Employment Standards TRIBUNAL

Citation: Co-Par Investments Inc. (Re)
2018 BCEST 20

An Application for Reconsideration

- by -

Co-Par Investments Inc.
("Co-Par")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Robert E. Groves

FILE No.: 2018A/4

DATE OF DECISION: February 22, 2018

DECISION

SUBMISSIONS

Karen Kostron on behalf of Co-Par Investments Inc.

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), Co-Par Investments Inc. ("Co-Par") applies for reconsideration of a decision of the Tribunal issued on December 6, 2017, under BC EST # D120/17 (the "Appeal Decision").

2. This matter originated with a section 74 complaint filed by a former employee of Co-Par, Tyler Betts ("Betts"), alleging that Co-Par had failed to pay him wages owed, or to provide him with wage statements, as required by the *ESA*.

3. The Director of Employment Standards, through a delegate (collectively, the "Director"), conducted a hearing of Betts' complaint, and subsequently issued a determination dated August 10, 2017 (the "Determination"). The Determination stated that Co-Par had contravened the *ESA*. It ordered that Co-Par pay Betts wages in the amount of $6,150.49. It also ordered Co-Par to pay $2,500.00 in administrative penalties. The total found to be owed in the Determination was, therefore, $8,650.49.

4. Co-Par filed an appeal of the Determination pursuant to section 112 of the *ESA*. The Appeal Decision dismissed the appeal and confirmed the Determination.

5. Co-Par then filed the application for reconsideration which is now before me.

6. Pursuant to Rule 30(4) of the Tribunal's *Rules of Practice and Procedure* I must assess Co-Par's application for reconsideration, and I may dismiss it, in whole or in part, without seeking submissions from the parties. In this case, I do not feel it necessary to request submissions from any other party.

FACTS

7. I accept, and incorporate by reference, the facts set out in the Determination and in the Appeal Decision.

8. In summary, Co-Par, a company incorporated in Alberta, carried on at least a part of its electrical services business within British Columbia. A corporate search in the record provided by the Director revealed that a Steven Barry ("Barry") and a Ross Kostron ("Kostron") were listed as directors of the company.

9. Co-Par employed Betts to perform electrical work for clients within British Columbia from January 16, 2017, until March 17, 2017, when Betts quit. Betts filed his complaint shortly thereafter.

10. The Director forwarded copies of the complaint, and a Demand for Employer Records, to Co-Par, Barry, and Kostron, via registered mail. While the material sent to Barry was returned unclaimed, receipt of the correspondence to the other parties was tracked and confirmed.

11. Kostron subsequently informed the Director that he was no longer a corporate director of Co-Par, and would not be representing the company further. He also stated that Barry had all the relevant documents and information concerning the complaint and that it was Barry with whom the Director should deal in order to seek a resolution.

12. The Director then conducted an email correspondence with Barry in which the latter communicated a desire to resolve the dispute. Barry advised the Director that he would follow up, but he neglected to do so, despite several attempts by the Director to make contact with him.

13. On July 19, 2017, the day of the hearing of the complaint, the Director attempted to contact both Kostron and Barry. Contact was made with Kostron, who declined to participate, and stated, in effect, that he was no longer associated with Co-Par. The Director left a voicemail message for Barry, but heard nothing from him thereafter.

14. The Director conducted the hearing in the absence of a representative, or any substantive submissions, from Co-Par. Betts gave evidence, and produced a detailed record of his hours of work. The Director found Betts' evidence to be credible, and in the absence of any evidence from Co-Par to the contrary the Director accepted it for the purposes of establishing the wages owed.

15. Co-Par subsequently filed an appeal with the Tribunal. The appeal referenced subsection 112(1)(c) of the *ESA*. That subsection establishes that a party may appeal when new evidence has become available that was not available at the time the Determination was made.

16. While Co-Par's appeal submission did include a series of documents that had not formed a part of the record in the proceedings before the Director, the Appeal Decision noted that the substance of Co-Par's contention was to question some of the facts accepted by the Director in the Determination. The Appeal Decision observed, correctly, that the *ESA* does not provide for appeals based on an alleged error of fact, unless it can be demonstrated that the error of fact amounts to an error of law.

17. The Appeal Decision declined to accept or consider the "new" evidence offered by Co-Par. The Tribunal stated that the evidence was available to Co-Par during the proceedings before the Director, and could have been employed by it to defend the complaint had Co-Par thought it desirable to do so. Since Co-Par had declined to participate in those proceedings in any meaningful way, the Tribunal determined that it was not open to the company to attempt to challenge the Director's findings by way of an appeal.

18. Having decided that the record on appeal was the record that had been before the Director, the Appeal Decision concluded that Co-Par had failed to establish an error in the Determination, and so the appeal must be dismissed.

ISSUES

19. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

20. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

21. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

22. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *ESA*.

23. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

24. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

25. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).

26. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

27. In my opinion, Co-Par has failed to establish that the Appeal Decision warrants reconsideration.

28. Co-Par raises several grounds in support of its application.

29. Co-Par alleges, for the first time, that the Tribunal has no jurisdiction over the original complaint. It says that "a portion of the complaint did not occur in British Columbia". It also states that Betts was not a resident of this province.

30. The Determination states that Betts was a resident of Alberta. However, it is undisputed that the work Betts was asked to perform occurred in British Columbia. It is unclear from Co-Par's submission what is meant by the assertion that a portion of the complaint occurred outside this province. I also note that in the record there is a copy of the agreement that appears to have governed Betts' employment. It says that the agreement was entered into in several provinces, including British Columbia, and that the laws of the province in which the work occurs governs the validity and interpretation of the agreement.

31. If Co-Par wished to allege a jurisdictional issue in reply to Betts' complaint, it should have raised the matter at its earliest opportunity, and in any event before the Determination was issued. Absent extraordinary circumstances, which have not been established here, a party should not be permitted to raise such a question for the first time on an application for reconsideration. Despite this, the fact that Betts performed the work in question within British Columbia and his employment agreement contemplated that the laws of this province would apply to his work here, provides a sufficient connection between Co-Par and this province for the complaint to fall within the jurisdictional purview of the *ESA* (see *Saueracker*, BC EST # D677/01).

32. The substance of the balance of Co-Par's application addresses whether the "new" evidence it sought to tender in its appeal, which the Appeal Decision determined was inadmissible, should have been admitted and considered on the merits. Co-Par's submission focuses on the efforts of Kostron to obtain the relevant documents and information from an uncooperative Barry, whom Kostron alleges was the person in possession of it. Co-Par also makes a vague reference to a computer failure which contributed to the delay in Kostron's gaining access to the relevant materials, apparently on behalf of Co-Par, which it then sought to have admitted for consideration on the appeal.

33. In my opinion, Co-Par's argument on this point is ill-conceived. The fact that Kostron was unable to retrieve the materials he might have wished to produce to the Director on behalf of the company does not undermine the reality that Co-Par, a separate entity, and the entity that was the subject of Betts' complaint, had the materials in question available to it, at least through its agent, Barry, during the period leading to the issuance of the Determination. For this reason, the materials Co-Par sought to tender on appeal, which had not previously been disclosed, cannot be said to have been "new" in the sense contemplated by subsection 112(1)(c) of the *ESA*.

34. In addition, Co-Par's description of the plight of Kostron is inconsistent with the position taken by Kostron in his dealings with the Director. Prior to the Determination, Kostron told the Director that he was no longer a corporate director of Co-Par and that he would not be representing the company any further. This was confirmed on the day of the hearing of the complaint, when Kostron informed the Director that he no longer had anything to do with the company, and that he would not be attending on its behalf. If Kostron believed there was evidence in the possession of Co-Par which he had been trying to obtain, without success, and which might have been useful for the purposes of presenting a defence to the complaint, one would have expected Kostron to communicate these facts to the Director well before the date of the hearing, and to take the legal steps to obtain the necessary documents and information. Kostron did not do that. Instead, he purported to remove himself from the dispute. As correspondence from Co-Par in support of its appeal indicates, it was in part only after Kostron learned that he might be personally liable, presumably as a director of Co-Par, for the payment of sums identified in the Determination, that the issue of the necessity to obtain the company's records relating to the complaint became a priority for him.

ORDER

35. Pursuant to section 116 of the *ESA*, I order that the Appeal Decision of the Tribunal, BC EST # D120/17, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal