

An appeal

- by -

John Steven Huska a Director and Officer of Cougar Metal 2005 Ltd.
(“Mr. Huska”)

- 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: David B. Stevenson

FILE No.: 2015A/114

DATE OF DECISION: December 10, 2015

DECISION

SUBMISSIONS

Jeff Bastien	counsel for John Steven Huska a Director and Officer of Cougar Metal 2005 Ltd.
Stephanie Drake	counsel for Erik Stein

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”), John Steven Huska a Director and Officer of Cougar Metal 2005 Ltd. (“Mr. Huska”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 17, 2015.
2. The Determination found that Mr. Huska was a director and officer of Cougar Metal 2005 Ltd. and, as such, was liable under section 96 of the *Act* for wages found owing in an arbitration award to Erik Stein (“Mr. Stein”) and ordered Mr. Huska to pay Mr. Stein wages in the amount of \$5,454.01.
3. Mr. Huska has appealed the Determination on the ground the Director erred in law in making the Determination. He seeks to have the Determination cancelled.
4. This appeal was initially assigned for consideration under section 114 of the *Act*. After assessing the appeal, I determined it was appropriate to have the positions of all of the parties on the issues raised. Accordingly, the Tribunal sought submissions from the other parties: Mr. Stein and the Director. A submission on the appeal has been filed on behalf of Mr. Stein; the Director has chosen not to respond. Counsel for Mr. Stein contends the Tribunal has no jurisdiction to address the appeal or, in the alternative, the appeal should be dismissed on its merits.
5. The section 112(5) “record” (the “record”) has been provided to the Tribunal by the Director and a copy has been delivered to the parties. There is no issue relating to the completeness of the “record”. The submission filed on behalf of Mr. Stein contains documents that are not included in the “record”.
6. I now have before me the Appeal Form and the appeal submission provided on behalf of Mr. Huska, the Determination, the Reasons for the Determination, the section 112(5) “record” provided by the Director, the submission made on behalf of Mr. Stein and the reply to that submission made on behalf of Mr. Huska.

ISSUE

7. Two issues have been raised in this appeal: whether the Tribunal has jurisdiction to consider the appeal; and, if so, whether the Director has erred in law in finding Mr. Huska liable under section 96 of the *Act* for the monies found owing in the arbitration award or, more specifically, whether it was correct for the Director to have issued the Determination based on the authority of section 3(8) of the *Act*.

THE FACTS

8. The background facts are not in dispute. They are set out in the reasons for Determination and the “record”.

9. On January 9, 2015, Mark J. Brown, an arbitrator acting under the authority of a collective agreement between Cougar Metal 2005 Ltd. (“Cougar Metal”) and the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied and Industrial Service Workers’ International Union, Local 2009 (the “Union”) and the *Labour Relations Code* [RSBC 1996] Chapter 244 (the “*Labour Code*”) determined a dispute between Cougar Metal and the Union relating to the layoff of Mr. Stein.
10. The arbitrator found Cougar Metal had breached the collective agreement by laying off Mr. Stein out of seniority. As a remedy, the arbitrator awarded Mr. Stein an amount of \$5,283.94, comprising lost wages, holiday pay, pension contributions and union dues & education fund less amounts earned by Mr. Stein in mitigation of his loss.
11. On March 23, 2015, the arbitration award was referred to the Director for enforcement under section 3(8) of the *Act*. On June 11, 2015, the Director notified Cougar Metal and Mr. Huska that the arbitration award had been referred to the Director under section 3(8) of the *Act* and demanded payment of the amount awarded by the arbitration award.
12. No payment was received from Cougar Metal nor was there any other response to the demand.
13. The Director conducted an on-line search of the corporate records for Cougar Metal and found Mr. Huska was listed as a director and officer of that company when Mr. Stein’s wages “were earned or should have been paid”.
14. In respect of section 3(8), the reasons for Determination state:

Section 3(8) of the Act provides that the Director may collect wages pursuant to an arbitration award under Sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the Employment Standards Tribunal. Section 96 is included on [sic] this authority, and thus includes director liability.
15. The Director found Mr. Huska personally liable for the amount of the arbitration award, together with interest under section 88 of the *Act*.

ARGUMENT

16. In the appeal, counsel for Mr. Huska submits the Director erred in law in seeking to enforce the arbitration award under section 3(8) of the *Act*. As a general statement, he says the arbitrator “did not consider, apply, interpret or deal with the operation of any provision in the Act” and the seniority and layoff provisions in the collective agreement have no counterparts in the *Act*.
17. The appeal argument contends the Director had no authority to enforce the arbitration award through section 3(8) and 96(1) of the *Act* as the arbitration award was not, in the words found in section 3(8), “a decision on the merits of a matter in dispute referred to subsection (7)”.
18. The appeal relies on the decision of the Tribunal in *Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc.*, BC EST # D089/10, and the Tribunal’s reconsideration of that decision, *Writers Guild of Canada*, BC EST # RD021/11.
19. In her response, counsel acting on behalf of Mr. Stein has raised the issue of whether the Tribunal has the jurisdiction to hear this appeal. Counsel argues the question of whether the statutory preconditions of section 3(8) of the *Act* were met was a decision made by the arbitrator and that decision can only be challenged under

section 99 of the *Labour Code* or in the Court of Appeal. The argument contends that once an arbitrator has decided the preconditions to section 3(8) are met, which is accomplished by the act of referring the decision to the Director, neither the Director nor the Tribunal have any reviewing authority over that decision. The only residual authority left with the Director is to decide whether to exercise the discretion allowed in section 3(8) to collect wages under the *Act* and the Tribunal, it seems, has no authority at all over any decision made under section 3(8).

20. Counsel acting on behalf of Mr. Stein argues there is no basis for concluding there is concurrent or overlapping jurisdiction over the arbitration award that would allow the Director – and by extension the Tribunal – to decide whether the preconditions in section 3(8) of the *Act* had been met, as such a conclusion would amount to allowing the Director, and the Tribunal, to interfere with an arbitration award without specific authority to do so. The argument contends that permitting the Director and the Tribunal oversight of the arbitrator's award would be “contrary to the common law principles of finality and fairness, which militate against re-litigation, and review of decisions outside of the appropriate appeal mechanisms”. The submission refers on this point to the Supreme Court of Canada decision in *British Columbia (Workers' Compensation Board) v. Figiolo and others* (“*Figiolo*”), 2011 SCC 52 for a summary of the principles.
21. Alternatively, the response made on behalf of Mr. Stein submits the arbitration award dealt with a matter referred to in section 3(7)(b) of the *Act*: “a provision specified in subsection (6)”. It is submitted the relevant provision specified in subsection (6) is section 21 [deductions]. Counsel for Mr. Stein says deductions within the meaning of section 21 were “one aspect” of the dispute that was before the arbitrator in two respects: first, the arbitrator was required to determine wages and benefits owing to Mr. Stein and make appropriate deductions from those wages; and second, the employer unlawfully withheld Mr. Stein's wages when he was laid off. Counsel commends the reasoning in an arbitration decision Mr. Dalton Larson, *Ratchford Creek Contracting Ltd. -and- United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied and Industrial Service Workers' International Union, Local 1-2171*, unreported, March 18, 2009 as supporting this position.
22. Counsel acting on behalf of Mr. Stein also submits the result of their position is consistent with the purposes of the *Act* as it protects the wages of employees by imposing personal liability on directors and officers of companies. The response disagrees with the appellant's submission that the Determination contains insufficient reasons, but submits that if it does, the appropriate course is to refer the matter back to the Director to provide reasons for assuming jurisdiction over the enforcement of the arbitration award.
23. In his final reply, counsel for Mr. Huska submits the Tribunal has jurisdiction to hear the appeal of the Determination, the arbitrator did not make a section 3(8) decision and in any event an arbitrator does not have exclusive jurisdiction over section 3(8): concurrent jurisdiction is contemplated. He submits the facts in the *Ratchford Creek* arbitration award are distinguishable from those in this case and the case as a whole does not support the argument for which it is cited.
24. Finally, counsel for Mr. Huska says section 21 of the *Act* was not an issue in dispute in the arbitration and cannot be relied upon to establish the section 3(8) preconditions. He submits the deductions referred to in the award, which are the focus of the arguments made for Mr. Stein, were no more than part of the monetary remedy awarded for Cougar Metal having breached the collective agreement. Counsel further submits the remedy provided in the arbitration award was not “wages”, because it was unrelated to work or to any other matter that defines “wages” under the *Act*.

ANALYSIS

25. I reject the argument that the Tribunal has no jurisdiction to address this appeal. The substantive issue in this case is whether the Director's decision to issue the Determination against Mr. Huska was based on a misapplication of the relevant statutory provisions appearing in section 3 of the *Act*. As stated in *Writers Guild of Canada, supra*, at para 62: "This is precisely the type of error of law the Tribunal is meant to remedy under section 112(1)(a) of the *Act*."
26. Section 3(8) of the *Act* reads:
- (8) *Despite subsection (6), if an arbitration board makes a decision on the merits of a matter in dispute referred to in subsection (7) and the decision is in respect of wages, the arbitration board may refer the decision to the director for the purpose of collecting the wages and, for that purpose, the director may collect the wages under sections 87 to 97 and 99 as if the decision of the arbitration board were an order of the tribunal.*
27. As stated in *Writers Guild of Canada, supra*, at para 64: "Section 3(8) is an enforcement provision. It permits the Director to collect wages that are found to be owed as if the decision of the arbitration board were an order of the Tribunal, nothing more."
28. In *Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc., supra*, the Tribunal laid out all of the applicable statutory provisions and described, in para 51, the legislative scheme in section 3. The circumstances within which section 3 will operate are limited. It is an exceptional provision, "allowing certain provisions of the *Act* to be included in a collective agreement through the deeming provisions to fill a void in the collective agreement in respect of those provisions and including other provisions of the *Act* into the collective agreement by necessary implication". Part of that legislative scheme provides the Director, through section 3(8), with a limited role in enforcing arbitration awards. This authority is an exception to the statutory mechanisms for enforcing arbitration awards that is found in section 102 of the *Labour Code*.
29. The operation of that provision contains elements of discretion for both the arbitrator and the Director, allowing an arbitrator to refer a decision to the Director and allowing the Director to use the enforcement mechanisms found in specified provisions of the *Act* to collect the wages found owing in the arbitration decision. A purposive reading of section 3(8) of the *Act* reveals it is intended to operate only in respect of those matters that are included in a collective agreement, either by deeming or by necessary implication, and have become a matter of dispute and a decision in respect of wages.
30. The exercise of discretion in section 3(8) is predicated on the presence of two statutory preconditions: that the arbitration award is a decision on the merits of a matter in dispute referred to in subsection (7) and that decision is in respect of wages. The preconditions are objective statutory criteria that direct both the discretion of the arbitrator to refer the arbitration award to the Director and the discretion of the Director to collect the wages under the *Act*. The discretion of the arbitrator is exercised relative to his or her authority over the matters in dispute under the collective agreement; the discretion of the Director is exercised relative to the Director's authority under the *Act*, which includes an obligation to ensure the integrity of its provisions. For the purposes of an appeal under the *Act*, the decision of the arbitrator to have the Director invoke the collection mechanisms through section 3(8) is largely irrelevant, made with the objective of having the Director exercise discretion to use the enforcement provisions identified in that provision.
31. Within this statutory framework, counsel for Mr. Stein submits the decision of an arbitrator to submit an award to the Director for enforcement is a decision by the arbitrator that the preconditions of section 3(8) have been met that cannot be reviewed or questioned by the Director. Counsel further submits there is no

basis for finding the arbitrator and the Director have “concurrent or overlapping” jurisdiction over the decision of the arbitrator to refer to the Director for enforcement. She argues such a result would amount to giving the Director jurisdiction to wade into an arbitrator’s exclusive jurisdiction and interfere in a decision of an arbitrator and would be contrary to the common law principles of finality and fairness and review of decisions outside of the appropriate appeal mechanisms.

32. I do not accept this argument. This is not a circumstance where concurrent jurisdiction arises. The arbitrator and the Director have separate and distinct authority. As counsel for Mr. Stein has correctly noted in her argument, an arbitrator has no jurisdiction over the decision by the Director to enforce an award under the *Act*. There is nothing in the wording of section 3(8), or in any other part of the *Act* that shows a legislative intent that an arbitration proceeding was intended to be the exclusive forum for deciding whether the enforcement provisions of the *Act* described in section 3(8) have been triggered. If that were the intent of the legislature, there would have been little reason for the Director to have been given discretion to collect the wages. In fact, the Director has exclusive authority over the enforcement provisions found in Part 11 of the *Act* and set out in section 3(8). Enforcement is a primary statutory duty of the Director under the *Act*. An arbitrator has no authority, statutory or otherwise, over the enforcement mechanisms in the *Act*. While an arbitrator has authority to interpret and apply any Act intended to regulate the employment relationship of persons bound by the collective agreement, that authority does not extend to enforcement under the *Act*.
33. The Director should not presume the arbitrator has correctly concluded the preconditions to section 3(8) have been satisfied and is not required, as is suggested in the submission made on behalf of Mr. Stein, to simply “rubber stamp” the apparent view of the arbitrator. The obligation of the Director is to ensure the integrity of the *Act* and that obligation requires the Director to consider and decide, independently of the arbitrator and as part of the exercise of the Director’s discretionary authority, whether the statutory preconditions for allowing enforcement under section 3(8) exist. I do not say the Director may not have reference to both the arbitration award and the rationale of the arbitrator for exercising his or her discretion to seek enforcement through section 3(8). In some cases the Director may find those matters helpful, although that is clearly not the case here, as neither the arbitration award or the correspondence referring the award to the Director address the statutory preconditions in section 3(8). The letter from the arbitrator seeking the Director’s assistance in collecting the monies found owing under the award says only that, pursuant to section 3(8), he is “referring the attached arbitration award for the purposes of collecting the wages owed to the Grievor by virtue of the award.” I also note that correspondence is not included in the “record”.
34. If the arbitration award satisfies the statutory preconditions, it will be objectively apparent. In this case the award contains no objective indication that the preconditions have been satisfied nor does the reference to the Director fill the obvious deficiency in that regard in the arbitration award.
35. In sum, section 3(8) of the *Act* is an enforcement provision. For the purpose of carrying out his statutory mandate it is essential the Director have the authority to assess whether the arbitration award satisfies the statutory preconditions. An arbitrator and the Director both exercise a discretion and are governed in the exercise of that discretion by the same preconditions. The exercise of discretion is for different purposes, but for the Director the objective of the discretionary decision is for the purpose of engaging the enforcement provisions of the *Act*, a matter that is within the exclusive jurisdiction of the Director. In such circumstances, there is an obligation on the Director to examine the substance of the matter and make an independent assessment of whether the statutory preconditions found in section 3(8) are met. What the Director may not simply “rubber stamp” is the arbitrator’s request to enforce the award. The decision of the arbitrator is largely irrelevant to that obligation.

36. The decision of the Director about whether to exercise discretion is subject to appeal under section 112 of the *Act*.
37. Applying the above considerations, I find the Director has erred in issuing the Determination against Mr. Huska.
38. In reaching this conclusion, I make two observations concerning the Determination.
39. First, there is a statutory requirement that the arbitration award must be in respect of “wages”. It is not at all clear from the arbitration award or the material on the “record”, however, that the monies found owed to Mr. Stein in the arbitration award are “wages” under the *Act*. There is no express finding in the arbitrator’s decision that the monies awarded to Mr. Stein meet the definition of “wages” in the *Act*. The monies do not relate to work performed by him or, with the possible exception of contributions payable under the collective agreement and union dues, to any other aspect of the definition of “wages” in the *Act*. Because the definition is inclusive, it might be that monies awarded in an arbitration decision that represent the monetary value of the loss suffered by Mr. Stein as a result of a breach of the collective agreement should be included in the definition, but that is by no means clear and nowhere, in either the arbitration award or the Determination, is that question addressed and answered. It seems to me that all the arbitrator has done in respect of the monetary element of the award is what is allowed in section 89(a) of the *Labour Code*: make an order setting the monetary value of a loss suffered by Mr. Stein as a result of a contravention of the collective agreement.
40. I do not, however, rely on this element of the preconditions to decide the Director erred in issuing the Determination. Rather, I find the arbitration award is not “*a decision on the merits of a matter in dispute referred to in subsection (7)*”. The matter in dispute, clearly expressed in the arbitration decision, was Mr. Stein’s improper layoff. The dispute invoked consideration of the seniority provisions in the collective agreement, provisions relating to lead and charge hands, job classifications in the agreement, the wage schedule and collective bargaining evidence. The issue in dispute is reflected in the finding made by the arbitrator:
- I conclude that Stein was improperly laid off out of seniority. Under Article 8.01 he has the efficiency to fulfill the job requirements of work that was performed by junior employees who continued to work while he was laid off.
41. There is no indication whatsoever in the award that section 21 of the *Act*, on which counsel acting on behalf for Mr. Stein, seeks to hang her argument, was a “matter in dispute” between the Union and Cougar Metal.
42. For the above reasons, I find the Director erred in law by issuing the Determination. As in *Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc., supra*, and for the same reasons, I do not find it necessary to refer this matter back to the Director for further consideration. The Determination is cancelled.

ORDER

43. Pursuant to section 115 of the *Act*, I order the Determination dated July 17, 2015, be cancelled.

David B. Stevenson
Member
Employment Standards Tribunal