IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trakalo v. Campbell Edgar Inc. (BC0489957),* 2024 BCSC 1316

Date: 20240723
Docket: S249200
Registry: New Westminster

Between:

Bill Trakalo

Petitioner

And

Campbell Edgar Inc. (BC0489957)
Elaine Hay CPC

Respondents

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

The Petitioner, appearing in person:	B. Trakalo
The Respondent Elaine Hay, appearing in person and on behalf of the Respondent Campbell Edgar Inc. (BC0489957):	E. Hay
Place and Date of Hearing:	New Westminster, B.C. April 11, 2024
Place and Date of Judgment:	New Westminster, B.C. July 23, 2024

Introduction

[1] The petitioner, Bill Trakalo, seeks a declaration that he was an employee of the respondents, Campbell Edgar Inc. (the "company") and Elaine Hay, president of the company and became entitled to severance pay for 44 months of employment when he stopped working for them.

[2] Interestingly, the petitioner does not allege in his petition that his employment with the respondents was ever terminated. I presume he also seeks a declaration that his employment was terminated.

[3] The petitioner represents himself in this matter. Ms. Hay represents the company and herself.

[4] In this petition, Mr. Trakalo seeks a summary determination of facts and law that would entitle him to statutory severance payment on termination of his employment. He relies on ss. 63(1), 65(1) and 118 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 [*ESA*]. He also referred to *York Detention Centre Ltd. v. Ontario Public Service Employees Union*, [2010] O.L.A.A. No. 140, 2010 CanLII 99125 and *Abbey Lane Driver Training Ltd. (Re)*, [1996] O.E.S.A.D. No. 220.

Facts

[5] The facts are brief but there is some controversy. The petitioner contends that he became an employee of the respondents in 2017, driving five-ton trucks to deliver Mercedes-Benz parts. He worked five days per week over 44 months and he claims that his employment ended April 29, 2021. He contends he did not receive any notice of termination of his employment nor was he issued a Record of Employment ("ROE").

[6] The petitioner is 64 years old and his employment with the company began August 14, 2017 following an interview with Ms. Hay earlier that month. He believed the position offered was "full-time driving" although he signed a written contract on August 10, 2017(the agreement); the agreement contained the following outline of the terms of his employment:

> Congratulations, you will soon be considered an employee of the temporary staffing division of Campbell Edgar Inc., which means you will be offered work within our client companies from time to time. You acknowledge that your relationship with us is entered into as an elect to work arrangement, and that you have a right to decline any job we contact you about without penalty. You also acknowledge that as an elect to work employee, you are exempt from termination pay. However, Campbell Edgar Inc. does pay stat pay in accordance with [the] Employment Standards Act.
>
> [Emphasis in original.]

[7] The petitioner was informed that he would be working with Ryder Truck Rentals ("Ryder"), a client of the company and in turn was assigned to deliver parts for Mercedes-Benz. In reality, Mercedes-Benz contracted with a separate company, Ryder Integrated Logistics to deliver Mercedes Benz parts to its locations.

[8] The petitioner's main role was to deliver parts to Mercedes-Benz operations in and around Vancouver, Langley, Richmond and Surrey. Although the petitioner was a temporary contract employee, he worked 40 hours per week and drove to ten locations beginning at 4:30 in the afternoon.

[9] The petitioner was directed to take delivery of Mercedes Benz parts from its warehouses using a Ryder truck.

[10] The petitioner was injured in a workplace event and made a claim for WorkSafeBC benefits on March 26, 2021. He did not report this injury or the claim to the company until March 30, 2021. The respondent informed Ryder that he had become disabled. The company scrambled to find replacement drivers for the petitioner's work. On April 6, 2021 the company learned that the contract to deliver Mercedes-Benz parts was under review. The petitioner said the contract then ended around April 27, 2021.

[11] Although the petitioner remained unable to work, the company did not terminate his employment and accepted his disability status. The company recognized that the petitioner was a good employee.

[12] Eventually, Ryder was asked to empty their trucks of personal belongings of the company's drivers, including the petitioner, and return keys to Mercedes-Benz.

[13] Over two weeks, the company attempted to contact the petitioner to ascertain his status insofar as his ability to work. The petitioner failed to respond or to provide medical confirmation of his condition. However, the company received information from WorkSafeBC regarding selecting modified duties for him to accommodate his injury. Without information concerning his capacity, the company was unable to provide work.

[14] Beginning in May 2021, the petitioner began requesting an ROE from the company. He repeated this request in July 2021 and indicated that his WorkSafeBC claim had ended July 18, 2021. The company informed the petitioner that it did not have any details concerning his abilities or limitations to return to work and told him that he was still on their roster. The company asked for information concerning the type of work he would be fit to do. He believed that the loss of his employment resulted from the loss of the contract with Mercedes-Benz in April 2021. He took that as an "actual end of the employment relationship" stating that he did not agree to be on the roster with the company; he was expecting full-time employment going forward.

[15] The company responded that they had an obligation to offer him similar work as performed before his injury but awaited his assessment of his health status and capabilities.

[16] The company was of the view that they had not terminated the petitioner's employment; rather it was waiting for him to return when he was able to work. Later, the company learned that Service Canada had issued an ROE to the petitioner.

Petitioner's Position

[17] The petitioner argues he was entitled to a declaration of his entitlement to severance pay pursuant to the *ESA*. He believes that under s. 95 of the *ESA*, he may also be able to claim that Ryder or Mercedes-Benz were associated employers and liable for *ESA* severance benefits or common-law damages along with the respondents. The petitioner says he had not been hired "on a roster" (no meaning was attached to those words in the material or in the parties' submissions). When he

was requested to remove his personal belongings from a Ryder truck, he believed his job had ended and the request was “notice of termination”.

[18] While he recognizes that the contract between him and the company was for temporary employment, and he was capable of refusing work at any time, he believes the company owes him statutory severance and common-law damages for wrongfully breaching the employment contract.

[19] The petitioner has not included Ryder or Mercedes-Benz in this petition; he says he wants to achieve a declaration of his entitlement to severance before adding them into this litigation. He contends he might be able to add Mercedes Beenz and Ryder as associated employers who are liable for his claims to common law damages and for severance pay under the ESA.

Respondents’ Position

[20] The respondents argue Ms. Hay was not the petitioner’s employer and his only claim is against the company which has been dissolved for a number of years.

[21] Moreover, the respondents contend that the petitioner was never terminated from his employment; after losing the contract in April 2021, there remained considerable work opportunities in the company. The petitioner would likely have obtained work if he had presented himself as ready, willing and able to perform his duties—he did not.

[22] The company did not issue the petitioner an ROE because he had not been terminated nor had he resigned. The company was surprised to find he had obtained an ROE from Service Canada without her input. Ms. Hay concluded from the Service Canada ROE that the petitioner had resigned his employment.

The Statutory Framework

[23] The relevant provisions of the *ESA* are as follows:

Definitions

…

"temporary layoff" means

(a) in the case of an employee who has a right of recall, a layoff that exceeds the specified period within which the employee is entitled to be recalled to employment, and

(b) in any other case, a layoff of up to 13 weeks in any period of 20 consecutive weeks;

"termination of employment" includes a layoff other than a temporary layoff;

…

Purposes of this Act

2 The purposes of this Act are as follows:

(a) to ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment;

(b) to promote the fair treatment of employees and employers;

(c) to encourage open communication between employers and employees;

(d) to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act;

(e) to foster the development of a productive and efficient labour force that can contribute fully to the prosperity of British Columbia;

(f) to contribute in assisting employees to meet work and family responsibilities.

…

Liability resulting from length of service

63 (1) After 3 consecutive months of employment, the employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service.

(2) The employer's liability for compensation for length of service increases as follows:

(a) after 12 consecutive months of employment, to an amount equal to 2 weeks' wages;

(b) after 3 consecutive years of employment, to an amount equal to 3 weeks' wages plus one additional week's wages for each additional year of employment, to a maximum of 8 weeks' wages.

(3) The liability is deemed to be discharged if the employee

(a) is given written notice of termination as follows:

(i) one week's notice after 3 consecutive months of employment;

(ii) 2 weeks' notice after 12 consecutive months of employment;

(iii) 3 weeks' notice after 3 consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of 8 weeks' notice;

(b) is given a combination of written notice under subsection (3) (a) and money equivalent to the amount the employer is liable to pay, or

(c) terminates the employment, retires from employment, or is dismissed for just cause.

(4) The amount the employer is liable to pay becomes payable on termination of the employment and is calculated by

(a) totalling all the employee's weekly wages, at the regular wage, during the last 8 weeks in which the employee worked normal or average hours of work,

(b) dividing the total by 8, and

(c) multiplying the result by the number of weeks' wages the employer is liable to pay.

(5) For the purpose of determining the termination date under this section, the employment of an employee who is laid off for more than a temporary layoff is deemed to have been terminated at the beginning of the layoff.

…

65 (1) Sections 63 and 64 do not apply to an employee

(a) employed under an arrangement by which

(i) the employer may request the employee to come to work at any time for a temporary period, and

(ii) the employee has the option of accepting or rejecting one or more of the temporary periods,

…

Rules about payments

68 (1)A payment made under this Part does not discharge liability for any other payment the employee is entitled to receive under this Act.

(2) The termination pay requirements of section 64 apply whether or not the employee has obtained other employment or has in any other way realized or recovered any money for the notice period.

…

Complaint and time limit

74 (1) An employee, former employee or other person may complain to the director that a person has contravened

(a) a requirement of Parts 2 to 8 of this Act, or

(b) a requirement of the regulations specified under section 127 (2) (l).(2)A complaint must be in writing and must be delivered to an office of the Employment Standards Branch.

(3) A complaint relating to an employee whose employment has terminated must be delivered under subsection (2) within 6 months after the last day of employment.

(3.1) Subsection (3) applies to an employee whose employment is terminated following a temporary layoff and, for that purpose, the last day of the temporary layoff is deemed to be the last day of employment referred to in subsection (3).

(4) A complaint that a person has contravened a requirement of section 8, 10 or 11 must be delivered under subsection (2) within 6 months after the date of the alleged contravention.

(5) On application, the director may extend the time to deliver a complaint under this section, including making an extension after the time to deliver has expired, if the director is satisfied that

> (a) special circumstances exist or existed that preclude or precluded the delivering of a complaint within the applicable time period required under subsection (3) or (4), and
>
> (b) an injustice would otherwise result.

...

Determinations and consequences

79 (1) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may `require the person to do one or more of the following:

> (a) comply with the requirement;
>
> (b) remedy or cease doing an act;
>
> (c) post notice, in a form and location specified by the director, respecting
>
> > (i) a determination, or
> >
> > (ii) a requirement of, or information about, this Act or the regulations;
>
> (d) pay all wages to an employee by deposit to the credit of the employee's account in a savings institution;
>
> (e) employ, at the employer's expense, a payroll service for the payment of wages to an employee;
>
> (f) pay any costs incurred by the director in connection with inspections under section 85 related to investigation of the contravention.

(2) In addition to subsection (1), if satisfied that an employer has contravened a requirement of section 8 or 83 or Part 6, the director may require the employer to do one or more of the following:

> (a) hire a person and pay the person any wages lost because of the contravention;
>
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
>
> (c) pay a person compensation instead of reinstating the person in employment;
>
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by that employee or other person because of the contravention.
>
> ...
>
> No other proceedings
>
> 82 Once a determination is made requiring payment of wages, an employee may commence another proceeding to recover them only if
>
> (a) the director has consented in writing, or
>
> (b) the director or the tribunal has cancelled the determination.
>
> ...
>
> Right to sue preserved
>
> 118 Subject to section 82, nothing in this Act or the regulations affects a person's right to commence and maintain an action that, but for this Act, the person would have had the right to commence and maintain.

Discussion

[24] Several issues emerged from submissions of the parties which, in my view, prevent the court from granting the order requested:

a) This is a petition that does not meet the requisite foundation under Rule 2-1 of the *Supreme Court Civil Rules*, which requires proceedings of this nature to be commenced by notice of civil claim;

b) The petitioner believes that he is entitled to a declaration of entitlement to severance based on the above noted sections of the *ESA*. Claims under the *ESA* must be commenced by application to the Director of Employment Standards. There is no authority to commence this proceeding either by petition or notice of civil claim in the Supreme Court of British Columbia for relief under the *ESA*;

c) There is significant controversy on the facts of this case. The petitioner did not address or argue the respondents' assertion that he was never terminated from his employment. It seems to me that issue would likely be more properly resolved at a trial depending on the position taken by the petitioner on that issue;

d) If the petitioner's employment was found to have been terminated in April 2021, it seems that this claim may be barred by the *Limitation Act*, S.B.C. 2012, c. 13 [*Limitation Act*] which requires commencement of proceedings for common-law damages within two years of the day on which the claim is discovered. This proceeding was commenced in January 2024; and

e) The respondent company is dissolved. Moreover, nothing in the evidence presented by the petitioner would suggest that Ms. Hay was the employer or has any liability to the petitioner either under the *ESA* or common law stemming from a wrongful dismissal.

[25] The court cannot give declaratory relief under the ESA stipulating the petitioner is an employee entitled to severance pay.

[26] Ordinarily the error of filing a petition rather than a notice of civil claim is an irregularity that can be corrected by several means. A direction can be given that the petition be converted into a notice of civil claim.

[27] Rule 22-7 focuses on the effect of non-compliance with the *Rules* as follows:

> Non-compliance with rules
>
> (1) Unless the court otherwise orders, a failure to comply with these Supreme Court Civil Rules must be treated as an irregularity and does not nullify
>
> (a) a proceeding,
>
> (b) a step taken in the proceeding, or
>
> (c) any document or order made in the proceeding.
>
> Powers of court
>
> (2) Subject to subrules (3) and (4), if there has been a failure to comply with these Supreme Court Civil Rules, the court may

> (a) set aside a proceeding, either wholly or in part,
>
> (b) set aside any step taken in the proceeding, or a document or order made in the proceeding,
>
> (c) allow an amendment to be made under Rule 6-1,
>
> (d) dismiss the proceeding or strike out the response to civil claim and pronounce judgment, or
>
> (e) make any other order it considers will further the object of these Supreme Court Civil Rules.
>
> Proceeding must not be set aside for incorrect originating pleading
>
> (3) The court must not wholly set aside a proceeding on the ground that the proceeding was required to be started by an originating pleading other than the one employed.

[28] The Court of Appeal decision in *Cepuran v. Carlton*, 2022 BCCA 76, revisited the question of what may be done if a triable issue is set out in a petition. The court said:

> [160] To summarize, I am of the view that a judge hearing a petition proceeding that raises triable issues is not required to refer the matter to trial. The judge has discretion to do so or to use hybrid procedures within the petition proceeding itself to assist in determining the issues, pursuant to R. 16-1(18) and R. 22-1(4). For example, the judge may decide that some limited discovery of documents or cross-examination on affidavits will provide an opportunity to investigate or challenge the triable issue sufficiently to allow it to be fairly determined by the court within the petition proceeding, without the need to convert the proceeding to an action and refer it to trial.

[29] In *Cepuran* the court endorses comments made in *Boffo Developments (Jewel 2) Ltd. v. Pinnacle International (Wilson) Plaza Inc.*, 2009 BCSC 1701 by Justice Ballance and by Justice Dardi in *Terasen Gas Inc. v. Surrey (City)*, 2009 BCSC 627, setting out some factors that can inform the court on whether to convert a petition to an action. She said:

> [38] If it is found that I am incorrect and this matter is properly brought by petition, the next issue is whether the petition should be converted to an action. Even if a matter is appropriately brought by petition, the court under R. 52(11)(d) has a discretion in proper circumstances to convert a petition to an action.
>
> [39] In *Haagsman v. British Columbia (Minister of Forest)* (1998), 64 B.C.L.R. (3d) 180, 12 Admin. L.R. (3d) 103 (S.C.), the court describes some of the factors to be considered on such an application as follows at para. 46:
>
> (a) The undesirability of multiple proceedings;

> (b) The desirability of avoiding unnecessary costs and delay;
>
> (c) Whether the particular issues involved require an assessment of the credibility of witnesses; and
>
> (d) The need for the court to have a full grasp of all the evidence.
>
> Further, the court should consider whether it is in the interests of justice that there be pleadings and discovery in the usual way, in order to resolve the issues between the parties.

[30] The error of filing a petition rather than a notice of civil claim as required under Rule 2-1(2) can be corrected by a direction that the petition be converted into a notice of civil claim or that the petition be referred to the trial list.

[31] The petitioner was careful and articulate in his submissions but lacked a grasp of some of the fundamental principles concerning the claim he advances and the implications of those claims for the respondents. It is clear the petitioner seeks common-law damages for wrongful dismissal which must be commenced by notice of civil claim in this court; the petitioner declined to characterize his claim in this manner. He seeks only the declaration which, if granted, he believes would then permit him to commence another action to have damages assessed and ordered.

[32] Next, the *Limitation Act* prescribes the time within which proceedings must be commenced:

> Basic limitation period
>
> 6 (1) Subject to this Act, a court proceeding in respect of a claim must not be commenced more than 2 years after the day on which the claim is discovered.
>
> (2) The 2 year limitation period established under subsection (1) of this section does not apply to a court proceeding referred to in section 7.

[33] The petitioner's claim does not engage in any of the exemptions set out in ss. 2 or 3 of the *Limitation Act*. This is a factor in considering whether the petition should be dismissed or an order granted converting the claim to an action.

[34] The petitioner did not make any plausible claim that Ms. Hay was his employer at any relevant time. I was not provided any authority that might lead to a finding of her liability. I am satisfied that the petition is otherwise to be dismissed

against her because she is an independent entity with a separate legal personality from the company: see *The Owners, Strata Plan KAS 3410 v. Meritage Lofts Inc.*, 2022 BCCA 109.

[35] In determining whether this action can continue against the company, s. 346 of the *Business Corporations Act*, S.B.C. 2002, c. 57 provides:

> Dissolved companies deemed to continue for litigation purposes
>
> 346 (1) Despite the dissolution of a company under this Act,
>
> (a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and
>
> (b) a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved.
>
> (2) Unless the court orders otherwise, records related to a legal proceeding referred to in subsection (1) may be
>
> (a) delivered to the company at its address for delivery in the legal proceeding, or
>
> (b) if the company does not have an address for delivery in the legal proceeding, served on the company
>
> (i) by personal service of those records on any individual who was a director or senior officer of the company immediately before the company was dissolved, or
>
> (ii) in the manner ordered by the court.

[36] Neither party's affidavits provide information concerning the date of dissolution of the company although February 2022 was mentioned in submissions.

[37] In my view, there are substantial issues of fact that are in dispute and must be resolved before a decision can be made in this case. Moreover, there are a number of legal issues, including whether the petitioner is entitled to the declaration he seeks in the manner it is framed in the petition.

[38] Furthermore, the petitioner seeks his declaration with a view to further litigation claiming damages for wrongful dismissal or statutory rights to compensation from relating to the termination of his employment from other subcontractors to the respondent's. He plans to seek amendments to his petition to expand his claims for severance payments (or possibly to commence another

proceeding). In my view, this is not permissible because the plan offends against the principal of litigation estoppel.

[39] In *Danyluk v. Ainsworth Technologies Inc.,* 2001 SCC 44, the Court set out the applicable principle:

> [18] The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry...

See also *Sood v. Hans*, 2023 BCCA 138.

[40] The requirements preventing claims dealt with in an earlier proceedings were set out by Justice Newbury in *Cliffs Over Maple Bay (Re)*, 2011 BCCA 180:

> [31] Turning then to issue estoppel, I note the three traditional “tests” adopted by the Supreme Court of Canada in *Angle*, namely:
>
> (1) that the same question has been decided;
>
> (2) that the judicial decision which is said to create the estoppel was final; and,
>
> (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised, or their privies. ... [At 254; emphasis added.]

See also *Air Palace Co., Ltd. v. Rotor Maxx Support Limited*, 2023 BCCA 393.

[41] In this case, the petitioner plans to advance claims against companies that subcontracted with the company during his term of employment. He said he seeks a declaration of his entitlement to ESA claims against other companies associated with the company on the basis that his employment with the defendants involved driving vehicles owned by other subcontractors to the defendants. Thus, he believes these companies will be liable under s. 95 of the ESA as associated employers. His plan was to add these other potential employers to this petition proceeding without the opportunity of addressing his claims for a declaration of entitlement to severance payments.

[42] It is not appropriate to bring a case forward while expecting to be able to make other claims against other parties privy to the respondents. The principal of res judicata all applies to the points advanced in this case and to claims that will be essential to the subsequent claims to be made.

[43] The petitioner has not provided sufficient evidence to satisfy me that he is entitled to the declaration claimed under the ESA. His plan to employ this declaration to seek claims against other employers will engage the defence of action estoppel because, in part, it will target parties that are in privy to the respondents in this petition.

[44] It would be an abuse of the courts process to attempt to achieve the result expected by the petitioner. Converting this petition to an action may give him the opportunity to expand of the claims he might wish to make against other parties. At present the petition should not be resolved on the state of the evidence and the pleadings.

[45] In the result, I will exercise my discretion to convert this proceeding commenced by petition to an action as provided for in Rule 22-1(7)(d) of the *Rules*.

[46] The parties did not raise the question of costs on this application. If either party seeks costs then they must provide written submissions to the court and to the other party concerning that claim within 14 days. A party receiving submissions must provide a written submission in response within 14 days of receiving the other parties position.

"Armstrong J."