Employment Standards TRIBUNAL

Citation: J.E. Sellors Services (2018) Ltd. (Re)
2020 BCEST 53

An Application for Reconsideration

- by -

J.E. Sellors Services (2018) Ltd.

- 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: Robert E. Groves

FILE No.: 2020/067

DATE OF DECISION: May 28, 2020

DECISION

SUBMISSIONS

Jeremy Sellors — on behalf of J.E. Sellors Services (2018) Ltd.

OVERVIEW

1. J. E. Sellors Services (2018) Ltd. (the "Applicant") seeks a reconsideration of a decision of the Tribunal dated April 6, 2020 and referenced as 2020 BCEST 27 (the "Appeal Decision"). The application is brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. These proceedings began with a complaint delivered to the Employment Standards Branch by Michael Rieveley (the "Complainant"), a former employee of the Applicant. The Complainant alleged that the Applicant had contravened the *ESA* when it made unauthorized deductions from his wages and failed to provide him with the requisite vacation pay.

3. In a determination issued on November 6, 2019 (the "Determination"), a delegate (the "Delegate") of the Director of Employment Standards (the "Director") allowed the complaint and ordered the Applicant to pay wages, vacation pay, and accrued interest in the sum of $2,266.80. The Delegate also imposed two $500.00 administrative penalties. The total found to be owed was, therefore, $3,266.80.

4. The Applicant appealed the Determination pursuant to section 112 of the *ESA.* However, it delivered its appeal materials late. In the Appeal Decision, the Tribunal declined to exercise its discretion to grant an extension of time for the filing of the appeal, and so it confirmed the Determination.

5. I have before me the Applicant'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 find that I can decide the application without the need to burden the Employer and the Director with a request for submissions.

FACTS

6. Absent any statements I may make to the contrary, I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is but a summary of the facts I believe are most salient.

7. The Applicant operates a logging business. The Complainant was employed as a logging truck driver in November and December of 2018, during which period he was paid a percentage of the loads he delivered to a local mill.

8. The complaint the Complainant delivered to the Branch alleged that the Applicant had calculated the percentage rate on loads that was payable to the Complainant at a rate that was lower than the parties had agreed upon. During the course of her investigation the Delegate determined this aspect of their dispute in favour of the Applicant.

9. The Complainant also claimed that vacation pay was owed. The Applicant did not dispute that this was so.

10. The contentious part of the complaint involved the Complainant's assertion that the Applicant had made deductions from his wages that were business costs, contrary to section 21 of the *ESA,* which reads:

> **Deductions**
>
> **21** (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.
>
> (2) An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.
>
> (3) Money required to be paid contrary to subsection (2) is deemed to be wages, whether or not the money is paid out of an employee's gratuities, and this Act applies to the recovery of those wages.

11. The dispute between the parties arose from the Complainant's delivering loads to the mill which were overweight, resulting in the imposition of overweight adjustments or fines, the cost of which the Applicant deducted from the Complainant's wages.

12. The Complainant asserted that the problem with overweight loads was due to the Applicant's having installed defective scales in its trucks.

13. The Applicant contended that the Complainant was responsible for the payment of the fines because he had initialed a letter form of employment agreement which stated that it was a driver's responsibility to avoid overloads, and so "overweight fines will be borne entirely by driver going forward."

14. The Applicant's position was that fines were levied against the truck, lowering the gross remuneration paid for the overweight load. Since the Complainant's wages were based on a percentage of the gross amounts paid for the load, after fines were deducted, there were no deductions to wages made in respect of the Complainant.

15. However, in reviewing the financial records provided by the Applicant, the Delegate noted that they did not reveal a calculation of the amounts paid to the Complainant for wages that was consistent with the Applicant's explanation. Instead, the records revealed that the full amount of the overweight fines were deducted from the Complainant's earnings after his wage percentage was calculated on the totals for the loads, which in many cases resulted in his earnings being placed into the negative. For the Delegate, this meant that the fines were deducted from the Complainant's wages, and not from the gross remuneration paid for loads. The Delegate concluded as follows, at R8:

> Section 21 of the Act prohibits an employer from passing this cost on to the employees. An employer must not, directly or indirectly, withhold, deduct or offset any employee's earnings for any reason without their written authorization. While the Employer argues that Mr. Rieveley's initials on the July 6 letter constitute a written authorization, I find that initialing the form does not constitute an authorization from Mr. Rieveley to deduct the fines from his wages. I further find that the fines are business costs which may not be passed on to Mr. Rieveley. This type of deduction is a contravention of section 21(2) of the Act.

16. The deadline for the filing of the Applicant's appeal was December 16, 2019. On December 17, 2019, the Tribunal received an email cover message and attached appeal form from the Applicant. The cover message advised that the Applicant had tried to submit its appeal, but it was too large and so it was being "kicked back". It stated further that the Applicant would "send all documentation through the mail."

17. The Tribunal responded later on December 17, informing the Applicant that while the size of email attachments sent to the Tribunal were limited, the Applicant could submit multiple emails if necessary. The Tribunal also confirmed that the Applicant had delivered its appeal late and referred the Applicant to the Tribunal's website for information as to how it might request an extension of the appeal period.

18. On December 23, 2019, the Tribunal wrote to the Applicant seeking written reasons for the appeal, copies of the Determination and the Delegate's Reasons, and a written request for an extension to the statutory appeal period. The Applicant complied with these directions some days later.

19. On January 3, 2020, the Tribunal wrote to the parties, including the Applicant, advising that the appeal had been filed and that the Applicant was requesting an extension of the appeal period. Among other things stated in that correspondence, the Tribunal informed the Applicant that it must, in support of its request for an extension, provide written reasons and argument demonstrating a strong *prima facie* case for the appeal, and a reasonable and credible explanation why the Applicant could not file a complete appeal before the appeal period expired. The Tribunal set a deadline of January 31, 2020, for the receipt of these written materials. The Applicant did not respond to these directions.

20. The Tribunal declined to extend the time for the delivery of the appeal. It then dismissed the appeal and confirmed the Determination.

21. On the issue whether the appeal period should be extended, the Tribunal alluded to subsection 109(1)(b) of the *ESA*, which enables the Tribunal to exercise a discretion to extend appeal deadlines. The Tribunal also referred to its oft-cited decision in *Niemisto*, BC EST # D099/96, which delineated criteria to be considered when the Tribunal determines whether the discretion should be exercised in favour of an extension, including:

- there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- there has been a genuine and on-going bona fide intention to appeal a determination;
- the respondent party as well as the Director must have been made aware of this intention;
- the respondent party will not be unduly prejudiced by the granting of an extension; and
- there is a strong *prima facie* case in favour of the appellant.

22. The Appeal Decision notes that the Applicant provided no explanation why it failed to deliver any appeal materials prior to the expiry of the statutory appeal period. There was also no information submitted that might have supported a conclusion that the Applicant demonstrated a genuine and on-going *bona fide* intention to appeal before the appeal period expired, that it had made the Complainant and the Director aware of this intention, or that the Complainant would not be prejudiced by the granting of an extension.

23. Moreover, the Tribunal concluded that the Applicant had presented no arguments establishing a strong *prima facie* case in support of a successful appeal.

24. The Applicant's appeal form stated as grounds of appeal that the Delegate erred in law and failed to observe the principles of natural justice.

25. The Tribunal decided that the Complainant's initialing terms of employment making him responsible for the payment of overweight fines could not justify the deduction of the amounts of the fines from the Complainant's wages in contravention of the *ESA*. Accordingly, the Delegate committed no error in law.

26. The Tribunal also determined that the Applicant had submitted nothing in support of its assertion that the Delegate had acted in breach of the principles of natural justice.

ISSUES

27. 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?

DISCUSSION

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

29. 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.

30. 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.

31. 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.

32. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the 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.

33. 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).

34. 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.

35. I have decided that the Applicant's application must be dismissed because I do not discern the Applicant has raised any questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that they warrant a reconsideration.

36. An argument advanced by the Applicant for the first time on this application for reconsideration is that the Delegate acted in a manner suggestive of bias during settlement discussions involving the parties prior to the issuance of the Determination.

37. An allegation of bias against a decision-maker is a serious matter. It is trite to say that such an allegation should never be made on speculation alone. Instead, there must be evidence that is sufficient to create an apprehension in a reasonable person that the decision-maker did not act impartially (see *Re Zadehmoghadami (cob E-Hot Wired Computers)*, BC EST # D171/05; and *Re Dang*, BC EST # D184/05).

38. Here, the Applicant's allegation relates to settlement negotiations between the parties. The Applicant suggests that the Delegate acted improperly by advising the Applicant she had delivered a September 11, 2019, offer to the Complainant when the Delegate's notes do not clearly show that such a communication to the Complainant occurred.

39. I reject the Applicant's assertion on this point. First, the Delegate's notes do not conclusively establish that she failed to share the offer with the Complainant. To the contrary, they explicitly state that she did so, even if the date on which that was done may be said to be unclear. Moreover, there is a letter in the record dated September 20, 2019, from the Delegate to the Applicant stating that the offer was delivered to the Complainant, and that it was rejected by him. The documents in the record to which I have referred were provided to the Complainant during the appeal proceedings. The Complainant has not indicated that anything in the documentary record is inaccurate or incomplete.

40. Of more importance is the fact that this question has been raised by the Applicant for the first time on this application for reconsideration. The record was available to the Applicant during the appeal proceedings. The issue should have been addressed then. Quite simply, it is too late for the issue to be raised now.

41. Finally, the issue relates to settlement discussions. It has nothing to do with the validity of the conclusions reached in the Determination. Settlement discussions are to be encouraged, and it is axiomatic that they are less likely to be productive unless the parties understand that the communications generated are without prejudice to the binding decision that may be issued should the negotiations be unsuccessful.

42. The Applicant also takes issue with the Delegate's imposition of a $500.00 administrative penalty due to the Applicant's failure to pay the Complainant all his wages within six days after he terminated his employment, contrary to subsection 18(2) of the *ESA*. The Delegate found that the Complainant quit his employment on December 18, 2018. The Applicant contends that December 18 was the last hauling day for all drivers before the Christmas break, and their expected return to work on January 2, 2019. The Complainant did not return on January 2, and the Applicant says it did not become aware that the Complainant had terminated his employment until it received his demand for payment later in February 2019.

43. The inference to be drawn from the Applicant's submission is that it could not comply with the provisions of subsection 18(2) because it was not aware the Complainant had quit until after the six days period had expired. I cannot accept this argument. The fact is, the deductions for the overweight fines should never have been made in the first place, and even after the Applicant learned that the Complainant had quit it declined to make him financially whole. The statute is clear that all wages owing to an employee must be paid within six days after the employee quits. The Applicant did not do that. I see no reason to doubt the outcome set out in the Appeal Decision confirming the Delegate's finding that the administrative penalty was payable.

44. The Applicant challenges the Delegate's finding of fact that the Applicant deducted the overweight fines from the remuneration percentage payable to the Complainant for each load delivered, and not from the gross remuneration for a load, as the Applicant contended during the Delegate's investigation of the complaint.

45. The appellate jurisdiction of the Tribunal under section 112 of the *ESA* does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)* (1998) 62 BCLR (3d) 354; *Delsom Estates Ltd. v. Assessor of Area #11 – Richmond/Delta*, [2000] BCJ No 331).

46. In this case, the Delegate's finding of fact was derived from financial spreadsheet information prepared by the Applicant itself. The analysis of the information performed by the Delegate was clear and reasonable. The Applicant provides no information that would support a conclusion the Delegate's finding was perverse or inexplicable. Rather, the Applicant asserts that the Delegate's interpretation of the evidence was simply wrong, and so too, therefore, the Tribunal's confirmation of it in the Appeal Decision. Such a posture on the part of the Applicant, standing alone, is insufficient to warrant my interfering with the Tribunal's conclusion set out in the Appeal Decision.

47. The Applicant queries that the Delegate did not contact the Applicant after she issued her Determination on November 6, 2019. I am uncertain as to the point the Applicant is seeking to make here. There would be no reason for the Delegate to contact the Applicant. After she issued her Determination her work was done.

48. The Applicant repeats some of the information it provided during the appeal proceedings. It states that it forwarded its appeal form to the Tribunal via email, with an attachment, but the email was not received until December 17, 2019. It says further that the receipt was delayed due to issues relating to email capacity at the Tribunal. It advises that its material was re-submitted and received on December 27, 2019.

49. This is the only discussion in the Applicant's submission that directly relates to the focus of the Appeal Decision – whether the time period for the appeal should be extended. Yet, the Applicant's submission merely re-states facts which are not disputed, and even if it could be said that the Applicant at least made an attempt to deliver its appeal within the stipulated time period, the submission does not offer answers to the questions that concerned the Tribunal relating to the failure of the Applicant to address, convincingly, the *Niemisto* criteria the Tribunal must consider when deciding whether an extension should be granted.

50. An application for reconsideration under section 116 of the *ESA*, like an appeal, is an exercise in error correction. The burden is on an applicant to establish that a decision of the Tribunal on appeal exhibits reviewable error. For the reasons I have set out, I am of the view that the Applicant has failed to meet that burden.

51. The Applicant has requested a hearing. It follows from what I have said that I have decided a hearing would serve no useful purpose.

ORDER

52. The Applicant's application for reconsideration is denied.

Robert E. Groves
Member
Employment Standards Tribunal