Employment Standards TRIBUNAL

Citation: Berjak Construction Ltd. (Re)
2019 BCEST 70

An Application for Reconsideration

- by -

Berjak Construction 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.: 2019/66

DATE OF DECISION: July 22, 2019

DECISION

SUBMISSIONS

Ahmad Berjak — on behalf of Berjak Construction Ltd.

OVERVIEW

1. Berjak Construction Ltd. (the "Applicant") applies for reconsideration of Tribunal Decision Number 2019 BCEST 46 (the "Appeal Decision") pursuant to section 116 of the *Employment Standards Ac*t (the "ESA*").* This application concerns the interplay between the strict test regarding the admissibility of "new evidence" submitted on appeal (see section 112(1)(c) of the *ESA*) as delineated in *Davies et al.*, BC EST # D171/03, and the burden imposed on the Director of Employment Standards (the "Director") to ensure that a respondent party in an unpaid wage claim investigation is afforded a reasonable opportunity to participate in that investigation (see section 77 of the *ESA*).

2. In my view, this application is not meritorious and, accordingly, must be dismissed because it does not pass the first stage of the *Milan Holdings* test (see BC EST # D313/98).

BACKGROUND FACTS

3. By way of a determination (the "Determination") issued by Terry Hughes, a delegate of the Director of Employment Standards (the "delegate"), on January 11, 2019, the applicant was ordered to pay $88,023.35 on account of unpaid wages and section 88 interest owed to two former employees. Further, and also by way of the Determination, the delegate levied five separate $500 monetary penalties against the applicant (see section 98), thus bringing the total amount payable to $90,523.35.

4. The applicant appealed the Determination solely on the "new evidence" ground of appeal and only with respect to one of the two former employees (albeit the employee whose unpaid wage claim constituted nearly 98% of the total amount of the two unpaid wage claims).

5. The applicant did not participate in the delegate's investigation of its former employees' unpaid wage claims. The delegate's efforts to contact the applicant prior to issuing the Determination are detailed at pages R3 – R4 of his "Reasons for the Determination" issued on February 22, 2019 (the "delegate's reasons"). I will discuss these efforts in greater detail, below. For now, I will only say that the delegate's attempts to communicate with the applicant bore no fruit, and thus the Determination was issued without the benefit of the applicant's evidence and argument.

6. As noted above, the Determination was issued on January 11, 2019. One of the applicant's three directors as of the date of the Determination, Ahmad Berjak ("Mr. Berjak") (and its representative in both the appeal and reconsideration proceedings), maintains that the applicant was "not made aware of the determination until mid-January 2019, when the determination was sent out by registered mail and someone living at the address received it". According to Mr. Berjak, this "someone" was a "family member living at the address who received it by *registered* mail" (*italics* in original text) and, after being made aware of the determination, Mr. Berjak "contacted Delegate Hughes by phone and asked that the determination be sent via e-mail on

January 29, 2019" – see page 2 of the Applicant's memorandum dated June 12, 2019, appended to the Applicant's Application for Reconsideration Form. The applicant's appeal, albeit incomplete, was filed about three weeks later, on February 19, 2019.

7. All of the "new evidence" submitted on appeal was clearly available when the Determination was issued and, as such, fell outside the ambit of section 112(1)(c) of the *ESA*. This latter ground of appeal permits evidence to be received on appeal, but only if it is evidence that "has become available [but] was not available at the time the determination was being made". Essentially, the evidence submitted on appeal consisted of assertions that the one employee's unpaid wage claim was grossly exaggerated, copies of e-mails, and some time sheets. On appeal, the applicant failed to provide any cogent explanation for failing to submit this evidence to the delegate. The applicant now appears to be saying that it did not do so because it was not aware that an investigation was ongoing. If that is indeed the explanation for failing to participate in the delegate's investigation, I find it to be wholly unconvincing.

THE APPLICATION FOR RECONSIDERATION

8. The applicant, as previously noted, says that the Appeal Decision (and the Determination) should be set aside and that this matter be referred back to the Director of Employment Standards for a new investigation. The applicant concedes that the former employee is entitled to some unpaid wages but also maintains that the amount owed is significantly less than the amount set out in the Determination.

FINDINGS AND ANALYSIS

9. The record before me discloses the following facts. The applicant is an Alberta corporation that is not, despite carrying on active business operations in British Columbia, extraprovincially registered under the B.C. *Business Corporations Act*. The applicant's registered office was formerly an Edmonton law firm but was changed to Mr. Berjak's Edmonton address some time prior to November 28, 2018, according to Alberta Corporate Registry search documents contained in the section 112(5) record.

10. In early February 2018, the employee delivered, by hand, a "self-help kit" to the applicant setting out his claim for unpaid wages. The applicant does not deny receiving this document. In June of 2018, the delegate left voice mail messages for Mr. Berjak, and it would appear that the parties agreed to a mediation but this was cancelled in early July and it never did proceed. On November 7, 2018, the delegate wrote to the applicant (and its directors), providing copies of the unpaid wage complaints and seeking the applicant's response. There was no response.

11. The delegate's November 7 letter to the Edmonton law firm resulted in reply dated November 22, 2018, from that firm indicating that it no longer served as the location of the applicant's registered office. A subsequent corporate registry search indicated that the new registered office was the same address as that of Mr. Berjak in Edmonton. The delegate's reasons state (at pages R3 – R4):

> Canada Post records indicate registered mail delivery notice cards were left at all three director addresses for the November 7, 2018 Registered Mail. Canada Post records also indicate that subsequent reminder delivery notice cards were also sent to the three directors. Canada Post ultimately returned all three director notice letters as unclaimed. None of the Regular Mail letters

> and Demands [for payroll records] of November 7, 2018 were returned to the [Employment Standards] Branch by Canada Post.

12. The delegate, in my view, made wholly reasonable efforts, consistent with section 77 of the *ESA*, to contact the applicant (and its directors) prior to issuing the Determination. I find that the applicant was actually (and not constructively) aware of the investigation into the unpaid wage complaints well prior to the issuance of the Determination. The applicant maintains that since Mr. Berjak had relocated from Edmonton to Vancouver in October 2018, the applicant is somehow relieved from any sort of responsibility for its failure to participate in the delegate's investigation. But Mr. Berjak took no affirmative steps to keep the delegate apprised of his whereabouts or to provide current contact information. The applicant, although it was an extraprovincial corporation carrying on business in British Columbia, did not register a British Columbia address for service with the B.C. corporate registry. Thus, the delegate was entitled to rely on the Alberta corporate records and send documents to the registered office for the applicant as indicated in those records. This is precisely what the delegate did do. I note Mr. Berjak never updated the Alberta registry records so that they would reflect a current British Columbia address where documents could be delivered.

13. Further, the applicant's registered address actually recorded in the Alberta corporate registry was, apparently, an Edmonton residence occupied by one of Mr. Berjak's relatives. Surely, given that Mr. Berjak was aware that an investigation into the unpaid wage claims was proceeding, he should have done one or both of taking the initiative to contact the Employment Standards Branch and ensure that any documents sent to this Edmonton residence from the Employment Standards Branch were forwarded in a timely manner to him in British Columbia.

14. As noted above, the so-called "new evidence" submitted on appeal clearly fell outside the strict criteria for admissibility set out in *Davies*. The applicant's explanation for its failure to provide this evidence to the delegate – namely, that it was "in the dark" about the ongoing investigation – is simply not, in my view, credible. If the applicant did not know about the specifics of the delegate's ongoing investigation, that state of affairs is wholly attributable to the inactions of its principals, including Mr. Berjak.

15. In the Appeal Decision, the Tribunal held that the applicant's "new evidence" did not meet the strict test for admissibility under section 112(1)(c). I entirely agree. There was no credible compelling explanation for the applicant's failure to provide this evidence to the delegate prior to the issuance of the Determination. In the circumstances, the only proper order to be issued was one dismissing the appeal and confirming the Determination – the very order issued in this case. There is nothing in the material before me that leads me to conclude that the Appeal Decision is tainted by any sort of legal error or procedural justice failing.

16. While I appreciate that the delegate issued a wage payment order for a considerable sum without hearing from the applicant, the delegate issued this order only after considering the evidence that was before him – evidence the delegate characterized as "the best and most compelling evidence that is available". In my view, the delegate cannot be faulted for issuing a decision without hearing from one party, when that party decided to either ignore, or otherwise refused to participate, in the preceding unpaid wage complaint investigation.

ORDER

17. This application for reconsideration is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal