Citation: The Director of Employment Standards and Construction & Specialized Workers' Union, Local 1611 (Re) 2020 BCEST 12

Applications for Reconsideration

- by -

The Director of Employment Standards

(the "Director")

- and -

Construction & Specialized Workers' Union, Local 1611

(the "Union")

- 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: Jacquie de Aguayo, Chair
Kenneth Wm. Thornicroft
David B. Stevenson

FILE Nos.: 2019/144 and 2019/148

DATE OF DECISION: February 20, 2020

DECISION

SUBMISSIONS

Jordan Hogeweide	delegate of the Director of Employment Standards (the "Director")
Howard Kornblum	on his own behalf (the "Complainant")
Paul M. Pulver	counsel for Ansan Industries Ltd. (the "Employer")
Kevin Blakely	counsel for Construction & Specialized Workers' Union, Local 1611 (the "Union")

INTRODUCTION

1. The Director of Employment Standards (the "Director") applies under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of Tribunal Decision Number 2019 BCEST 67 (the "Appeal Decision") issued on July 10, 2019 (EST File No. 2019/148). The Union has also separately applied for reconsideration of the Appeal Decision (EST File No. 2019/144).

2. The Appeal Decision cancelled a determination (the "Determination") in which the Director's delegate (the "Delegate") declined to further investigate a complaint filed by the Complainant. The Delegate found the *ESA* did not apply because the Complainant's employment was covered by the collective agreement (the "Agreement") between the Employer and the Union.

3. In the Appeal Decision, the Member found the Delegate erred in concluding the Complainant, as a probationary employee, was covered by the Agreement. The Member found the Delegate therefore erred in concluding the *ESA* did not apply, and he remitted the matter to the Director to consider the complaint on its merits.

4. The Director submits the Appeal Decision errs in finding the Complainant was not covered by the Agreement and in cancelling the Determination on this basis. The Union applies for standing to also seek reconsideration of the Appeal Decision, or alternatively for standing to make submissions in support of the Director's application. The Complainant opposes the applications by the Director and the Union.

BACKGROUND

5. The Complainant filed a complaint against the Employer under the *ESA*, alleging his employment had been terminated after only two weeks of employment and seeking the payment of wages and overtime, as well as reimbursement of Union initiation fees and dues (Appeal Decision, para. 1).

6. The Delegate found a preliminary issue was whether the *ESA* applied to the complaint. He investigated by speaking with the Complainant, the Union, and the Employer (Determination, pp. R2 – R5). The Complainant argued the *ESA* applied to him because he was a probationary employee "and was therefore

not covered by the collective agreement", while the Employer and the Union advised that the Complainant, as a probationary employee, was covered by the Agreement (Determination, p. R5).

7. The Delegate noted the Complainant relied on Clause 7.02 of the Agreement, which states that an employee gains union membership upon completion of probation (600 hours of work). The Delegate found the Agreement does not indicate that a probationary employee is not covered by the collective agreement; "[r]ather, it states that upon completion of the probationary period, the employee will gain union membership" (Determination, p. R5).

8. At this juncture, it is helpful to note that Clause 7 is a "union security" article. The *Labour Relations Code* requires that employers deduct union fees and dues from employees and remit them to the union: section 16. It also expressly contemplates that an employer and union may have a provision in a collective agreement requiring that employees be a member of the union as a condition of employment: section 15. In this case, the information provided by the Union confirmed that Clause 7 was a security clause and it provided that, after the completion of the probationary period, an employee was required to become a member of the union and pay non-refundable member initiation fees.

9. The Delegate found the probationary period "is intended to assess the suitability of the employee for permanent employment, not exclude an employee from coverage under the collective agreement", and he concluded that "even though [the Complainant] was a probationary employee, he was still covered by the collective agreement between [the Employer] and [the Union]" (Determination, p. R5).

10. The Delegate further noted the Complainant had authorized the deduction of union dues and initiation fees from his wages and that his wages were based on the wage schedule in the Agreement. He concluded that the Complainant "was covered by the collective agreement and therefore the Employment Standards Act and Regulation do not apply to his complaint" (Determination, pp. R5 – R6).

11. The Delegate quoted subsection 3(7) and subsection 76(3)(h) of the *ESA* and found that, in light of those provisions, "the grievance procedure within that collective agreement must be utilized to resolve the Complainant's discontent", and it was appropriate for the Delegate to "exercise discretion and stop investigating this complaint" (Determination, p. R6).

12. The Complainant appealed the Determination to the Tribunal under section 112 of the *ESA* alleging all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice, and on the basis that he had "new evidence" not previously available. In the Appeal Decision, the Member dismissed the latter two grounds of appeal (paras. 52 and 57).

13. In the Appeal Decision, the Member stated that, as the only issue decided in the Determination was whether or not the *ESA* applied to the complaint, he would limit his examination "to that question" (para. 20). The Member noted the Agreement does not expressly state that all employees "are members the Union bargaining unit or are covered by the Agreement" (para. 36). The Member considered Clause 7 of the Agreement and decided, based on his interpretation of that provision, that the Employer and the Union "did not intend that probationary employees were to be covered by the Collective Agreement" (para. 41).

14. The Member found on this basis that the Director "erred in concluding that the [Complainant] was covered by the Collective Agreement" and also erred in interpreting and applying section 3 of the *ESA* (para. 42). The Member therefore granted the Complainant's appeal on this ground. The Appeal Decision dismisses the Complainant's other grounds of appeal (paras. 44 – 57).

15. In the result, the Appeal Decision cancelled the Determination and referred the matter back to the Director to examine the merits of the complaint (para. 58).

STANDING

16. We turn first to the Union's request for standing to make submissions in respect to the Director's application for reconsideration. The Employer and Director take no position while the Complainant objects to the Union's request.

17. The Appeal Decision overturned the Determination on the basis that the Delegate erred in concluding that the Complainant, as a probationary employee, was covered by the Agreement. The Member found, based on his interpretation of the Agreement, that the Union and the Employer did not intend for the Agreement to cover probationary employees. This finding was made notwithstanding the Determination records the Union and Employer (the parties to the Agreement) both agreed that the collective agreement covered probationary employees.

18. The finding in the Appeal Decision that the Complainant, as a probationary employee, is not covered by the Agreement potentially impacts the scope of the Union's representation rights and responsibilities. Specifically, it casts doubt on whether the Union represents probationary employees under the terms of the Agreement. The Appeal Decision therefore materially affects the legal rights of the Union. Indeed, the Appeal Decision may have implications for other parties who may also have similar provisions in their collective agreements.

19. In addition, the Appeal Decision turns on a finding as to the intention of the Union (and the Employer) with respect to the Agreement's coverage of probationary employees. The Union did not have notice of the Complainant's appeal of the Determination because it was not served with the Determination. It therefore did not have an opportunity to make submissions to the Member before he issued the Appeal Decision.

20. In all these circumstances, we find it is appropriate to grant the Union's request for standing to make submissions in respect of the Director's application for reconsideration of the Appeal Decision. As the Union has been granted standing in the Application before us (EST File No. 2019/148), we dismiss its alternative application for reconsideration (EST File No. 2019/144).

SUBMISSIONS

21. The Director submits that the Appeal Decision errs in law in concluding the Complainant's employment was not covered by the Agreement and therefore the *ESA* applies to his complaint.

22. The Director says that where both the union and the employer in a unionized workplace agree an employee is covered by a collective agreement, it is not the role of the Director or the Tribunal under the *ESA* to interpret the collective agreement and reach a contrary conclusion. The Director cites Tribunal's jurisprudence which states it is the role of an arbitrator appointed under the *Labour Relations Code* (the "*Code*") to resolve disputes regarding the interpretation or application of collective agreements, including in the context of section 3 of the *ESA*.

23. The Director submits that where a complaint raises a threshold question of whether the *ESA* applies, because the complainant appears to be employed under a collective agreement, the delegate must decide this question based on the available evidence. Here, the Director submits, the available evidence before the Delegate was that both the Union and the Employer agreed the Complainant's employment was covered by the Agreement. In addition, the Complainant had signed a form authorizing the deduction of union dues and had received a copy of the Agreement at the start of his employment. Accordingly, the available evidence supported the conclusion reached by the Delegate in the Determination.

24. The Director further submits that an "ordinary reading" of the Agreement in its entirety leads to the conclusion that the Complainant, as a probationary employee, was covered by the Agreement, and therefore the Delegate was correct to decline to further investigate the complaint. The Director submits the Member misinterpreted Clause 7 of the Agreement, and the Agreement as a whole, in concluding it established the Union and Employer did not intend that probationary employees be covered by the Agreement.

25. The Union also takes the position that the Appeal Decision errs in law in finding that the *ESA* applies to the complaint for substantially the same reasons as those of the Director. The Union says the impact of that finding is "profound" in that it affects its exclusive bargaining agency and its administration of the Agreement in the context of probationary employees

26. The Union submits the Appeal Decision errs in its interpretation of the Agreement by conflating the concept of an employee gaining membership in the Union on completion of the probationary period with the employee being covered by the Agreement for purposes of the *ESA*. It says all employees (including probationary employees) employed in its bargaining unit are entitled to Union representation and have access to the Agreement's grievance procedure.

27. The Union further submits the Appeal Decision errs at paragraph 36 in finding there was no provision in the Agreement indicating that all employees, including probationary employees, are covered by the Agreement. It says the Complainant's status as an employee represented by the Union arises from the Union's certification under the *Code*, which is reflected in the Union recognition clause in Article 4 of the Agreement.

28. The Union also says the Member errs at paragraph 41 of the Appeal Decision in finding that the Employer and Union did not intend that the Agreement apply to probationary employees. The Union says the Member embarked on an interpretation of the Agreement and came to a result completely contrary to the evidence of both the Employer and the Union on that point.

29. The Employer did not file submissions in response to the merits of the Application.

30. The Complainant submits the Appeal Decision was correct when it concluded that he was not covered by the Agreement. He says the Appeal Decision correctly remedied what he characterizes as a violation of his rights under the *Charter of Rights and Freedoms* to gain a livelihood, his freedom of association, and his privacy. He says all these rights and interests are at the core his complaint. With respect to the Complainant's *Charter* argument, we note that the Tribunal does not have any statutory authority to interpret and apply the *Charter* (see *ESA*, section 103(e)). Accordingly, we are unable to address the merits of the Complainant's *Charter* claim.

31. The Complainant disputes the evidence on which the Director and Union rely on reconsideration as follows:

> The facts in this file, virtually ALL disputed (by the Appellant) are studiously ignored by the three recalcitrants: employer, ESB Delegate(s) & purported no-standing intervener. Instead, substituted by them, especially [the] Applicant, are voluminous citations to a [Agreement]; but ZERO observable compliance with ANY of its clauses, (other than a disputed ALTERED dues authorization card), by the employer & union.

32. The Complainant further submits that, contrary to the Union's position, the Appeal Decision did not conflate the concept of union membership with whether probationary employees are covered by the Agreement. He asserts that the Agreement was not adhered to in respect of his employment. For example, he says, he was paid a higher rate of pay than the probationary rate in the Agreement. He says this demonstrates he was not covered by the Agreement and the Application should be dismissed.

FINDINGS AND ANALYSIS

33. The Tribunal's reconsideration power is discretionary, and is to be exercised in limited circumstances as described in *Milan Holdings Inc. (Re)*, BC EST # D313/98 ("*Milan Holdings*") at page 7:

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96).

34. We find the Director's application makes an arguable case of sufficient merit that the Appeal Decision errs in law when it finds the Complainant was not an employee covered by the Agreement and, therefore, that the *ESA* applied to his complaint. We further find that clarity with respect to that issue is of significant importance both to the parties and the system in general, given its potential impact on the approach to determining the appropriate forum for the enforcement of rights, duties, and obligations under the *ESA* in a unionized context. Accordingly, we find this is an appropriate case in which to exercise our power of reconsideration with respect to the Appeal Decision.

35. We find the Determination correctly identified that the threshold question raised by the complaint was whether the Complainant was "covered by a collective agreement" within the meaning of the *ESA*. The Delegate noted the Complainant argued "that, under Clause 7 of the collective agreement, he was a probationary employee and probationary employees are not covered by the collective agreement" (Determination, p. R5). The Delegate found, however, that while the provision stated probationary employees do not become members of the Union until they have completed the probationary period (600 hours of work), "[a]t no point does the collective agreement indicate that a probationary employee is not covered by the collective agreement" (*ibid.*).

36. The Delegate further noted the Union and the Employer both agreed that the Agreement covered probationary employees like the Complainant. The Complainant signed an authorization form permitting the deduction of union dues. The Delegate further noted that probation is "intended to assess the suitability of the employee for permanent employment, not exclude an employee from coverage under the collective agreement" (p. R5). In all these circumstances, the Delegate rejected the Complainant's argument that, as a probationary employee, he was not covered by the Agreement.

37. In deciding whether the Delegate was correct to reject this argument, the Member began by noting that the Agreement "contains no provision that specifies that all [the Employer's] employees are members of the Union bargaining unit or are covered by the Collective Agreement" (Appeal Decision, para. 36).

38. However, collective agreements do not necessarily contain such a provision as the duty to represent employees in a bargaining unit arises from the fact of the Union's certification as the exclusive bargaining agent under the *Labour Relations Code*. Moreover, as noted by the Union, the collective agreement contains a "union recognition clause" in Clause 4.01 of the Agreement pursuant to which the Employer recognized the Union as "the sole and exclusive bargaining authority for all employees covered by this Agreement or order of certification issued by the Labour Relations Board of British Columbia". The Union's certification is for "employees" of the Employer.

39. The Member then went on, in paragraphs 37 – 41 of the Appeal Decision, to consider and interpret the wording of Clause 7 of the Agreement, on which the Complainant relied in arguing that as a probationary employee he was not covered by the Agreement. The Member noted that Clause 7 requires all employees covered by the Agreement to become members of the Union, but that employees were not entitled to become members of the Union until they had completed their probationary period (600 hours of work). From this, he inferred the Union and the Employer "did not intend that probationary employees were to be covered by the Collective Agreement" (para. 41). On this basis, he found the Director "erred in concluding that the Appellant was covered by the Collective Agreement" and therefore erred in interpreting and applying section 3 of the *ESA* (para. 42).

40. In reaching this conclusion, the Member did not address the finding in the Determination that, while the Complainant believed he was not covered by the Agreement because he was a probationary employee, both the Employer and the Union "disagree and consider [the Complainant] to be covered by the collective agreement" (p. R5). The Appeal Decision also does not address the Delegate's finding in the Determination that, while Clause 7 of the Agreement states that an employee does not become a member of the Union until after completing their probationary period, "[a]t no point does the collective agreement indicate that a probationary employee is not covered by the collective agreement" (p. R5).

41. We find the Member erred in his interpretation of Clause 7 by conflating an employee becoming a member of the Union with an employee being a member of the Union's bargaining unit and therefore covered by the Agreement. The evidence before the Delegate, reflected in the Determination, established that all employees of the Employer in the Union's bargaining unit, including probationary employees, are members of the Union's bargaining unit and covered by the Agreement. Subsequently, on completion of the probationary period, they become members of the Union.

42. The Determination records that the Delegate asked the Union about the probationary period in the collective agreement "and whether [the Complainant] would have had the opportunity to grieve under the collective agreement", and was advised by the Union that union membership did not determine coverage under the Agreement, confirming that the Complainant would have received the protection and benefits of the collective agreement even before becoming a full member of the Union. Since the Complainant was covered by the collective agreement, the Union acknowledged that it would have represented him if he had requested that it file a grievance on his behalf (Determination, p. R5).

43. We find the evidence before the Delegate, recorded in the Determination, clearly supports the Delegate's finding that the Complainant was covered by the Agreement. As the Delegate correctly noted, the available information and the language of Clause 7 did not in fact support the Complainant's position. More importantly, however, even if Clause 7 could bear a range of interpretations (and we do not accept that argument), we find the Delegate's finding is supported by the evidence that the Union and the Employer agreed that probationary employees are covered by the Agreement.

44. Collective agreements are a specialized form of contract which is negotiated in a unique labour relations context. The meaning of collective agreement provisions is not determined by merely reading the words in isolation, but rather by reading them in their labour relations context and with the objective of determining the mutual intention of the parties. Where the parties to a collective agreement agree that it applies to probationary employees who are members of the designated bargaining unit, as the Employer and Union did in the present case, it is a full answer to the question of whether the *ESA*'s dispute resolution procedures applied for the purposes of resolving the Complainant's dispute with the Employer. In this case, the proper channel for the Complainant's dispute was the filing of a grievance under the collective agreement.

45. Accordingly, we find the Appeal Decision erred in interpreting the Agreement as expressing an intention directly contrary to evidence of both the Union and the Employer and the terms of the collective agreement. Generally speaking, it is not the role of the Director or, by extension, the Tribunal, to interpret collective agreements. To the extent there is a dispute as to the interpretation or application of a collective agreement, that is a matter for a labour arbitrator to decide: *Rand Reinforcing Ltd.*, BC EST # D123/01.

46. Even if we accept it was necessary to consider Clause 7 or other provisions of the Agreement to address the Complainant's position, for the reasons set out, we find the Delegate correctly found it did not support the Complainant's position. Rather, the Delegate was correct in relying on the Union and Employer's agreement that bargaining unit probationary employees, including the Complainant, were covered by the Agreement.

47. We find the Appeal Decision errs in concluding otherwise, and therefore erred in overturning the Determination on this basis. We would add that, in our view, it is unlikely the Member would have fallen into error had he received submissions from the Union responding to the Complainant's appeal of the Determination. The Union did not make submissions because it was not served with the Determination and therefore did not receive notice of the appeal. Under section 81 of the *ESA*, the Director must serve a determination on any person "named in the determination". This is generally interpreted as meaning the complainant and the employer or other respondent to the complaint. Third parties, whose rights are not at issue, are generally not served.

48. In the present case, the Union was not a respondent to the complaint and therefore was not served with the Determination. However, its rights were affected when the issue arose as to whether the *ESA* applied to the complaint because of the existence of a collective agreement to which the Union was a signatory party. While the circumstances here may arise only rarely, where a complaint is filed and an issue arises as to the applicability or not of a collective agreement, we find the Delegate's approach in this case was the correct one: the union's view should be sought. We further note that, once a determination is made on a question as to the application or not of a collective agreement, the union should be served with a copy (together with the complainant, employer, or other respondents) to ensure that a party whose legal rights are affected will have notice and standing for appeal purposes under section 112 of the *ESA*.

49. The Complainant raised a number of issues in his submissions which are not relevant to the Director's application for reconsideration. To the extent the Complainant makes relevant submissions, we find they do not persuade us the Delegate erred in rejecting his argument that as a probationary employee he was not covered by the Agreement. For example, even if we accept for purposes of this decision his assertion that he was not paid in accordance with the wage grid set out in the Agreement, we find this fact alone would not persuade us the Delegate erred.

50. Whether or not the Agreement was adhered to (and we make no finding in that regard), the Union and the Employer agreed that probationary employees are covered by the Agreement. As the Delegate noted in the Determination, there was other evidence which supported this finding, and the collective agreement language the Complainant relied on in asserting otherwise did not in fact contradict that finding. For the reasons set out above, we find the Appeal Decision erred in concluding that the language did contradict that finding.

51. In summary, we find the Delegate was correct to reject the Complainant's assertion that, as a probationary employee, he was not covered by the Agreement. As he was covered by the Agreement, the Delegate correctly concluded the *ESA* did not apply to his complaint. The Appeal Decision errs in quashing the Determination on the basis that it did, and accordingly it must be reconsidered and set aside.

CONCLUSION

52. For the reasons given, the Director's application for reconsideration is granted and the Appeal Decision is cancelled. The Union's application for reconsideration (EST File No. 2019/144) is dismissed. The Determination is confirmed.

Jacquie de Aguayo **Chair** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Member** **Employment Standards Tribunal**	**David B. Stevenson** **Member** **Employment Standards Tribunal**