Citation: LMSCL Lower Mainland Society for Community Living (Re)
2020 BCEST 118

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration

- by -

LMSCL Lower Mainland Society for Community Living
("LMSCL")

- of a Decision issued by -

The Employment Standards 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.: 2020/086

DATE OF DECISION: October 20, 2020

DECISION

SUBMISSIONS

Arondeep Mand	counsel for LMSCL Lower Mainland Society for Community Living
Rene-John Nicolas	counsel for Evelyn Chevrefils, Salvador Bayos, Eldy Pragados, Rowena Oandasan on behalf of the B.C. Government and Service Employees' Union
Megan Roberts	delegate of the Director of Employment Standards

OVERVIEW

1. The Lower Mainland Society for Community Living ("LMSCL") applies for reconsideration of a decision of the Employment Standards Tribunal dated May 6, 2020, and referenced as 2020 BCEST 42 (the "Appeal Decision"). The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. This matter originated with complaints filed with the Employment Standards Branch by Evelyn Chevrefils ("Chevrefils"), Salvador Bayos ("Bayos"), Eldy Pragados ("Pragados"), and Rowena Oandasan ("Oandasan"). The complaints alleged that LMSCL had contravened the *ESA* when it failed to pay overtime wages, statutory holiday pay, and compensation for length of service.

3. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") investigated the complaints and issued a determination on December 2, 2019 (the "Determination"). The Determination ordered LMSCL to pay $34,560.90 in respect of unpaid overtime wages, vacation pay, and interest. It also required LMSCL to pay two administrative penalties of $500.00, for a total payable in the amount of $35,560.90.

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

5. I have before me LMSCL'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. I also have a submission from the B.C. Government and Service Employees' Union (the "BCGEU") requesting that it be added to this proceeding as an interested party, or alternatively, as an intervener.

THE FACTS

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 summary of what I construe to be the salient facts.

7. The Delegate's Reasons for the Determination describe the operations of LMSCL in the following manner:

> LMSCL operates a non-profit organization in Metro Vancouver which falls within the jurisdiction of the Act. They provide government funded community and residential support services to developmentally disabled children, youth and adults who qualify for funding through Community Living British Columbia (CLBC) and Ministry of Children and Family Development (MCFD). LMSCL's services include short and long term residential placements in care settings (care homes), client care plan management, life and social skill building, and other specialised services. The care homes are operated by LMSCL and staffed on 24-hour basis.

8. Chevrefils and Bayos had been employed by LMSCL as support workers. Most of their work was performed in care homes, unless they were assisting clients to participate in programs delivered elsewhere in the community.

9. Pragados worked as a support worker, but also as a case manager. His duties meant that his workspaces included care homes, other locations in the community, LMSCL's head office, and his own home.

10. Oandasan worked as LMSCL's scheduler. She, too, worked out of LMSCL's head office, but also from her home.

11. The complaints alleged that LMSCL had failed to pay overtime wages, statutory holiday pay, and compensation for length of service. The Delegate rejected the claims for statutory holiday pay and compensation for length of service, as well as a claim that LMSCL had required them to work excessive hours.

12. Regarding Oandasan, LMSCL acknowledged that overtime wages were owed, but challenged the amount claimed. The Delegate conducted a detailed examination of the relevant evidence relating to Oandasan's complaint and identified a sum LMSCL was found to owe to her in respect of her overtime work. LMSCL did not appeal this part of the Determination, and so the Appeal Decision was concerned with issues pertaining to Chevrefils, Bayos, and Pragodos, to be referred to hereafter, collectively, as the "Complainants".

13. A principal argument advanced by LMSCL before the Delegate was that the Complainants worked as "live-in home support workers" and thus were subject to the provision exempting LMSCL from paying overtime wages to workers in positions of that type that appears in subsection 34(q) the *Employment Standards Regulation* (the "*ESR*").

14. In addition, LMSCL contended that Pragados should not be paid overtime wages for his time spent working as a case manager. LMSCL relied on the fact that subsection 34(f) of the *ESR* stipulates there is no obligation to pay overtime wages to a person employed as a "manager".

15. The Delegate declined to accept either argument presented by LMSCL. Instead, the Delegate decided that the Complainants did not perform work that rendered any of them a "live-in home support worker" for the purposes of subsection 34(q) of the *ESR*. The Delegate also determined that Pragados' duties as a case manager did not support a finding that he was precluded from seeking overtime wages because he was a "manager" in the sense contemplated by subsection 34(f) of the *ESR*.

16. LMSCL appealed the Determination to the Tribunal. It relied on subsection 112(1)(a) of the *ESA*. It claimed that the Delegate committed errors of law when she determined that Pragados was not a "manager", and when she decided that none of the Complainants was a "live-in home support worker".

The Appeal Decision – the "manager" exemption

17. This aspect of the appeal related to those elements of Pragados' work that involved his acting as a case manager.

18. Subsection 1(1) of the *ESR* defines "manager" in the following way:

> "manager" means
>
> (a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising or directing, human or other resources, or
>
> (b) a person employed in an executive capacity

19. LMSCL did not argue that Pragados was employed in an executive capacity. The issue was whether Pragados' principal employment responsibilities fell within part (a) of the definition.

20. The Delegate's Reasons for the Determination show that she relied on the decision of the Tribunal in *Director of Employment Standards*, BC EST # D479/97 ("*Amelia Street Bistro*"), when considering whether Pragados was a "manager". In that decision, the Tribunal said this:

> Typically, a manager has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person.

21. The Delegate noted that Pragados' duties as a case manager placed him at a higher level on LMSCL's organizational chart than other workers and that he performed at least some supervisory functions. He was also paid at a higher rate while working as a case manager.

22. Pragados made recommendations to his superiors regarding employees on probation, assisted with the allocation of shifts, oversaw activities at care homes, checked for deficiencies, directed other employees regarding their duties, and reviewed expenses before sending them elsewhere for authorization. His job description identified duties including "reporting functions, attending to critical incidents, managing client care plans and scheduling client appointments, meeting with staff including providing training on policies, [and] checking in with and encouraging them."

23. However, the Delegate also found a lack of evidence that Pragados had final authority to evaluate performance, or to hire, fire or discipline any employee, and "no convincing evidence" that he had any independent authority to spend, to decide how much employees were paid, or whether they should be granted leaves. Further, the evidence did not indicate that Pragados was "able to arbitrarily alter or deviate from LMSCL's established protocols and work processes".

24. Accordingly, the Delegate was not persuaded that Pragados' principal employment responsibilities consisted of supervising or directing, or both supervising and directing, human or other resources, and so LMSCL had failed to show that Pragados was a "manager" within the meaning of the definition set out in the *ESR*.

25. Instead, the Delegate accepted Pragados' characterization of his principal employment responsibilities as a case manager to be "focused upon facilitating communication between client stakeholders and monitoring care plan adherence for LMSCL".

26. On appeal, LMSCL did not attack the general principles identified in the authorities which the Delegate felt bound to consider. Rather, LMSCL submitted that the Delegate erred in law "by applying a more onerous definition of manager that is found in the Regulation…[and] overstating some facts and factors that indicated Mr. Pragados was a manager while understating other facts and factors".

27. LMSCL asserted that the Delegate failed to acknowledge the force of evidentiary facts and factors that tended to establish Pragados' role as a "manager", and so the Delegate made the Determination on a view of the facts which could not reasonably be entertained. LMSCL also argued that the Delegate misapplied the general principles when she required all the objective factors set out in *Amelia Street Bistro* to be established in order to decide that Pragados was a "manager".

28. The Tribunal disagreed. It considered the Delegate's analysis to be "reasoned, transparent, and intelligible".

29. The Tribunal's approach to the issues raised by LMSCL on this point is captured in the following excerpts from the Appeal Decision:

> I agree with the appellant's legal counsel that a determination regarding whether an individual is a "manager", as defined in section 1(1) of the *Regulation*, is a question of mixed fact and law. Accordingly, the delegate's decision should only be set aside on appeal if she made a "palpable and overriding error" (see *Housen v. Nikolaisen,* [2002] 2 S.C.R. 235). I am unable to conclude that the delegate's determination that Mr. Pragados was not a manager was clearly erroneous. Indeed, given her findings of fact (which were within her province to make), I am of the view that her decision on this point was not only reasonable, but entirely correct. The weight of the evidence before the delegate, at least in my view, showed that Mr. Pragados' duties as a "case manager" were principally administrative, rather than managerial, in nature.
>
> The appellant's position appears to be that the delegate should have given greater weight to certain facts while, at the same time, giving lesser weight to other facts. In my view, the delegate properly weighed all of the relevant evidence, and arrived at a conclusion that was entirely defensible in light of the somewhat conflicting evidence before her. I reject the appellant's assertion that the delegate's determination that Mr. Pragados was not a "manager" was predicated on a "view of the facts which could not be reasonably entertained".

The Appeal Decision – the "live-in home support worker" exemption

30. LMSCL challenged the Delegate's finding that the duties the Complainants performed did not fall within the statutory definition of "live-in home support worker". The definition appears in subsection 1(1) of the *ESR* and reads:

> "live-in home support worker" means a person who
>
> (a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and
>
> (b) provides those services on a 24 hour per day live-in basis without being charged for room and board

31. The Tribunal observed that while the duties of the Complainants met some of the elements incorporated within the definition, the Delegate had drawn conclusions supporting her opinion that other mandatory criteria had not been satisfied.

32. The thrust of the first LMSCL argument on this point in the appeal was that the Delegate erred in law by inserting a requirement that does not appear in the statutory definition, namely, that the services a "live-in home support worker" provides must occur in the ill or disabled person's own home.

33. In this regard, the Delegate had made findings of fact that the clients of LMSCL were routinely provided with temporary accommodation in the LMSCL care homes, in order to assist them either in a transition back to their own personal residences, or into another residential care facility. Clients might stay in a care home for a time, but their ability to do so was contingent on their willingness to follow the rules and remain eligible for funding. Clients were not tenants in a legal sense, and while the LMSCL care homes sought to provide a setting similar to a home, personal privacy was circumscribed by the necessity for LMSCL to manage and maintain its facilities.

34. Like the Delegate, the Tribunal relied on the guidance provided in *Active Care Youth and Adult Services Ltd.*, BC EST # D064/17 ("*Active Care*"), where the interpretation of the words in the statutory definition had previously been considered. In that decision, the Tribunal said this:

> In my view, the interpretation of the definition of live-in home support worker made by the Director is one the language can reasonably bear and is consistent with the characteristic of the position described by Prof. Thompson as being performed "in private residences". I am not satisfied the definition can be read without recognizing, as the Director did, that it was intended to apply to persons working in a private residence….

35. Regarding *Active Care*, LMSCL argued that the limits of what a "private residence" might mean for the purposes of applying the definition should not be restricted to a person's own home, but should, instead, be construed more broadly, so as to include any home-like location other than a hospital. Viewing the statutory definition in this way, it asserted that, regardless of the length of time a client might stay in one of its transition facilities, those locations, during those periods, acted as homes for the clients and should therefore be construed to constitute the types of premises intended to be captured by the definition.

36. The Tribunal accepted that the statutory definition did not state, explicitly, that a worker's services must be provided in a client's ordinary residence. However, it did note that an inference to that effect might be drawn from the words "live-in *home*" and "*home support* services" in the definition.

37. In the result, the Tribunal affirmed the Delegate's conclusion that the intent of the statutory definition was to limit its application to those workers who provide services to persons in their own private residences, and it should not capture persons like the Complainants who acted as support workers in the transition facilities operated by LMSCL.

38. Concerning the "24 hour per day live-in basis" aspect of the statutory definition, LMSCL submitted that it was an error for the Delegate to conclude that in order for one of the Complainants to be considered a "live-in home support worker" the individual, personally, must have been employed on a 24 hour per day live-in basis. For LMSCL, all that was required for the Complainants to be captured by this portion of the definition was that they provided support services to clients in facilities where such services were provided to the clients on a 24 hour per day live-in basis.

39. The Tribunal rejected the LMSCL argument as misconceived. It stated that the definition of "live-in home support worker" expressly provides that it is a "person", meaning an individual worker, who delivers the services, and that it would be illogical to expect a legally fictional non-profit society like LMSCL to provide "live-in" services, or to receive "room and board" without charge.

40. LMSCL also challenged the Delegate's finding that the Complainants were not furnished with "room and board" without charge. Again, LMSCL submitted that the Delegate's interpretation of the phrase "without being charged for room and board" appearing in the statutory definition was too narrow. It argued that the definition did not specify what was meant by the phrase, and that it had tendered evidence to the Delegate sufficient to establish the provision of "room and board" without charge. In support, it alluded to the evidence it had tendered during the investigation to the effect that LMSCL's care homes maintained staff rooms containing beds, bedding, refrigerators, and closets, that support workers were permitted to use the care home facilities to shower, to cook, and to do laundry, and that the terms of LMSCL's government funding allocated monies for food, not only for clients, but also for staff.

41. The Reasons for the Determination establish that, while the Delegate acknowledged some of the amenities referred to by LMSCL were made available to staff, the weight of the evidence supported a finding that the Complainants were not living in the spaces provided. Instead, the worksite spaces in question were shared spaces and so they could not be viewed as private accommodations, and the Complainants were not afforded the use of the spaces for personal purposes beyond what would normally be permitted in other work spaces such as private offices.

42. The Tribunal declined to accept the LMSCL submission, observing that it amounted to an invitation to set aside the Delegate's findings of fact. As the Tribunal concluded that the Delegate's findings were adequately grounded in the evidence, and LMSCL had not established a palpable and overriding error, the Tribunal concluded there was no basis for interfering with the Determination regarding this issue.

43. LMSCL has now applied for reconsideration. It argues that its application raises serious questions relating to the proper interpretation of the language in the definitions of "manager" and "live-in home support

worker" in subsection 1(1) of the *ESR*. It says that these questions require statements from the Tribunal that provide clarity.

44. As noted earlier, the BCGEU has applied for interested party standing and, in the alternative, an application for intervener standing, with respect to LMSCL's application for reconsideration.

45. The Delegate's Reasons note that at the time the complaints were filed, the BCGEU was engaged in efforts to organize the employees of LMSCL, and to make an application to be certified as the bargaining agent for those employees pursuant to the provisions of the *Labour Relations Code* of British Columbia. The BCGEU application for standing states that a certification order was secured late in 2019. That order excluded from the BCGEU's bargaining, *inter alia*, the LMSCL case managers.

ISSUES

46. The issues arising on this application are as follows:

1. Should the application of the BCGEU for interested party, or intervener, standing be allowed?
2. Does the LMSCL application meet the threshold established by the Tribunal for reconsidering the Appeal Decision?
3. If so, should the Appeal Decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

DISCUSSION

The BCGEU Application for Standing

47. The BCGEU requests:

a) that it be granted interested party standing, as it has a direct interest in the issues to be decided on LMSCL's application, and it is able to assist the Tribunal in canvassing a matter of general importance; and

b) in the alternative, that it be granted intervener standing, as it is able to bring a valuable perspective to the application, the benefits of which outweigh any prejudice its participation may cause to the other parties.

48. The BCGEU submits that it is an interested party, and should receive standing in these proceedings, because LMSCL is seeking interpretations in respect of the statutory definitions of "manager" and "live-in home support worker" which would broaden the number of workers who would be excluded from the benefits of the overtime protections made available in the *ESA*. It states further that if the exclusions are accepted by the Tribunal, the interests of the BCGEU will be affected adversely, in at least three ways.

49. It says, first, that a decision establishing that Pragados' duties as a case manager rendered him a "manager" for the purposes of the *ESR* may affect the BCGEU's ability to expand its existing bargaining unit at LMSCL to include him, and the other case managers employed there, either by means of further negotiation with LMSCL, or a further application under the *Labour Relations Code*.

50. Second, the BCGEU states that the complaints filed by the Complainants also requested that the Director conduct a broader investigation pursuant to subsection 76(2) of the *ESA* (the "76(2) investigation") regarding alleged contraventions of the statute by LMSCL in respect of approximately 248 members of the BCGEU's LMSCL bargaining unit who also perform support work. The BCGEU contends that, if any of the Complainants is found to be a "live-in home support worker" under the *ESR*, such a conclusion will prejudice the 248 members who are the subject of the 76(2) investigation. The BCGEU states that since it represents these employees, it has an interest in protecting the rights it claims the legislation confers upon them.

51. Third, the BCGEU argues that its interests are engaged by the LMSCL application because it represents, or seeks to represent, thousands of other workers engaged by other employers, on similar terms and conditions of work as the Complainants, for the purpose of providing support services to clients in institutional settings that are not hospitals. The BCGEU submits that if LMSCL is successful in its application for reconsideration, it is possible that these thousands of workers may also be captured by an expanded definition of "live-in home support worker" and excluded from the hours of work and overtime wage benefits contained in the *ESA*. Since the *ESA* represents a statutory minimum, or floor, which routinely acts as a starting point for collective bargaining, any elimination of protective planks in the floor can only act to reduce the bargaining power of the employees affected by the change.

52. In addition, the BCGEU cites Tribunal authority where interested party standing has been granted in circumstances where there is an issue of significant general importance, and the interested party is seen to be in a position to assist the Tribunal in examining the issues presented.

53. In the alternative, the BCGEU seeks intervener standing in the LMSCL application.

54. The BCGEU states that its submissions made regarding its application for interested party standing also sustain its application to be added as an intervener.

55. The BCGEU submits that its being added as an intervener creates no prejudice to any of the other parties. It says the interests of the Complainants and the Director are aligned with those the BCGEU seeks to advance, insofar as they all support a confirmation of the outcomes identified in the Determination and the Appeal Decision. As for LMSCL, the BCGEU argues that there can be no prejudice to it as the Determination and Appeal Decision ruled against it, and LMSCL is the party that seeks to "disrupt the finality of those decisions by applying for reconsideration".

56. I will deal with the two aspects of the application brought by BCGEU together, as I believe there is little of substance to distinguish between them.

57. Pursuant to section 103 of the *ESA*, section 33 of the *Administrative Tribunals Act* (the "*ATA*") applies to the Tribunal. Section 33 of the *ATA* provides, in part:

> 33 (1) The tribunal may allow a person to intervene in an application if the tribunal is satisfied that
>
> (a) the person can make a valuable contribution or bring a valuable perspective to the application, and

(b) the potential benefits of the intervention outweigh any prejudice to the parties caused by the intervention

58. In addition to the Tribunal's jurisdiction to join interveners set out in section 33 of the *ATA*, the Tribunal's *Rules of Practice and Procedure* provide that a "party" means not only an appellant, an applicant, a respondent, and the Director, but also "any other person or group allowed by the Tribunal to participate in an appeal or application for reconsideration".

59. In *Emergency Health Services Commission (c.o.b. BC Ambulance Service)* BC EST # D132/09, the Tribunal noted that the joining of interveners or parties involves the exercise of a discretion and "the party seeking to be joined needed to demonstrate that it had a direct interest in the issues to be decided…, or that it could assist the Tribunal to canvass a matter of sufficient general importance".

60. I am not persuaded that I should allow the application of the BCGEU to be joined as an interested party, or as an intervener.

61. I acknowledge that the degree to which a decision in the case before me might affect the ability of the BCGEU to organize, and to represent, other workers in the care sector pursuant to the provisions of the *Labour Relations Code* would be a matter of interest to the BCGEU. It is trite to say, however, that the complaints in this case alleged contraventions of the *ESA*; they did not engage any of the provisions of the *Labour Relations Code*.

62. It is also trite to say that the legislative purposes of the two statutes are different. Any decision I make regarding the proper interpretation of words like "manager" and "live-in home support worker" for the purposes of the *ESA* would not be binding on the Labour Relations Board in any applications brought before it under the *Code*.

63. I conclude, therefore, that the interest of the BCGEU in this case, albeit important, is indirect, rather than direct.

64. I accept that the outcome of the LMSCL application will likely be of interest to other employees in the support services sector who work at jobs that involve the performance of duties akin to those required of the Complainants, and in particular, the approximately 248 other members of the bargaining unit at LMSCL that the BCGEU represents who are the focus of the 76(2) investigation.

65. However, any decision of the Tribunal regarding rights that may, or may not, accrue to classes of employees identified in the *ESA* will always potentially affect others who are similarly situated. The mere fact this may be so cannot entitle anyone whose rights may be affected, to be added as a party or intervenor as a matter of right.

66. I also note the BCGEU has acted as the representative for the Complainants since the complaints were filed with the Director. Since the substance of the BCGEU submission in support of its application for standing is that other similarly situated workers in the support services sector whom it is certified to represent, or wishes to, may be affected by the decision I make on this application by LMSCL, I am of the view that any arguments it has made, or could have made, on behalf of the Complainants would be

substantially the same as those it would seek to make if it were added as an intervener, or as an interested party.

67. Since I have decided that the BCGEU application should be dismissed, for the reasons I have stated, a finding of prejudice is unnecessary. I do note, however, that a purpose of the *ESA* identified in section 2 is that it should provide fair and efficient procedures for resolving disputes over its application and interpretation. In my view, the addition of persons as interveners or interested parties will, at a minimum, increase the cost of the proceedings for all the parties, and it will almost certainly result in at least some delay, which will cause a measure of prejudice in most, if not all, cases.

The LMSCL Application for Reconsideration

68. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *ESA*, 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.

69. 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.

70. 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, as I have stated above, 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.

71. 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.

72. 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.

73. 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).

74. 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.

75. In my view, the issues identified in LMSCL's application, considered cumulatively, raise matters of interpretation regarding the statutory definitions of "manager" and "live-in home support worker" contained in the *ESR* which are important, and warrant a reconsideration of the Appeal Decision. I find, therefore, that LMSCL has satisfied the requirements of the first stage of the Tribunal's analysis of applications for reconsideration.

76. LMSCL's application for reconsideration refers to five legal errors it asserts are revealed in the Appeal Decision.

77. I will discuss the LMSCL position, and the arguments provided in response by the other parties engaged, in the order LMSCL has presented them.

1. The Tribunal made a palpable and overriding error in its assessment of the complainant Pragados' duties as a case manager.

78. The LMSCL argument on this point focuses on the Tribunal's characterization of Pragados' duties while acting as a case manager as "principally administrative, rather than managerial, in nature."

79. LMSCL cites the Merriam-Webster dictionary definition of "administrative", which includes the phrase "relating to the management of a company, school, or other organization". It claims that the words "administrative" and "managerial" are therefore synonymous, and so, I infer, the Tribunal should have concluded that Pragados was a "manager" for the purposes of the *ESR*.

80. LMSCL submits that the Tribunal must have drawn a distinction between "administrative" and "managerial" duties, so that Pragados could not be determined to be a "manager" under the *ESR*. LMSCL contends that not only did the Tribunal imply a more onerous set of criteria for establishing what the exercise of managerial, as opposed to purely administrative, duties might entail than is set out in the definition of "manager" in the *ESR*, the Tribunal neglected to articulate the criteria that would need to be applied whenever such a distinction would need to be drawn. Accordingly, LMSCL seeks assurances that the Tribunal's decision regarding the interpretation and application of the definition of "manager" was appropriate.

81. The Complainants respond that the argument of LMSCL establishes no palpable and overriding error. Instead, it amounts to "cherry picking" a use of a word by the Tribunal in a sentence summarizing the thrust of comprehensive evidentiary findings on the part of the Delegate in the Determination, and ascribing a meaning to it that is inconsistent with the factual context. The Complainants say that the Tribunal's use of the word "administrative" does not connote confusion, but rather it was meant to distinguish the principal responsibility of Pragados for the administration of case plans for LMSCL's clients from the supervising and directing duties more characteristic of a "manager" that are set out in the definition of that word in the *ESR*.

82. In her submission on the application, the Delegate submits that the Appeal Decision should not be disturbed because the LMSCL arguments on appeal were "cogently addressed" by the Tribunal, which "confirmed that the Director's interpretation and application of the statutory definitions accord with and are justified by the relevant and established legal principles, jurisprudence and tests."

83. LMSCL submits in reply that only the Tribunal can speak to the use of the word "administrative" in the context of its Appeal Decision. It states that "[i]f there is any indication to the Tribunal that there was some form of confusion on the part of the Adjudicator that affected the Adjudicator's ability to appropriately assess the Appeal and deliver a correct decision, then the Tribunal ought to embark on a reconsideration of the Appeal Decision."

84. In my opinion, there was no confusion on the part of the Tribunal on this point.

85. As no one argued that Pragados was employed in an "executive capacity", the focus of the Delegate's inquiry in this case was whether Pragados was a person "whose principal employment responsibilities" consist[ed] of supervising or directing, or both supervising and directing, human or other resources". The Delegate found as a fact that he was not.

86. As noted by the Tribunal in the Appeal Decision, the Delegate decided that there were limited aspects of Pragados' role which involved supervision, but they were ancillary to his principal duties when working as a case manager, which "focused upon facilitating communication between client stakeholders and monitoring care plan adherence for LMSCL."

87. These were findings of fact that the Delegate made, and absent an error of law the Tribunal has no power to interfere with them. In my view, the Tribunal's use of the word "administrative" to describe the nature of Pragados' principal employment responsibilities as a case manager, in order to distinguish them from duties that would be characterized as supervisory or directive, was not, in this context, inappropriate, and it in no way undermines the clarity of the legal result.

2. The Tribunal misinterpreted LMSCL's position on appeal regarding the application of equal weight to all the facts in assessing the managerial nature of Pragados' role as a case manager.

88. LMSCL disputes the Tribunal's comment in the Appeal Decision that characterized LMSCL's position to be that the Delegate should have given greater weight to certain facts, and lesser weight to others. LMSCL also questions the Tribunal's statement that the Delegate properly weighed all the relevant evidence and reached a conclusion that was entirely defensible.

89. LMSCL says that the Tribunal misinterpreted its argument in the appeal. It states that its position did not relate to the weight to be given to some facts, and not to others, *simpliciter*. Instead, it addressed the failure of the Delegate to follow the guidance offered in the *Amelia Street Bistro* case that an employee need not possess all the criteria set out therein in order to be found to be a "manager" under the *ESR*. LMSCL submits that the Delegate erred in determining that Pragados did, indeed, need to satisfy all those criteria before that could occur. In so doing, it argues, the Delegate attributed more weight to certain facts, and less weight to others, which resulted in the Delegate applying a more onerous definition of "manager" than was required by the definition.

90. More specifically, LMSCL asserts that the Delegate emphasized Pragados' lack of final authority in deciding whether employees were hired, disciplined, or terminated, and that this factor outweighed other considerations that supported Pragados' role as a "manager". LMSCL submits that the Tribunal affirmed this approach in the Appeal Decision, but failed to address the issue whether all the characteristics of a "manager" outlined in *Amelia Street Bistro* needed to be met in order for Pragados to be found to occupy that type of position. LMSCL concludes that if the Tribunal had decided that all the characteristics of a "manager" need not be satisfied, it would have addressed the issue whether the Delegate placed too much emphasis on certain facts supporting a conclusion that he did not act in that capacity while performing his duties as a case manager.

91. The Complainants' response submission accepts that *Amelia Street Bistro* stands for the proposition that a decision an employee is a "manager" does not require a finding that the person possesses responsibility and discretion relating to all the characteristics of work typically associated with that role. As was stated in that case, it is always "a question of degree." For that reason, a decision-maker must focus on a characterization of all the duties of employees when determining their status – there must be a "holistic assessment".

92. The Complainants point out that the Delegate never said that all the *Amelia Street Bistro* factors needed to be satisfied. They submit that the Delegate conducted the holistic assessment of the duties Pragados performed that *Amelia Street Bistro* required, however, and so it is inaccurate to say the Delegate required LMSCL to demonstrate that all the indicia of a managerial role had been established in his case.

93. The Complainants argue further that the Tribunal did not err in deciding that the Delegate's analysis on this point was legally correct.

94. The Delegate's submission regarding this aspect of the application is the same as that stated in respect of the first issue discussed above.

95. LMSCL's reply submission denies that the Delegate conducted a holistic assessment, and alleges that her decision rejecting the LMSCL argument that Pragados' role as a case manager was captured within the statutory definition "ultimately fell on his duties lacking the authority to hire or fire other employees." LMSCL asks that the Tribunal clarify whether the application of *Amelia Street Bistro* requires that all the characteristics of the managerial role set out in that decision must be present before an employee can be found to be a "manager" pursuant to the *ESR*. The characteristics identified in *Amelia Street Bistro*, and alluded to by LMSCL are as follows:

- The power of independent action, autonomy and discretion;
- The authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; and
- Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering working processes, establishing or altering work schedules and training employees.

96. I agree with the submissions of the Complainants and the Director on this point. *Amelia Street Bistro* does not require that all the indicia that are typical of the managerial role be in place before a person is capable

of being found to be a "manager" for the purposes of the *ESR*. This is made plain in the portion of the excerpt from the *Amelia Street Bistro* decision, reproduced above, where, after listing the typical elements associated with such a role, the Tribunal stated "[w]e do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree."

97. Nor did the Delegate decide that all the indicia must be satisfied. She did, however, consider the indicia identified in *Amelia Street Bistro* having regard to the evidence before her, and it was entirely proper that she conducted that inquiry. In order to determine the influence each one of the indicia would exercise for the purpose of the analysis, they should all at least have been considered.

98. Once that occurred, it was for the Delegate, as the finder of facts, to determine the extent to which the different aspects of the evidence supported a determination that Pragados either was, or was not, a "manager". It was implicit in that exercise that the Delegate make decisions about the significance of certain elements of Pragados' role suggesting he was, indeed, a "manager", when held in the balance against other aspects of the work he performed that weighed in favour of a conclusion that he did not hold that type of position. As the Tribunal in *Amelia Street Bistro* stated, it must always be a "question of degree". Indeed, the definition of "manager" in the *ESR* mandates such a comparative process when it directs that the focus of the inquiry relate to the "principal" employment responsibilities of the person in question.

99. This, in my opinion, is what the Delegate did, and the Tribunal was right to affirm her analysis in the Appeal Decision.

100. It is also incorrect, in my view, for LMSCL to assert that the Delegate's decision that Pragados was not a "manager" "ultimately fell on his duties lacking the authority to hire or fire other employees." As I outlined earlier in this decision, a reading of the Delegate's Reasons demonstrates that there were other factors gleaned from the factual matrix the Delegate weighed in order to find, on balance, that Pragados did not satisfy the requirements relating to supervision and direction set out in the statutory definition. They included the facts that the Delegate was unconvinced Pragados had independent authority to spend, to decide how much employees were paid, to decide whether they should be granted leaves, or to alter or deviate from LMSCL's established protocols and work processes.

101. If follows from what I have said that I also reject LMSCL's assertion that the Delegate's mode of analysis resulted in her applying a more onerous definition of "manager" than is required in the statutory definition. In my opinion, the Delegate's Reasons establish that she applied the words of the definition in a manner that was in accord with their plain meaning. If, as LMSCL alleges, this makes it more difficult for a person to be characterized as a "manager" under the *ESR*, that is a matter for the legislature to address, not the Director.

3. The Tribunal made a mistake of law or fact regarding the definition of private residences, and in doing so erred in law by confirming a more onerous definition of live-in home support worker than is found in the ESR.

102. In support of this assertion, LMSCL says:

- there is still no accepted definition for what constitutes a "private residence" when one seeks to determine whether the services provided by a person render that person a "live-in home support worker". The *Active Care* decision, in particular, does not define the term "private residence";
- if the legislative intent of the definition of "live-in home support worker" is to identify those persons who provide services in "individual client's residences", as the Tribunal in the Appeal Decision affirmed, that intention would have been expressly stated in the language of the definition. Instead, the definition identifies other requirements that must be satisfied.

103. LMSCL then repeats, by inference. the argument it made before the Delegate, and in the appeal. It submits that the term "private residence", when used in the context of determining whether an employee is a "live-in home support worker", "means nothing more than a location other than a hospital."

104. In response, the Complainants point out that LMSCL takes no issue with the proposition that a person who works as a "live-in home support worker" provides services in personal residences. What LMSCL challenges is the more restricted definition of personal residence excluding the care homes operated by LMSCL that was adopted by the Delegate and was affirmed by the Tribunal in the Appeal Decision.

105. The Complainants say that the conclusions drawn by both the Delegate and the Tribunal correctly apply the principle set out in *Active Care*, which makes it clear that a private residence is meant to refer to a client's "actual", "ordinary", or "regular" home, and not a staffed residential facility like the care homes operated by LMSCL. Indeed, as the Tribunal noted in the Appeal Decision, *Active Care* itself dealt with circumstances involving care in residential facilities, rather than in the clients' own homes, and determined that the employees providing those services were not captured by the statutory exemption.

106. The Delegate submits that the interpretation of the definition of "live-in home support worker" presented by LMSCL should be rejected because it seeks to broaden the application of exceptions to the minimum protections provided to employees under the legislative scheme, and it is inconsistent with the jurisprudence established in the decisions of the Tribunal.

107. In its reply submission, LMSCL contends that its argument is not repetitive. It asserts that the literature relating to the correct interpretation of the definition of "live-in home support worker" has not delivered a framework that provides the requisite certainty. It alleges, moreover, that while the submissions of the Complainants and the Delegate focus on extending the benefits of the statutory scheme to as many employees as possible, they do not consider the significant financial liabilities that may be created for an employer that fails to classify its employees properly.

108. I disagree with the LMSCL submission that there is still no accepted definition for what constitutes a "private residence" when considering whether a person performs the duties of a "live-in home support worker". *Active Care* explicitly states that such duties must be performed in the recipient's "own home", and this is the interpretive factor the Tribunal has adopted.

109. To be sure, acceptance of this approach means that one must consider in each case whether a place where a recipient of support is, shall I say, "staying" qualifies as his "own home". But such an analysis involves the consideration of nuanced matters of fact it is the province of the Director to resolve in each instance.

Here, the Delegate determined, as a matter of fact, that the clients to whom the Complainants provided support services in the LMSCL care homes were not receiving those services in their "own homes". The reasons the Delegate gave included the fact that the LMSCL care homes were meant to provide but temporary accommodation to clients in a period of transition who were prepared to follow LMSCL's rules relating to behaviour, including rules circumscribing their personal privacy, and who had continued access to funding.

110. These were findings of fact the Delegate was entitled to make, and they have not been shown to be unreasonable.

111. I also disagree that the requirement a "live-in home support worker" must provide services in a recipient's own home confirms a more onerous definition of the phrase than is found in the *ESR*. Like all words appearing in statutes, they must be interpreted in order to give them life. The British Columbia *Interpretation Act* gives guidance as to how that should occur. Section 8 says this:

> Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.

112. It is true that the definition of "live-in home support worker" contains no specific words requiring that the relevant services be provided in the recipient's "own home". One might say, then, that the interpretation LMSCL contends for – that the services of a "live-in home support worker" need only be provided in any home-like setting, broadly defined, outside of a hospital – is one that the language of the definition might reasonably bear. Even if that were so, such an interpretation would, nevertheless, be incorrect.

113. When drawing this conclusion, I take guidance from the comments of the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27 to the effect that employment standards statutes like the *ESA* are intended to act as a mechanism for providing minimum benefits and standards to protect the interests of employees. As benefits-conferring legislation, the elements of the *ESA* that provide those benefits should be interpreted in a broad and generous manner. It follows that provisions in the legislation that restrict or eliminate access to those minimum benefits should be interpreted narrowly. Most importantly, the court stated that any doubt arising from "difficulties of language" should be resolved in favour of employees.

114. A narrow interpretation of the language in the statutory definition of "live-in home support worker", requiring that the services provided by such a worker be delivered in the recipient's own home, was adopted by the Delegate when she made the Determination. It was confirmed by the Tribunal in the Appeal Decision. That narrow interpretation served to maintain the Complainants' access to the overtime wage benefits provided for in the *ESA*, which the broader interpretation LMSCL contends for would have denied to them. The comments in *Rizzo*, and the many decisions of the Tribunal which have followed it, make it clear that it was entirely proper such a narrow interpretation be applied in this instance.

4. The Tribunal misinterpreted LMSCL's position on the appeal regarding the requirement in the live-in home support worker definition that services be provided on a 24 hour per day live-in basis.

115. On this point, LMSCL states that it understands it is the employee who provides the services on a 24 hour per day live-in basis, not the employer. That said, it argues that the definition of "live-in home support worker" does not specify whether the employee must be employed on a 24 hour basis, or if the employee can satisfy the definition by completing consecutive 24 hour shifts when required, as the Complainants did on occasion.

116. LMSCL submits that the Tribunal misunderstood its position in the appeal. It says that the Delegate decided that the Complainants had to be employed on a 24 hour basis for the definition to be satisfied, and that the Tribunal confirmed the Delegate's decision without addressing the substance of LMSCL's position on appeal. LMSCL states that the proper interpretation of the 24 hour per day requirement in the definition remains unresolved.

117. The Complainants argue that the position taken by LMSCL in the appeal was clear. They say it supported an interpretation of the statutory definition of "live-in home support worker" permitting the 24 hour requirement to be based on the manner in which LMSCL managed the delivery of its services to its clients, rather than on the terms and conditions under which the employees in question performed their support duties. The Complainants submit, therefore, that the Tribunal issuing the Appeal Decision was entirely correct when it rejected LMSCL's position as misconceived.

118. Regarding the argument presented by LMSCL on this application for reconsideration, the Complainants submit that the *ESR* definition of "live-in home support worker" is also clear. They say the definition refers to services being provided on a "24 hour per day live-in basis". The definition says nothing about shifts being scheduled on a 24 hour basis.

119. The Complainants submit that the wording of the definition demonstrates a legislative intention that it apply to a person who is present with a client 24 hours per day for an extended period, and becomes, in effect, "a member of the client's household". It does not incorporate into its application a consideration of shifts, or the way in which an employee's work hours might be organized over fixed periods of time, however long.

120. The Complainants state further that if the statutory definition is reasonably capable of supporting its interpretation, and the interpretation of LMSCL, the Complainants' interpretation should be preferred because it accords with Tribunal jurisprudence and the principle that the benefits conferred by the legislative scheme should be distributed broadly.

121. The Delegate's submission repeats her comments regarding the previous issue, and affirms the comments made by the Tribunal in the Appeal Decision regarding this point.

122. In reply, LMSCL again submits that the Tribunal misunderstood its position on appeal, and repeats that the issue it addressed remains unresolved. It states that further clarification is necessary.

123. LMSCL argues further that the absence of a reference to "shifts" in the definition of "live-in home support worker" cannot be determinative. In support, it points to the Delegate's insertion, discussed earlier, of the requirement that the employees' services be provided in "personal residences", when no such wording appears in the statutory language. LMSCL asserts that the reading into the definition of certain words, but not others "is rather self-serving to ensure that workers employed by [LMSCL] are not captured…by the live-in home support worker definition."

124. I agree with the submissions of the Complainants. It follows that I discern no error in the result of the appeal proceedings on this point.

125. LMSCL is correct to say that the meaning the Delegate, and the Tribunal in the Appeal Decision, ascribed to the words "24 hour per day live-in basis" ensured that the Complainants were not captured by the "live-in home support worker" definition. Such a result, however, does not give validity to an argument that the interpretation affirmed reveals an error of law.

126. Even if it can be said that the LMSCL interpretation of the "24 hour per day live-in basis" language is one that the words may reasonably bear, and I do not decide that it does, the meaning affirmed in the Determination and the Appeal Decision is also reasonable, and for the reasons grounded in the *Rizzo* line of cases, it is more compelling. Once again, any doubt arising from "difficulties of language" should be resolved in favour of employees, in this case the Complainants.

5. The Tribunal failed to deal with the LMSCL submissions on appeal regarding the definition of room and board, and in so doing erred in law by confirming a more onerous definition of live-in home support worker than found in the ESR.

127. LMSCL submits that when the Delegate reflected upon the proper interpretation of the words "room and board" in the definition of "live-in home support worker" she applied a meaning appearing in the Merriam Webster Online Dictionary, namely: "lodging and food usually furnished for a set price or as part of wages".

128. LMSCL says it was an error of law for the Delegate to do so because the dictionary definition imports requirements that are not incorporated into the *ESR* definition. It argues that the effect of the Delegate's actions is to make it more difficult for a person to be characterized as a "live-in home support worker".

129. LMSCL also asserts that the Appeal Decision did not address this concern relating to the Delegate's use of what LMSCL argues is an overly restrictive, and therefore inappropriate, interpretation of the meaning of the words "room and board" that appear in the statutory definition. It states that the Tribunal should provide clarity on what constitutes "room and board" for the purposes of the definition.

130. The Complainants dispute that the Appeal Decision neglected to address the substance of the LMSCL argument on the issue of "room and board". They say further, however, that the LMSCL position before the Delegate, and in the appeal, did not set out what "room and board" should mean. Instead, LMSCL simply relied on the evidence it had tendered regarding the amenities made available to the Complainants at their places of work as support for the conclusion that "room and board" had been provided to them.

131. The Complainants say that, unlike LMSCL, they did offer criteria to the Delegate. They argued that "room and board" was generally understood to be the provision of "lodging and food". The Complainants submit that this was the meaning the Delegate accepted when she referred to the excerpt from the online dictionary. They state further that it was entirely appropriate for the Delegate to reach this conclusion, given that LMSCL did not directly challenge the interpretation the Complainants had presented.

132. The Complainants submit further that an acceptance of "room and board" as incorporating "lodging and food" was warranted because LMSCL had argued before the Delegate that the lodging and food it provided to the Complainants was "sufficient" to constitute "room and board" for the purposes of the definition. The Complainants ask why LMSCL would argue so strenuously that sufficient lodging and food was provided if they intended to take the position that "room and board" did not mean "lodging and food"? The answer, the Complainants say, is that LMSCL did not, and could never, have argued, reasonably, that "room and board" does not mean "lodging and food". If follows, the Complainants submit, that the Tribunal was correct when it decided the Delegate had made no palpable and overriding error when she reached her conclusion on this point.

133. The Delegate responds with a reference to the statement in the Appeal Decision that the Delegate's decision regarding "room and board" incorporated findings of fact that the Tribunal should not set aside absent palpable and overriding error.

134. In its further reply, LMSCL denies that the Complainants' position regarding the meaning to be attributed to the phrase "room and board" was uncontested in the appeal.

135. LMSCL questions why the Tribunal did not address the Delegate's use of the online dictionary definition of "room and board". LMSCL says that the Delegate was "in an influential position" to set the parameters of the phrase "room and board" for the purposes of the statutory definition, and should have done so in order to provide clarity.

136. Again, I have concluded that I must reject the submissions of LMSCL on this issue.

137. The Delegate's Reasons for the Determination make it clear that she was of the opinion the words "room and board" in the statutory definition meant "lodging and food". In my view, it was reasonable for her to draw that conclusion. I do not discern that LMSCL contends for a meaning that is in substance any different.

138. What LMSCL argues is that the elements of "lodging and food" the Delegate decided, and the Appeal Decision confirmed, should constitute "room and board" were formulated in too narrow a manner, and so the amenities at work LMSCL stated it provided to the Complainants, and which it said were sufficient to constitute "room and board" for the purposes of the statutory definition, were found to fall outside of the proper meaning to be ascribed to those words.

139. A review of the Delegate's Reasons reveals that she conducted a detailed examination of the evidence in order to determine the degree to which the "lodging and food" amenities offered to staff at its care homes might support a conclusion that LMSCL was providing "room and board" for the purposes of the statutory definition of "live-in home support worker". The Delegate determined they were not, because they did

not meet the requisite standard. In my view, that was all that was required for the Delegate to dispose of the case.

140. The Delegate's findings are captured in the following excerpts from her Reasons:

> In consideration of all evidence, I accept the staff areas pictured primarily functioned as workspaces shared by and accessible to all LMSCL workers on site at any given time. The fact clients had restricted access to the rooms or that they may have been furnished with a bed or pull out couch, does not obfuscate their primary function in allowing LMSCL to meet its day to day operational needs and contractual requirements.
>
> In addition, and despite LMSCL's assertions otherwise, I do not accept that 'board' was provided to the Complainants. Although I fully considered LMSCL's attempts to rebut the related evidence presented, the memorandums and statements of the Complainants clearly indicate employees were neither normally provided food nor allowed to use the amenities within the care home for personal use including for showering, laundry and cooking.

141. As I have stated with regard to other grounds for reconsideration LMSCL has advanced, a search for the meaning of words in the legislative scheme must pay heed to the interpretive guidance provided by the Supreme Court of Canada in *Rizzo*, and the cases that have followed it. Accordingly, the narrower interpretation of what constitutes "room and board" that the Delegate adopted, and the Appeal Decision affirmed, which resulted in the rejection of the LMSCL characterization based on its practices, was not in error, not only because the Delegate's interpretation was reasonable on the facts, but because it gave effect to an interpretation of the wording that preserved the access to the overtime wage benefits found in the *ESA* the LMSCL interpretation would have denied to the Complainants.

ORDER

142. The LMSCL application for reconsideration is dismissed. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2020 BCEST 42, is confirmed.

Robert Groves
Member
Employment Standards Tribunal