Employment Standards TRIBUNAL

Citation: Bayshore Healthcare Ltd. (Re)
2018 BCEST 18

An appeal

- by -

Bayshore Healthcare Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE NO.: 2017A/111

DATE OF DECISION: February 21, 2018

DECISION

SUBMISSIONS

J. Geoffrey Howard	counsel for Bayshore Healthcare Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. Bayshore Healthcare Ltd. (the "Appellant") appeals the July 31, 2017, determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), denying the Appellant's application (the "Variation Application") under sections 72(f) and 72(h) of the *Employment Standards Act* (the "*ESA*") to vary sections 35 and 40.

2. Sections 35(1) and 40 of the *ESA* compel an employer to pay overtime wages, as a multiple of the regular wage rate, "… if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week."

3. In the Variation Application, approved by almost eighty-eight percent of affected employees - registered nurses, licensed practical nurses, and non-nurse caregivers providing respite services to critically ill children and their families - the Appellant sought permission from the Director:

   (a) to pay affected employees the regular hourly wage rate, as opposed to an overtime wage rate, for the first 12 hours worked in each day; and

   (b) to calculate weekly overtime for affected employees based on 40 hours per week averaged over 28 days.

4. The Appellant challenges the Determination and the rejection of its Variation Application on the basis that the Delegate:

   (a) erred in law; and

   (b) failed to observe the principles of natural justice,

   both grounds for appeal under section 112(1) of the *ESA*.

5. Concerning the latter, the Appellant asserts that the Director asked inappropriate, leading questions when interviewing affected employees, and made statements giving rise to a reasonable apprehension of bias. Somewhat obliquely, the Appellant also argues that the Director failed to provide adequate reasons in the Determination.

6. With respect to the former, the Appellant argues that the Delegate:

   (a) made material factual findings with no evidentiary basis;

   (b) based her Determination on legally irrelevant factors; and

(c) failed to appreciate or consider relevant policy grounds, which the Appellant characterizes as "overwhelmingly strong".

7. The Appellant says that the Determination ought to be modified, effectively granting the variance as originally requested. Alternatively, the Appellant says that the Tribunal should refer the application back to the Director, for investigation by a different delegate.

8. I have now reviewed in considerable detail:

(a) the Determination;

(b) the Record, submitted by the Delegate on September 28, 2017;

(c) submissions from the Delegate, received on November 27, 2017; and

(d) submissions from Appellant's counsel, received on September 7, 2017, September 27, 2017, October 4, 2017, October 13, 2017, and December 12, 2017.

9. I have not considered, except in the context of the Appellant's assertion of bias, any of the unsworn, unverified supporting letters, messages, and other correspondence purportedly authored by affected employees. In my view it would be inappropriate to do otherwise, considering that the Appellant does not appeal on the basis that there is new evidence. In any event, considering the Delegate's findings with respect to section 73(1)(a) of the *ESA* (discussed below), I am of the view that this evidence is not relevant to the outcome of this appeal.

FACTS AND ANALYSIS

Applications for Variance

10. Sections 72(f), 72(h) and 73(1) of the *ESA* provide that:

> *72 An employer and any of the employer's employees may, in accordance with the regulations, join in a written application to the director for a variance of any of the following:*
>
> *…*
>
> *(f) section 35 (maximum hours of work);*
>
> *(h) section 40 (overtime wages for employees not working under an averaging agreement);*
>
> *…*
>
> *73 (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that*
>
> *(a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and*
>
> *(b) the variance is not inconsistent with the purposes of this Act, set out in section 2.*

11. This Tribunal has consistently recognized that sections 72 and 73 of the *ESA* vest in the Director and his Delegate a broad discretionary authority to approve or reject variance applications. (*GoodLife Fitness Centres*

Inc., BC EST # D089/14, at paragraph 33, and *Victoria Federation of Parent Advisory Councils*, BC EST # D436/01, at page 4).

12. When considering the merits of a challenge to the exercise of that discretion, this Tribunal is guided by the approach adopted in *Jody L. Goudreau et al*, BC EST # D066/98, at page 4:

> The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > ... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".
> > *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229

13. It is fair to say that the discretionary authority conferred under section 72 of the *ESA* is exercisable if, and only if, the conditions in section 73(1) have been satisfied. If the Delegate concludes that affected employees are not aware of or otherwise do not approve of the variation, or if the variation is inconsistent with any one or more of the purposes described in section 2 of the *ESA*, the application must be denied.

14. It does not follow, however, that satisfaction of the conditions in sections 73(1)(a) and 73(1)(b) will automatically result in approval of the application for a variance. The final decision rests with the Director, who must exercise discretion to grant or deny an application within "well established legal principles". It must not be arbitrary but, rather, based on *bona fide*, relevant, considerations (*Joda M. Takarabe and others,* BC EST # D160/98, at page 14, adopting comments from Abbott, J. in *Boulis v. Minister of Manpower and Immigration* [1974] SCR 875 at page 877). Within those parameters, the Delegate "… even has the right to be wrong" (*Jody L. Goudreau et al*, *supra,* at page 4).

Reasonable Apprehension of Bias

15. I address, first, the Appellant's claims of bias.

16. The Appellant argues that the Delegate's conduct when interviewing a subset of affected employees demonstrates a level of bias that is tantamount to a breach of the principles of natural justice. I accept that, if proved, bias would be a good reason for the Tribunal to interfere with the exercise of discretionary authority.

17. Having regard to the materials before me, however, I do not agree that the Appellant has shown bias on the part of the Delegate.

18. The test for bias adopted by the Supreme Court of Canada is set out in *Committee for Justice and Liberty v. National Energy Board* [1978] 1 SCR 369, at page 394: "What would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude"?

19. According to the Appellant, the Delegate's failure to remain impartial is demonstrated by the manner in which she questioned employees during her investigation, the precise questions she asked, and the comments she made while questioning them. The Appellant's proof consists of questionnaires, circulated by the Appellant, and completed by seven of the forty-four employees interviewed by the Delegate.

20. I am hard pressed to say that, together, they amount to the "clear and convincing evidence" objectively demonstrating bias required by this Tribunal (see *Bernhausen Specialty Automotive Ltd.*, BC EST # D043/16, at paragraph 36).

21. Context is key. Variation of minimum employment standards designed to address an inherent imbalance between employer and employee requires thorough investigation to ensure that employee approval is both informed and freely given. It is abundantly clear that, for a number of affected employees, English is not the first language. Some expressed reluctance to speak to the Delegate. In the face of her obligation to ensure consent, it would have been entirely appropriate for the Delegate to ask direct, pointed, even leading questions of these employees. It would have been necessary to determine whether employees knew what rights accrued to them, under the *ESA*, and essential to confirm that giving up those rights by way of a variation was not mandatory. In that context, I see nothing inherently wrong with the Delegate's approach.

22. I find the Appellant's evidence of bias wanting. It does not satisfy the requisite burden of proof, and I am not even remotely convinced that the Delegate's investigation was prejudiced against granting the Variation Application.

Section 73(1)(a)

23. In any event, the issue of employee approval (or the lack of it) is relevant only to a consideration under section 73(1)(a) of the *ESA*. On that point, the Determination is reasonably clear - although affected employees "… had varying positions on and reasons for signing… they were generally aware of its effect when they signed [the Variation Application] in approval."

24. The Appellant, in submissions to the Tribunal, makes much of the fact that there is, or there appears to be, considerable support for the Variation Application amongst affected employees. With respect, however, and considering the Delegate's ultimate conclusion concerning the section 73(1)(a) condition, I do not see the point of this argument. It is true that an application to vary specific provisions of the *ESA* must not be allowed without the support of a majority of affected employees, but mere employee consent (even if unanimous) does not mandate approval of the Variation Application.

25. The reason for this, in my view, is simple. Employees individually do not have the capacity to waive rights under the *ESA* – that power rests with the Director of Employment Standards (and his delegates) and, on a limited basis, with a trade union negotiating a collective agreement in circumstances where the scales are less likely to be so heavily tipped in the employer's favour.

Section 73(1)(b)

26. That is not to say that the Determination is without issues.

27. According to the Determination's final paragraph, the Delegate's refusal to grant the Variation Application is based on two critical findings:

(a) firstly, the "application does not identify a benefit to the employees which is sufficient to justify the requested alteration of their entitlement to a minimum employment standard';

(b) secondly, the Variation Application is inconsistent with the intent of the *ESA* and, as such, does not satisfy the condition described in section 73(1)(b).

28. Pursuant to section 73(1)(b), the Delegate must consider the variation sought in light of the purposes of the *ESA*, described in section 2:

(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.

29. The Delegate considered and rejected several arguments from the Appellant, including:

(a) the importance of ensuring the delivery of an admittedly critical care service to patients within the funding limitations imposed by the provincial government, and the inability of the Appellant to adequately provide that service within rigid minimums set according to section 35 of the *ESA*;

(b) similarities between the model proposed in the Variation Application and the sub-sector collective agreement between the Health Employers Association of British Columbia and the Nurses Bargaining Association;

(c) the wage increase promised by the Appellant as part of the variance;

(d) the increased flexibility afforded to employees wishing to work longer shifts, or for more than 40 hours in a week;

(e) the Appellant's inability to set fixed working schedules, given the demands of its patients.

30. According to the Delegate, the Variation Application must "demonstrate that relaxation of minimum employment standards in such things as daily and weekly overtime is balanced by an improvement in other factors such as meeting work and family responsibilities, so that the proposed work schedule remains consistent with the purposes of the Act." In the Delegate's opinion, none of the items considered in her Determination satisfied that requirement.

31. In my opinion, this approach is not entirely consistent with guidance offered by the Tribunal in *Sun Peaks Mountain Resort Association*, BC EST # D434/01, at page 8 (emphasis added):

> Generally speaking, whether an employee is excluded from all or parts of the *Act* does not depend on whether there is a perceived corresponding benefit for the excluded employees. Rather, exclusions are based on factors inherent to the work performed, which include considerations of fairness, economic viability and unusual or unique features of the particular employment. In our view, and in light of the basis upon which the variance was sought, there should have been assessment of the particular features of the employment and the impact on the employer to operate without the variance.
>
> … In our view it is appropriate in a variance application, and consistent with the intent of the *Act*, to consider the compensation and conditions of the relevant employment as a whole in determining whether the resulting variance will give an employee less than basic compensation and conditions of employment.

32. Moreover, while the Delegate concludes that the Appellant's proposed variation is inconsistent with section 2 of the *ESA*, the Determination does not clearly explain why that is the case. As in *Goodlife Fitness*, *supra*, at paragraph 37, "…the reasons lack sufficient analysis to identify what relevant considerations and purposes outlined in section 2 of the *Act* factored into the [Delegate's] conclusion."

33. The Delegate argues that varying minimum standards set out in the *ESA* is an extraordinary step. She relies, in part, on comments made by the Tribunal in *Terrace Kitimat Bldg. Maint. Ltd.,* BC EST # D150/97, at page 4 (emphasis added):

> Section 2 must also be read in light of the court's admonition in *Helping Hands Agency Ltd. v. Director of Employment Standards*, unreported, British Columbia Court of Appeal, Vancouver Registry CA018751 that the purpose of the *Act* is to "give protection to employees for the payment of their wages" and "to afford protection to the payment of an employee's wages which may not be available to the employee at common law." This suggests that any exemption from the minimum standards set out in the *Act* must be narrowly construed. Where there is any doubt as to the efficacy and fairness of an exemption, the application under section 72 must be denied.

34. While this is true, the Tribunal also declared in *Sun Peaks, supra,* at page 7, that it is wrong to suggest that section 2(a) (addressing basic standards of employment) expresses the full intent of the *ESA*:

> Such a suggestion would ignore the other statements of purpose found in Section 2 of the *Act*. Of particular note in the context of the variance application made by the Association (as they will be in many variance applications) are the objectives of promoting fair treatment for employees and employers, fostering a productive and efficient workforce and contributing in assisting employees to meet work and family responsibilities. The Legislature must have intended those statements of purpose be given some effect in the context of administering the *Act*.

Did the Delegate fail to observe the principles of natural justice in making the determination?

35. Natural justice demands that, at all times, the Director must act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

36. Fairness, in the context of an investigation under the *ESA*, means that all parties involved must have the right to notice, the right to be heard, the right to a coherent procedure, and the right to a reasoned decision (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

37. I understand, and agree with, the Delegate's conclusion that the Variation Application fails to identify a corresponding benefit to employees offsetting deviation from a minimum standard. However, I am unable to glean from the Determination how the Delegate considered the Appellant's argument in the context of an analysis under section 73(1)(b) of the *ESA*.

38. In this instance, the Delegate has not adequately explained her finding that the Variation Application is inconsistent with the purposes of the *ESA.* The lack of an identifiable corresponding benefit is not sufficient, particularly considering that section 30 of the *Employment Standards Regulation* does not identify that as a requisite component of the application for variance.

39. In my view, the Determination does not include the requisite "degree of analysis sufficient to identify the considerations that comprised the conclusion" (see *GoodLife, supra,* at paragraph 37, and *Victoria Federation of Parent Advisory Councils, supra*, at page 6.)

Conclusion

40. This Tribunal will interfere with an exercise of discretionary authority only in limited circumstances.

41. I am satisfied that the Appellant has met the burden of proving that the Delegate, on a balance of probabilities, has breached the requirement to deliver adequate reasons in the Determination.

42. I do not agree, however, that varying the Determination is appropriate. Instead, I am of the view that the correct approach would be to cancel the Determination and to refer this matter back to the Director of Employment Standards. To be clear, and in light of my finding that bias is not proved, I make no further direction concerning the role of the Delegate.

43. I do not find it necessary to address the Appellant's submissions concerning an error of law under section 112(1)(a) of the *ESA.*

ORDER

44. Pursuant to section 115(1)(a) of the *ESA*, the Determination is cancelled, and this matter referred back to the Director of Employment Standards.

Rajiv K. Gandhi
Member
Employment Standards Tribunal