Citation: Plaza Premium Lounge B.C. Ltd. (Re)
2020 BCEST 87

An appeal

- by -

Plaza Premium Lounge B.C. Ltd.
(the "Employer")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2020/084

DATE OF DECISION: July 13, 2020

DECISION

SUBMISSIONS

Ryan Savage — counsel for Plaza Premium Lounge B.C. Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("the *ESA*"), Plaza Premium Lounge B.C. Ltd. (the "Employer") has filed an appeal of a determination issued by the Director of Employment Standards ("the Director") on April 23, 2020 (the "Determination").

2. On March 9, 2020, the Employer filed an application, pursuant to section 72 of the *ESA*, for a variance of the payday requirements set out in section 17 of the *ESA*. The Director declined to grant the variance.

3. The Employer appeals from that decision contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

4. The Tribunal provided the record to the Employer and sought submissions on the completeness of that record. The Tribunal received no objections to the completeness of the record.

5. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Director.

6. This decision is based on the appeal submissions, the section 112(5) record that was before the Director at the time the decision was made, and the Reasons for the Determination.

FACTS

7. The Employer is part of a group of companies that operate airport lounges worldwide. It sought a variance of the payday requirements with respect to several lounges it operates inside the terminals of the Vancouver International Airport.

8. As part of its application, the Employer provided a list of 184 employees who were employed as of the date of the application. However, since that date, the Employer temporarily closed its lounges and laid off its employees in response to the Covid-19 pandemic. Of the 184 employees on the list, 114 agreed with the variance.

9. The Employer manually processes payroll for the Vancouver employees from its Hong Kong head office. It informed the Director that, because the payroll was processed in Hong Kong, the Employer was required to "estimate hours of work, which often resulted in errors and miscalculations." In order to resolve that problem, the Employer sought a variance to extend the deadline by which it must pay wages by two days – i.e., within 10 days after the end of each pay period rather than the 8 days prescribed by section 17 of the *ESA*.

10. The Employer contended that the variance should be granted because the extra time would allow it to pay employees more frequently than it does now (bi-weekly rather than semi-monthly) and to pay them for actual hours worked rather than estimates. The Employer further contended that the variance would assist it in harmonizing the Employer's payroll system in British Columbia with its payroll in other Canadian jurisdictions in which it operates.

11. The Director's delegate notes that he spoke with counsel for the Employer about the Employer's application and informed him that variances under section 17 were only granted in exceptional circumstances where there is a compelling benefit for the affected employees, and that he could not identify such a benefit in the application.

12. The Employer nevertheless sought the variance, suggesting that, with the benefit of the variance, the Employer would be able to implement a payroll system that would see the affected staff be paid more often and on actual hours worked, and that the payroll system would be more efficient and effective.

13. In his decision to deny the application, the delegate found it unnecessary to make a finding with respect to whether the majority of the employees have given their consent to the application. He determined that, even if each of the 114 employees who had been named in the application confirmed their understanding and agreement to the variance, he would deny the application as being inconsistent with the purposes of the *ESA*.

14. The delegate noted that the two reasons advanced for the variance - that being it would prevent mistakes on the employees' pay cheques and that it would allow the employees to receive more frequent pay cheques – did not meet the requirements of the *ESA*. The delegate wrote that the purpose of a variance was not to correct an employer's inability to comply with the minimum standards set out in the *ESA*. The delegate found that the fact that the Employer's payroll department was located in Hong Kong was not a justification for failing to comply with fundamental employment requirements established in British Columbia.

15. The delegate also found that if the variance enabled the Employer to pay its employees bi-weekly rather than semi-monthly, any benefit was "trivial." He noted that it was not necessary for the Employer to obtain a variance in order to pay employees bi-weekly; that the *ESA* already permitted wage payments bi-weekly or bi-monthly: "…it can hardly be said that offering one [method of payment] over the other is an adequate *quid pro quo* for employees to forgo receiving a timely pay cheque."

16. Finally, the delegate noted that while British Columbia might have more stringent payday requirements than other Canadian jurisdictions, and that it might be inefficient and inconvenient for the Employer to comply with different rules in each jurisdiction, that was also not a basis to grant the variance. The delegate noted that the regulation of labour was within the jurisdiction of the province and that other international companies with head offices in different parts of the world were able to pay their employees accurately and within the 8 days prescribed by the *ESA*.

ISSUE

17. The issues on appeal are whether the delegate 1) erred in law in finding that the Employer's application for a variance did not meet the requirements of section 73(1)(b) of the *ESA;* and 2) failed to observe the principles of natural justice.

ARGUMENT

18. The Employer submits that the delegate erred in informing it that "the Director grants variances to section 17 of the Act only in exceptional circumstances where there is a compelling benefit to the affected employees." The Employer contends that this is not the test for granting variances and there is nothing in the *ESA* that permits the delegate to impose a different and more onerous test, that of a "compelling benefit", for the approval of variance requests.

19. The Employer further contends that the delegate erred by determining himself whether there was a "compelling benefit" to employees without actually communicating with any of its employees. The Employer argues that there are two separate factors to be assessed in granting a variance. Firstly, he submits, a majority of the employees who will be affected by the variance must be aware of its effect and voluntarily approve of the application. Counsel says that if this condition is met, then the Director may issue a variance as long as the request is not inconsistent with the purposes of the *ESA*.

20. The Employer argues that the delegate erred in relying solely on the purpose outlined in section 2 (b) of the *ESA* in making his determination. The Employer argues that this purpose – "the standard of fair treatment" - is not the same as the subjective requirement improperly imposed by the delegate – that of "compelling benefit."

21. The Employer contends that the proposed variance will allow staff to be paid more often, and that the delegate provided no valid reason why the proposed variance is inconsistent with the purposes of the *ESA*.

22. The Employer further asserts that the delegate's failure to contact any of the employees identified in the joint application in order to properly assess both factors outlined in section 73(1) is a denial of natural justice.

ANALYSIS

23. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

24. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

25. Section 72 of the *ESA* provides that an employer and the employer's employees may join in a written application to the director for a variance of a number of enumerated provisions of the legislation. Section 17 (paydays) is one of those enumerated provisions.

26. Section 17 requires that an employer pay to an employee all wages earned by the employee in a pay period at least semimonthly and within 8 days after the end of the pay period.

27. The purpose of the variance application was to permit the Employer to pay the employees within 10 days after the end of the pay period – that is, to vary the minimum standard prescribed in the *ESA*.

28. Section 73(1) gives the Director the discretion to vary a time period or a requirement specified in the application <u>if the director is satisfied that</u>

a) a majority of the employees who will be affected by the variance are aware of its effects and approve of the application, <u>and</u>

b) the variance is not inconsistent with the purposes of this Act set out in section 2.

(my emphasis)

29. Section 2 of the *ESA* sets out the purposes of the legislation. It includes ensuring that employees in British Columbia receive at least basic standards of compensation and conditions of employment (section 2(a)) and promotes the fair treatment of employees and employers (section 2(b)).

Denial of natural justice

30. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. There is no evidence the Employer, who sought the variance with the agreement of the 114 employees, was denied a right to be heard. The delegate and counsel for the Employer spoke by telephone, and the Employer was given the opportunity to make written submissions on why the application should be granted. I find that the application, along with the reasons for making it, was fully considered by the delegate.

31. I find no basis for the Employer's argument that, in not contacting all 114 employees who signed the joint application, the delegate failed to observe the principles of natural justice.

32. The use of the word "and" in section 73(1) signifies a conjunctive list, which means that each of the two conditions in the list must be satisfied. In other words, the director has the discretion to grant a variance only if he is satisfied that the conditions in both paragraphs have been met.

33. Even if all of the employees were aware of the variance and approved the application, that in itself is not sufficient to the granting of the application. In *Sun Peaks Mountain Resort Association*, BC EST # D434/01, the Tribunal found that the Director was under no obligation to satisfy himself that paragraph 73(1)(a) is met before he considers whether or not the variance is not inconsistent with the *ESA*.

Error of Law

34. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

35. Section 73 grants the Director broad discretionary authority to approve or deny a variance application. (see *Victoria Confederation of Parent Advisory Councils*, BC EST # D190/03)

36. In *Jody L Goudreau et.al.*, BC EST # D066/98, the Tribunal recognized the Director's role in enforcing minimum standards of employment and "is deemed to have a specialized knowledge of what is appropriate in the context of carrying out that mandate."

37. The Tribunal will only interfere with the Director's exercise of discretion in exceptional and very limited circumstances:

> The Tribunal will not interfere with [the] exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > ...a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. *Associated Provincial Picture Houses v. Wednesbury Cor*p. [1948] 1

> K.B. 223 at 229. (*Re: Jody L. Goudreau and Barbara E. Desmaris, employees of Peach Arch Community Medical Clinic Ltd*. (BC EST #D066/98)

38. In *Maple Lodge Farms Limited v. Government of Canada,* [1992] 2 SCR, the Supreme Court held:

> It is…a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might exercise the discretion in a different manner had it been charged with that responsibility. When the statutory discretion has been exercised in good faith, and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

39. The Employer does not argue, and has presented no evidence, that the Director acted in bad faith or abused his power. There is also no argument or evidence that the Director made a mistake in construing the limits of his authority or that there was any procedural irregularity when he exercised his discretion.

40. The Employer's argument is that the Director failed to properly consider all the section 2 factors and considered irrelevant factors – that is, that the delegate only considered whether there was any "compelling benefit" to the application.

41. The delegate assessed the two reasons advanced for the application. He found the first reason; that is to extend the time within which employees must be paid under the *ESA* by two days in order for the Employer to implement a payroll system that would allow the Employer to harmonize its payroll system with other Canadian jurisdictions, to be only of benefit to the Employer. The Employer does not to take any issue with this conclusion and I find that it is reasonable. The main purpose of the request for a variation in order to pay employee wages not in accordance with the *ESA* was entirely for the Employer's benefit.

42. The delegate then considered the second reason advanced for the application – that it would enable the Employer to pay the employees more frequently than it does now, and decided this reason to be a "neutral" factor as there was nothing in the ESA preventing the Employer from paying the Employees bi-monthly. I find the delegate's conclusion that this factor was "neutral" to be a reasonable one.

43. I am unable to find that the Director imposed more stringent criteria, or assessed the application using a "compelling benefit" standard. The delegate's reasons evaluated the request according to the purposes outlined in section 2 of the *ESA,* which were the only relevant considerations.

44. I am not persuaded that the Employer has demonstrated any basis to interfere with the Director's exercise of discretion. I find that the Director applied the appropriate statutory factors and provided full reasons for his decision.

45. I conclude there is no reasonable prospect the appeal will succeed and dismiss the appeal.

ORDER

46. Pursuant to section 114 of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated April 23, 2020, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal