Employment Standards TRIBUNAL

Citation: Kendall Jefferson Treadway (Re)
2019 BCEST 32

An Application for Reconsideration

- by -

Kendall Jefferson Treadway
("Treadway")

- 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.: 2019/28

DATE OF DECISION: April 15, 2019

DECISION

SUBMISSIONS

Kendall Jefferson Treadway — on his own behalf carrying on business as Jeffer's Fryzz

OVERVIEW

1. Kendall Jefferson Treadway ("Treadway") has filed an application under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2019 BCEST 18 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal confirmed a Determination issued against Mr. Treadway on November 19, 2018, in the total amount of $1,321.62 representing unpaid wages and interest ($321.62) and two separate $500 monetary penalties (see section 98 of the *ESA*).

2. The Determination was issued by Jennifer L. Sencar, a delegate of the Director of Employment Standards (the "delegate"), following an oral complaint hearing held on October 25, 2018.

3. In my view, this application does not raise even a presumptively meritorious issue and that being the case, must be dismissed because it fails to pass the first stage of the *Milan Holdings* test (see BC EST # D313/98). In other words, there is nothing in the reconsideration application that would justify, even on a *prima facie* basis, varying or cancelling the Determination. My reasons for reaching that conclusion now follow.

BACKGROUND FACTS AND PRIOR PROCEEDINGS

4. Mr. Treadway operates a food truck under the trade name "Jeffer's Fryzz". Mr. Treadway conducts the business as a sole proprietor. The complainant in these proceedings, who worked for Mr. Treadway as a cook at a $16 hourly wage, filed an unpaid wage complaint under section 74 of the *ESA*. The complainant maintained that when he told Mr. Treadway that he would be quitting because he found new employment as a bartender, Mr. Treadway asked him to continue working for two weeks. The complainant agreed to do so. However, during the two-week working notice period, his employment was terminated. Mr. Treadway maintained that the complainant quit and that he when he advised the complainant that he need not work the balance of his scheduled shifts, he (Treadway) "was being kind" so that the complainant would have time to work full-time at his new job (see the delegate's "Reasons for the Determination" – the "delegate's reasons" – page R3).

5. The delegate, noting that both parties conceded that the complainant verbally resigned, nonetheless concluded that Mr. Treadway effectively terminated the complainant's employment during the working notice period (see section 66 of the *ESA*) "by cancelling all of his remaining shifts" (delegate's reasons, page R5). The delegate determined, based on the complainant's prior average working hours, that he was entitled to 29 hours' pay, less wages earned and paid, for a total amount payable of $321.62 including 4% vacation pay and section 88 interest.

6. Mr. Treadway filed a late appeal to the Tribunal (albeit by only one day). The Tribunal did not extend, nor did it refuse to extend, the appeal period (see subsection 109(1)(b) of the *ESA*). Rather, the Tribunal held

that the appeal had no reasonable prospect of succeeding, and thus it was dismissed under subsection 114(1)(f) of the *ESA* (see Appeal Decision, paras. 35 – 36).

7. Mr. Treadway's appeal was based on two grounds – error of law and breach of the principles of natural justice (see subsections 112(1)(a) and (b) of the *ESA*). However, as noted in the Appeal Decision, Mr. Treadway's appeal documents did not disclose any natural justice breach; his entire appeal was predicated on the assertion that he never terminated the complainant "prematurely". Mr. Treadway maintained on appeal, as he did before the delegate at the complaint hearing, that he was only "being nice, kind, and generous to cover the shifts that he [the complainant] found taxing on his body to make".

8. However, as noted by the delegate, even though Mr. Treadway may not have *intended* to terminate the complainant's services prior to the end of his working notice period, he effectively did so. If Mr. Treadway wished to have the complainant end his employment before the end of the working notice period, it was incumbent on Mr. Treadway to make an express agreement with the complainant to that effect – he was not legally permitted to unilaterally bring the working notice period to an early end.

THE RECONSIDERATION APPLICATION – ANALYSIS & FINDINGS

9. Mr. Treadway seeks to have the Appeal Decision cancelled. He advances the following three points:

- "I have not broken any Employment Standards regulations…and don't feel I'm being heard";
- "I thought I would be heard and understood thinking my issue would be heard by a Panel. To my surprise it was a Panel of one employee"; and
- "I feel that it is biased that Employees are making are making decisions regarding Employees vs Employers. I feel I'm being unfairly treated".

10. In essence, Mr. Treadway disagrees with the delegate's findings – he believes them to be unfair – but her findings were consistent with the evidence before her and in accordance with the relevant provisions of the *ESA*. The delegate did not err in law in making her factual and legal findings with respect to the termination of the parties' employment relationship and Mr. Treadway's consequent unpaid wage liability to the complainant.

11. While Mr. Treadway may have believed that his appeal would be adjudicated by more than one Tribunal Member, a "panel" as defined in the Tribunal's *Rules of Practice and Procedure* "means <u>one</u>, three, or five members of the Tribunal that have been authorized to determine appeals and applications for reconsideration made to the Tribunal" (my <u>underlining</u>).

12. Finally, Tribunal Members are not "employees" of the Tribunal or of the provincial government. Tribunal Members are appointed as independent statutory decision-makers in accordance with the provisions of subsection 102(b) of the *ESA*. There is absolutely no *evidence* (only a vague assertion) in the record before me to suggest that the Tribunal Member who adjudicated the appeal was, or even appeared to be, tainted by any form of bias (by way of example, the Tribunal Member would be tainted by bias if he were related to one of the parties or to the delegate).

13. To summarize, in my view, the grounds advanced to support the reconsideration application are entirely baseless and thus this application must be summarily dismissed.

14. Finally, I wish to address one matter that was raised before the delegate at the complaint hearing, namely, the effect of Mr. Treadway's assignment into personal bankruptcy on April 30, 2018. The delegate addressed this matter as follows (at page R4):

> Initially, [Mr. Treadway] questioned whether he as an undischarged bankrupt could be held liable for unpaid wages…Mr. Treadway filed for personal bankruptcy on April 30, 2018. The claim for wages arose after the date of the assignment into bankruptcy. Accordingly, the Complainant's wage claim is not protected [*sic*] by the bankruptcy.

15. The complainant's unpaid wages were earned and became payable in the period from May 9 to 12, 2018, and, as such, were not "claims provable in bankruptcy", nor was the complainant a "creditor" under the federal *Bankruptcy and Insolvency Act* ("*BIA*"), when Mr. Treadway filed for bankruptcy. Since the complainant's unpaid wage claim was not a debt that was required to be dealt with under the *BIA*, the "stay of proceedings" provisions of that latter statute do not apply.

ORDER

16. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal