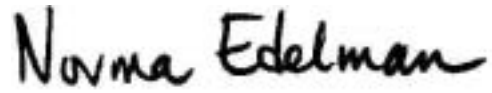
I am not persuaded that the Applicants will be denied natural justice if the Tribunal does not order the Director to postpone investigation of the three newer complaints until after the appeal of the Determinations of the four earlier complaints is completed. The Applicants will be able to raise any alleged breaches of natural justice by the Director when a s. 79 determination with respect to the newer complaints is made. As noted by Member Falzon in *R.J. Somers Enterprises Ltd., supra*, determining what is fair in all the circumstances is generally only possible once the process has been completed and a determination issued.

In any case, and more importantly, I find the Tribunal does not have jurisdiction to order the Director to stay the investigation, nor to consider an appeal of the Director's decision to proceed with investigating the complaints. I note that characterizing the issue as being an appeal of the Director's decision not to stay the investigation under ss. 76(3) is in my view merely an attempt to appeal “through the back door” that which cannot be appealed through the front, namely, the Director's decision to proceed with the investigation. In my view, as stated earlier, the Tribunal has jurisdiction only to hear an appeal of a decision to *refuse* to investigate or to *stop or postpone* an investigation, not to hearing an appeal of a decision to *proceed* with an investigation.

It follows that I also find the Tribunal has no jurisdiction to hear an appeal of the Delegate's decision not to give the Applicants copies of the complaints at this time. As noted by the Delegate, s. 77 of the *Act* requires the Director to “make reasonable efforts to give a person under investigation an opportunity to respond”. If, after a decision is issued under s. 79 as to whether the Applicants have contravened the *Act*, the Applicants feel they have been denied natural justice or that that the Director failed to comply with s. 77 because of the way the Delegate dealt with their request for copies of complaint, this is a matter that can be raised in a s. 112 appeal of the s. 79 determination.

CONCLUSION

For all of the above reasons, I find the Tribunal has no jurisdiction to make the orders sought by the Applicants, or to hear an appeal of the Delegate's June 1, 2005 decision to proceed with the investigation and not to give the Applicants copies of the complaints at that time. Accordingly, the application is dismissed.



Norma Edelman
Vice-Chair
Employment Standards Tribunal