Citation: Darvonda Nurseries Ltd. (Re)
2021 BCEST 11

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Darvonda Nurseries Ltd.
("Darvonda")

- 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.: 2020/150

DATE OF DECISION: January 28, 2021

DECISION

SUBMISSIONS

Matthew Splinter — on behalf of Darvonda Nurseries Ltd.

OVERVIEW

1. Darvonda Nurseries Ltd. ("Darvonda") applies for reconsideration of 2020 BCEST 116, issued on October 7, 2020 (the "Appeal Decision"), pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). These proceedings arise from a Determination issued on April 16, 2020, by Dawn Sissons, a delegate of the Director of Employment Standards (the "delegate").

2. As will be seen, there is a serious procedural problem with respect to this application. The Tribunal issued three separate decisions regarding a dispute between Darvonda and a former employee. In the first of those decisions, the Tribunal dismissed, under section 114(1)(f) of the *ESA*, almost all of the issues raised by Darvonda, including the question that Darvonda now raises in this application, namely, whether the former employee quit his employment, and thus was not entitled to section 63 compensation for length of service. By way of the first decision, the Tribunal also sought additional submissions from the parties regarding certain matters and, after receiving those submissions, issued a second decision directing the Director of Employment Standards to recalculate a portion of the former employee's regular wage entitlement in light of the findings set out in the second decision. This second decision is the subject of the section 116 application that is now before me. Finally, the Tribunal issued a third decision varying the Determination in accordance with the Director's recalculations.

3. Although this application, on its face, concerns the second Tribunal decision, the issue raised in this application concerns a finding made in the first Tribunal decision. That being the case, it is untimely (see section 116(2.1)) and, in the absence of an order extending the reconsideration period (and such an application has not been filed), it is not properly before the Tribunal.

4. The Tribunal is not obliged to hear and consider a section 116 application for reconsideration but, rather, has a discretion to do so. In accordance with the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98), the Tribunal will first consider whether the application raises an important question regarding findings of fact, matters of law, principle, or fundamental fairness. If the application does not pass this first stage, it will be summarily dismissed. If the application passes the first stage, the Tribunal will then undertake a more searching evaluation of the application.

5. In my view, this application fails to pass the first stage of the *Milan Holdings* test, and thus must be dismissed. My reasons for reaching that conclusion now follow.

PRIOR PROCEEDINGS

6. Following an investigation, the delegate ordered Darvonda to pay a former employee (the "complainant") the total sum of $18,778.73 on account of unpaid wages (including section 63 compensation for length of service) and section 88 interest. In addition, and also by way of the Determination, the delegate levied

six separate $500 monetary penalties (see section 98) against Darvonda based on its various contraventions of the *ESA* and the *Employment Standards Regulation* (the "*Regulation*"). Accordingly, the total amount payable under the Determination was $21,778.73. The delegate also issued, concurrent with the Determination, her "Reasons for the Determination" (the "delegate's reasons").

7. Briefly, the complainant was employed by Darvonda as a truck driver from January 1, 2013, until July 29, 2019 (July 29th being the day of his last delivery). The complainant took the position that he was, in effect, dismissed when Darvonda stopped offering him delivery jobs; Darvonda took the position the complainant quit. There were various other matters in dispute between the parties. After considering the evidence before her, the delegate made the following findings.

8. First, the delegate determined that the complainant worked as a truck driver, not a "farm worker", and thus was not exempted from the *ESA*'s overtime pay and statutory holiday pay provisions. Second, relying on the trip time and wage payment records that were before her, the delegate determined that the complainant was owed $4,149.20 in unpaid regular wages. Third, the delegate awarded the complainant $2,499.87 for unpaid overtime hours calculated in accordance with section 37.3(2) of the *Regulation*. Fourth, the delegate determined that the complainant was owed $802.71 for statutory holiday pay under section 45 of the *ESA*, and a further $2,129.82 for statutory holiday pay owed under section 46 of the *ESA*. Fifth, the delegate awarded the complainant $1,034.88 on account of unpaid vacation pay. Finally, the delegate awarded the complainant six weeks' wages ($7,666.46) as compensation for length of service (section 63). The section 63 award is the subject of this section 116 application.

9. Darvonda appealed the Determination on the sole ground that the delegate failed to observe the principles of natural justice in making the Determination. However, as noted by Tribunal Member Stevenson in 2020 BCEST 103 (at para. 28): "[Although] Darvonda has raised the natural justice ground of appeal…it is apparent from the appeal submission that Darvonda alleges the Director made errors of law in several areas and has introduced evidence with the appeal that is not found in the record." In other words, the appeal was apparently based not just on section 112(1)(b) of the *ESA*, but also on sections 112(1)(a) and (c) – these being, respectively, the "error of law" and "new evidence" grounds of appeal.

10. In the original appeal, Darvonda alleged that the delegate erred in finding that the complainant was not a "farm worker", in regard to her findings with respect to various elements of the delegate's unpaid wage calculations, and in finding that the complainant had not quit his employment. For the most part, these alleged errors were found to lack merit. However, the evidence before Member Stevenson was that Darvonda submitted incomplete (and incorrect) payroll records to the delegate. These records, in turn, were relied on by the delegate in making some of her unpaid regular wage calculations. Member Stevenson noted, at paras. 41 – 42 of his reasons in 2020 BCEST 103:

> This matter raises somewhat of a conundrum. On the one hand, if the information provided to the Director by Darvonda, and relied on, was wrong because of an innocent mistake, it would seem unfair to saddle Darvonda with the unintended consequences of that mistake – and to coincidently enrich [the complainant]. On the other, there was a Demand for Employer Records that required Darvonda to provide all records relating to wages and hours of work. The records were provided late and are not, it appears, complete or correct. The statutory responsibility to provide correct records in a timely manner in response to a Demand falls on Darvonda.

> I find this is an appropriate circumstance for which to seek additional submissions. I am referring this aspect of the appeal to the parties for submissions. While I am not foreclosing any of the parties from making any relevant argument on this matter, the following questions should be answered by them:
>
> - should this matter be reviewed at all or, even if a mistake has been made by Darvonda, are they saddled with the consequences of their mistake, however inadvertent;
> - should I accept evidence relating to the alleged mistake even though the ground of appeal in section 112(1) (c) has not been raised and, if so, are there limits to what I should accept; that is, should I accept evidence that goes beyond simply showing a mistake;
> - what is the nature of the burden on Darvonda to show an error has been made; and
> - is it shown that an error been made and, if so, how might it be corrected?

11. Member Stevenson made the following orders and issued the following directions (at paras. 71 – 72):

> …I find a substantial portion of this appeal has no reasonable prospect of succeeding and no purpose is served by requiring the other parties to respond to those matters. They are dismissed under section 114(1)(f) of the *ESA*. [my underlining]
>
> I have, however, decided that the matter of the findings and calculations on the regular wage should not be dismissed at this stage. I have requested submissions; the Tribunal will communicate with the parties, providing timelines for making those submissions.

12. The Director of Employment Standards (through a new delegate, Michael Thompson), the complainant, and Darvonda all provided submissions regarding the questions raised by Member Stevenson in the above-noted decision (2020 BCEST 103). On October 7, 2020, Member Stevenson issued the Appeal Decision that is now before me in this reconsideration application (2020 BCEST 116). Member Stevenson's findings with respect to the matters that he identified in his earlier decision were as follows (at paras. 26 and 28 – 30):

> It is agreed by all parties that Darvonda submitted wrong information to the Director for the pay period ending November 24; it was not information that related to [the complainant], but to another employee. There is no basis for suggesting this error was anything other than inadvertent. The name of the other employee is shown on the payroll record: see page 659, record. The Director also made an error by not noticing the payroll record was not for [the complainant] but for another employee. In these circumstances, it would be unfair not to accept the addition of the correct payroll record with the appeal.
>
> …
>
> My view of the additional evidence relating to the material relating to the April 13 pay period is different. In this matter, the fault for providing wrong information to the Director lies entirely with Darvonda, which failed to meet its statutory obligation to comply with the Demand for Employer Records. There is no indication this failing was inadvertent or accidental; it was, at best, negligent. This material could have, and should have, been given to the Director during the investigation, in response to the Demand. The Tribunal has never used its discretion to allow new

> or additional evidence to relieve a party of its own default or negligence and will not start now. The material relating to the April 13 pay period will not be accepted in this appeal.
>
> The acceptance of the payroll information for the November 24 pay period changes the factual matrix of the Director's calculation for that period with the result that the findings of fact and the conclusion reached by the Director on the matter of regular wages owed for that period were unsupported by the evidentiary record and must be set aside.
>
> The refusal to accept additional evidence relating to the April 13 pay period does not change the factual matrix for the Director's finding for that period and consequently has no effect on the Determination.

13. Accordingly, Member Stevenson issued the following order (para. 33):

> Pursuant to section 115 of the *ESA*, I order the Determination dated April 16, 2020, be varied as outlined above and that this matter be referred back to the Director to vary the amount of regular wages owing in accordance with this decision. I retain jurisdiction to confirm the Determination resulting from the re-calculation of [the complainant's] regular wage entitlement.

14. As noted above, the Appeal Decision was issued on October 7, 2020. On October 19, 2020, delegate Thompson submitted his wage recalculations (totalling $15,995.59 including interest) to the Tribunal. The delegate's October 19th submission reads, in part:

> On October 13, 2020, I sent a letter to [the complainant] and Darvonda Nurseries Ltd. by email, providing them with these calculations and requesting that they identify any issues with the method or result of calculation no later than 12:00 pm (noon) on October 19, 2020. Each party responded by email indicating receipt of the calculations, and neither identified concern with the calculations.

15. The Tribunal provided Delegate Thompson's October 19th report to both the complainant and Darvonda, but neither party submitted a written response to the Tribunal.

16. On November 4, 2020, Darvonda filed its section 116 reconsideration application with respect to the Appeal Decision. On December 8, 2020, Member Stevenson issued the third and final decision with respect to Darvonda's appeal (2020 BCEST 144). In light of delegate Thompson's uncontested recalculations, Member Stevenson issued an order varying the Determination, reducing the complainant's unpaid wage award (including interest) from $18,778.73 to $15,995.59.

17. Since Darvonda's reconsideration application was filed prior to the third and final Tribunal decision regarding the appeal (2020 BCEST 114), the Tribunal's Registrar wrote to Darvonda on December 8, 2020, enquiring whether it wished to amend its reconsideration application in light of Member Stevenson's December 8th decision varying the original Determination. Darvonda did not file an amended application by the January 2021 deadline.

18. I now turn to Darvonda's section 116 application.

DARVONDA'S APPLICATION FOR RECONSIDERATION

19. The *only* matter raised in Darvonda's application is whether or not the delegate erred in determining that the complainant was entitled to section 63 compensation for length of service. Since it is quite brief, I have reproduced Darvonda's entire submission on this matter, below:

> We are writing to request a reconsideration of the above noted decision. The key part of the decision we are referring to is the alleged termination of [the complainant].
>
> The main reason that it was determined by the Director that [the complainant] did not quit (and was therefore terminated) is because he worked on one instance after he said he quit. We don't understand how this could mean he did not quit. It is quite common for people to work after they have given notice. [The complainant] was quite clear when he returned to work that one time that he was doing a favor for a coworker [*sic*] that he liked but it did not change his position that he quit. He told multiple people at the company that he quit. He was never told he was terminated
>
> What is an employer supposed to do with an employee that screams at multiple staff and owners of a company (on multiple occasions) saying "I'll never work for those (expletive) guys again"? We feel that rational common sense would say that it is acceptable for an employer to accept a resignation of this manner.
>
> We request that the tribunal reconsider the determination that [the complainant] was terminated. We have many people, including [the complainant's] wife, that would attest to the fact that his employment was ended by [the complainant] resignation, not Darvonda. We feel that this testimony has been overlooked in the ruling and would like the tribunal to revisit it.

FINDINGS AND ANALYSIS

20. Section 63 compensation for length of service (CLS) is a form of deferred wages that is presumptively payable when an employment relationship ends. CLS is not payable to an indefinite term employee if the employer provides a specified amount of written notice of termination, or has just cause for termination, or if the employee "retires from employment" (section 63(3)(c)).

21. In this case, Darvonda argued that the complainant "verbally quit his employment on July 24, 2019 or July 25, 2019" (delegate's reasons, page R9). The delegate rejected this submission and awarded the complainant CLS in the amount of $7,666.46. The delegate set out the correct legal framework governing a voluntary resignation (or a "quit") at page R9 of her reasons, namely, that there is both a subjective and an objective element to a valid quit – i.e., there must be evidence of an intention to quit coupled with objective evidence consistent with that subjective intent (see, for example, *Bru v. AGM Enterprises Inc.*, 2008 BCSC 1680; *Bishop v. Rexel Canada Electrical Inc.*, 2016 BCSC 2351; and *Conway v. Griff Building Supplies Ltd.*, 2020 BCSC 1899). The delegate's finding that the complainant did not voluntarily resign his employment was a finding of mixed fact and law and, as such, cannot be set aside unless it was tainted by a "palpable and overriding error" (*Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

22. The complainant's evidence was that Darvonda "terminated his employment when [it] stopped contacting him for work" (delegate's reasons, page R2). The complainant stated that on July 24, 2019, he was asked to vacate a house that he was renting from Darvonda, but later made deliveries for Darvonda on July 26 and 29, 2019 (having been asked to do so by Darvonda's foreman on July 25th). The delegate noted "these

were the last deliveries that [the complainant] did for the Employer and July 25, 2019, was the last time that the Employer contacted [the complainant] for work" (page R3).

23. Darvonda's evidence was "that on July 24, 2019 or July 25, 2019 [the complainant] quit his employment [and he] communicated his decision to quit verbally to Mr. Jansen multiple times"; the complainant "quit his employment after the Employer asked him to move out of the Employer's house he was renting" (delegate's reasons, page R3).

24. The delegate made the following finding regarding the CLS issue (at page R9):

> The Employer has stated that [the complainant] verbally quit his employment on July 24 or 25, 2019. [The complainant] has stated that the Employer simply stopped contacting him for further shifts. As the Employer has provided no evidence to support it's [*sic*] claim that [the complainant] verbally quit his employment, I find that it has not met its burden to demonstrate that [the complainant] formed an intention to quit his employment.
>
> (my underlining)

25. The delegate's finding – which I have underlined, above – that Darvonda did not provide any evidence demonstrating that the complainant did not communicate an intention to quit, is contradicted by the delegate's own summary of Darvonda's evidence set out at page R3 of her reasons. Whether that evidence was credible is another matter, but certainly Darvonda *did* provide evidence to the effect that the complainant stated that he was quitting his employment. The delegate stated in her reasons that the complainant never formed a subjective intention to quit (page R9), but it is not clear whether this finding was based on her rejection of Darvonda's evidence that the complainant stated he was quitting (because this evidence was not credible), or because of a complete lack of evidence (which, as noted above, would have constituted a misstatement of the evidentiary record).

26. I have reviewed the section 112(5) record regarding the submissions made to the delegate with respect to the end of the complainant's employment. Darvonda's chief financial officer, in an interview conducted on December 23, 2019, told the delegate that the company "assumed" the complainant quit, and that he abandoned his employment. In an interview conducted that same day with Randall Jansen, the latter told the delegate that the complainant had communicated his position that he had quit "multiple times" after being told the vacate his rental premises: "EE [the employee] quit when he was asked to move out of the house". Mr. Jansen also told the delegate that the complainant "was one of the best guys that they had [and] they didn't want him to leave". The evidence of the chief financial officer is not compatible with that given by Mr. Jansen. The complainant, for his part, denied abandoning his employment, and insisted he never stated to anyone at Darvonda that he was quitting his employment.

27. The section 112(5) record also includes some documents that are relevant to the "quit" issue. On September 21, 2019, Darvonda issued the complainant a Record of Employment ("ROE"). The ROE was issued on the basis that the complainant had "quit" his employment. On December 11, 2019, the federal Employment Insurance Commission ("EIC") issued a decision finding that complainant "voluntarily left your employment with DARVONDA NURSERIES LTD. on August 17, 2019 without just cause within the meaning of the *Employment Insurance Act*." The delegate did not reference either of these documents in her reasons. Darvonda has never asserted that the EIC's decision gave rise to an issue estoppel, and the delegate did not turn her mind to that matter.

28. However, the delegate further held that even if the complainant had communicated an intention to quit, since he continued to make deliveries on two subsequent days, "[the complainant] did not objectively carry out an act inconsistent with his further employment but rather continued to work" (page R9).

29. The complainant's position, as reflected in the section 112(5) record, was that he never stated that he was quitting his employment, but that Darvonda simply stopped calling him to undertake deliveries, and that he was "no longer welcome" at the workplace. Given this evidence, and Darvonda's conflicting evidence regarding the reason why the complainant's employment came to an end, it certainly was open to the delegate to accept the complainant's evidence and reject Darvonda's evidence. However, the delegate's reasons seemingly only go as far as finding that Darvonda failed to provide any evidence that the complainant quit. Nevertheless, the delegate also held that even if the complainant had communicated such an intention, there was no objective confirmatory evidence in light of the fact that he later continued to work.

30. Section 63 CLS is payable "on termination of the employment" (section 63(4)), and the delegate determined that the parties' employment relationship ended on July 29, 2019. Although there is no evidence before me that Darvonda formally terminated the complainant on that date, or at any other time, the logical inference from the delegate's findings is that she concluded Darvonda's failure to make any further work available to the complainant after July 29th constituted, in effect, a "constructive dismissal".

31. Darvonda's appeal placed in issue, among other things, the complainant's entitlement to section 63 CLS. Member Stevenson, in his first decision issued on August 12, 2020 (2020 BCEST 103) – and it should be noted that this latter decision is *not* the subject of the present section 116 reconsideration application – specifically addressed the CLS claim at paras. 52 to 70. In essence, Member Stevenson noted that during the investigation Darvonda advanced "different positions" asserting, at one point, that the complainant essentially abandoned his position and, at another point, that he formally quit by giving verbal notice. Member Stevenson also noted that, at least in part, Darvonda's argument regarding section 63 CLS was based on "new evidence" that was not admissible on appeal in light of the *Davies et al.* framework (BC EST # D171/03). Finally, Member Stevenson held (at paras. 68 – 70):

> The test set out in the Determination recognizes there is a subjective element – that the employee communicated to the employer an intention to terminate the employment relationship – and an objective element – that such intention was confirmed by some subsequent conduct.
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> …the Director concluded that [the complainant] did not express an intent to quit on July 24 or 25, 2019, as alleged by Darvonda, but even had he said words that, subjectively, might have indicated an intention to quit, his subsequent conduct in continuing to work was, objectively, inconsistent with an intention to quit his employment.
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> The Director did what is expected under the test, which is to search the evidence for whether [the complainant] had clearly and unequivocally expressed an intention, through words or conduct, to quit his employment.
>
> The weight of evidence is a matter for the Director and is a question of fact, not law. It is only where a conclusion reached on the facts is one that could not reasonably be entertained that an error of law is shown. Findings of fact made by the Director require deference. Asking the Tribunal

> to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.
>
> Had the error of law ground of appeal been clearly raised, I would find no reasonable likelihood it would succeed.

32. By way of his August 12th decision (the first decision), Member Stevenson requested further submissions *solely* on the complainant's regular wage entitlement. Member Stevenson dismissed all other aspects of Darvonda's appeal, including its appeal with respect to section 63 CLS. These matters were dismissed under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding (see para. 71).

33. Darvonda filed a submission regarding the "wage entitlement" issue on September 24, 2020. Darvonda has never filed an application for reconsideration of Member Stevenson's August 12, 2020 decision (2020 BCEST 103) – the decision dismissing Darvonda's appeal under section 114(1)(f) regarding whether the complainant had "quit", and which confirmed the complainant's section 63 CLS entitlement.

34. The only section 116 reconsideration application before the Tribunal concerns the Appeal Decision (2020 BCEST 116, the second decision), the decision by which Member Stevenson varied the Determination, and referred the question of the complainant's entitlement to regular wages for the so-called "November 24 (2018) pay period" back to the Director for purposes of recalculation. The Director's recalculation was later confirmed by way of 2020 BCEST 144, issued on December 8, 2020 (Member Stevenson's third and final decision). However, Darvonda's reconsideration application *does not, in fact, concern the Appeal Decision*. Rather, it purports to challenge the delegate's section 63 CLS award that was confirmed in Member Stevenson's first decision, issued on August 12, 2020 (2020 BCEST 103). By way of the August 12th decision, Member Stevenson dismissed Darvonda's appeal with respect to all matters save for the complainant's regular wage entitlement (which was the subject of a request for further submissions).

35. Even if I were to accept the present section 116 application as being in relation to 2020 BCEST 103, it would be untimely and, as such, not properly before the Tribunal. Member Stevenson's decision confirming the section 63 CLS award was issued on August 12, 2020, and Darvonda then had 30 days to file a reconsideration application with respect to that decision. The reconsideration application now before me was not filed until November 4, 2020, and Darvonda has never applied under section 109(1)(b) to have the reconsideration application period extended.

36. This application could be dismissed solely on the basis that it is untimely.

37. However, even if I were to ignore that obvious problem regarding the Tribunal's jurisdiction to hear and decide this application, I am not persuaded that this application is presumptively meritorious and, that being the case, it does not pass the first stage of the two-stage *Milan Holdings* test.

38. Although, I have some concerns regarding the delegate's assertion that Darvonda "provided no evidence to support it's [*sic*] claim that [the complainant] verbally quit his employment" (page R9), I agree with both the delegate's and Member Stevenson's analysis that the uncontested evidence that the complainant continued to work, after his so-called "verbal quit", is a complete answer to the assertion that Darvonda is relieved from having to the pay section CLS by reason of section 63(3)(c) of the *ESA* (voluntary retirement from employment). Further, Darvonda's reconsideration application purports to introduce evidence (for example, evidence from the complainant's wife and other co-workers) that was

never part of the record before the delegate, and that evidence is not now admissible in this section 116 application.

ORDER

39. Darvonda's application for reconsideration of the Appeal Decision is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal