



# Civil Resolution Tribunal

Date Issued: June 30, 2020

File: SC-2020-000393

Type: Small Claims

Civil Resolution Tribunal

Indexed as: *Trustees of the IWA-Forest Industry Pension Plan v. Log Smart Contracting Ltd.*, 2020 BCCRT 730

B E T W E E N :

TRUSTEES OF THE IWA-FOREST INDUSTRY PENSION PLAN and  
TRUSTEES OF THE IWA-FOREST INDUSTRY LTD PLAN

**APPLICANTS**

A N D :

LOG SMART CONTRACTING LTD., SKY GIBB and TRISHA GIBB

**RESPONDENTS**

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## REASONS FOR DECISION

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Tribunal Member:

Sherelle Goodwin

## INTRODUCTION

1. This dispute is about alleged breach of trust concerning pension and long-term disability (LTD) plan contributions.

2. The applicant Trustees of the IWA-Forest Industry Pension Plan (pension trustees) and the applicant Trustees of the IWA-Forest Industry LTD Plan (LTD trustees) oversee a pension plan, and an LTD plan, for B.C. Forestry workers. They say the respondent Log Smart Contracting Ltd. (Log Smart) breached its trust obligations because it did not pay contributions to the pension trust and to the LTD trust, as required.
3. The respondents Sky Gibb and Trisha Gibb are Log Smart's sole directors and owners. The applicants say the Gibbs are personally responsible for the unpaid contributions because they knowingly assisted in Log Smart's breach of trust.
4. The pension trustees claim \$2,579.32 in unpaid contributions, plus contractual interest. The LTD trustees claim \$621.60 in unpaid contributions, plus contractual interest.
5. The Gibbs say they have paid what they could and say the applicants can keep any pension payments the Gibbs might be entitled to. They say that Log Smart is in the first stages of bankruptcy. Log Smart did not provide a dispute response, which I will address below.
6. Ms. Gibb and Mr. Gibb each represent themselves. The applicants are represented by an employee.

## **JURISDICTION AND PROCEDURE**

7. These are the formal written reasons of the Civil Resolution Tribunal (CRT). The CRT has jurisdiction over small claims brought under section 118 of the *Civil Resolution Tribunal Act* (CRTA). The CRT's mandate is to provide dispute resolution services accessibly, quickly, economically, informally, and flexibly. In resolving disputes, the CRT must apply principles of law and fairness, and recognize any relationships between parties to a dispute that will likely continue after the dispute resolution process has ended.

8. The CRT has discretion to decide the format of the hearing, including by writing, telephone, videoconferencing, email, or a combination of these. I decided to hear this dispute through written submissions because I find that there are no significant issues of credibility or other reasons that might require an oral hearing.
9. The CRT may accept as evidence information that it considers relevant, necessary and appropriate, whether or not the information would be admissible in a court of law. The CRT may also ask questions of the parties and witnesses and inform itself in any other way it considers appropriate.
10. Where permitted by section 118 of the CRTA, in resolving this dispute the CRT may order a party to do or stop doing something, pay money or make an order that includes any terms or conditions the tribunal considers appropriate.

## **ISSUES**

11. The issues in this dispute are:
  - a. Did Log Smart breach its trust obligations by not paying the pension plan and/or LTD plan contributions?
  - b. If so, is Mr. Gibb and/or Ms. Gibb personally responsible
  - c. If either of the above answers are “yes”, how much must the respondents pay?

## **EVIDENCE AND ANALYSIS**

12. In a civil claim, such as this one, the applicants must prove their claim on a balance of probabilities. Although I have reviewed all the applicants’ evidence, and the parties’ submissions, I refer only to that which explains and gives context to my decision. The Gibbs did not provide any evidence to the CRT, despite being given the opportunity to do so.

13. As noted above, Log Smart did not file a Dispute Response after being served with a Notice of Dispute, as required by the CRT rules. However, Log Smart's principals and owners, the Gibbs, filed Dispute Responses, which were identical. In their Dispute Responses and submissions, the Gibbs provide their version of events and address the applicants claims against themselves and against Log Smart. I find the the Gibbs intended to represent both themselves and Log Smart with the Dispute Responses they filed. I therefore find Log Smart is not in default for failing to file a separate formal Dispute Response.
14. The applicants provided as evidence copies of the trust agreements for both the pension plan and the LTD plan, as well as the plan texts, which I find sets out the plans' policies. They also provided copies of employer participation agreements and undertakings for each plan. I find these documents jointly (agreements) set out Log Smart's obligations to the applicants, as set out below. The agreements allow the applicants to administer the pension plan and LTD plan through a plan office.
15. Based on the participation agreements a I find Log Smart became a participating employer in both the pension plan and the LTD plan on March 8, 2016. The participation agreements were signed by Mr. Gibb on behalf of Log Smart. Based on the Gibbs' submissions, and the results of the applicants' July 2018 audit (described below), I find Mr. Gibb was Log Smart's only employee.
16. The pension plan trust agreement, and the LTD plan trust agreement clearly say that the pension plan and LTD plan contributions are trust funds. I find Log Smart was required to hold the employer and employee contributions for both the pension plan and LTD plan in trust for the applicants, based on the terms of the trust agreement. I further find section 58(2) of the *Pension Benefits Standards Act* (PBSA) required Log Smart to hold the pension plan contributions in trust for the applicants.
17. The agreements required Log Smart to submit monthly contribution reports to the plan office. The reports list Mr. Gibb's working hours for that particular month, plus

the calculated employee and employer deductions for the pension plan and the LTD plan. The reports are due at the end of the month following the reporting month.

18. The agreements also require Log Smart to deduct Mr. Gibb's employee contributions from his pay and pay both Mr. Gibb's employee contributions, and Log Smart's employer contributions, to the applicants by the end of the month following the deduction month. This is the due date.
19. In July 2018 the applicants audited Log Smart's payroll records from March 1, 2016 to January 31, 2018. According to the July 6, 2018 audit report, Log Smart had under-reported 160 hours Mr. Gibb worked in May 2017, and 120 hours in each of June and July 2017, for a total of 400 hours.
20. The applicants sent Log Smart a copy of the audit report on January 16, 2019 and gave Log Smart 30 days to disagree with the audit results. Based on the January 16, 2019 letter I find Log Smart then owed \$2,360 for outstanding pension plan contributions, plus \$58.51 in interest, along with \$480 for outstanding LTD plan contributions, plus \$11.90 in interest, for May, June and July 2017.
21. Based on the agreements, I find Log Smart must pay interest on any pension or LTD plan contributions unpaid by the due date. The agreement sets out the calculation for the contractual interest rate. As the respondents have not disputed this calculation, I accept the applicants are entitled to claim interest on the outstanding audit amount set out in the January 16, 2019 letter.
22. The applicants provided an email exchange between the applicants, Ms. Gibb, and Log Smart's bookkeeper, between December 13, 2018 and February 5, 2019. Based on those emails I find Log Smart, through the bookkeeper, sent completed contribution reports to the plan office for October, November and December 2018. I further find Log Smart did not pay the contributions for October, November and December 2018 on their respective due dates, as the applicants continued to ask both Ms. Gibb and the bookkeeper to pay those contributions in the emails.

23. In her February 27, 2019 email Log Smart's bookkeeper told the plan administrator that Mr. Gibb would do his best to pay off the balance he owed, including the audited amount. As the bookkeeper added "for Log Smart" below her name on the email I find she was acting as agent for Log Smart in sending the email and was authorized to do so. I agree with the applicants and find that Log Smart did not dispute the audit amount owing, as set out in the January 16, 2019 letter.
24. I also find Log Smart agreed that it owed contributions for October, November and December 2018 as well, based on a March 7, 2019 email from Ms. Gibb, who said "they" would try to pay once per month.
25. Based on the bookkeeper's December 13, 2018 email, I find Log Smart paid for machine repairs and there was no money left in the account for the pension plan and LTD plan contributions it owed the applicants. I find Log Smart breached the trust agreements by not holding the pension plan and LTD plan contributions in trust for the applicants and by, instead, using the funds to pay its general operating expenses.
26. Based on the applicants' April 27, 2020 billing statement, I find Log Smart owes the pension plan trustees \$2,579.32 in outstanding pension plan contributions and owes the LTD plan trustees \$621.60 in outstanding LTD plan contributions, plus contractual interest.

### ***Personal Liability***

27. Although Mr. Gibb signed the participation agreements and undertakings on Log Smart's behalf, I find he is not personally bound by the terms of the trust agreement. Neither is Ms. Gibb. However, they may still be personally responsible for Log Smart's breach of trust if they knew that the trust existed and knew that Log Smart's breach was "dishonest and fraudulent" (*Air Canada v. M & L Travel Ltd.* [1993] 3 SCR 787, at paragraph 38).
28. Where a trust is imposed by statute, someone outside the trust is deemed to know that the trust exists but where a trust is imposed by contract someone outside the

trust's knowledge will depend on their involvement with the contract (see *Air Canada*, at paragraph 39, and *Trustees of the IWA v. Wade*, 2019 BCSC 1085 at paragraph 74). I find the Gibbs knew of the trust obligations over the pension plan contributions, as the trust was created by a statute. I find the LTD plan was created by contract, so I must consider how involved Mr. and Ms. Gibb were with that contract.

29. I find Mr. Gibb knew of the trust obligations over the LTD plan contributions, as he signed the participation agreement, which clearly states Log Smart's obligations to hold the LTD plan contributions in trust for the applicants. Further, the participation agreement refers to the LTD trust agreement and binds Log Smart to those terms.
30. However, I find Ms. Gibb did not know of the contractual trust over the LTD plan contributions. Based on the email exchanges I find Ms. Gibb knew of Log Smart's obligation to pay plan contributions to the applicants. However, there is nothing in those emails, the attached contribution reports, or the July 2018 audit report, that indicate Log Smart needed to hold those contributions in trust. Ms. Gibb did not sign the participation agreement and there is no indication she knew, or ought to have known, of the terms of the LTD trust agreement. I acknowledge that Ms. Gibb is one of Log Smart's two owners and directors, but I find that alone is insufficient to show that she was aware of the contractual trust over the LTD plan contributions. I find the applicants have failed to prove Ms. Gibb knew of the existence of the contractual trust over the LTD plan contributions. As such, I find Ms. Gibb is not personally liable for Log Smart's breach of trust over the LTD plan contributions. I dismiss the applicants' claim for \$621.60 in LTD plan contributions, and contractual interest, against Ms. Gibb personally.
31. I next turn to whether either of the Gibbs knew that Log Smart's breach of trust was dishonest and fraudulent. As Ms. Gibb is deemed to know about the trust over the pension plan contributions, I must still consider her involvement in Log Smart's breach of trust. A dishonest and fraudulent breach is where the trustee takes a risk

it had no right to take, to the prejudice of the rights of others (*Air Canada*, at paragraph 60).

32. The applicants say Log Smart breached the trust by not keeping the contributions separate from its general funds, thus creating an unnecessary risk that the contribution funds would be used for general operating expenses, rather than paid to the applicants, as required. I find this is exactly what happened in this case. As noted by the bookkeeper, Log Smart was unable to pay the outstanding contributions because it had used its money for machine repairs. Log Smart comingled the contributions with its general fund, used the money for general operating expenses, and was then unable to pay the contributions to the applicants. I find Log Smart's breach of trust was dishonest and fraudulent.
33. I find Mr. Gibb had full knowledge of the nature of Log Smart's breach. Mr. Gibb is the owner-operator and sole employee of Log Smart. On Log Smart's behalf, the bookkeeper told the applicants that Mr. Gibb would try to pay the outstanding amount. She further said that Mr. Gibb's machine had broken down and Mr. Gibb needed to pay for the machine repairs, leaving no money in the account for the overdue plan contributions. Based on the bookkeeper's emails and Mr. Gibb's position in the company I find he knowingly assisted with Log Smart's breach of trust.
34. I do not make the same finding about Ms. Gibb. There is no indication that Ms. Gibb directed the comingling of the funds, directed the payment of machine repairs, or in any other way assisted with Log Smart's breach of trust. I find Ms. Gibb did not knowingly assist with Log Smart's breach of trust over the pension plan contributions. I dismiss the applicants' claim for \$2,579.32 in pension plan contributions, plus contractual interest, against Ms. Gibb personally.
35. I find Log Smart and Mr. Gibb equally responsible for the breach of trust and find them jointly and severally liable for the unpaid contributions and contractual interest detailed below.



36. In the applicants' April 27, 2020 billing statement summary, they claim \$2,579.32 in outstanding pension plan contributions plus \$67.73 in contractual interest, as well as \$621.60 in outstanding LTD plan contributions, plus \$17.85 in contractual interest.
37. Based on the agreement, I find Log Smart must pay interest on any pension or LTD plan contributions unpaid by the due date. The agreement sets the contractual interest rate at 1.5 x a bank quarterly prime interest rate. The respondents do not dispute the applicants' interest calculations on the April 27, 2020 billing statement and I accept that it is accurate.
38. I also find that the applicants' are entitled to contractual interest on the outstanding plan contributions from April 28, 2020 to the date of this decision, at the calculated contractual rate of 3.675% per annum. This equals \$0.13 on the outstanding pension plan contributions of \$2,579.32 and \$0.09 on the outstanding LTD plan contributions of \$621.60.
39. Under section 49 of the CRTA and tribunal rules, the CRT will generally order an unsuccessful party to reimburse a successful party for tribunal fees and reasonable dispute-related expenses. I see no reason in this case not to follow that general rule. I find the applicants are each entitled to reimbursement of \$175 in CRT fees, divided evenly between them. I find the applicants have failed to prove any dispute-related expenses.

## **ORDERS**

40. Within 60 days of the date of this order, I order Log Smart and Mr. Gibb, jointly and severally, to pay the applicant pension plan trustees a total of \$2,724.68, broken down as follows:
  - a. \$2,579.32 for outstanding pension plan contributions,
  - b. \$67.86 in pre-judgment interest at the contractual rate, and

- c. \$87.50 for CRT fees.
41. Within 60 days of the date of this order, I order Log Smart and Mr. Gibb, jointly and severally, to pay the applicant LTD plan trustees a total of \$717.04, broken down as follows:
- a. \$621.60 for outstanding LTD plan contributions,
  - b. \$17.94 in pre-judgment interest at the contractual rate, and
  - c. \$87.50 for CRT fees.
42. The applicants are entitled to post-judgment interest, as applicable. The applicants' claims against Ms. Gibb personally are dismissed.
43. Under section 48 of the CRTA, the CRT will not provide the parties with the Order giving final effect to this decision until the time for making a notice of objection under section 56.1(2) has expired and no notice of objection has been made. The time for filing a notice of objection is 28 days after the party receives notice of the CRT's final decision. The Minister of Public Safety and Solicitor General has issued a Ministerial Order under the *Emergency Program Act*, which says that tribunals may waive, extend or suspend a mandatory time period. The CRT can only waive, suspend or extend mandatory time periods during the declaration of a state of emergency. After the state of emergency ends, the CRT will not have this ability. A party should contact the CRT as soon as possible if they want to ask the CRT to consider waiving, suspending or extending the mandatory time to file a Notice of Objection to a small claims dispute.
44. Under section 58.1 of the CRTA, a validated copy of the CRT's order can be enforced through the Provincial Court of British Columbia. A CRT order can only be enforced if it is an approved consent resolution order, or, if no objection has been made and the time for filing a notice of objection has passed. Once filed, a CRT order has the same force and effect as an order of the Provincial Court British Columbia.

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Sherelle Goodwin, Tribunal Member