Employment Standards TRIBUNAL

Citation: 0697655 B.C. Ltd. (Re)
2019 BCEST 31

An Application for Reconsideration

- by -

0697655 B.C. Ltd.
(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)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2019/17

DATE OF DECISION: April 15, 2019

DECISION

SUBMISSIONS

David Willoughby — on behalf of 0697655 B.C. Ltd. carrying on business as The Rocking Horse Pub

OVERVIEW

1. This is an application filed under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2019 BCEST 12 (the "Appeal Decision"). The application is filed by 0697655 B.C. Ltd. carrying on business as "The Rocking Horse Pub" (the "Applicant").

2. By way of the Appeal Decision, the Tribunal confirmed a Determination issued against the Applicant on September 28, 2018, pursuant to which the Applicant was ordered to pay a former employee the total sum of $821.35 on account of unpaid wages and section 88 interest and an additional $2,000 on account of four separate $500 monetary penalties (see section 98 of the *ESA*). Accordingly, the Applicant's total liability under the Determination is $2,821.35.

3. In my view, this application does not raise, even on a *prima facie* basis, any argument that would justify cancelling or varying the Appeal Decision. That being the case, the application must be dismissed. My reasons for reaching this conclusion now follow.

PRIOR PROCEEDINGS

The Determination

4. The Determination was issued by Carrie Manarin, a delegate of the Director of Employment Standards (the "delegate"), following an oral complaint hearing conducted on September 20, 2018. The complainant, a former employee (she worked as a cook) of the Applicant, attended and testified at the hearing as did David Willoughby, the Applicant's sole director and officer, and his spouse, Karen Willoughby.

5. The Applicant operates a restaurant/pub in Nanoose Bay. All witnesses agreed that the complainant resigned, in writing, on March 23, 2018, effective as of April 6, 2018 (which would be her last shift). The complainant was advised, by text message on April 2, 2018, "that she did not need to come into work for the rest of the week" (delegate's "Reasons for the Determination" – the "delegate's reasons" – at page R3). The Applicant's text did not indicate that the complainant was being terminated for cause.

6. The delegate, relying on the Applicant's payroll records, determined that the complainant was owed overtime pay in the amount of $157.50. Further, the payroll records indicated that the complainant was entitled to additional statutory holiday pay in the total amount of $182.51. Although the Applicant paid the complainant some statutory holiday pay, the amounts paid to her fell short of the amounts mandated by the *ESA*.

7. Finally, the delegate determined that the Applicant did not have just cause to dismiss the complainant on April 2, 2018. That being the case, the delegate ordered the Applicant to pay the complainant a prorated amount of $436.68 on account of compensation for length of service, this amount being one week's wages adjusted for one shift the complainant worked in what would otherwise have been her last week of employment.

8. The delegate also awarded the complainant 4% vacation pay and section 88 interest on the above amounts.

9. The Applicant appealed the Determination on the ground that the delegate failed to observe the principles of natural justice, and it also submitted it had new and relevant evidence (see subsections 112(1)(b) and (c) of the *ESA*).

10. The Applicant's principal arguments in support of its grounds of appeal were as follows:

- "Bias – The hearing officer refused to allow Mr. Willoughby to record the hearing";
- "The case went strait [*sic*] to the hearing rather than a mediation meeting which we believe to be protocol";
- The delegate refused to accept an unsworn witness statement (although she did afford the Applicant an opportunity to contact the witness so that he might provide his testimony by telephone, but the Applicant was unable to contact this witness) and also refused to admit into evidence a written business record – "the written statement (log) in the Rocking Horse Pub's incident book as requested by the Liquor and Food Inspector for any incidents that need to be documented about staff and customers".

11. The Applicant also appeared to argue that some sort of legal estoppel (although it did not use this specific term) applied insofar as the complainant's overtime and statutory holiday pay awards were concerned because she "never, ever mentioned or questioned her overtime prior to her complaint".

12. At this juncture, I should note that insofar as the "incident log" is concerned, the delegate did *not* refuse to admit this document. Indeed, the delegate admitted the document into evidence (as Exhibit 6) but found it to have little, if any, probative value. At pages R5 – R6 of her reasons, the delegate stated:

> The Employer relied on a copy of a statement in its incident book purportedly written by its bartender [concerning some alleged misbehaviour by the complainant, which she specifically denied in her testimony]…
>
> …the entry in the liquor inspector's incident book is hearsay; the person who wrote the statement about the Complainant acting against the "owner's wishes" did not attend the hearing to be questioned on her statement and accordingly I give it very little weight because it is unreliable.

13. It also appears that the delegate did not refuse to receive the written witness statement (it was received and marked as Exhibit 7); rather, she admitted the document but gave it very little weight due to its hearsay nature and because the maker of the statement had no first-hand knowledge about the matters referred to in his statement (see Appeal Decision, para. 44c).

The Appeal Decision

14. The Applicant's appeal was summarily dismissed under subsection 114(1)(f) of the *ESA* on the basis that it had no reasonable prospect of succeeding. In dismissing the appeal, the Tribunal held that the Applicant's arguments with respect to natural justice were either "speculative" (regarding whether the delegate adequately reviewed the Applicant's evidence in advance of the hearing) or legally unfounded. The delegate's submission on appeal confirmed that oral complaint hearings are not recorded unless certain criteria are satisfied; that the Applicant essentially refused to participate in a mediation process; and that the Applicant had ample notice that witnesses should attend in person and that written witness statements may be given less weight than oral testimony, especially because the person's evidence cannot be tested through oral questioning.

15. As noted above, the Applicant wished to record the complaint hearing, but the delegate refused this request, citing the Applicant's failure to comply with the Employment Standards Branch's policy regarding the recording of hearings. Although the Applicant has not argued in this application that the delegate erred in refusing to allow the hearing to be recorded, I nonetheless wish to note that, in my view, the Branch's policy is entirely reasonable and defensible (see *Wosk*, BC EST # D128/11). Digital recordings can be easily manipulated and altered using any number of readily available software programs and applications, and the altered recording could then be used for improper purposes. If a complaint hearing is to be recorded, in my view, this should be strictly under the control of the delegate presiding at the hearing and no party should be given an independent right to record a hearing and retain that recording for their own personal use. Further, the party seeking to have the hearing recorded must be willing to undertake all reasonable costs associated with the preparation of a transcript of that recording which transcript must be made available to all parties present at the hearing.

16. With respect to the mediation that apparently never occurred, the delegate's submission to the Tribunal stated the following (Appeal Decision, para. 44b): "According to the notes to file of a[n] [Employment Standards] Branch administrative employee, the Branch contacted Mrs. Willoughby on July 20, 2018, to schedule a mediation [and] Mrs. Willoughby advised that The Rocking Horse would not be attending a mediation and hung-up on the Branch employee". All I would say about the aborted mediation session is that a person has a great deal of chutzpah to complain about a mediation session that never occurred because that same party wilfully refused to participate.

17. As for the Applicant's "new evidence", the Tribunal held that the evidence – a written statement from the Applicant's bookkeeper regarding certain payroll matters – was not admissible on appeal because it failed to meet the stringent test for admissibility set out in *Davies et al.*, BC EST # D171/03.

18. The Tribunal also considered whether the Applicant's appeal submissions demonstrated that the delegate erred in law (subsection 112(1)(a) of the *ESA*) but, ultimately, found that the delegate did make any legal errors.

THE APPLICATION FOR RECONSIDERATION

19. The Appeal Decision was issued on January 23, 2019. The Applicant's formal Application for Reconsideration (Form 2) was filed on February 25, 2019, although it is dated February 5, 2019. Under subsection 116(2.1) of the *ESA*, a reconsideration application must not be filed "more than 30 days after

the date of the [Tribunal's] order or decision" although the Tribunal may extend the reconsideration application period (see subsection 109(1)(b) of the *ESA*).

20. On February 21, 2019, David Willoughby faxed a short note to the Tribunal stating: "I am applying for an extention [*sic*] date from FEB 22 to 21 MARCH 2019 for my lawer [*sic*] at Stevens & Company to get my appeal papers [*sic*] in order, I did not receive the appeal forms until the 13th FEB". In another note appended to the Application for Reconsideration, Mr. Willoughby states: "I have many more evidence in support of my appeal [*sic*] but need more time to organise, (to talk to a lawer)" [*sic*]. Mr. Willoughby also stated, in the same memorandum appended to his Application for Reconsideration, that the complainant "was lying under testomy [*sic*]" and "lying about overtime payments periods" and that he now had "three witness's [*sic*] who will testify on my behave" [*sic*].

21. In a final submission from Mr. Willoughby, dated March 19 and filed on March 20, 2019, he states, among other things:

- "I am requesting another face to face hearing, so I may be able to have our employees present who were working at the time of [the complainant's] dismissal"; and
- "I am also requesting a new adjudication panel be brought forward so that I may have a fair hearing".

FINDINGS AND ANALYSIS

22. This application does not, in my view, have any legal merit. I do not find it necessary to rule specifically on the Applicant's request for an extension of the reconsideration appeal period because the application – as it now stands, supplemented by further submissions from Mr. Willoughby – does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). I might add that the Applicant never did provide any submissions, as it indicated that it would do, from its legal counsel.

23. There is no basis for an oral hearing in this matter. Reconsideration applications are principally based on the record that was before the Tribunal when the Appeal Decision was issued. Presumably, the Applicant is seeking an oral hearing, at this late stage of the proceedings, so that it can call witnesses that it might have called at the original complaint hearing before the delegate. However, as addressed in the Appeal Decision, these witnesses would not be providing "new evidence" within the *Davies et al.* framework and thus their testimony is not admissible in an appeal – or in a reconsideration application – to the Tribunal.

24. In essence, the Applicant wished to use the appeal process, and now wishes to use the reconsideration process, to rehabilitate the case it presented at the original complaint hearing. However, the appeal and the reconsideration processes are not designed to allow a party to present the case it could have – and probably should have – presented at the original complaint hearing. A section 112 appeal to the Tribunal is not an entirely new hearing (i.e., a hearing *de novo*) but rather it affords an appellant an opportunity to argue that the delegate's decision – based on the evidence that was properly before the delegate – should be set aside or varied. While new evidence may be, in rare cases, admitted on appeal, such evidence must not have been "available" when the original complaint hearing was conducted. An appellant's lack of diligence in failing to properly prepare for an oral complaint hearing does not justify a "do-over" via the appeal process.

25. In this case, the Applicant, with reasonable diligence, could have made arrangements in advance of the complaint hearing for its witnesses to testify in person at the hearing or to provide their evidence by telephone. The Applicant's lack of diligence in this regard does not constitute a proper ground for setting aside the Determination and ordering a new evidentiary hearing.

26. The Applicant has provided the names of four individuals who, it says, would provide evidence to support its position that there was just cause to summarily dismiss the complainant. However, it has not provided a summary of the proposed testimony from these individuals and, in any event, even if these individuals corroborated the Applicant's position that the complainant's behaviour on April 1, 2018, somehow gave it just cause for dismissal, the Applicant would still have to explain why it never formally dismissed the complainant for cause and why, if there was some misconduct, it never followed the principles of progressive discipline. Further, there is nothing from the Applicant that calls into question the delegate's factual finding regarding the true reason for the complainant's dismissal (at page R6):

> …although the Employer argued that they terminated the Complainant because she was "rude and obnoxious", Mr. Willoughby's testimony makes it clear that the real reason the Employer terminated the Complainant's employment prior to April 6, 2018 was because he found another cook to replace the Complainant [and] as a result, he texted the Complainant on April 2nd and advised her that they did not need her to work for the balance of her notice period.

27. Regarding this latter finding, which is not one that the Tribunal could overturn on appeal without cogent evidence that it was made without any legal or evidentiary basis (and there was no such evidence before the Tribunal), there are several documents in the subsection 112(5) record that undermine the Applicant's "just cause" assertion. First, the Applicant's text message makes absolutely no mention of any "cause" for terminating the complainant's services prior to the end of her working notice period. The text simply states: "Hi Kathy think we will be ok for the rest of the week thanks for your input". Second, Mr. Willoughby also testified that the complainant was dismissed before the end of her notice period because "there was no work for her" (delegate's reasons, page R3), a position that is not consistent with an assertion of just cause. Third, the Applicant issued the complainant a Record of Employment (Exhibit 4) indicating that she had "quit" (code "E" on the ROE) rather than because she had been dismissed (code "M"). The ROE *is the Applicant's own document* and in issuing it, the Applicant certified that all statements contained within it "are true".

28. As for the Applicant's implied assertion that the appeal process was "unfair", I would first note that the Applicant has not explained how or why the appeal hearing process was unfair. The Tribunal carefully considered each and every one of the arguments the Applicant raised in its appeal submissions and provided clear and detailed written reasons (the actual text of the Appeal Decision is about 11 single-spaced pages in length) as to why each of the arguments lacked legal merit. Second, I wholly endorse the Tribunal's reasons for summarily dismissing the appeal.

ORDER

29. Pursuant to subsection 116(1)(a) of the *ESA*, this application is refused and the Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal