Citation: Beejay Ventures Ltd. (Re)
2020 BCEST 108

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Beejay Ventures 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: Robert E. Groves

FILE No.: 2020/083

DATE OF DECISION: August 19, 2020

DECISION

SUBMISSIONS

Jim Mitchell	agent on behalf of Beejay Ventures Ltd. carrying on business as Visual Sound AVU
Richard Aker	on his own behalf
Jeff Bailey	delegate of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), Beejay Ventures Ltd., carrying on business as Visual Sound AVU (the "Applicant") applies for a reconsideration of a decision of the Tribunal dated April 27, 2020, and referenced as 2020 BCEST 38 (the "Appeal Decision").

2. This matter arose from a complaint delivered to the Employment Standards Branch by Richard Aker (the "Complainant"), who alleged that the Applicant had contravened the *ESA* when it failed to pay him regular wages, vacation pay, and compensation for length of service. The complaint also included a claim in respect of a personal debt which the Complainant later withdrew.

3. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") conducted an investigation of the complaint and issued a determination dated December 19, 2019 (the "Determination") ordering the Applicant to pay wages, vacation pay, compensation for length of service, and interest in the amount of $6,185.50. In addition, the Delegate determined that four administrative penalties should be levied against the Applicant at $500.00 each. The total owed, therefore, was $8,185.50.

4. The Applicant appealed the Determination pursuant to section 112 of the *ESA*. The Tribunal's Appeal Decision confirmed the Determination.

5. I have before me the Applicant's appeal form and application for reconsideration, its submissions delivered in support, the Determination and its accompanying Reasons, the Appeal Decision, the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA*, and the further submissions I requested from the parties.

FACTS AND ARGUMENT

6. Unless I indicate otherwise, I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is a necessary summary.

7. The Complainant was employed by the Applicant as a general manager of an audio-visual electronics store from February 1, 2006, until March 31, 2019.

8. The evidence revealed that the Complainant ran the store operation. One of the principals of the Applicant visited the store twice monthly to "check in" with the Complainant and to issue pay.

9. The Applicant's business at the store operated without attention to the creation of all the employee records mandated by the *ESA*. The Complainant was often paid in cash, and irregularly. The Applicant prepared no wage statements for the Complainant.

10. On March 18, 2019, in the store, the Complainant observed a principal of the Applicant write and then deliver a letter to him. When the Complainant read the letter he noted that the principal had dated it March 3, 2019. The letter advised that the store would close on March 31, 2019, and that the Complainant's employment would terminate on that date.

11. Later, in May 2019, the Complainant received a bank draft from the Applicant representing "severance pay". The Delegate's Reasons note that the Applicant and Complainant agreed that this payment represented four weeks' wages. It was as a result of this payment, and the parties' agreement, that the Delegate was able to identify the Complainant's rate of pay, and to calculate the other wages owed by the Applicant to the Complainant for the purposes of the Determination.

12. The Applicant's response to the complaint that wages were owed was that the Complainant had been paid in full. As for the claim that the Complainant was owed compensation for length of service, the Applicant asserted that the requisite combination of notice of termination and payment had been given to the Complainant.

13. The Delegate observed that in addition to its failure to issue wage statements to the Complainant, the Applicant provided contradictory information regarding the Complainant's monthly salary during the course of the investigation, and did not submit other employment records in support of its contention that all wages owing to the Complainant had been paid. Accordingly, on the issue of the amounts for salary the Applicant paid, the Delegate elected to prefer the evidence of the Complainant.

14. Regarding compensation for length of service, the Delegate affirmed that working notice cannot be provided retroactively, and is not effective prior to the date on which the written notice is delivered to the employee (see subsection 63(3) of the *ESA*). On the issue of the date on which the written notice of the termination of employment was given, the Delegate preferred the evidence of the Complainant. Accordingly, the Delegate determined that the Applicant had not proven it had discharged its liability to the Complainant on this aspect of the complaint.

15. The Applicant appealed the Determination, arguing that the Delegate had failed to observe the principles of natural justice (subsection 112(1)(b) of the *ESA*), and that evidence had become available that was not available at the time the Determination was being made (subsection 112(1)(c) of the *ESA*). The Applicant repeated its submission during the Delegate's investigation that it had paid the Complainant all the wages that were owed to him, asserted that it was unnecessary for it to deliver wage statements to the Complainant on each payday as required by section 27 of the *ESA*, and that it had satisfied the amounts owed to the Complainant by agreement after the Determination was issued.

16. The Tribunal Member issuing the Appeal Decision rejected the Applicant's contention that the Delegate had failed to observe the principles of natural justice. A review of the record delivered by the Director satisfied the Tribunal Member that the Delegate's investigation had proceeded in a manner that was fair.

17. The Tribunal Member also observed that to the degree the Applicant was challenging the Delegate's findings of fact, *simpliciter*, section 112 of the *ESA* provided no jurisdiction under which the Tribunal might provide relief. The Tribunal Member noted, and it has oft been stated, that the Tribunal may only review errors of fact if they amount to errors of law, as is the case where there is no rational basis for the findings, and so they are perverse or inexplicable. Here, the Tribunal Member was not persuaded that any of the Delegate's findings of fact met that test.

18. As for the appeal relating to subsection 112(1)(c) – new evidence – the Tribunal Member decided that some of the material on which the Applicant relied was neither new nor probative. I refer here to the Applicant's assertions that the Complainant determined his own payroll amounts, paid himself what he was owed, and was given a pay statement at the beginning of each year.

19. The Tribunal Member decided that this information was available to the Applicant during the Director's investigation of the complaint, and should have been presented to the Delegate before the Determination was issued. In addition, the Tribunal Member observed that the information relating to the wage statement matter lacked probative value because the Applicant's position was in direct conflict with the requirements of section 27 of the *ESA*, which sets out the form wage statements must take, and the frequency with which they must be delivered.

20. The Tribunal Member acknowledged that the Applicant's reference in its submission to correspondence suggesting that the Applicant and the Complainant may have entered into a settlement of the complaint after the Determination was issued could, from a timing perspective, qualify as new evidence. However, the Tribunal Member decided that the email correspondence the Applicant had provided was, on its own, inconclusive as evidence which might have led the Delegate to a different conclusion.

21. For these reasons, the Tribunal Member found that the Applicant's appeal had no presumptive merit, and no prospect of succeeding. The Tribunal Member dismissed the appeal and confirmed the Determination.

ISSUES

22. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1) Does the request meet the threshold established by the Tribunal for reconsidering a decision?

2) If so, should the decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

ANALYSIS

23. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may

(a) reconsider any order or decision of the tribunal, and

(b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

24. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

25. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

26. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

27. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A “yes” answer means that the applicant has raised questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

28. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06). It has also been said that evidence that was available at the time of the original hearing of an appeal, but not presented, cannot found a basis for a reconsideration (see *Steelhead Business Products*, BC EST # D237/97).

29. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

30. I have decided that the Applicant has raised no questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that a reconsideration is warranted. Accordingly, the application must be dismissed, for the reasons which follow.

31. The Applicant asserts that the Delegate’s calculation of the wages owed to the Complainant is in error because the Determination assessed them in gross. The Applicant contends that the Determination should have reflected an analysis of wages owed based on a number that was net of deductions.

32. While subsection 21(1) of the *ESA* contemplates that employers may withhold and remit statutory deductions to the appropriate authorities in order to establish a net sum payable for wages to an

employee, there is no compelling evidence that the Applicant did this in respect of the wages the Delegate found were owed to the Complainant in this case. The Delegate's Reasons state that the Applicant operated without significant employment records, including wage statements for the Complainant, and that the other financial information regarding payments to the Complainant that the Applicant supplied were contradictory. This led the Delegate to accept the evidence presented by the Complainant regarding the amount of wages that were owed.

33. A bald statement on the part of the Applicant that the Delegate's calculation is incorrect, even where, as here, the Applicant has supplied a T4 prepared by it in support, is insufficient to disturb the Delegate's finding. As the Tribunal issuing the Appeal Decision observed, the Tribunal has no jurisdiction to cure errors of fact unless the error can be said to constitute an error of law. If an error of fact is to constitute an error of law, it must be established that there is no rational basis for the impugned finding, and so it is perverse or inexplicable. I am not persuaded that the Applicant has shown such an error or that the Appeal Decision should be found to have been wrongly decided on this ground.

34. I pause, further, to say that determinations issued by the Director normally do state amounts owed for wages in gross terms, rather than sums that are net of statutory deductions. It is the employer's obligation to withhold and remit statutory deductions on behalf of the employee where necessary, but this requirement does not diminish the validity of a calculation in gross if wages are found to have been unpaid (see *Baer Enterprises Ltd.*, BC EST # D252/00).

35. The Applicant alleges that any amount of wages owed to the Complainant should be reduced by $2,000.00. It asserts that the Complainant transferred this sum from the Applicant's bank account shortly before its business was closed in March 2019.

36. I decline to accept the Applicant's submission that the Appeal Decision be reconsidered for this reason.

37. The Complainant acknowledges receipt of the $2,000.00, but states that the Applicant's principal was aware of it, and that it represented cash owed to him before he commenced to work for the Applicant. The Applicant denies knowledge of any such balance owed to the Complainant.

38. It has been stated that a reconsideration may be granted if it is based on significant new evidence that was not reasonably available to the original Tribunal panel that issued the appeal decision under scrutiny. Here, the payment was not raised by the Applicant during the Delegate's investigation prior to the issuance of the Determination, or on appeal. The Applicant asserts that its principal was not aware of the transfer until later. However, the Applicant provides no explanation why, with reasonable due diligence, the existence of the transfer could not have come to the attention of the Applicant before the Determination or, indeed, the Appeal Decision, were made. In my opinion, it would undermine the purposes of the *ESA* to which I have alluded to permit the Applicant to rely on evidence of the disputed payment of the $2,000.00 to establish a right to reconsideration at this late stage of the proceedings.

39. The Applicant alleges that the Complainant was the manager of the store operation and so he was responsible for ensuring that all employees were paid. The Complainant acknowledges that it was, in fact, part of his job to pay the staff. The imposition of this duty does not, however, relieve the Applicant from its statutory obligation as the employer to see that all of its employees were, in fact, paid all the wages that were owed to them (see sections 16, 17, 18, and 20 of the *ESA*, *inter alia*).

40. Here, the evidence accepted by the Delegate established that the Applicant failed to provide sufficient monies to pay the Complainant all of his wages. The Tribunal Member issuing the Appeal Decision determined that it was reasonable for the Delegate to have drawn this conclusion on the evidence, and so the Delegate committed no error of law. I agree. The mere fact that the Complainant's duties as a manager might have included his being responsible for paying the staff does not alter this result.

41. The Applicant also submits that when its store operation was closed on March 31, 2019, the Complainant confirmed to the Applicant's principal that "all wages had been paid." The Complainant denies that he communicated any such message, and repeats the evidence he provided to the Delegate to the effect that the Applicant's principal told him not to worry about what was owed to him, as payment would be made at a later date.

42. It was, as I have said, the Delegate's obligation to find the relevant facts. When doing this, it was entirely appropriate for the Delegate to prefer the evidence of one of the parties over the evidence of the other, to draw proper inferences from the evidence, and to place more weight on some parts of the evidence rather than others, particularly in cases where there appears to have been conflicting evidence (see *Housen v. Nikolaisen*, 2002 SCC 33). Here, after considering the whole of the evidence, the Delegate decided that wages remained unpaid. The Tribunal Member issuing the Appeal Decision found no lawful basis for disturbing the Delegate's findings, nor do I. A statement from the Applicant asserting facts to the contrary, rejected by the Complainant, is insufficient to establish a basis on which the Appeal Decision should be reconsidered.

43. The Applicant contends that the compensation for length of service the Delegate ordered it to pay should be reduced because the Applicant gave notice of termination of his employment to the Complainant on March 4, 2019, and not on March 18 as the Delegate found when making the Determination. This submission from the Applicant is, in essence, a repetition of the position the Applicant took with the Delegate during the investigation of the complaint. The exceptions are that the Applicant now says that the letter was delivered to its employees on March 4, instead of March 3, that the Complainant advised the Applicant's principal "he knew what the envelope contained", and that the Complainant decided not to open the envelope containing the written notice until two weeks later.

44. Before the Delegate, the Applicant contended that its principal delivered the letters to the employees on March 3, 2019, and that he left the Complainant's letter on his desk.

45. In his submission delivered on this application, the Complainant repeats the evidence he provided to the Delegate. He says that the notice was never placed in an envelope, but was written in front of staff and back-dated to March 3, 2019. It was then delivered to each employee individually, including the Complainant.

46. A difficulty with the Complainant's submission on this application is that he states the notice was written in front of staff on March 4, and back-dated to March 3. I can only infer that his writing March 4 is an error on the part of the Complainant, as the record of the Delegate's investigation contains repeated references by the Complainant to this incident occurring on March 18, which formed the basis for his steadfast assertion, maintained throughout, that he was owed a further two weeks' compensation for length of service.

47. The Applicant's version of events in support of its contention that no further compensation for length of service is owed to the Complainant was rejected by the Delegate, and the Appeal Decision found no basis to conclude that the Delegate was wrong. I cannot conclude that the Applicant has established a basis for my reconsidering the Appeal Decision on this point.

48. The Applicant argues, in addition, that the Complainant knew the landlord of the Applicant's business premises had been notified of the closure in February 2019 and that the Complainant had placed advertisements relating to the store's closure in a local newspaper. It asserts, too, that there were several other prior notices that the business would be winding up, of which the Complainant had been made aware, but they came to naught because the Applicant had learned of the possibility that the business might be sold.

49. These submissions, tendered to support a conclusion that the Complainant had more than enough notice that the Applicant was ceasing to do business, and that the Complainant's employment would also be coming to an end, were further arguments the substance of which the Applicant presented to the Delegate, unsuccessfully. As stated earlier, absent demonstrable error, reconsideration is not a procedure intended to provide a further opportunity to re-argue a case that failed at first instance, and was affirmed in the result on appeal.

50. In my opinion, the Delegate was right to ignore indications from the Applicant that the business might be closed when determining whether the Complainant was owed compensation for length of service. The provisions of subsection 63(3) of the *ESA* make it plain that the obligation to pay compensation for length of service is discharged if an employee is given the appropriate written notice of termination, or a combination of written notice and money equivalent to the amount the employer is liable to pay. Whether an employee like the Complainant was aware that the Applicant had advised the landlord of a closure, or placed advertisements in a local newspaper, are entirely irrelevant when deciding if the statutory requirements have been discharged.

51. The Applicant contends further that since the Complainant received full salary while he was on vacation, no vacation pay is owed to him. Moreover, the Applicant submits, without further particulars, that since the Complainant was paid for the two week vacation he took in January 2019 his vacation pay was overpaid.

52. The Applicant made this submission to the Delegate. However, it does not appear to have pursued the issue on appeal. As reconsideration is a procedure that focuses on the validity of the Appeal Decision, the Applicant's submission may be rejected on this basis alone. That said, the Delegate has noted that the complaint, and therefore the Determination, did not address whether vacation pay was owed on wages that had been paid. The Delegate's order that vacation pay be paid related only to vacation pay that was payable on the regular wages that were found to have been unpaid, and the sum that was payable in respect of compensation for length of service.

53. The final argument presented by the Applicant for the purposes of this application is that the Complainant accepted a payment of $5,000.00 from the Applicant by way of "a settlement of all amounts owed to him" on December 19, 2019, the day the Determination was issued. An email from the Complainant to the Applicant's accountant, forwarded late that day, states, in part, that "in exchange for my receiving of $5000 (for debt owning *[sic]*) from Peter Johnson *[the Applicant's principal]*, I will cease all other actions

related to other monies I feel may have been owed. This includes salary, vacation pay or days off in lieu of, and severance."

54. The Complainant's email was delivered to the Applicant's accountant at 8:43 p.m. on December 19, 2019. The Determination was issued earlier in the day, during business hours. The Delegate says that the Determination was based on the information provided by both of the parties prior to its issuance. There is no evidence that the Delegate was apprised of any settlement before the Determination was issued, and his Reasons make no reference to the subject.

55. The Applicant delivered a copy of the Complainant's email to the Tribunal as part of its submission on appeal. However, the Tribunal declined to accept that it had probative value, as it was generated after the Determination had been issued, and the Applicant had provided no evidence that the $5,000.00 had, in fact, been paid. For these reasons, the Tribunal concluded that the email would not have led the Delegate to a different conclusion on a material issue in the case, and so it did not constitute "new evidence" of the type that would successfully engage the ground for appeal set out in subsection 112(1)(c) of the *ESA*.

56. Now, on this application for reconsideration, the Applicant repeats its assertion that the complaint has been settled. In support of this contention, the Applicant has also provided evidence that it has cured its failure to demonstrate that the $5,000.00 was paid when it drew attention to the matter during the appeal. It has accompanied its application with evidence that a bank draft was issued on December 23, 2019, in favour of the Complainant in the amount of $5,000.00. Why the Applicant did not produce evidence of the draft during the appeal proceedings is unexplained.

57. For his part, the Complainant advises that the $5,000.00 payment represented a payment to him to discharge a loan he had made to the Applicant, which was to be distinguished from the claims he had made in his complaint in respect of sums owed by the Applicant pursuant to the *ESA*. I pause here to note that the record supplied by the Director for the purposes of the appeal contain references to such a loan, the claim for which the Complainant abandoned during the original investigation of his complaint, once the Delegate informed him the statute provided no jurisdiction by means of which he might seek to have it reimbursed.

58. In the circumstances presented here, the evidence of a possible settlement generated after the Determination was made, of which the Delegate had no prior notice, is insufficient to qualify as evidence that is "new" for the purposes of subsection 112(1)(c) of the *ESA*. For the same reason, the Tribunal Member issuing the Appeal Decision was right to conclude that the existence of a possible settlement was no reason to decide that the Determination was issued in error. As I am of the view that the Tribunal Member on appeal came to the correct conclusion on this point, I do not accept that the evidence of the possible settlement warrants a reconsideration of the Appeal Decision. The extent to which the Applicant may have discharged its obligations arising from the Determination may be relevant for the purposes of its enforcement, but that is a matter for other authorities to decide.

ORDER

59. The Applicant's application for reconsideration of 2020 BCEST 38 is denied.

Robert E. Groves
Member
Employment Standards Tribunal