Citation: Ulrike Roth and Benoit Brochu (Re)
2020 BCEST 97

EMPLOYMENT STANDARDS TRIBUNAL

Applications for Reconsideration

- by -

Ulrike Roth and Benoit Brochu
("the Applicants")

- 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: Jacquie de Aguayo

FILE Nos.: 2020/087 & 2020/088

DATE OF DECISION: August 12, 2020

DECISION

SUBMISSIONS

Ulrike Roth and Benoit Brochu on their own behalf

OVERVIEW

1. The Applicants apply for reconsideration under section 116 of the *Employment Standards Act* (the "*ESA*") of Tribunal Decision Number 2020 BCEST 44 (the "Appeal Decision") rendered by Member David B. Stevenson (the "Member") on May 13, 2020. The Appeal Decision dismisses the Applicants' appeals of a determination (the "Determination") made by a delegate of the Director of Employment Standards (the "Director"), dated October 16, 2019.

2. The Determination finds the Applicants' former employer, Livingstone RV Park (the "Employer"), contravened ten sections of the *ESA* in respect of their employment. The Director ordered the Employer to pay wages and interest owing to the Applicants and issued administrative penalties in respect of the ten contraventions (Appeal Decision, para. 2). The Applicants filed appeals alleging the Director erred in law and acted in a procedurally unfair manner in coming to a decision on the amounts owing to them. The Appeal Decision dismisses their appeals.

3. The Appeal Decision summarizes the facts as set out in the Determination (paras. 14 – 37), summarizes the grounds of appeal in detail, and identifies new evidence submitted by the Applicants in support of the appeals (paras. 39 – 40).

4. The Appeal Decision finds most of the alleged errors of law were a challenge to the findings of fact made by the Director and were a re-argument of matters raised before the Director as part of the investigation process leading to the Determination (paras. 38 – 41). The Appeal Decision addresses the allegation that the Director erred having regard to the Tribunal's long-established approach as set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.) (para. 61 – 68). The Appeal Decision concludes that the findings in the Determination were supported by the evidence, adequate reasons were provided in support of them and, as such, the allegations on appeal did not show any errors of law as alleged (paras. 69 – 107).

5. Among other things, the Applicants alleged errors by the Director in failing to find a contravention of section 39 of the *ESA*, which prohibits an employer from requiring or allowing an employee to work excessive hours or hours detrimental to their health. The Appeal Decision finds no specific claim of a contravention of section 39 of the *ESA* was before the Director and, therefore, was improperly raised for the first time on appeal. However, the Appeal Decision goes on to find, in any event, that the Director expressly found that the Applicant Roth's position with respect to her long hours of work was "based on a view by her of hours worked which the Director found was not credible or reliable" (paras. 52, 79, 94 – 95).

6. The Applicants also alleged the Director erred by failing to find a contravention of section 18 of the *ESA*, which requires an employer to pay wages owing within a specific period of a termination from

employment. The Appeal Decision finds it was within the Director's statutory discretion as to whether to make an express finding of a contravention of section 18 of the *ESA*. Accordingly, the Member found the Director did not err in law in not making that finding in the present case (paras. 82 – 92).

7. With respect to the natural justice grounds of appeal, the Appeal Decision finds they constituted re-argument of the evidence filed in support of their claims before the Director (para. 43). The Appeal Decision states that "[o]n the face of the material in the record and in the information submitted to the Tribunal in this appeal", the Applicants were provided with the opportunity to "present their position and to respond to the position presented by Livingstone RV" (paras. 42 – 43, 108 – 116) and, as such, were not denied procedural fairness.

8. The Appeal Decision also declines to consider new evidence submitted by the Applicants in support of the appeals on the bases that: it contains information that was available during the complaint process, some of which was provided to the Director or could have been; even if of recent origin, it does not add anything to the information already provided to the Director; it is not "credible" in the sense that it contains "predominantly anecdotal and unsupported commentary concerning [the Applicant Roth's] work and the arrangement concerning a separate property"; and "it is not "probative", in the sense that it is not capable of resulting in a different conclusion than what is found in the Determination" (para. 59).

GROUNDS FOR RECONSIDERATION

9. The Applicants allege they were denied natural justice because the Member refused to consider the following five documents:

(1) Applicants' statements dated 29 March 2020 in response to employer's and Director's final statements before review

(2) The independent medical review by Dr. Parhar MD, CCFP, CCBOM, CIME confirming physical injuries from employment at Livingstone RV and trailer park

(3) The new witness testimony by Lorne [Crampton] confirming illegal working conditions

(4) Evidence of misrepresentation of job requirement by employer (Exhibit 1) submitted 26 December 2019

(5) Weekly timesheet of Ulrike Roth confirming correctness of previous timesheets; Missing video recordings confirm reliability of Applicants timesheets

REASONS FOR DECISION

10. Whether to grant an application for reconsideration is discretionary and the Tribunal exercises its reconsideration power in limited circumstances: *Milan Holdings Inc. (Re)*, BC EST # D313/98 ("*Milan Holdings*"). The Tribunal's approach is to first assess whether an application for reconsideration raises an arguable case of sufficient merit. If it does not, the Tribunal will dismiss the application. The reasons for this two-step approach are set out in *Milan Holdings* as follows:

> 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. At

> this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BC EST #D199/96 , reconsideration of BC EST #D114/96). [p. 7]

11. I have taken into account that the Applicants are self-represented and have given them the benefit of the doubt with respect to whether the application passes the first stage of the *Milan Holdings* test: *Triple S Transmission Inc.*, BC EST # D141/03, *Jordan Enterprises Ltd.*, BC EST # RD154/16 (Reconsideration of BC EST # D114/16).

FRAMEWORK FOR RECONSIDERATION

12. In considering the issues raised on reconsideration in the present case, I note that the Appeal Decision sets out extensive reasons for concluding that the Applicants' appeals should be dismissed on the merits. The issue I must decide on reconsideration is whether the Applicants have raised a case of sufficient merit that they were denied procedural fairness on appeal as alleged.

13. In coming to a decision, I have also taken into account that the Appeal Decision correctly set out the principles of procedural fairness as they apply in the context of the complaint process under the *ESA*: *Imperial Limousine Service Ltd.*, BC EST # D014/05, and *BWI Business World Incorporated*, BC EST # D050/96 (paras. 109 – 110). As noted above, the Appeal Decision finds that, in the proceedings before the Director, the Applicants were given the opportunity to present their evidence and submissions on the issues in dispute and, as such, were accorded procedural fairness in the course of the investigation leading to the Determination. I find no error in the Member's conclusions in that regard.

14. I also find that the Appeal Decision correctly sets out the Tribunal's approach with respect to its very limited role in reviewing findings of fact or questions of mixed fact and law made by the Director. Briefly, there is no statutory ground of appeal based on errors of fact. As such, an appeal is not a fresh opportunity to re-argue the evidence before the Director in the hope that the Tribunal will come to different findings of fact or a more favourable result on the merits.

15. Rather, the question on appeal is whether the factual conclusions reached by the Director are based on inadequate evidence, or no evidence, such that there is no rational basis for the findings made (paras. 65 – 67), *Britco Structures Ltd.*, BC EST # D260/03, *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13. As summarized above, the Appeal Decision finds the Determination was well-supported by the evidence, sets out adequate reasons for the findings made, and did not err in law as alleged.

16. On appeal or reconsideration, therefore, the Tribunal does not review the evidence and reach its own findings of fact, nor does it re-evaluate the evidence and come to different findings than those made by the Director beyond the limited grounds of appeal set out in sections 112 and 116 of the *ESA* respectively.

To the extent that the Applicants attached documents that were already before the Director to highlight their arguments on appeal, these documents are subject to this approach.

17. Even where an appellant provides "new" evidence (i.e. evidence that was not before the Director in coming to a determination), it is not automatically admitted. I find the Appeal Decision correctly identifies the requirements for admitting new evidence on appeal. The Tribunal may, in its discretion, admit new evidence taking into account a number of considerations, including whether the evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different outcome: *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 (para. 56).

18. As such, the new evidence ground for appeal is not an opportunity to submit additional evidence that could have been provided to the Director prior to issuing the Determination. It is not enough to show that the evidence is "new" in the sense that it was acquired after the proceedings before the Director have concluded. Rather, as noted above, a range of factors are considered in deciding whether to admit new evidence in support of an appeal.

19. It is within this general framework that I have considered the record of material before me, the Determination, the Appeal Decision, and the Applicants' submissions in the present case.

FINDINGS ON THE GROUNDS FOR RECONSIDERATION

20. The Applicants submit they were denied procedural fairness when the Member refused to consider the five documents itemized above. The documents and arguments before me are interrelated. However, for ease of reference, I have set out my reasons for decision in relation to each of them.

(1) THE MARCH SUBMISSION

21. Document (1) refers to final reply submissions filed by the Applicants in March 2020 (the "March Submission"). By way of background, the Member found it was appropriate to consider the appeals having regard to section 114(1)(f) of the *ESA*, i.e., whether to dismiss the appeals on the basis that there was no reasonable prospect they would succeed (paras. 9 - 13).

22. By letter dated February 13, 2020, the Tribunal sought submissions from the Employer and the Director on one basis for appeal, being "whether there was a contravention of section 18 of the *ESA* and, if so, whether the Director committed an error of law by not imposing an administrative penalty for it". The Respondents were asked for their positions on that question, and then the Applicants were provided the opportunity to provide a final reply to those submissions in March 2020. All correspondence was copied to all the parties to the appeal.

23. The Member finds the March Submission was non-responsive to the question asked with respect to section 18 of the *ESA* and that its content constituted re-argument and an expansion of the grounds raised on appeal, including with respect to section 39 of the *ESA* (paras. 50 - 53). The Member states that, on this basis, he would be justified in dismissing the March Submission in its entirety (paras. 52 – 53).

24. The March Submission is not new evidence. Rather, it is analogous to an unsolicited submission filed by the Employer (also in March 2020) which the Member also declined to consider on the basis that it was non-responsive to the question asked (para. 48).

25. The Applicants allege the Member rejected their final reply submissions in a manner that was unjustified and contrary to procedural fairness. They submit that the Member's reasons are inexplicable because no "question" was asked of them but, rather, they were simply filing their submissions in response to the Tribunal's request for a final reply. They say that by failing to consider the March Submission, the Member could not understand their arguments. They say that "[t]ruth and fairness should be the goal, not senseless ignorance of principles and facts that could alter the decision".

26. Even if I accept that the Applicants misunderstood the scope of the Tribunal's request for final reply submissions, I find the Member's decision to decline to consider unsolicited submissions by either party falls within the Tribunal's discretionary authority to manage the proceedings before it, including with respect to the filing of submissions: section 103.

27. The Member noted that, other than the basis of appeal in respect of section 18 of the *ESA*, the appeals were addressed and dismissed under section 114(1)(f) of the *ESA* without further submissions from the parties. The Applicants provided full submissions in support of their appeals at the time they were filed and, as such, were given an opportunity to address the bases on which they say the Determination should be cancelled. Those submissions were considered and addressed at length in the Appeal Decision.

28. In addition, I find the Member did consider the March Submission, finding that it constituted re-argument of the submissions raised on appeal, including with respect to section 39 of the *ESA*. As such, even though the Member indicated he would be justified in dismissing the March Submission in its entirety, he considered and rejected it for the reasons set out.

29. While the Applicants disagree with the Member's findings, I find they have not raised a case of sufficient merit that they were denied procedural fairness with respect to the March Submission.

(2) THE REPORT

30. Document (2) refers to a medical report (the "Report") from March 2020, attached to the March Submission. The Applicant Roth alleged that the Report demonstrated that she worked excessive hours and that this was detrimental to her health. As such, the Report is new evidence submitted on appeal and was intended to support her arguments alleging a failure by the Director to find a contravention of section 39 of the *ESA*.

31. The Applicants allege the Member breached their right to procedural fairness by not considering the Report. The Applicants submit this ground for reconsideration raises important issues under the *ESA* because the evidence was rejected where she was engaging her "civil duty of protecting not only her rights and safety but also those of her husband, future employees and customers", characterizing the approach in the Appeal Decision as "offensive and inappropriate". The Applicants submit this, alone, justifies granting reconsideration in the present case.

32. However, the Appeal Decision finds the Report did not establish that the Applicant Roth "was required to work excessive hours to the detriment of my health" as alleged (paras. 51 – 52). The Appeal Decision further notes that, in any event, the Applicant Roth's position with respect to her long hours of work was "based on a view by her of hours worked which the Director found was not credible or reliable" (para. 52).

33. In the circumstances, I find the Appeal Decision considered the Report in light of the Applicants' submissions and rejected it for the reasons set out (paras. 51 – 52, 59). As such, I find the Applicants' right to procedural fairness was respected.

34. In coming to this conclusion, I note that the Appeal Decision states, at paragraph 52, that the Report does "not go to any issue that was before the Director in Ms. Roth's complaint; section 39 is raised for the first time in this appeal process". The Applicants allege that section 39 *was* in issue before the Director.

35. A review of the Record filed by the Director (at p. 631) shows that in a preliminary assessment of the complaint provided to the parties, the Director identified a potential contravention of section 39 of the *ESA*. However, after further submissions and evidence in response to the preliminary assessment (a standard part of the investigation process before the Director), the Determination ultimately does not find a contravention of section 39 of the *ESA*.

36. Accordingly, I find the Appeal Decision is inaccurate in stating that section 39 of the *ESA* was not an issue before the Director. However, I find nothing turns on this inaccuracy because the Appeal Decision also finds, in any event, that the Director rejected the Applicant Roth's position she worked the excessive hours she claimed in her complaint (para. 52). The Appeal Decision further considered the allegation that the Director failed to find a contravention of section 39 of the *ESA* and noted the Director's findings expressly rejecting the factual bases for that claim. The Applicants' disagreement with the Director's findings of fact in that regard, or the reference to section 39 in the Director's preliminary assessment, do not establish a case of sufficient merit that they were denied a fair hearing when the Member declined to consider the Report.

(3) THE WITNESS STATEMENT

37. Document (3) is new evidence and contains a witness statement in the form of a letter from a resident of the RV Park where the Applicants worked (the "Witness Statement"). The Applicants say the individual was present at the RV Park on a daily basis and confirms their claim of "illegal working conditions".

38. As is set out in the Determination, both the Applicants and the Employer submitted a list of witnesses to the Director they said should be interviewed (pages 4 – 5). Additional witnesses were identified by the parties after the Director provided a copy of a preliminary assessment. The Applicants listed a total of 27 people they said had evidence to support to their claims, including residents of the RV Park where the Applicants worked. The Director declined to rely on the evidence of the witnesses interviewed for either party for several reasons, including reliability and that none of them were well-positioned to be able to speak to the issues in dispute.

39. The Appeal Decision considers the Witness Statement under the new evidence ground of appeal but finds it should not be admitted (para. 56).

40. While the Applicants disagree with that finding, as well as alleging that there was no basis for the Director to disregard the 27 witness statements put into evidence during the investigation, I find they have not established a case of sufficient merit that they were denied a fair hearing. Rather, I find that this ground for reconsideration constitutes re-argument of their position before the Member which was considered and rejected for the reasons set out in the Appeal Decision.

(4) THE JOB POSTING

41. Document (4) refers to a job posting from 2017 (the "Job Posting") attached to a submission filed by the Applicants in December 2019 (page 12). The Applicants say the Job Posting shows that the Employer misrepresented the job requirements and that the Director erred in failing to find a contravention of section 8 of the *ESA*.

42. However, the Job Posting was referred to by the Director in the Determination (page 14) as evidence submitted by the Employer. It is also referred to in the Applicants' list of documents for a fact-finding meeting with the Director (page 58 of the Appeal). The Job Posting is not new evidence and, as such, is to be assessed in light of the Director's role as the trier-of-fact.

43. The Applicants maintain that they were denied a fair hearing because the Appeal Decision does not mention the Job Posting. However, the Appeal Decision expressly notes that some of the additional documents submitted on appeal were before the Director and, as such, were not new evidence (paras. 57-59). As an element of procedural fairness, the Member was not required to refer to each document submitted, nor was he required to determine, in place of the Director, whether a contravention of section 8 of the *ESA* occurred.

44. I find the Applicants have not raised a case of sufficient merit that the absence of an express mention in the Appeal Decision of the Job Posting, a document in evidence before the Director, gives rise to a breach of their right to a fair hearing.

(5) THE TIME SHEETS

45. Document (5) refers to time sheets prepared by the Applicant Roth to show that, among other things, the Director violated her right to procedural fairness in not accepting her estimate of her hours worked. This document also refers to a request for production of video surveillance tapes from the RV park that the Applicant allege show that their estimated hours were reliable (I will refer to the time sheets and the video tapes collectively as the "Time Sheets").

46. However, I find the Appeal Decision considers and answers the Applicants' arguments with respect to the Time Sheets, including the allegation that the Director erred by failing to allow the Applicant Roth to provide "further clarification of the evidence" with respect to her hours of work. As noted in the Appeal Decision, at paragraphs 108 to 116, the Director expressly addressed the Applicants' claim for unpaid wages and their allegation that they were required to be available for work 24/7 and worked long and excessive hours. As noted in the Appeal Decision, the Director found that Applicant Roth's time sheets setting out her claims for unpaid wages and overtime was neither credible nor reliable.

47. The Appeal Decision considered the Applicants' arguments on appeal and rejected them. I find this basis for reconsideration constitutes re-argument and, as set out, does not raise a case of sufficient merit that the Applicants' were denied procedural fairness on appeal.

CONCLUSION

48. For the reasons set out, I find the Applicants have not raised a case of sufficient merit that they were denied procedural fairness as alleged. With respect to the documents in issue, the Appeal Decision expressly considers, and correctly concludes, that they did not meet the requirements for the admission of new evidence on appeal. With respect to evidence that was either already before the Director or could have been provided to the Director in the course of the investigation, I find the Appeal Decision considered the Applicants' arguments on appeal and did not err in dismissing them for the reasons set out. The Applicants' disagreement with those reasons, however strongly held, does not raise a serious question that their right to procedural fairness on appeal was breached: *Milan Holdings*, *supra*.

49. Accordingly, for the reasons given, the applications for reconsideration are dismissed.

ORDER

50. Pursuant to section 116 of the *ESA*, the original decision is confirmed.

Jacquie de Aguayo
Chair
Employment Standards Tribunal