Citation: Charles M. Fellnermayr (Re)
2020 BCEST 126

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration

- by -

Charles M. Fellnermayr carrying on
business as Mezmer Eyes & Grapevine Optical
(the "Employer")

- 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.: 2020/133

DATE OF DECISION: November 10, 2020

DECISION

SUBMISSIONS

Bruce Bergez	on behalf of Charles M. Fellnermayr carrying on business as Mezmer Eyes & Grapevine Optical

OVERVIEW

1. Charles Fellnermayr, carrying on business as Mezmer Eyes & Grapevine Optical (the "Employer"), applies for a reconsideration of a decision of the Tribunal dated August 17, 2020, and referenced as 2020 BCEST 106 (the "Appeal Decision").

2. The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

3. The matter arose when Natasha Martin (the "Complainant"), a former employee of the Employer, filed a complaint with the Director of Employment Standards (the "Director") alleging that the Employer had contravened the *ESA* when he failed to pay her compensation for length of service.

4. A delegate (the "Delegate") of the Director conducted a hearing of the complaint on January 30, 2020. The Delegate then issued a determination dated May 11, 2020 (the "Determination") stating that the Employer had contravened the *ESA* and that the Complainant was entitled to compensation for length of service, annual vacation pay, and accrued interest in the amount of $4,984.29. The Delegate also imposed an administrative penalty of $500.00. The total found to be owed was $5,484.29.

5. The Employer appealed the Determination pursuant to section 112 of the *ESA*. The Tribunal's Appeal Decision dismissed the appeal.

6. I have before me the Employer's appeal form and application for reconsideration, his submissions delivered in support, the Determination and its accompanying Reasons, the Appeal Decision, and the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA*. I have not requested responding submissions from the Complainant or the Director.

ISSUES

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

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

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

ARGUMENT

8. The Employer alleges that the appeal process reveals a failure to observe the principles of natural justice. He also asserts that the Tribunal erred in law.

9. The natural justice infringements the Employer alleges may be summarized as follows:

- The Delegate failed to record the proceedings at the hearing of the complaint;
- At the hearing, the Complainant declined to answer further questions after approximately three hours of cross examination by the representative of the Employer, thereby denying the Employer "due process", and the opportunity to fully impeach the evidence of the Complainant;
- The Delegate acted in a manner that was biased when he stated, in his Reasons for the Determination, that the questioning was "overly tedious" and, "in some cases, irrelevant";
- The Delegate denied the Employer "due process" at the hearing when he informed the Employer that it would not be appropriate for him to be present to hear the evidence of his other witnesses if he intended to give his own evidence thereafter;
- The Delegate reversed the burden of proof at the hearing when he required the Employer to demonstrate that the Complainant was not entitled to compensation for length of service.

10. The Employer identifies the following errors of law:

- The Delegate fell into error when he decided that the Complainant was dismissed. The Employer asserts that it was the Complainant who terminated the employment relationship;
- The Delegate acted on a view of the facts which could not reasonably be entertained;
- The Delegate acted without any evidence in reaching certain of his conclusions.

11. The Employer claims that all the above failures should have been reviewed and corrected by the Tribunal on appeal.

12. The Employer also submits that it was an error for the Tribunal to have stated, in the Appeal Decision, that the evidentiary burdens and natural justice requirements in criminal cases were inapplicable to the content of the duty of fairness that must be adhered to in a complaint hearing under the *ESA*.

13. The Employer says further that the Tribunal should not have confirmed the Determination. Instead, he submits that the Appeal Decision should be cancelled. Alternatively, he asks that the matter be referred back to the Tribunal on appeal, for consideration by a different panel.

THE FACTS

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

15. The Employer operates an eyewear sales business. He employed the Complainant as a manager from January 8, 2011, until July 10, 2019.

16. The Complainant alleged that her employment was terminated because the Employer dismissed her. The Employer argued that it was the Complainant who had terminated the employment relationship, and so no compensation for length of service was payable to her.

17. The parties agreed that the relevant discussion between the Employer and the Complainant, which led to termination of the Complainant's employment, occurred on July 10, 2019. They also agreed that, on that day, the Employer told the Complainant she no longer had signing authority on the Employer's bank account for the business, and that the Employer had cancelled her credit card.

18. The parties delivered different versions of many of the other statements they made to each other during their discussion on that day.

19. The Complainant stated that the Employer told her he did not require a manager any longer because he would be assuming the responsibilities of that role moving forward. The Complainant asked the Employer if she was being fired or laid off. The Employer replied: "I could lay you off." The Complainant concluded that this, in fact, was what was happening. The Employer then asked for her keys, and advised her when she could collect her final paycheque and record of employment.

20. The Complainant told the Delegate that she provided no letter of resignation, and that she never stated that she was quitting.

21. The Employer denied that he told the Complainant he was laying her off. He also denied that he told her he no longer needed a manager. He stated that he needed the Complainant to remain as manager as he still had work for her and no one to replace her. He merely felt it necessary to reclaim "managing the money portion of it."

22. The Employer claimed that it was necessary for him to rescind the Complainant's signing authority as, despite his instructions to the contrary, the Complainant continued to cash her bonus payments early, which caused cashflow problems for the business. As for the cancellation of the credit card, the Employer stated that he did this because he was planning to provide the Complainant with a different card. He acknowledged, however, that he did not communicate this plan to the Complainant.

23. The Employer asserted that he asked the Complainant to come in "on Thursday and Friday" but she replied that she "would rather not". The Employer testified that he asked the Complainant directly if she was quitting, and the Complainant said "yes". He then asked her: "So today is your last day?" He said the Complainant responded "yes" to this question as well.

24. A witness presented by the Employer overheard the July 10, 2019 discussion between the parties She stated that the Employer told the Complainant he needed to revoke her signing authority because, as the Delegate put it in his Reasons, "things were not running the way they were supposed to be." The witness stated that the Complainant responded: "That's not fair." The parties then discussed the Complainant's cashing her bonus cheques early. The Complainant stated that "this is not working out", and added that the least the Employer could do was lay the Complainant off, as she had "a family to feed". The

Complainant then gathered her belongings and left. As she was doing so, the Employer told the Complainant she could come back in the days following as he needed her to show him how to do things. The Complainant declined.

25. The witness agreed with the Complainant's statement that she had not said she quit. Nor did the witness hear the Employer use the terms "lay off" or "fire". She acknowledged that she was told the Complainant had not been fired, but she did not know whether this was ever communicated to the Complainant.

26. In his Reasons, the Delegate stated that the Employer bore the burden of proving that the Complainant's employment was terminated because she quit. The Delegate found that the Employer had failed to meet this burden, as the evidence was not clear and unequivocal in support of a conclusion that the Complainant voluntarily exercised her right to quit.

27. The Delegate found that the discussion between the parties on July 10, 2019, led the Complainant to conclude that she was being laid off, and that the Employer did not act to correct what she believed was happening to her. Instead, the Employer asked for the Complainant's keys, asked her to return for the purpose of training him to do aspects of her job, and told her when she might collect her final paycheque and record of employment.

28. When analyzing the proper legal approach, given the facts before him, the Delegate alluded to the decision of the Tribunal in *Burnaby Select Taxi*, BC EST # D091/96. In that decision, the Tribunal identified as attributes of a quit that an employee form a subjective intent to terminate her employment, and that there be objective conduct on the part of the employee which is inconsistent with a continuation of the employment relationship.

29. Here, the Delegate concluded that while the Complainant left the worksite, and did not return, she never formed a subjective intent to quit.

30. Alternatively, the Delegate determined that the Employer's actions to rescind the Complainant's signing authority and cancel her credit card substantially altered the conditions of her employment, thereby terminating her employment pursuant to section 66 of the *ESA*.

31. The Tribunal Member issuing the Appeal Decision determined that the Employer's appeal should be dismissed pursuant to subsection 114(1)(f) of the *ESA* because there was no reasonable prospect that it would succeed.

32. The Tribunal Member rejected the Employer's submission that the Delegate ignored the Employer's evidence on the question whether the Complainant had terminated the employment relationship, noting that the Delegate's Reasons set out what the Employer and his witnesses had said at the hearing, including the Employer's evidence that the Complainant had told him she was quitting.

33. The Tribunal Member stated, correctly, that it was for the Delegate to determine the relevant facts. In this case, the Tribunal Member observed that the Delegate decided the evidence could not support a finding that the Employer had established an intention to quit on the part of the Complainant. The Tribunal Member also concluded that there was nothing in the submissions of the Employer in the appeal

that demonstrated the Delegate had acted without any evidence, or on a view of the facts that was unreasonable.

34. As the Tribunal Member decided that the Employer had shown no reviewable error on the part of the Delegate regarding the quit issue, the Tribunal Member felt it unnecessary to consider the Employer's ground of appeal challenging the Delegate's alternative determination that the Complainant was entitled to compensation for length of service because the Employer had substantially altered a condition of her employment.

35. The Tribunal Member also rejected the Employer's argument that the Complainant had abandoned her employment when she did not return to work after July 10, 2019. The Tribunal Member stated that the Employer did not appear to have raised this as an issue before the Delegate, and so it could not be said that the failure of the Delegate to consider it constituted an error of law.

36. The Tribunal Member made short work of the Employer's contention on appeal that the Delegate had no jurisdiction to deliver the Determination, as he was not a lawyer. The Tribunal Member referred to the provisions of the *ESA* expressly permitting the Director, and his delegates, to investigate and adjudicate complaints.

37. The Employer's appeal included an argument that the Delegate failed to observe the principles of natural justice when he accepted the Complainant's "abdication of responsibility" to continue answering questions after several hours of cross examination during the hearing.

38. The Tribunal Member declined to accept the Employer's argument. Relying on comments made in its previous decision in *Hall*, BC EST # D266/00, the Tribunal Member acknowledged that the Director and his delegates must observe the principles of natural justice when they conduct hearings of complaints. However, the concern of the law is not for "perfect or idealized justice". The duty is discharged if parties are given "a meaningful opportunity to be heard".

ANALYSIS

39. 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.

40. 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.

41. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application

and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

42. 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.

43. 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.

44. 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).

45. It will also weigh heavily against reconsideration if an applicant raises issues for the first time which should, more properly, have been addressed earlier (see *Re Faqiri*, BC EST # RD180/05).

46. 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.

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

48. There are several issues referred to in the Employer's submission on this application which relate to matters that were not raised with the Tribunal during the appeal. As will be obvious from what I have said earlier in this decision, the reconsideration process is not intended to incorporate a review *de novo* of the proceedings before the Delegate, which led to the Determination. Rather, the principal purpose of reconsideration is to correct errors made by the Tribunal during the appeal.

49. It follows that applicants like the Employer cannot expect the Tribunal to accede to a request for a reconsideration when matters the Employer wishes the Tribunal to consider were never identified as issues that needed to be addressed in the appeal.

50. The issues I discern the Employer has raised on this application which he did not ask the Tribunal to consider in the appeal are these:

- The Delegate failed to record the proceedings at the hearing of the complaint;
- The Delegate acted in a manner that was biased when he stated, in his Reasons for the Determination that the questioning was "overly tedious" and, "in some cases, irrelevant";

- The Delegate denied the Employer "due process" at the hearing when he informed the Employer that it would not be appropriate for him to be present to hear the evidence of his other witnesses if he intended to give his own evidence thereafter;
- The Delegate reversed the burden of proof at the hearing when he required the Employer to demonstrate that the Complainant was not entitled to compensation for length of service.

51. For the reasons I have given, it is unnecessary for me to address these specific submissions in order to dispose of the Employer's application for reconsideration. I will, however, make the following comments to address the Employer's concerns, and to respond to a submission the Employer has made in his application that does refer to a statement made in the Appeal Decision that the evidentiary burdens and natural justice requirements in criminal cases were inapplicable to the content of the duty of fairness that must be adhered to in a complaint hearing under the *ESA*.

52. The tenor of the Employer's submissions reveals that he misconceives the nature of proceedings conducted by the Director and the Tribunal under the *ESA*. The Employer interprets these proceedings to be the equivalent of criminal proceedings conducted in our courts. That is incorrect. Administrative decision-makers like the Director and the Tribunal have been created as an alternative to the courts, and so it is an error to assume that proceedings under the *ESA* must incorporate the full array of the evidentiary and other procedural requisites that must be complied with when parties participate in a trial.

53. It is, of course, trite to say that the principles of natural justice must inform the work of the Director and the Tribunal. However, the way those principles are applied must pay heed to the summary nature of the proceedings contemplated by the statute, and the interpretive purposes of fairness and efficiency identified in section 2. As was affirmed in *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03, the *ESA* is designed as a relatively quick and cheap means of resolving employment disputes. Its processes should not be applied in a way that is formal and burdensome.

54. The natural justice protections that are contemplated by the *ESA* are set out in section 77, which reads:

> 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

55. It is, therefore, what is "reasonable" that counts when one decides what is fair. Moreover, as the Tribunal stated in *Re Storey*, BC EST # RD107/14, section 77 is the limit of the procedural protection that is provided in the *ESA*. The application of principles of natural justice should reflect the extent of this protection, and not extend procedural rights "to require the full panoply of procedural and technical rules that might operate in a criminal or civil court proceeding."

56. It follows that there will be a significant degree of flexibility accorded to the Director, and to the Tribunal, in the processes they implement. Many of the decisions relating to the way investigations and hearings are conducted, the way evidence is collected, and the basis on which submissions are considered will involve the exercise of discretionary powers by the Director and his delegates with which the Tribunal will be reluctant to interfere absent a finding that the exercise has been unreasonable.

57. Bearing these comments in mind, it is enough to say, for the purposes of this application, that there was no obligation that required the Delegate to record the proceedings at the hearing. If the Employer wished

the proceedings to be recorded, he could have made a request to the Delegate, which the Delegate could have decided as a matter within his discretion (see *Re Bercasio*, BC EST # D088/09 and BC EST # RD049/10; *Re 0697655 BC Ltd.*, 2019 BCEST 12).

58. The Employer's complaint that the Delegate was biased is also without merit. Proof of real bias, or even the reasonable apprehension thereof, requires evidence that is clear and convincing. Mere suspicion, or an impression of bias, is not enough (see *Re Gallagher (cob Mid Mountain Contracting)*, BC EST # D124/03; *Re Andrew Chengalath*, 2018 BCEST 55 and 2018 BCEST 74).

59. The Delegate's characterizing of the Employer's cross examination of the Complainant as "overly tedious" and, "in some cases, irrelevant" was merely expressive of the Delegate's conclusion that there were elements of the Employer's questioning that were not probative, and so they were unhelpful. The words the Delegate employed fall far short of the standard necessary to establish bias.

60. The assertion that the Delegate denied the Employer "due process" at the hearing when he informed the Employer that it would not be appropriate for him to be present to hear the evidence of his other witnesses if he intended to give his own evidence thereafter is also misconceived. The Employer did, in fact, testify. The admonition delivered by the Delegate was nothing more than a repetition of the adage that if a party listens to the evidence of his own witnesses and then gives testimony himself, the probative value of his evidence may be undermined, particularly where credibility is an issue.

61. The Employer also alleges that the Delegate improperly reversed the burden of proof at the hearing when he required the Employer to demonstrate that the Complainant was not entitled to compensation for length of service. I disagree. Compensation for length of service is a statutory benefit to which employees are entitled based on their length of tenure. In this instance, there was no dispute as to the length of time the Complainant was employed by the Employer. Once that was established, it was for the employer to establish grounds that might disentitle the Complainant to the benefit. The evidentiary burden associated with the analysis was outlined succinctly in *Re Grant Howard*, BC EST # D011/07, at paragraph 75:

> …. It is not necessary for an employee to prove a wrongful dismissal in order to claim payment for length of service compensation under the *Act*. The employee needs only to establish the fact of employment for a term longer than the qualifying period and the fact of termination. The *Act*, in subsection 63(3), allows an employer to discharge the statutory liability for length of service compensation by providing notice, or a combination of notice and compensation, paying compensation or by showing the employee has quit, retire [*sic* retired] or engaged in conduct that provides just cause for termination.

62. The other challenges to the Appeal Decision the Employer raises do flow from the matters raised by the Employer on appeal.

63. The Employer repeats his argument, made in the appeal, that the hearing before the Delegate should have been resolved in his favour because the Complainant declined to answer further questions after approximately three hours of cross examination, thereby denying the Employer "due process", and the opportunity to fully impeach the evidence of the Complainant. The Employer says that he had "every right to cross-examine a party and was under no statutory time-restraint to get to the truth." In support of this contention, the Employer refers to axioms to the effect that cross examination is a fundamental

tool utilized to impeach the evidence of adverse witnesses, and that it is especially helpful in cases where credibility is at issue.

64. I do not disagree with these statements. That said, I also agree with the statements made in the Appeal Decision that the right to cross examine is not unfettered, and that it was within the purview of the Delegate to determine whether the Employer's questioning of the Complainant for over three hours on the narrow issues before him constituted a sufficient opportunity for the Employer to seek to impeach the Complainant's evidence.

65. It is clear from the Delegate's Reasons that the matters of fact that were disputed were painstakingly canvassed by the Delegate, and the Employer has not presented arguments on this application that persuade me the Tribunal fell into error in deciding that the Employer had ample opportunity to present his case and to respond to the Complainant's evidence.

66. On this application the Employer also repeats its argument, maintained since the dispute with the Complainant arose, that her complaint should be dismissed because she resigned. In my view, the Employer's submissions do no more than make an attempt to have the Tribunal second-guess the Delegate's factual findings, his legal analysis flowing from those facts, and the decision of the Tribunal in the appeal that the Employer had not established a legal error in the Determination regarding the point. As I noted earlier, reconsideration is not meant merely to be an opportunity for a disappointed party to have another panel of the Tribunal re-weigh arguments that failed in an appeal, based on the hope that a different result will ensue. The Employer has demonstrated no legal error on the part of the Delegate, or in the Appeal Decision. Repeating arguments that failed to convince earlier cannot result in a different outcome.

67. A similar issue arises relating to the Employer's submissions that the Delegate acted on a view of the facts which could not reasonably be entertained, and that he acted without any evidence in reaching certain of his conclusions.

68. As the Appeal Decision points out, in proceedings under the *ESA*, findings of fact are within the purview of the Director and his delegates. The statute provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact very rarely amount to errors of law. A decision by the Tribunal that such an error has occurred presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, a party will only succeed in challenging a delegate's findings of fact if he establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

69. The stance of the Tribunal on this point is captured in the following excerpt from the Appeal Decision, at paragraph 35:

> The Employer argues that the delegate erred in "ignoring" the Employer's evidence on the question of whether Ms. Martin quit or was "laid off." I find no basis for this argument. The

delegate set out the Employer's evidence, including his testimony that Ms. Martin said that she quit, in the Determination. After considering all of the evidence, including that of the witnesses, the delegate rejected the Employer's argument that Ms. Martin had quit.

70. I agree. The Employer's submissions repeat, in substance, his interpretation of the facts that he argued unsuccessfully before the Delegate, and in the appeal. It is not surprising that the Employer would disagree with the factual conclusions drawn by the Delegate, but that is different from saying the Determination is wrong in law. In my view, the Employer has not established that the factual conclusions of the Delegate were irrational, perverse, or inexplicable, or that the Tribunal's confirmation of the Determination reveals a legal error on this point.

ORDER

71. The Employer's application for reconsideration of 2020 BCEST 106 is denied.

Robert Groves
Member
Employment Standards Tribunal