

IN THE MATTER of the Employment Standards Act. S.N.W.T. 2007, c. 13 as amended

And in the matter of Appeal of Order 2605 of the Employment Standards Officer

Between:

Number Corp ("Corporate Appellant")
and DB, MR, LS, RE, BB, KW ("Director Appellants")
Appellants/Employers
and
Dbr
Respondent/Employee
and
Employment Standards Officer

Party

This decision is written in compliance with Section 52 of the Employment Standards Act which prohibits disclosure of Appellants and Respondents identities.

[1] This matter is before an Adjudicator as a result of appeals filed by the Corporate Appellant and Director Appellants (the "Employers") of orders of the Employment Standards Officer (the "Officer"). The Respondent/Employee (the "Employee") was employed by a predecessor of the Corporate Appellant which is now a numbered company after a change from its prior name. The Employee was temporarily laid off on April 3, 2020, and subsequently received notice of termination effective September 29, 2020. The Employee on November 20, 2020, filed a complaint with Employment Standards claiming that the employment was terminated without sufficient notice or termination pay in lieu of notice.

[2] On November 23, 2020, an Inspector from Employment Standards wrote the Corporate Appellant advising of the claim and on November 26, 2020 the then legal counsel to the Corporate Appellant responded indicating that the Corporate Employer and certain of its affiliates had filed for and obtained protection from creditors under the Companies' Creditors Arrangement Act (the "CCAA"). The CCAA is federal legislation

which allows larger corporations in financial difficulty to restructure their affairs. The legal counsel stated that the CCAA order (the “Initial Order”) filed April 23, 2020 which was issued out of the Court of Queen's Bench of Alberta (the “Court”) imposed a broad stay of proceedings with respect to the Corporate Appellant including claims for termination pay under the Employment Standards Act (the “ESA”). The Initial Order included the following at paragraph 15:

“ During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 11 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date of this Order and that relates to any obligations of the Applicants whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants or this Court.”

[3] As part of the CCAA process the Court appointed a monitor. The role of the monitor, a trustee licensed by the Office of the Superintendent of Bankruptcy, is to monitor the company's business, to prepare reports and to assist in a Plan for Court approval. On April 8, 2021, legal counsel of the monitor, responding to a calculation of amounts owing from Employment Standards, advised that there was no realistic prospect that unsecured creditors would receive anything from the Corporate Appellant and advised that the monitor would not be taking any steps with respect to any claims of the employees. The Stay Period referred to in the Initial Order was extended by the Court several times pending the resolution of the CCAA proceedings.

[4] After lengthy and complex litigation the Court in an order dated November 16, 2021 titled Transaction Approval and Reverse Vesting Order (the “Vesting Order”) transferred the remaining assets of the Corporate Appellant to a Creditor Trust and at paragraph 5(c) of the Vesting Order the Court stated “all claims and Encumbrances other than the Retained Claims shall be irrevocably and expunged, released and discharged” against various corporate entities which would include the Corporate Appellant. The Retained Claims did not include any amounts owing to former employees of the Corporate Appellant.

[5] The Officer in a decision dated July 20, 2022, found that the Employee was owed wages for termination pay in lieu of notice and vacation pay in the amount \$21,582.74. The Officer concluded that the Employee would not receive any payment as a result of the CCAA proceedings and issued orders against the Director Appellants as well as the Corporate Appellant.

[6] On September 2, 2022, the Employment Standards Appeal Office (the "Appeal Office") received an email from the then legal counsel for the Corporate Appellant appealing the orders of the Officer against both the Corporate Appellant and Director Appellants.

[7] The matter of the timeliness of the appeal and the payment by the Employers to the Employment Standards Appeal Office of the amount appealed from to perfect the appeal as well as a request by legal counsel for the Employer to have an oral hearing have been dealt with in earlier interim decisions. After an exchange of documentation sent by the Appeal Office to the parties the current legal counsel for the Employers submitted a letter of appeal dated April 21, 2023 (the "Appeal Letter") which was then sent to the Employee allowing him to respond. The Employee in a letter dated June 10, 2023, expressed concerns about the good faith of the monitor in the CCAA proceedings. In a letter dated September 8, 2023, the legal counsel to the Employers responded to the submissions of the Employee repeating earlier submissions concerning paramountcy and noting that the monitor was not a party to this appeal and that concerns about good faith should have been addressed in the CCAA proceedings. The concerns of the Employee about the monitor are beyond the scope of this appeal and would have been an issue to be determined by the Court.

[8] In this matter the essential facts regarding the employment of the Employee are not in dispute and credibility is not an issue. It is not contested that the Director Appellants were directors and/or managers of the Corporate Appellant at the relevant time nor are the calculations of the Officer of the amount that would be normally owing to the Employee. The issue is whether the orders made by the Court release both the Corporate Appellant and the Corporate Directors from liability and whether orders made by the Court should prevail over the ESA and orders made by the Officer under that legislation. These are issues which require an examination of the ESA and the CCAA as well as the orders made by the Court.

[9] Legal counsel for the Employers has argued that the orders of the Court release the Employers from liability and that if orders made by the Court pursuant to the CCAA conflict with orders made pursuant to the ESA the Federal legislation should prevail and in the event Territorial legislation conflicts with Federal legislation the portion of Territorial legislation which conflicts is inoperative. This is known as the doctrine of paramountcy. It has also been argued on behalf of the Employers that if the debt is expunged against one obliger (the Corporate Appellant) it is expunged also against the Director Appellants and that if the Corporate Appellant has no liability through the CCAA proceedings the Director Appellants also have no liability.

[10] The first step is to determine whether both pieces of legislation are valid. The Constitution Act 1867 at sections 91 and 92 lists different matters over which different

levels of government have jurisdiction. Bankruptcy and Insolvency is an area of Federal jurisdiction under section 91. Property and civil rights are areas of Provincial jurisdiction under section 92. The ESA would come within the heading of property and civil rights and is therefore an area of Provincial and therefore Territorial jurisdiction. As both pieces of legislation come within the classes of subjects allocated to the appropriate legislature both appear to have been validly enacted.

[11] The second step is to determine whether the CCAA and the ESA conflict in which case the doctrine of paramountcy would apply. Paramountcy in Canada is a legal doctrine that stipulates that if valid Federal laws conflict with valid provincial laws (which would include Territorial laws) the Federal legislation takes precedence.

[12] The Officer also made orders against the Director Appellants pursuant to Section 17 of the ESA and the issue arises that if the Corporate Appellant has no liability because of orders made pursuant to the CCAA whether this protection against liability also extends to the Director Appellants.

[13] Section 17 of the ESA in addressing the liability of corporate directors states as follows:

17 (1) Every director and other officer of a corporation is liable for the unpaid wages of the employees of the corporation in an amount not exceeding the equivalent of two months wages for each employee who has not been paid.

(2) The provisions of this Act respecting the recovery of wages apply, with the necessary changes and to the extent that they are applicable, to the recovery of the wages referred to in subsection (1) from a director and other officer of a corporation that does not pay an employee's wages.

[14] The stay of proceedings under the CCAA is a mechanism whereby the federal parliament intends that debt obligations of the Employers (including directors) are stayed in order to allow a company to restructure its finances. Employees who are terminated become creditors of the company and their claims could not proceed during the CCAA stay of proceedings.

[15] The stay of proceedings referred to in the Initial Order protecting the directors /managers against claims came to an end on March 4, 2022 after being extended several times. At section 20 of the Vesting Order the Court requested the aid and recognition of any court, tribunal, or regulatory body in carrying out of the terms of the Vesting Order.

[16] In a recent case the Superior Court of Quebec dealt with the issue of employee claims in CCAA proceedings (Magasin Laura (PV)Inc. /Laura's Shoppe -2023 QCCS 3435) and concluded that employee claims, including those issued by provincial tribunals, can be extinguished under CCAA proceedings as employee claims are part of the restructuring process and are settled as part of the plan implementation which concludes the CCAA process.

[17] The orders made by the Court during the CCAA proceedings apply to a broad range of obligations including termination and severance payments. The plan set out in the Vesting Order concluded the CCAA proceedings and no provision was made for employee claims. The claim of the Employee against both the Corporate Appellant and the Director Appellants was extinguished by the Vesting Order.

[18] In this matter I find that that orders made by the Officer under the ESA conflict with the orders made by the Court under the CCAA. The orders made under the federal legislation must prevail because of the principle of paramountcy and the orders made by the Officer under the ESA are inoperative .

[19] For the above reasons the appeal of the Corporate Appellant and Director Appellants is allowed and the orders of the Officer are revoked.

Dated this 6th day of December, 2023.

Louis Sebert – Employment Standards Adjudicator