Citation: Pirate Hockey Ltd. (Re)
2020 BCEST 13

An Application for Reconsideration

- by -

Pirate Hockey Ltd. carrying on business as Clippers Hockey Limited Partnership
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2020/017

DATE OF DECISION: February 20, 2020

DECISION

SUBMISSIONS

Karol Suprynowicz	counsel for Pirate Hockey Ltd. carrying on business as Clippers Hockey Limited Partnership

INTRODUCTION

1. This is an application for reconsideration filed by Pirate Hockey Ltd. carrying on business as Clippers Hockey Limited Partnership (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). The application concerns 2019 BCEST 137, issued on December 24, 2019 (the "Appeal Decision").

2. By way of the Appeal Decision, the Tribunal confirmed a Determination issued on May 9, 2019, against the Applicant ordering it to pay $21,179.92 on account of unpaid wages (including $11,186.63 for section 63 compensation for length of service) and section 88 interest owed to a former employee (the "Complainant"). In addition, and also by way of the Determination, the Applicant was ordered to pay $3,000 reflecting six separate $500 monetary penalties (see section 98 of the *ESA*). Thus, the total amount payable under the Determination is $24,179.92.

3. The statutory deadline for filing this reconsideration application expired on January 23, 2020 (see section 116(2.1) of the *ESA*). The application was filed on January 24, 2020, one day after this deadline expired. Accordingly, the Applicant seeks, under section 109(1)(b) of the *ESA*, a one-day extension of the reconsideration period.

4. In the circumstances of this case, I consider it appropriate to extend the reconsideration application period, but this order has no practical import because, in my view, this application must be dismissed as having no presumptive merit.

THE APPLICATION TO EXTEND THE RECONSIDERATION PERIOD

5. As noted above, the application was filed one day after the reconsideration period expired. It would appear that the Applicant attempted to file its application, by electronic mail, on January 23, 2020, but that its attempted transmission was unsuccessful. The Applicant says that it was not aware of the transmission problem until after the Tribunal's offices closed on January 23. While I am prepared to accept the Applicant's assertion that there were "possible server issues", I should note that it has not been independently verified by any corroborating records. In any event, I will grant a one-day extension under section 109(1)(b).

BACKGROUND FACTS AND PRIOR PROCEEDINGS

6. On May 24, 2018, the Complainant filed a complaint against the Applicant under section 74 of the *ESA* seeking over $20,0000 for unpaid regular wages, commissions, and compensation for length of service. The parties participated in a teleconference hearing before Micah Carmody, a delegate of the Director of

Employment Standards (the "delegate"), on January 30, 2019. The complainant acted on her own behalf and the Applicant was represented by legal counsel (the same counsel who represented the Applicant on appeal and again in this reconsideration application).

7. The Applicant operates the Nanaimo Clippers franchise in the BCHL, a "Junior A" hockey league. The Complainant's evidence was that she had been involved with the Junior A hockey team since early November 2017. On October 10, 2017, the Complainant, through a business corporation, entered into a "General Service Agreement" with "Nanoose Bay Sports Limited Partnership operating as the Nanaimo Clippers Junior A Hockey Club" ("Nanoose Bay"). Under this agreement, which is contained in the section 112(5) record before me, the Complainant (who was described as a "contractor") contracted to provide certain sales and marketing services to Nanoose.

8. The agreement was for a term ending May 31, 2019, although the agreement contained an early termination provision. The Complainant was to be paid a "base fee" of $60,000 per year, paid by way of $2,500 semi-monthly installments (upon being invoiced). Additional compensation included a "17.5% commission on all sales closed on cash contracts" and a vacation allotment described as: "6 weeks off during the term of the contact" to be "scheduled in advance with [Nanoose] and are not to conflict with the operations of the team". The agreement also provided for the reimbursement of the Complainant's "reasonable and necessary expenses".

9. On November 15, 2017, Nanoose transferred its ownership of the hockey club to the Applicant. In late December 2017, the Complainant entered into a new agreement whereby she became the hockey team's business manager at a $30 per hour wage rate, effective January 1, 2018. The Complainant testified that she terminated her new agreement on March 21, 2018, and that her March 2018 invoice had not been paid.

The Determination

10. The delegate addressed several issues in his lengthy (27 single-spaced pages) "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination. First, he determined that the relationship between the Applicant and the Complainant "was functionally one of employment" (page R15) and, that being the case, the *ESA* governed her employment. Second, and based on his interpretation of the parties' written agreement combined with testimony before him, the delegate determined that the Complainant was owed $2,100 on account of unpaid commissions. Third, the delegate determined that the Applicant substantially altered the conditions of the Complainant's employment (see section 66) and, on that basis ordered the Applicant to pay section 63 compensation for length of service based on seven weeks' wages. Fourth, and with respect to the matter of section 63 compensation, the delegate found that the Applicant was not relieved from having to pay section 63 compensation based on its assertion that it had just cause to dismiss the Complainant. Fifth, and with respect to the matter of overtime pay and statutory holiday pay, the delegate determined that the Complainant was not a "manager" as defined in section 1 of the *Employment Standards Regulation*. The delegate awarded her $1,953.90 for unpaid overtime pay, $201.30 for unpaid statutory holiday pay, and $2,099.70 for unpaid vacation pay.

The Appeal Decision

11. The Applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (sections 112(1)(a) and (b) of the *ESA*). In essence, the Applicant argued that the Complainant was not an employee and, in any event, she was never terminated from her employer; rather, she resigned. As for the natural justice allegations, they largely concerned the delegate's findings of fact. The Applicant asserted that the delegate "acted on a view of facts which could not be reasonably entertained"; that the delegate based his decision "on a lot of hearsay evidence"; and that "it does not appear the [delegate] conducted a thorough investigation of the entire matter, or in fact any kind of investigation".

12. I now briefly digress to address this latter assertion regarding the lack of investigation. The delegate did *not* conduct an investigation in this matter. The complaint was the subject of an oral complaint hearing. That being the case, the delegate was obliged to hear and decide the dispute based on the evidence that the *parties* brought forward. In this circumstance, it would have been improper for the delegate to supplement the evidentiary record created by the parties by independently embarking on his own factfinding mission.

13. In the Appeal Decision, the Member reviewed the evidence before the delegate and ultimately concluded that the delegate did not make any errors of law in finding in favour of the Complainant (at para. 55):

> The Delegate did not misinterpret or misapply the *ESA,* nor did he misapply a general principle of law. The Delegate acted based on the evidence before him and his conclusions are reasonably supported by the evidence. The Delegate did not exercise his discretion in a fashion that was wrong in principle. Given these factors, I am satisfied on a balance of probabilities that the Delegate did not commit an error of law in making the Determination.

14. The Member also rejected the Applicant's "natural justice" arguments (at paras. 57 to 59):

> The Appellant was informed of the case to meet and was provided with an opportunity to respond to the allegations by providing evidence to the Delegate. The Appellant was provided with the opportunity to make detailed submissions to the Delegate which addressed all of the issues that were before the Delegate. While the Appellant submitted that the Delegate's conclusion about the lawsuit against the Complainant is a breach of procedural fairness, this evidence did not form any meaningful part of the Delegate's reasoning in the Determination. As noted above, it was well within the Delegate's discretion to conclude that the Appellant had not met the burden to prove that it had cause to dismiss the Complainant.
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> The Appellant has not identified any reasonable basis that the Delegate was biased in favour of the Complainant. That a decision maker has preferred the evidence of one party over another is not by itself evidence of bias. An apprehension of bias must be a reasonable one held by reasonable right-minded persons. (See *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394.) The test is what would an informed person, viewing the matter realistically and practically, and having thought the matter through, think in regards to whether it is more likely than not, whether consciously or unconsciously, that the decision maker would not decide fairly.
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> The Delegate heard evidence from both parties, provided the parties with an opportunity to make submissions on the issues and decided the case based on the evidence before him. When applying

> the applicable legal test for bias above, there is no reasonable basis to think that the Delegate would not (or did not) decide fairly. I am not satisfied on a balance of probabilities that the Delegate failed to observe the principles of natural justice in making the Determination.

15. Accordingly, the Member dismissed the Applicant's appeal and issued an order confirming the Determination.

THE APPLICATION FOR RECONSIDERATION

16. The Applicant maintains that both the delegate and the Tribunal Member erred in law and failed to observe the principles of natural justice. In its submission filed in support of its reconsideration application, the Applicant reiterates many of its arguments that were advanced in the complaint hearing and then again on appeal. Indeed, several of the arguments made and set out in the Applicant's written submission on reconsideration have been reproduced verbatim from the Applicant's written submission filed in its appeal.

17. In particular, the Applicant says that the delegate erred in law and failed to observe the principles of natural justice based on the following assertions:

- "…the [Complainant] was never employed by the [Applicant] save for a short period of time before the new owners purchased the team in November 2017";
- the Applicant was not dismissed, constructively or otherwise; rather, she voluntarily resigned to assume a different position or as a type of pre-emptive strike because she was about to "be caught out on the impropriety of financial compensation from the [Applicant]";
- In any event, the Applicant now maintains that a civil suit filed against the Applicant in the B.C. Supreme Court "is likely to clearly show [the Complainant] perpetrated a fraud on the [Applicant] in stealing money from the liquor sales";
- Further, and with respect to this theft allegation, the Applicant now alleges: "Clearly, there was full evidence now to establish grounds for termination given the investigation that has uncovered some substantial alleged fraud on the part of [the Complainant] for stealing liquor cash proceeds. The [Applicant] say[s], and the facts are, there were grounds for dismissal retroactively." Thus, the Applicant appears to be (but does not expressly state that it is) relying on so-called "after acquired cause" (see *Director of Employment Standards (Black Press)*, BC EST # RD074/17) so as to avoid any obligation to pay the Complainant compensation for length of service.

18. On the other hand, and in my view somewhat confusingly, the Applicant also says:

> Regardless, the question of termination and misconduct is irrelevant to this proceeding as [the Complainant] decided to terminate the contract on their own volition…
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> [The Applicant] did not litigate the issue of the fraud in this proceeding and for the Adjudicator to argue there was insufficient evidence is quite unfair. This argument is before the Supreme Court of British Columbia and is the subject matter of a higher court, yet the Adjudicator seems to have come to the conclusion that there was insufficient evidence. The reason why the evidence was not fulsome in the tribunal hearing is that the main thrust of the [Applicant's] argument is not

> that [the Complainant] was terminated for cause due to the fraud but rather, she was not an employee of the [Applicant] and further, she terminated the contract on her own volition.
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> For the Adjudicator to conclude that the evidence was insufficient on that point was most unfair to the [Applicant] and shows an inherent bias of the Adjudicator.
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> Simply put, the fraudulent nature of [the Complainant] is very much the issue before the Supreme Court of British Columbia and that is the proper forum, not this Tribunal. The [Applicant was] not afforded an opportunity to present their entire case, which is very compelling, as it was something that should be heard by the Supreme Court of British Columbia, not by the Tribunal.
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> An investigation into [the Complainant's] misconduct proceeded after she resigned. Certain conclusions were reached, and the [Applicant] decided to take the matter to the Supreme Court of British Columbia. The Adjudicator should have declined to hear and consider any evidence regarding the allegation that brought about this lawsuit. Making a decision regarding a subsequent lawsuit and making a decision that the lawsuit has no merit is in the [Applicant's] submission, biased and the Adjudicator acted on a view of the facts which could not be reasonably entertained. It is a breach of natural justice…
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> …the [Applicant has] an extensive body of evidence to support that there were very significant liquor sales shortages during the tenure of [the Complainant]…The [Applicant] did not lead this extensive evidence before the tribunal because it would be inappropriate as the proper forum for the allegations of theft are in the Supreme Court of British Columbia. Despite this, the Adjudicator decided to provide his views into the issues before the Supreme Court of British Columbia. He did so despite the fact that he is not anywhere near qualified to do so and simply put, this was not the subject matter of the tribunal hearing. The subject matter in the tribunal hearing was whether or not [the Complainant] was an employee and whether or not she was constructively dismissed.
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> The decision of the Adjudicator is primarily based on a lot of hearsay evidence. It does not appear the Adjudicator conducted a thorough investigation of the entire matter, or in fact any kind of investigation.

19. The Applicant's submission also advances several arguments with respect to the Appeal Decision. The Applicant says that the Member "states conclusions with no explanation of how these conclusions were reached and upon what view of which facts". The Applicant asserts, as a general legal principle, that "one needs to fully explain the rationale behind a conclusion" and then asserts that in the Appeal Decision the Member "simply put forward any findings of fact or law". By way of summary, the Applicant says:

> [The Member] and the Adjudicator have both fallen into error by making their own personal views known on the evidence as to the theft. They have overstepped their authority as they should leave the determination of the theft to the Supreme Court of British Columbia where the higher court has proper jurisdiction. The issue of the theft was not before the tribunal as it would not be relevant to the issues at hand of whether or not [the Complainant] was an employee and whether or not she was constructively dismissed…
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> The [Applicant was] blindsided by the tribunal when the Adjudicator and [the Member] made findings on the chances of success of the theft allegations because quite frankly, the [Applicant was] not afforded the opportunity of providing fulsome evidence to establish what clearly shows a theft of cash from the liquor sales.

> …the award that the Adjudicator awarded is more than what [the Complainant] asked for because [the Complainant] knows full well that she was only employed for a relatively short period of time with the [Applicant]. The award itself was nonsensical.
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> Ultimately this is a case about the tribunal clearly overstepping its bounds and trying to make findings of fact that should be left to the Supreme Court of British Columbia where the issue of the extent of the fraudulent actions of [the Complainant] will be determined on full evidence before the higher court. It's unfortunate that the [Member] and the Adjudicator felt they are able to make determinations of fact when the facts are not fully before them. This is most unfair to the [Applicant] and for that reason alone, the appeal [*sic*] should be allowed.

20. It is important to note that an application for reconsideration is an entirely separate proceeding from an appeal of a determination. A reconsideration is a request to review an appeal decision of the Tribunal (which itself, is not a *de novo* hearing of the original complaint) on the basis that it is tainted by a serious legal error or some other significant procedural flaw. Several of the Applicant's arguments appear to be more focused on the Determination rather than the Appeal Decision. In any event, and by way of summary, the Applicant's reconsideration application appears to be based on the following grounds:

- First, the Applicant says that the Appeal Decision should be set aside because the Member erred in confirming the delegate's finding that there was an employment relationship between the Applicant and the Complainant.
- Second, the Applicant says that even if there were an employment relationship, the Member erred in upholding the delegate's findings that the Complainant did not resign but, rather, was "constructively dismissed" under section 66.
- Third, the Applicant says that the Member erred in upholding the delegates finding that there was no just cause for dismissal. The Applicant's position in this regard is that the issue of "just cause" was not properly before the delegate.
- Fourth, the Applicant says that the Member should have concluded that the delegate's findings of fact were unreasonable given the evidence before him and that the delegate improperly relied on hearsay evidence particularly in determining certain essential factual matters.
- Fifth, and with respect to its "natural justice" ground of appeal, the Applicant says that the Member should have concluded that the delegate's Determination was tainted by "bias" and that, overall, the Member's reasons were legally deficient.

FINDINGS AND ANALYSIS

21. The Tribunal assesses applications for reconsideration in light of the two-stage procedure set out in *Director of Employment Standards*, BC EST # D313/98 (the "*Milan Holdings*" test). At the first stage, the Tribunal will assess whether the application, on its face, should proceed to a more searching assessment (the second stage). Applications will not pass the first stage if they are unjustifiably untimely, concern a preliminary determination made in an appeal proceeding, or where the primary focus of the application is to have the Tribunal simply "re-weigh evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence)." As noted in *Milan Holdings*: "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."

22. In my view, this application does not pass the first stage of the *Milan Holdings* test. In essence, this application simply manifests a disagreement with the Appeal Decision. The Applicant has advanced more or less the same arguments that were argued (and rejected) in its appeal submissions.

23. The delegate determined that there was an employment relationship between the parties. The delegate considered the appropriate legal framework and fully considered the evidence before him touching on this issue. I, like the Member, am unable to conclude that the delegate erred in either his legal or factual analysis. Although certain aspects of the parties' submissions were consistent with the Complainant being an independent contractor, on balance, I agree with both the delegate and the Member that the Complainant was an employee as defined in the *ESA* and the Tribunal's jurisprudence.

24. With respect to the Complainant's section 63 entitlement, I must concede that I am somewhat perplexed by the Applicant's arguments regarding this aspect of the Determination. Compensation for length of service is a form of deferred "wages" that is presumptively payable to an employee when the employment relationship ends. However, section 63 compensation is not payable in certain circumstances, such as where proper written notice is given in lieu of payment, the employee is dismissed with just cause, or if the employee voluntarily resigns (see section 63(3) of the *ESA*).

25. In this case, the evidence before the delegate was that the Complainant resigned her position but that this resignation was triggered by unilateral changes made regarding her working hours, responsibilities, and compensation (see delegate's reasons, pages R19 – R21). Section 66 provides that if "conditions of employment" (defined in section 1) are "substantially altered", that circumstance may lead to a determination that the employee was dismissed. The Applicant continues to press the point that the Complainant resigned – and, on its face, that is accurate – but the Applicant's submissions do not substantively address the delegate's finding that a deemed termination under section 66 occurred. The Applicant says "there never was a termination" but, of course, while the Applicant may not have expressly terminated the Complainant, there was nonetheless a *deemed* termination under section 66. In this latter regard, the delegate considered various aspects of the Complainant's duties and responsibilities and determined that they had been unilaterally and substantially altered. I am unable to conclude that the delegate erred in his section 66 analysis. Thus, in law, there was a termination and that being the case, the Complainant was presumptively entitled to section 63 compensation.

26. Given that the Complainant was dismissed, it was then open to the Applicant to argue that it had just cause for dismissal (thereby avoiding an obligation to pay section 63 compensation). Although the Applicant presented evidence and argument during the complaint hearing that there was cause for dismissal (see delegate's reasons, pages R21 – R22), it now asserts that whether or not there was cause is "irrelevant" because the Complainant resigned. But, of course, by reason of section 66, she was, as a matter of law, dismissed.

27. The Applicant now says that only the B.C. Supreme Court can hear and decide the cause issue. This submission is fundamentally misconceived. The Applicant put cause in issue and the delegate was obliged to consider the evidence before him on that score. If the Applicant says that it never argued cause, then

the Complainant was entitled to compensation for length of service. If it did argue that there was cause (as appears to be the case), the delegate was required to evaluate that evidence (deficient and incomplete as it may have been) and make a decision. I entirely agree with the delegate that the evidence tendered at the complaint hearing fell well short of establishing just cause for dismissal. Had the Applicant wished to supplement its evidence regarding cause, it might have applied under section 112(1)(c) to introduce new evidence on appeal – but it did not do so. Even if it had applied to introduce new evidence on appeal, that evidence might well have been inadmissible in light of the stringent criteria governing the admissibility of new evidence set out in *Davies et al.*, BC EST # D171/03.

28. The Applicant's suggestion that cause can only be determined by the B.C. Supreme Court wholly ignores the fact that the *ESA* provides that section 63 compensation is not payable if there is just cause for dismissal. Since the Applicant apparently put cause in issue, the delegate was required to hear and decide that issue. The Applicant's assertion that the delegate was "biased" because he turned his mind to an issue that he was required to adjudicate is, in my view, wholly untenable. If the Applicant says that it never intended to argue cause (and did not do so), it follows that the Complainant was indisputably entitled to section 63 compensation based on her continuous service as calculated in accordance with section 97 (I note the Applicant never challenged, on appeal or in this application, the delegate's section 97 declaration).

29. I understand that the Applicant has now filed a civil action in the B.C. Supreme Court where it has put cause in issue. It will, of course, fall to that court to determine if the Applicant is foreclosed from arguing cause based on the doctrine of issue estoppel. However, insofar as the proceedings under the *ESA* are concerned, the delegate did not err in addressing cause, given that the Applicant seemingly put the matter in issue by presenting evidence regarding the Complainant's alleged misconduct.

30. Finally, I see no basis for concluding that there was any bias on the part of the delegate or the Member, or that in any other respect, there was a breach of the principles of natural justice. In this regard, I adopt the Member's analysis in the Appeal Decision at paras. 56 – 59.

31. I am unable to conclude that the Member's reasons for decision are legally deficient (see Canada (*Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65), as they more than adequately set out the issues in dispute and the Member's analysis and findings with respect to the relevant evidence and applicable legal principles.

ORDER

32. The application for reconsideration of the Appeal Decision is dismissed. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal