Employment Standards TRIBUNAL

Citation: Creative Advantage Childcare Inc. (Re)
2019 BCEST 65

An Application for Reconsideration

- by -

Creative Advantage Childcare Inc.
(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.: 2019/55

DATE OF DECISION: July 9, 2019

DECISION

SUBMISSIONS

Jennifer Kennedy — on behalf of Creative Advantage Childcare Inc.

OVERVIEW

1. This is an application filed under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of an appeal decision – 2019 BCEST 42 – issued on April 30, 2019 (the "Appeal Decision"). The application is filed by Creative Advantage Childcare Inc. (the "Applicant").

2. By way of the Appeal Decision, the Tribunal confirmed a Determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "delegate") on January 15, 2019. The Determination ordered the Applicant to pay a former employee (the "complainant") the total sum of $1,706.99 on account of two weeks' wages as compensation for length of service ($1,480) together with an additional sum reflecting unpaid overtime pay, concomitant vacation pay, and section 88 interest.

3. In addition, the Applicant was ordered to pay the further sum of $1,500 on account of three separate $500 monetary penalties (see section 98 of the *ESA*). These penalties were levied based on the Applicant's contravention of sections 28 (failure to keep payroll records), 40 (failure to pay overtime pay), and 63 (failure to pay compensation for length of service or to provide proper written notice in lieu of payment). Accordingly, the total amount payable under the Determination is $3,206.99.

4. I am satisfied that this application is not meritorious, and that being the case, must be dismissed. My reasons for reaching this conclusion now follow.

PRIOR PROCEEDINGS

5. As noted above, the Appeal Decision confirmed a Determination issued against the Applicant on January 15, 2019. The Determination was issued following an oral complaint hearing (by teleconference) held on December 14, 2018. There were two principal issues before the delegate: first, did the complainant refuse an offer of reasonable alternative employment (see subsection 65(1)(f) of the *ESA*) thereby disentitling her to any section 63 compensation; and, second, if the complainant was entitled to compensation for length of service, when did her period of continuous employment commence?

6. The delegate, in her "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination, held that the complainant resigned offering two weeks' notice and that the Applicant, by way of immediate response, summarily terminated the complainant's employment. As for the period of continuous service, the delegate accepted the complainant's position that she commenced working for the Applicant on June 12, 2017, (which gave her 12 months' consecutive service and thus an entitlement to two weeks' wages as section 63 compensation) rather than the Applicant's position that the complainant's start date was July 7, 2017 (in which case, the complainant would only be entitled to one week's wages).

7. The Applicant appealed the Determination, arguing all three statutory grounds of appeal. Fundamentally, however, the Applicant's appeal was predicated on the assertion that the delegate misapplied or misapprehended the evidence before her. The Applicant challenged several of the delegate's findings of fact. The Applicant also asserted that the delegate erred in law in awarding the complainant section 63 compensation for length of service and in rejecting the Applicant's subsection 65(1)(f) "reasonable alternative employment" argument.

8. The Tribunal summarily dismissed the Applicant's appeal as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). The Tribunal held that there was nothing in the Applicant's material that raised, even on a presumptive basis, a legitimate natural justice ground of appeal (Appeal Decision, para. 8).

9. The Applicant submitted what it claimed were "supplementary payroll records" as "new evidence" under subsection 112(1)(c) of the *ESA*. The Tribunal, applying *Davies et al.*, BC EST # D171/03, refused to admit this evidence noting that this evidence could have been submitted to the delegate at the complaint hearing (Appeal Decision, para. 20).

10. The Applicant does not now challenge the Appeal Decision as it relates to either of the "natural justice" or "new evidence" grounds of appeal.

11. With respect to the alleged errors of law made by the delegate, the Tribunal noted that findings of fact can be characterized as errors of law only if the findings are not supported by a proper evidentiary foundation (see also *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235). In this instance, there was no dispute about two central facts. First, the complainant submitted a resignation providing two weeks' notice and she intended to work through her notice period. Second, and by way of response to the resignation, the Applicant immediately terminated the complainant's employment – this was clearly evident from the Applicant's June 12, 2018, text message to the complainant: "Ok [complainant's first name]. Today was your last day then. All the best".

12. It was only subsequent to this clear communication of summary dismissal that the Applicant offered to allow the Applicant to either work on "casual status" for the balance of the notice period (with no guarantee of any work) or to work out her notice period at another workplace also owned by the Applicant. The delegate held – and I entirely agree with her analysis on this point – that these latter offers came only *after* the Applicant had already terminated the complainant's employment and, as such, constituted new offers of temporary employment. On appeal, the Tribunal found, and I entirely agree, that the Applicant's summary dismissal on June 12 immediately triggered her entitlement to section 63 compensation.

13. The Applicant maintained that the delegate erred in finding that the complainant's employment commenced on June 12, 2017, rather than July 7, 2017; that the delegate erred in finding that the Applicant failed to keep complete payroll records; and that the delegate erred in accepting that the complainant had been paid in cash for her work during the period from June 12 to July 6, 2017. The Tribunal rejected each of these arguments. The Tribunal's reasons relating to these arguments were as follows (Appeal Decision, paras. 25 – 27):

> The Company next complains that the Delegate ought not have preferred [the complainant's] testimony and documentary evidence regarding her start date. This was not a case where there was significant conflict in the evidence. [The complainant] provided documentary evidence and testified that she started work on June 12, 2017. The Company provided no contradictory documentary evidence. Ms. Kennedy's evidence on behalf of the Company was that she did not recall the first week of July 2017, but that since the Company had no time sheets for [the complainant] until July 7, 2017, she must not have worked before July 7, 2017. It was open to the Delegate to prefer [the complainant's] evidence on this point. The Delegate's findings were not irrational, perverse, or inexplicable. I find the Company has no reasonable chance of success on this ground.
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> Given the Delegate's finding that [the complainant's] employment started on June 12, 2017, and the lack of payroll records for the period June 12, 2017, to July 6, 2017, it was open to the Delegate to make a finding that the Company contravened section 28 of the *ESA*. It was also open to the Delegate to find a breach of that section with respect to time sheets for January 1, 2018 to January 15, 2018, and June 1, 2018 to June 12, 2018, that the Company created months after the fact for the purpose of the hearing. I find this ground of appeal has no reasonable chance of success.
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> Finally, the Company asserts that the Delegate's finding that the Company paid [the complainant] in cash from June 12, 2017 to July 6, 2017, was a finding of criminal activity that was outside of the jurisdiction of the Delegate to make. The Company is incorrect. The *ESA* authorizes the payment of wages in cash in section 20(a).

14. In the end result, the Tribunal dismissed the appeal as having no reasonable prospect of succeeding.

THE APPLICATION FOR RECONSIDERATION

15. The Appeal Decision was issued on April 30, 2019, and the Applicant's Reconsideration Application Form (Form 2) was filed on May 31, 2019. Thus, taking a strict view of the matter, this application was filed after the statutory reconsideration application period expired (see subsection 116(2.1) of the *ESA*). However, and notwithstanding the absence of any explanation from the Applicant regarding its tardy application, I do not intend to rest my decision dismissing this application on this circumstance. Rather, in my view, this application manifestly fails to pass the first stage of the two-stage *Milan Holdings* test (see BC EST # D313/98) and, accordingly, must be dismissed.

16. The Applicant continues to assert that the delegate erred in determining that the complainant's start date was June 12, 2017, rather than July 7, 2017. The Applicant maintains that the delegate's finding in this regard is "not only irrational and inexplicable but is also unlawful". Clearly, there was conflicting evidence before the delegate on this particular matter. The delegate's analysis of the evidence before her is set out at pages D12 – D13 of her reasons. Her analysis took into account both the *viva voce* and the documentary evidence before her including, importantly, the *Applicant's own documentary evidence* that supported the complainant's position.

17. Reviewing courts and tribunals must give a significant degree of deference to an original decision-maker's findings of fact. The delegate's finding regarding the complainant's start date was, in my view, a legally defensible finding based on the evidentiary record before her. I would go further and suggest that the delegate's conclusion appears to be the only sensible conclusion in light of the evidence adduced at the complaint hearing.

18. In light of the fact that the complainant's employment commenced on June 12, 2017, the Applicant's failure to keep payroll records for the period from June 12 to July 6, 2017, constitutes a contravention of section 28 of the *ESA*. That being the case, the Applicant's present challenge to the delegate assessing a $500 monetary penalty based on a section 28 contravention is misconceived. The delegate's finding regarding the complainant's start date was not, as is asserted by the Applicant, "merely speculation". Rather, this finding reflected an assessment of the available evidence and, in my view, the delegate's finding constituted a reasonable inference that could be drawn from that evidence.

19. Finally, the Applicant reiterates a position it advanced on appeal, namely, that it did not pay the complainant in cash for her work from June 12 to July 6, 2017. The Applicant says that by accepting the complainant's evidence regarding a cash payment, the Applicant's *Charter* right to be presumed innocent has been violated. The Applicant says that the delegate's finding on this point "was a finding of criminal activity that was outside the jurisdiction of the Delegate to make" and that the delegate's finding "implies that I [i.e., the Applicant's principal] have committed tax evasion which is a crime that must be proven in a court of law".

20. This argument is wholly devoid of merit. The *Charter*'s subsection 11(d) "presumption of innocence" guarantee applies to persons charged with an offence and does not apply to the *ESA*'s wage recovery provisions. The complaint adjudication process under the *ESA* is not tantamount to a criminal prosecution. As was noted in the Appeal Decision, the *ESA* permits wages to be paid in cash (see subsection 20(a) of the *ESA*). It does not follow from the delegate's finding of fact that some of the complainant's wages were paid in cash, that the Applicant committed the federal crime of tax evasion. The burden of proof in a complaint under the *ESA* is based on a civil, not a criminal, standard. The delegate simply found, on the civil "balance of probabilities" standard, that some wages were paid to the complainant in cash, full stop. The Applicant is not subject to any criminal sanction as a result of the delegate's finding on this point.

21. The complainant's testimony at the complaint hearing was that she was hired under a wage subsidy program that did not commence until July 2017. She explained that her "net wages" (I presume "net" of federal income tax, employment insurance, and Canada Pension Plan remittances) up to July 6 were paid in cash, that she signed a receipt acknowledging payment, and that she deposited most of her cash earnings into her bank account (delegate's reasons, page D10). The complainant's testimony in this regard was corroborated by her bank records (delegate's reasons, page D12). If the Applicant failed to remit amounts to the federal government on account of income tax, employment insurance, or pension contributions, the Applicant may well have run afoul of federal law and could face sanctions. But that is a matter for the federal authorities – it is not something over which the Employment Standards Branch or this Tribunal has any jurisdiction and neither body has made any findings regarding possible contraventions of federal law.

22. To summarize, none of the Applicant's arguments raised in support of its position that the Appeal Decision should be cancelled has any presumptive merit. This application does not demonstrate, even on a *prima facie* basis, that the delegate erred in making any findings of fact or in interpreting and/or applying the *ESA*, or that the Appeal Decision is tainted by any sort of legal error. As such, this application fails to pass the first stage of the *Milan Holdings* test and thus it must be dismissed.

ORDER

23. This application to have the Appeal Decision reconsidered is dismissed. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal