Employment Standards TRIBUNAL

Citation: Della Casa Hospitality Inc. (Re)
2018 BCEST 24

An Application for Reconsideration

- by -

Della Casa Hospitality Inc. carrying on business as Char 631 Modern Steakhouse
(the "Applicant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2018A/23

DATE OF DECISION: March 15, 2018

DECISION

SUBMISSIONS

Roger Mpania	counsel for Della Casa Hospitality Inc. carrying on business as Char 631 Modern Steakhouse

OVERVIEW

1. This is an application to extend the time for filing a reconsideration application (see *Employment Standards Act* – the "*ESA*" – section 116) and it is made pursuant to subsection 109(1)(b) of the *ESA*. The application concerns Tribunal Decision 2018 BCEST 7, an appeal decision issued on January 22, 2018.

2. By way of the appeal decision, Tribunal Member Stevenson confirmed a Determination issued by Paul Grace, a delegate of the Director of Employment Standards (the "delegate"), on October 17, 2017. On that same date the delegate also issued his "Reasons for the Determination" (the "delegate's reasons").

3. In my view, this application to extend the reconsideration application period must fail principally, but not exclusively, because there is no presumptive merit to the substantive challenge to the appeal decision that is the subject matter of the reconsideration application. My reasons for that conclusion now follow.

PRIOR PROCEEDINGS

4. A former employee (the "complainant") of Della Casa Hospitality Inc. (the "Applicant") filed an unpaid wage complaint against the latter firm. There was no dispute between the parties regarding the complainant's unpaid wage claim; the Applicant conceded the wages in question were due and payable. The complainant also sought to recover $200 in unpaid expenses but this claim was rejected and no appeal was ever taken from that finding.

5. The complaint was the subject of an oral complaint hearing held on June 20, 2017. Although the complainant attended the hearing, the Applicant did not. This failure to attend was a deliberate decision made by the Applicant's principal. The facts regarding the latter circumstance are set out in the delegate's reasons at pages R3 – R4.

6. The delegate awarded the complainant the unpaid wages he sought ($1,041.74) plus section 88 interest ($25.55) but refused the complainant's claim to recover $200 in unpaid work-related expenses. Further, and this was the central challenge to the Determination, the delegate also levied $3,500 in monetary penalties (see section 98). Two of the penalties were for $500, representing first contraventions of section 17 the *ESA* (payment of wages at least semi-monthly) and section 46 of the *Employment Standards Regulation* (the "*Regulation*" – failure to produce employment records on demand) while the third penalty was in the amount of $2,500, being a second contravention of section 18 of the *ESA* (failure to pay wages on termination of employment) within a 3-year period.

7. The Applicant appealed the Determination on the grounds that the delegate erred in law and on the ground that it had new evidence that was not available when the Determination was being made (see subsections 112(1)(a) and (c) of the *ESA*). As noted above, there was no dispute about the fact that the Applicant had failed to pay the complainant the wages he was seeking – the Applicant's counsel noted in his memorandum of argument appended to the Applicant's appeal form: "Both parties agree that [the complainant] is owed that balance [$1,041.74]". The appeal exclusively concerned the monetary penalties: "[the Applicant], however, takes the position that it has not contravened any rule or practice of employment".

8. Member Stevenson dismissed the appeal under subsection 114(1)(f) of the *ESA* (*i.e.*, the appeal had no reasonable prospect of succeeding) noting, at para. 21: "I am not persuaded that this appeal has any reasonable prospect of succeeding. In fact, and I cannot express this strongly enough, this appeal is completely devoid of any merit at all". I must echo that sentiment as it relates to the instant section 116 reconsideration application.

9. The uncontested facts are: first, the Applicant owed the complainant the unpaid wages he sought; second, the Applicant failed to pay those wages to the complainant within the time period provided by section 18 of the *ESA* following the end of the parties' employment relationship; third, the Applicant failed to make timely payment of wages (at least semi-monthly) during the currency of the parties' employment relationship; fourth, the Applicant failed to provide all employment records pursuant to a lawful production demand. Given these uncontested facts, there was no basis to vary or cancel the Determination and, that being the case, Member Stevenson issued an order confirming the Determination. While the Applicant's counsel quibbles, at least to some degree, about the relevant dates of the Applicant's contraventions, there is no dispute about the central fact that the Applicant did contravene the provisions of the *ESA* and *Regulation* that underlie the penalties issued in this case.

THE SECTION 116 APPLICATION

10. The application before me was filed, on February 23, 2018, after the statutory 30-day reconsideration application period expired, although the delay in this case is not particularly consequential. Counsel's explanation for the tardy application (the same counsel who represented the Applicant on appeal) is that he was away "on a trip" and returned to his office on February 20, 2018; he met with the Applicant's principal that same day. While he had planned to file application the next day, he fell ill "with a cold and headache" and returned to his office on February 23 when he prepared and filed the instant application. There is no independent corroborating medical report before me.

11. The section 116 application that is before me consists of the Tribunal's Reconsideration Application Form (Form 2) to which is appended a memorandum of argument that is, essentially, an abridged version of the memorandum submitted on appeal together with a short explanation regarding why the application was late (the latter is summarized in the preceding paragraph).

12. The Applicant's counsel does not address the governing legal principles regarding section 116 applications and, in particular, the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98), in his memorandum. Thus, the application stands as an unvarnished attempt to reargue the points raised, and rejected (and rightly so, in my view), on appeal. As such, the application does not pass the first stage of the

Milan Holdings test. Accordingly, even if I were to extend the reconsideration application period, the underlying application would nonetheless be dismissed because it does not pass the first stage of the *Milan Holdings* test.

13. Given that the reconsideration application is fundamentally a truncated "cut and paste" version of the arguments advanced on appeal (which were only a few double-spaced pages in length), I must query why the section 116 application could not have been prepared and filed the very same day that counsel met with his client. However, given that the application is so obviously lacking in merit, even if I were satisfied that counsel had adequately explained the delay in filing the section 116 application (and I am not), I would not have been prepared to extend the reconsideration application period in this case.

14. Thus, to summarize, the application is untimely and I see no proper basis for extending the reconsideration application period and, in any event, the application must be dismissed since it does not pass the first stage of the *Milan Holdings* test.

15. Notwithstanding the above conclusion, there are two further points that I believe should be addressed.

16. First, as previously noted, although the complainant's unpaid wage claim was not in dispute, the complainant did seek an additional $200 on account of unreimbursed work-related expenses (groceries that the complainant had allegedly purchased on his own account for use in the Applicant's restaurant). The complainant testified – and, of course, this testimony was completely uncontroverted since the Applicant chose not to attend the complaint hearing – that he did not have any corroborating purchase receipts "because he gave them to [the Applicant]" (delegate's reasons, page R3). The delegate rejected this claim for the sole reason that "[the complainant] did not provide any receipts or any evidence to support this claim" (page R5). Thus, the delegate held: "Accordingly, I find that expenses are not owed."

17. This latter finding is, in my view, problematic. In fact, there *was* evidence regarding the expenses claim, namely, the complainant's *viva voce* testimony. The complainant explained why he did not have corroborating receipts. The delegate could certainly have found that he was not persuaded, on a balance of probabilities, that the expense claim was proven (say, because he did not find the complainant to be credible – provided the delegate equally explained *why* he found the complainant's evidence to lack credibility). However, it was an error, in my judgment, for the delegate to have seemingly rejected the expense reimbursement claim solely because there were no corroborating receipts.

18. The complainant did not appeal the delegate's finding regarding expenses and so it must stand, but I do wish to record my concerns about this aspect of the Determination.

19. Second, although the delegate's reasons, at page R5, clearly indicate that a $2,500 penalty was being levied for a second contravention of section 18 of the *ESA*, the Determination (which is the formal payment order), indicates that a $2,500 penalty is being levied for a "first" contravention of section 18. This aspect of the Determination is obviously a recording error, and therefore must be corrected. Accordingly, I propose to issue, on my own motion, the appropriate order varying the Determination in this regard.

ORDER

20. The Applicant's application, made pursuant to subsection 109(1)(b) of the *ESA*, to extend the time to apply for reconsideration of 2018 BCEST 7 is refused.

21. Pursuant to subsection 116(1)(b) of the *ESA*, the Order of Tribunal Member Stevenson issued in 2018 BCEST 7 is varied to reflect that the Determination is varied to indicate that the Applicant is subject to a $2,500 monetary penalty for a second, rather than a first, contravention of section 18 of the *ESA*. In all other respects, 2018 BCEST 7 is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal