Citation: The Director of Employment Standards (Re)
2020 BCEST 30

An Application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- 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
Robert E. Groves
Carol L. Roberts

FILE No.: 2019/212

DATE OF DECISION: April 6, 2020

DECISION

SUBMISSIONS

Laurel Courtenay — counsel for the Director of Employment Standards

INTRODUCTION

1. This is an application by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2019 BCEST 131, issued by the Tribunal on November 28, 2019 (the "Appeal Decision"). In the Appeal Decision, the Tribunal varied a Determination issued by the Director of Employment Standards on May 23, 2019, by cancelling an overtime pay award issued in favour of one of the thirteen employees who were awarded wages under the Determination. In all other respects, the Determination was confirmed.

2. Although invited to do so, the respondent parties did not file any submissions in reply to the Director's application.

THE MILAN HOLDINGS TEST

3. Section 116 of the *ESA* confers an express discretionary reconsideration power on the Tribunal. (see *Director of Employment Standards*, BC EST # D313/98).

4. The Director submits that the Appeal Decision should be reconsidered because this application provides the Tribunal with an opportunity to "clarify jurisdictional boundaries between the Director and the Tribunal" which has important implications for future cases. The Director contends that the Tribunal "over-stepped its role on appeal and usurped the jurisdiction of the Director when it assessed and weighed the evidence, as a matter of first impression, regarding whether [the respondent employee] was a high technology professional" as defined in section 37.8(1) of the *Employment Standards Regulation* (the "*Regulation*").

5. Further, and with respect to the underlying merits of the application, the Director says that the Tribunal Member failed to conduct a proper analysis of the relevant definition contained in section 37.8(1) of the *Regulation*, the evidence regarding the respondent employee's actual job duties (to be contrasted with the duties outlined in his job description), or which particular subsection of section 37.8(1) applied in this case.

6. In our view, this application raises a serious question regarding the interpretation and application of an exemption provision in the *Regulation* and, in addition, raises an issue regarding how the Tribunal should proceed with respect to an issue, identified by the Tribunal on appeal, that was not addressed in a determination. We will now turn to the merits of the application.

PRIOR PROCEEDINGS

7. Several former employees of OE Construction Solutions Ltd., carrying on business as Optimal Efficiency (the "Employer"), filed unpaid wage complaints with the Employment Standards Branch. On May 23, 2019, following an investigation, the Director determined that the Employer had contravened seven separate sections of the *ESA* and ordered the Employer to pay $112,645.33 representing wages and interest owed to thirteen former employees. The Director determined that one of the thirteen employees (the "Employee") was entitled to unpaid overtime pay. This Employee's overtime pay award underlies the Director's application for reconsideration.

8. The Employer appealed the Determination arguing, among other things, that the Employee was a "high technology professional", and thus exempt from the overtime pay provisions of the *ESA*. The Employer did not raise this argument during the Director's investigation and the issue was not addressed in the Determination.

9. On October 4, 2019, the Tribunal issued reasons for decision (2019 BCEST 106 – the "Initial Decision"), dismissing the appeal under section 114(1)(f) of the *ESA* [appeal has no reasonable prospect of succeeding], save for one issue, and otherwise confirming the Determination. The Tribunal Member was not prepared to summarily dismiss the Employer's "high technology professional" argument and, accordingly, requested submissions from the parties regarding this matter.

10. The Director's submission did not specifically address whether the Employee was a "high technology professional". The Director stated that the Employer never argued during the investigation that an overtime exemption applied, even though it was given a reasonable opportunity to do so. Further, the Director submitted that the Employer's exemption argument relied on inadmissible "new evidence". Alternatively, the Director suggested that the overtime exemption issue should be referred back to the Director "for a full investigation on the discrete issue of whether or not [the Employee] falls within the definition of high technology professional under the Act and whether or not [the Employer] falls within the definition of high technology company".

11. In the Appeal Decision, the Member concluded that the Director should have considered whether the Employee was exempted from the overtime pay provisions of the *ESA* as a "high technology professional", notwithstanding that the Employer never raised this issue during the investigation. The Tribunal Member found that all of the evidence necessary to identify and decide the issue was before the Director when the Determination was made and that "the Director has the primary statutory obligation of ensuring compliance with the *ESA*" (para. 31). Accordingly, he found the Director erred in not considering and deciding whether the "high technology professional" overtime exemption applied in this case.

12. The Member concluded that the section 112(5) record before him contained sufficient information allowing him to determine whether the Employee was a "high technology professional". The Member held that the Employee was a "high technology professional", and thus exempted from the *ESA*'s overtime provisions. The Member cancelled the Employee's overtime pay award.

THE DIRECTOR'S POSITION ON RECONSIDERATION

13. The Director notes that as a general principle, the Tribunal does not hear and decide matters that are raised for the first time on appeal. Nevertheless, the Director concedes that in the circumstances of this case, the overtime exemption issue was properly before the Tribunal and that "the Director's failure to investigate and adjudicate this issue [i.e., whether an overtime exemption applied] was in error". However, the Director says that rather than deciding whether the exemption applied, the Tribunal Member should have referred this issue back to the Director to investigate and determine.

FINDINGS AND ANALYSIS

14. In the Initial Decision, the Member observed (at para. 43) that a "high technology professional" had to be employed by a "high technology company" in order to meet the former definition. However, we do not read the former definition as requiring employment with a "high technology company". Although section 37.8(1) of the *Regulation* contains a definition of a "high technology company", that definition is only relevant if such an employer has entered into an averaging agreement with an employee who is not a "high technology professional" (see sections 37.8(2) and (3) of the *Regulation*). Thus, whether the Employer was a "high technology company" is not relevant here.

15. Generally speaking, if the Tribunal finds that the Director failed to address a matter that should have been considered during the investigation, and dealt with in the resulting Determination, the Tribunal will cancel or vary the determination to the extent necessary and refer the matter back to the Director. A section 115(1)(b) referral back order allows the Director to conduct a needed further investigation, and to receive any additional submissions from the parties that may be required in order to properly consider the matter and make a determination.

16. However, we do not accept the Director's submission that the Tribunal *must* refer a matter back to the Director in every instance where it sets aside or varies a determination because the Director failed to properly address a matter that should have been considered. It may not be necessary to refer a matter back where, for example, the Tribunal has before it all of the relevant facts and argument and is in as good a position as the Director to decide the matter. Accordingly, we do not agree that the Tribunal Member necessarily "usurped the jurisdiction" of the Director when he determined, as a matter of first instance, if the Employee was a "high technology professional".

17. The Member concluded that "all of the evidence necessary to identify and…decide this [overtime exemption] issue is included in the record" (Appeal Decision, para. 22). Had there been a sufficient evidentiary record before him, it may well have been appropriate for the Member to decide this issue. However, we find the Member erred in determining that the record was sufficiently complete so as to allow him to decide the overtime exemption issue. In this regard, we accept the Director's submission that the determination of this question, in this instance, could not be properly made based solely on evidence such as job titles and job descriptions (which evidence was contained in the section 112(5) record). Rather, determining the exemption issue also required a consideration of the Employee's actual work activities, and there was no such evidence in the record. Since the Director never investigated whether the Employee was a "high technology professional", relevant evidence touching on this issue was not included in the record.

18. As for the sufficiency of the Member's reasons on this issue, we agree with the Director that the Member did not adequately explain why the Employee met the definition of "high technology professional" set out in section 37.8(1) of the *Regulation*. This provision identifies several distinct categories of employees who qualify as "high technology professionals". The Appeal Decision does not indicate which category applied to the Employee, nor does it summarize the evidence that justified placing the Employee into any particular category.

19. Accordingly, we find the Appeal Decision must be reconsidered to the extent it determined that the Employee was a "high technology professional", and therefore disentitled to the overtime pay under the *ESA*. In the circumstances, we consider it appropriate to refer this question back to the Director.

20. Although we have concluded that the Member should not have decided the exemption issue in this case, since the requisite evidentiary record was deficient, we nonetheless generally endorse his reasons as to why this issue was properly before the Tribunal on appeal, and why the Director should have turned his mind to this issue during his initial investigation.

ORDER

21. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is varied such that the issue of whether the Employee is a "high technology professional" as defined in section 37.8(1) of the *Regulation*, is referred back to the Director.

Kenneth Wm. Thornicroft **Panel Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**	**Carol L. Roberts** **Member** **Employment Standards Tribunal**