Employment Standards TRIBUNAL

Citation: Golden Feet Reflexology Ltd. (Re)
2018 BCEST 22

An Application for Reconsideration

- by -

Golden Feet Reflexology Ltd.
("Golden Feet")

- 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: David B. Stevenson

FILE No.: 2018A/20

DATE OF DECISION: March 15, 2018

DECISION

SUBMISSIONS

Brahm Dorst — counsel for Golden Feet Reflexology Ltd.

OVERVIEW

1. Golden Feet Reflexology Ltd. ("Golden Feet") seeks reconsideration of a decision of the Tribunal, Decision Number 2018 BCEST 1 (the "original decision"), dated January 10, 2018.

2. The original decision considered an appeal of a Determination issued by Janko Predovic, a delegate of the Director of Employment Standards (the "Director"), on May 10, 2017.

3. The Determination was made by the Director on a complaint filed by Jennifer Jing Yi Feng (Ms. Feng"), who had alleged Golden Feet had contravened the *Employment Standards Act* (the "*ESA*") by failing to pay overtime wages, statutory and annual vacation pay, compensation for length of service and had improperly deducted Golden Feet's business costs from wages owing to her.

4. In the Determination, the Director found Golden Feet had contravened sections 21, 27, 40, 45 and 58 of the *ESA* and that Ms. Feng was owed wages under the *ESA* in the amount of $1,771.86, plus interest, and that Golden Feet was liable for administrative penalties in the amount of $2,500.00.

5. An appeal of the Determination was filed by Golden Feet alleging the Director had erred in law, failed to observe principles of natural justice in making the Determination and there was evidence that had become available that was not available when the Determination was being made.

6. The Tribunal Member making the original decision dismissed the appeal under section 115 of the *ESA*, finding no error of law or breach of natural justice by the Director in making the Determination and did not accept the additional material submitted with the appeal, finding Golden Feet had not met the required threshold for allowing that material to be accepted and considered as new evidence in the appeal. A summary of the result of the appeal is found at paras. 73 and 74 of the original decision:

> A conclusion on the above factors – control, integration, and client ownership – was determined on findings of fact, a question over which the Tribunal has no jurisdiction. I am not persuaded that there is any error of law regarding the findings made by the Director, as there was evidence available and considered on which the Director could reasonably arrive at the decisions made.
>
> The Director considered and based his determination on the definition of "employee", "employer" and "work" in the *ESA* as well as various common law tests, while acknowledging the Supreme Court of Canada's decision in *Sagaz*, *supra*, that there is not one conclusive test, but rather a multitude of factors dependant on the facts of each case. I find the decision of the Director to be both rationally and reasonably supported in the law and in the evidence.

7. At the root of both the Determination and the original decision was the conclusion, which was disputed by Golden Feet, that Ms. Feng was an employee under the *ESA* and therefore entitled to the benefit of its provisions.

8. This application was delivered to the Tribunal on February 13, 2018, four days outside the statutory time period for filing an application for reconsideration found in section 116 of the *ESA*. Golden Feet has applied for an extension of the reconsideration period to allow for the application to be accepted as timely. The application seeks to have the original decision cancelled and the matter referred back to the original panel or another panel of the Tribunal.

ISSUE

9. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

10. This application is limited to the continued disagreement by Golden Feet with the conclusion in the Determination, affirmed in the original decision, that Ms. Feng was an employee of Golden Feet under the *ESA*. This application does not allege error in, or seek reconsideration of, the finding in the original decision on the natural justice ground of appeal or the decision of the Tribunal Member making the original decision to not accept the additional evidence submitted with the appeal.

11. In this application Golden Feet has done no more than restate its arguments against finding Ms. Feng is an employee of Golden Feet under the *ESA* – the same arguments made unsuccessfully to the Director and, also without success, to the Tribunal Member making the original decision.

12. The reconsideration submission is critical of the original decision in the following respects:

i. The original decision did not contain a sufficient analysis of the evidence which led the Director to find Ms. Feng was an employee;

ii. The Tribunal Member of the original decision erred in stating the Director considered the "integration" test; and

iii. The Tribunal Member of the original decision failed to appreciate the conclusion on Ms. Feng's status under the *ESA* was based on a flawed application of common law tests and an unjustified subordination of the "control or direction" element in the definition of "employer" in section 1.

13. Golden Feet submits this panel of the Tribunal should consider whether an error was made in the reasoning in the original decision and, if so, decide the issue of the status of Ms. Feng based on "common law principles", with a full explanation of the reasons for the conclusions reached.

14. In respect of its application for an extension of the reconsideration application period, Golden Feet notes the application deadline was missed by only one-half hour and was the result of an innocent miscalculation of the amount of the time required to complete and file the application.

ANALYSIS

15. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

16. Section 116 of the *ESA* reads:

> *(1) On an application under subsection (2) or on its own motion, the tribunal may*
>
> *(a) reconsider any order or decision of the tribunal, or*
>
> *(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
>
> *(2) The director or a person served with an order or a decision of the tribunal may make an application under this section.*
>
> *(2.1) The application may not be made more than 30 days after the date of the order or decision.*
>
> *(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
>
> *(3) An application may be made only once with respect to the same order or decision.*
>
> *(4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

17. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in section 2(b) is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

18. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

19. The Tribunal has accepted an approach to applications for reconsideration that resolves itself into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not available to the original panel;
- inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

20. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

21. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised in the reconsideration.

22. I find this application does not warrant reconsideration.

23. As indicated above, this application does nothing more than reiterate the argument on Ms. Feng's status under the *ESA* that Golden Feet has advanced throughout the process, seeking to have this reconsideration panel of the Tribunal re-visit the result of the original decision and come to a different conclusion.

24. I agree with the result and the reasoning in the original decision: the findings of fact made by the Director were based on evidence before the Director and on a view of the facts that could reasonably be entertained.

25. The Director did exactly what was required: identified the central question when considering whether a person is an employee for the purposes of the *ESA*; identified the relevant provisions in and considerations arising from the *ESA*, examined the relationship between Golden Feet and Ms. Feng; made findings of fact concerning that relationship and, applying the findings of fact to the relevant statutory provisions and considerations, reached a conclusion on the question.

26. As perceived in the original decision, the appeal was an attempt to have the Tribunal review findings of fact made by the Director in respect of matters identifying the relationship between Golden Feet and Ms. Feng. The Tribunal Member of the original decision correctly noted the Tribunal has no jurisdiction to review findings of fact made by the Director unless such findings raise an error of law and was not persuaded Golden

Feet had shown an error of law on the facts. I am not persuaded the Tribunal Member made an error in that regard, let alone one that warrants reconsideration.

27. I am entirely satisfied, as was the Tribunal Member making the original decision, that based on the facts as found by the Director, the relationship between Golden Feet and Ms. Feng quite comfortably fit within the definitions of employee and employer, respectively, for the work Ms. Feng performed; the conclusion by the Director that they were employer and employee under the *ESA* is consistent with the findings of fact, the relevant definitions and with the policy objectives of the legislation.

28. As indicated in the original decision, the Director considered the matter of control, whether Ms. Feng was in business on her own account and the question of "client ownership", finding none of these matters pointed to a conclusion that Ms. Feng was not an employee but an independent contractor. Golden Feet did not show a reviewable error on any of those matters. It is not the role of the Tribunal on appeal to provide a complete analysis of the reasoning of the Director that led to the findings of fact, but to decide whether the appellant has shown a reviewable error. The Tribunal has adopted and applied a "functional context-specific approach" when assessing the sufficiency of reasons: see *Kirk Edward Shaw, a Director or Officer of Guardian Films Inc. and En Garde Films Inc.*, BC EST # D089/10, *Worldspan Marine Inc.*, BC EST # D005/12 and *Robin Bourne carrying on business as Agent 99 Express Services*, BC EST # D044/16. These decisions direct a reading of the Determination as a whole, in the context of the evidence and the arguments, with an appreciation of the purposes or functions for which they are delivered: see *R. v. R.E.M.*, 2008 SCC 51, from paragraph 15. Every finding and conclusion need not be explained and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. In this case, the delegate has reached a result that is grounded in the evidence and the material provided by the parties. The Tribunal Member making the original decision approached the reasoning in the Determination on this basis. It is the correct approach; no error in this respect has been shown.

29. If nothing else, this application, and the appeal, simply exemplifies and endorses the admonition in *Ajay Chahal carrying on business as Zip Cartage*, BC EST # D109/14, against arguing the employment status of a person under the *ESA* on common law tests. It perhaps requires repeating, although in my view both the Determination and the original decision made efforts to reinforce the point, that common law tests are a helpful and a useful tool when addressing employment status, but they are subordinate to the provisions of the *ESA*. As stated in *Chahal*, *supra*, the "only appropriate "test" is whether the relationship of the putative employee and employer can be found within the relevant provisions and purposes of the *Act*." The goal is to determine, for the purposes covered by the *ESA*, the reality of the relationship through objective facts.

30. One final comment related to the use of common tests generally. The comments of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 S.C.R. 983 describes the limitations of any specific common law test and indicates that the final result at common law in any case will evolve from a weighing of many factors and "will depend on the particular facts and circumstances of the case" as a whole. That decision says the: "central question is whether the person who has been engaged to perform the services performs them as a person in business on his own account." Thus, even the common law as it now stands is less concerned with defining the actual "form" of any particular test than obtaining, on a weighing of all the relevant factors, which are themselves dependent on the particular facts and circumstances of the case viewed as a whole, an answer to the central question: "is the person who has been engaged to perform services

performing those services in business on his or her own account"; or, as more expeditiously expressed: "whose business is it?"

31. This approach is consistent with the approach endorsed by the Tribunal, and with the approach taken by the Director in this case and approved in the original decision. Assessed in that framework, the Director could not be said to have misinterpreted and misapplied – to the extent it is relevant in any event – any common law test.

32. In view of the above, it is not necessary to consider whether it would have been appropriate to extend the time period for delivering the application to the Tribunal; the application fails in any event.

33. The application is denied.

ORDER

34. Pursuant to section 116 of the *ESA*, the original decision, 2018 BCEST 1, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal