Citation: Arctic Pearl Fishing Ltd. (Re)
2021 BCEST 18

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Arctic Pearl Fishing Ltd.
("Arctic Pearl")

- 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.: 2020/172

DATE OF DECISION: February 10, 2021

DECISION

SUBMISSIONS

Cliff Liu — on behalf of Arctic Pearl Fishing Ltd.

OVERVIEW

1. Arctic Pearl Fishing Ltd. ("Arctic Pearl") has applied, pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), for reconsideration of 2020 BCEST 137 (the "Appeal Decision"). The Appeal Decision confirmed a Determination, in the total amount of $55,356.26, issued against Arctic Pearl on June 17, 2020. The Determination was issued by a delegate of the Director of Employment Standards (the "delegate") following an investigation (which included a November 13, 2019 "factfinding meeting").

2. The delegate also issued, concurrently with the Determination, her extensive "Reasons for the Determination" (the "delegate's reasons") in which she set out the parties' evidence, the governing legal principles, and her analysis and findings.

3. In my view, this application is untimely and, in any event, fails to pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). Accordingly, this application must be dismissed. My reasons for reaching this decision now follow.

PRIOR PROCEEDINGS

4. Arctic Pearl owns and operates a commercial fishing vessel, the "Viking Enterprise". The Viking Enterprise experienced mechanical problems in late April 2018, and was docked in Port Alberni for repairs through the end of May 2018. In early June 2018, the vessel went out to sea but broke down and was towed back to Port Alberni.

5. Two former members of the vessel's crew, the skipper and first mate (the "complainants"), filed unpaid wage complaints following the termination of their employment in early June 2018. The complainants quit when they did not receive anticipated wages for the month of May. The delegate determined that since these quits were triggered by a failure to pay wages, there had been a "substantial alteration" of their employment conditions, and thus both were deemed to have been dismissed under section 66 of the *ESA* (see delegate's reasons, page R7).

6. A central issue before the delegate was whether the complainants were "fishers" as defined in section 1(1) of the *Employment Standards Regulation* (the "*Regulation*"):

> "fisher" means a person
>
> (a) who is employed on a vessel engaged in commercial fishing, and
>
> (b) whose remuneration is a share or portion of the proceeds of a fishing venture,
>
> but does not include a person employed in aquaculture;

Section 16 ("minimum wage"), Part 4 (other than section 39), and Parts 5, 7 and 8 of the *ESA* do not apply to "fishers" (see *Regulation*, section 37).

7. The "Viking Enterprise" was at sea on three separate occasions in April 2018 (each time returning with low volume catches), but since the vessel was docked in May 2018, there was obviously no fishing activity, and thus no "proceeds of a fishing venture" to distribute. The complainants' evidence was that for the month of May, an agreement was reached to pay them a salary while they worked on the vessel while it was docked for repairs.

8. The delegate held, at page R11 of her reasons, in relation to the skipper, that while he was a "fisher" prior to May 1, 2018, for the month of May he was not: "For May 2018, I find that the agreement for wages between the party [*sic*] was based on a per-month amount, and as a result [the skipper's] employment for the month of May does not fall within the definition of 'fisher' in the Regulation."

9. Similarly, and in relation to the first mate, the delegate held that he was employed as a "fisher" up to the end of April 2018. However, the delegate also held that that as of "May 1, 2018, I find that as a result of lower than expected fishing proceeds, and Arctic Pearl's desire to retain [the first mate] as an employee, the basis of his remuneration changed" (page R16). The delegate, in the face of conflicting evidence, determined that the wage rate was $25.00 per hour, "the amount confirmed by [Arctic Pearl's accountant] on behalf of Arctic Pearl, as [the first mate's] rate of pay" (page R17).

10. Arctic Pearl appealed the Determination, relying on all three statutory grounds of appeal *(i.e.*, "error of law"; "natural justice"; and "new evidence" – see subsections 112(1)(a), (b), and (c) of the *ESA*). Arctic Pearl also applied for an extension of the appeal period so that it could file further submissions. This latter application was refused (see Appeal Decision, para. 76).

11. With respect to its "error of law" ground of appeal, Arctic Pearl principally alleged that the delegate erred in finding that the complainants were not "fishers" during May 2018 and that, in any event, they were not entitled to compensation for length of service under section 63 of the *ESA*. The "natural justice" ground of appeal principally concerned whether the delegate complied with her obligations under section 77 of the *ESA*, and otherwise whether she appropriately weighed and considered all of the evidence submitted to her. Section 77 states: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." The "new evidence" consisted of new "facts" that Arctic Pearl wished to put into the record, as well as some additional documents.

12. By way of the Appeal Decision, each of Arctic Pearl's grounds of appeal was found to be without merit and, that being the case, the appeal was dismissed under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding.

THE APPLICATION FOR RECONSIDERATION

13. A section 116 reconsideration application "may not be made more than 30 days after the date of the order or decision" (see section 116(2.1) of the *ESA*). However, section 109(1)(b) of the *ESA* empowers the Tribunal to extend the reconsideration application period.

14. Arctic Pearl's section 116 application was, at least initially, procedurally misconceived. The Appeal Decision was issued on November 23, 2020. On December 23, 2020, Arctic Pearl e-mailed a "request for an extension for our appeal" to which was appended an Appeal Form purporting to, *for a second time*, appeal the Determination – no reasons for appeal were provided, but the Appeal Form indicated that the appeal was based on the "natural justice" and "new evidence" grounds of appeal. Arctic Pearl's one-sentence e-mail and its Appeal Form were the only documents it filed with the Tribunal on December 23, 2020.

15. On December 24, 2020, the Tribunal's Registry Administrator e-mailed Arctic Pearl's representative explaining that the Tribunal's appeal file was closed, and additionally providing information regarding the process for filing an application for reconsideration of the Appeal Decision (if Arctic Pearl wished to apply for reconsideration).

16. On January 22, 2021, Arctic Pearl filed a Reconsideration Application Form with the Tribunal together with an attached memorandum setting out its reasons in support of the application. Since this application was untimely, Arctic Pearl also applied for an extension of the reconsideration period.

17. The reconsideration application raises two issues regarding the correctness of the Determination, later confirmed by the Appeal Decision. First, Arctic Pearl says that the delegate (and, by extension, the Tribunal) erred in finding that the complainants were not "fishers" in May 2018. Second, and alternatively, even if there were section 66 dismissals, the complainants were not entitled to section 63 compensation for length of service, since they never completed the requisite three-month period of consecutive employment.

18. As noted above, this application is untimely. Accordingly, I will first turn to Arctic Pearl's application to extend the reconsideration period.

THE APPLICATION TO EXTEND THE RECONSIDERATION PERIOD

19. On December 23, 2020, Arctic Pearl purported to file *an appeal of the Determination*, not an application to have the Appeal Decision reconsidered under section 116 of the *ESA*. Even if one were to characterize the filing of an Appeal Form as a injudicious attempt to actually file a reconsideration application with respect to the Appeal Decision, the application was still deficient since the appeal decision in question was never identified, and there were no accompanying reasons supporting the application.

20. The Appeal Decision was issued on November 23, 2020 and the Tribunal provided a copy of this decision to Arctic Pearl by way of a letter e-mailed to Arctic Pearl that same day. The Tribunal's one-page November 23rd letter included the following text box at bottom of the page:

> **Reconsideration Information**
> An application for reconsideration of the Tribunal's decision in this matter must be delivered to the Employment Standards Tribunal by **4:30 p.m. on December 23, 2020.** For information on the reconsideration process, please visit the Tribunal's website at www.bcest.bc.ca or contact the Tribunal at 604-775-3512. If you live outside the Lower Mainland and would incur a cost in contacting the Tribunal's office via telephone, please contact Service BC Contact Centre at 250-387-6121 (Victoria) or toll free in B.C. at 1-800-663-7867 to request a transfer to the Tribunal's telephone number].

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21. Arctic Pearl has not provided any explanation regarding why – especially in the face of the above information it received regarding the reconsideration process – it filed an Appeal Form, rather than a Reconsideration Application Form, on December 23, 2020. Upon receipt of the Appeal Form, the Tribunal immediately provided information to Arctic Pearl regarding how it could file a reconsideration application. This latter application was submitted one month later, on January 22, 2021. Arctic Pearl says that it was delayed in filing a timely reconsideration application due to staffing issues attributable to the resignation of a key employee, the holiday season, and the COVID-19 pandemic.

22. While I do not doubt that the pandemic has created administrative problems for many firms, I still do not have before me an adequate (or, indeed, any) explanation regarding why Arctic Pearl filed an Appeal Form with respect to the Determination, rather than a reconsideration application with respect to the Appeal Decision, on December 23, 2020. As noted above, even if the Appeal Form filed on December 23rd were accepted as a reconsideration application, it was woefully (and fatally) deficient.

23. The grounds alleged in the reconsideration application eventually filed on January 22, 2021, essentially reiterate those previously advanced on appeal. That being the case, it should have been a very simple matter to incorporate those reasons into a timely reconsideration application. As will be seen, I am also of the view that the application is not, even on a presumptive basis, meritorious, and this is an additional consideration when assessing an application to extend the reconsideration application period.

24. In my view, the application to extend the reconsideration application period should be refused and, accordingly, on that basis alone, the Appeal Decision would stand. However, in the event I have erred in that regard, I shall now also address the application on its merits.

25. Arctic Pearl says that the delegate misinterpreted the definition of "fisher" set out in section 1(1) of the *Regulation*. The definition encompasses two separate requirements: first, the person must be employed "on a vessel engaged in commercial fishing" and, second, their "remuneration is a share or portion of the proceeds of a fishing venture". Arctic Pearl submits:

> That the Complainants were not actively engaged in a fishing venture in May and June 2018 due to the unexpected docking of the Vessel should not bar them from the classification of "fisher," because despite the docking they were both employed on a vessel engaged in commercial fishing

> and their remuneration remained a share or portion of the proceeds of a fishing venture. At all times relevant to the complaint, the Complainants were employed on a vessel engaged in commercial fishing and at no time did their employment agreement change to such that they were not to receive a remuneration in the form of a share or portion of the proceeds of the Vessels' fishing ventures.

26. In order to accept Arctic Pearl's submission on this issue, one must reject the delegate's findings of fact. More particularly, the delegate determined – and there was ample evidence to support her findings of fact in this regard – that while the complainants were paid on a "share of catch" basis prior to May 2018, following the breakdown of the vessel, new compensation arrangements were negotiated. In short, as and from May 1, 2018, neither complainant was paid on a "share" basis (nor could be they be so paid, since no fishing was undertaken in May 2018), but rather at an agreed wage rate (a monthly salary for the skipper and an hourly wage for the first mate). While Arctic Pearl says that the complainants' wage agreements never changed, that is precisely contrary to what the delegate determined. I agree with, and adopt, the reasoning of the Appeal Decision at paras. 87 – 89.

THE MERITS OF THE RECONSIDERATION APPLICATION

27. Arctic Pearl, as an alternative argument, maintains that this change in the complainants' compensation arrangements for May 2018 "constituted a substantial alteration of the conditions of their employment sufficient to equate termination [*sic*] and thereby implicate section 66 of the ESA at that time." On this reasoning, a new employment contract immediately arose, and given the delegate's finding that the complainants' employment ended (applying section 66 of the *ESA*) on June 3, 2018 (by failing to pay wages due for May 2018), neither complainant met the section 63 "3 consecutive months of employment" qualification for payment of compensation for length of service.

28. There are several insurmountable problems with Arctic Pearl's alternative argument.

29. First, section 66 does not apply where the parties negotiate new terms and conditions of employment, as was the case here (see delegate's reasons, pages R9 and R11 in relation to the skipper, and pages R16 - R17 in relation to the first mate). Arctic Pearl, noting the delegate recognized that, prior to May 1, 2018, the complainants were "fishers", says that their "reclassification" as of May 1, 2018 constituted a "substantial alteration" and, therefore, a "deemed dismissal" within section 66. Statutory provisions must be interpreted so as to avoid absurd results (*Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27). If Arctic Pearl's submission on this score were to be accepted, any negotiated improvement in an employee's conditions of employment – assuming the improvement was "substantial" – could be characterized as a deemed dismissal under section 66 that would, in turn, presumptively entitle the employee to section 63 compensation despite the continuation of employment. In my view, such an interpretation of section 66 is plainly absurd.

30. Second, although section 66 does not specifically state that the substantial alteration of a condition of employment must be at the employer's behest, in my view, the only logical interpretation of this provision is that it is intended to address unilateral alterations by the employer. As a practical matter, employees simply do not have the independent ability to substantially alter their conditions of employment – it is only the employer that could, for example, change pay rates, retract benefits, or fundamentally alter the employee's duties. Although not a perfect analogue, section 66 is akin to the common law notion of

"constructive dismissal" (see *Potter v. New Brunswick Legal Aid Services Commission*, [2015] 1 S.C.R. 500) where the focus is on the employer's unilateral conduct.

31. Therefore, it follows that the "substantial alteration" must constitute a unilateral decision by the *employer*; section 66 does not apply where there is a mutually negotiated agreement that results in significant changes to, for example, an employee's compensation arrangements (see *Isle Three Holdings Ltd.*, BC EST # RD124/08; see also *RL7 Mechanical Ltd.*, 2019 BCEST 107, reconsideration refused: 2019 BCEST 132). By way of example, a commissioned salesperson cannot be deemed to have been dismissed by voluntarily accepting a promotion to a sales manager position, and a concomitant change in compensation structure from commission to salary.

32. Third, the new compensation arrangements at issue here were put in place precisely to *avoid* a termination of employment. The delegate found that Arctic Pearl offered new compensation arrangements to the complainants so that neither would quit. There was no gap in employment – the employment relationship continued, albeit with new compensation arrangements in place while the vessel was in dock being repaired.

33. Finally, since there was no deemed termination of either complainant prior to early June 2018, the complainants' respective "consecutive months of employment" dated from their original dates of hire, not as and from May 1, 2018. On that basis, both complainants were employed for more than 3 consecutive months, but less than 12 consecutive months. Thus, each complainant was entitled to one week's wages as compensation for length of service (as awarded by the delegate).

ORDER

34. Arctic Pearl's application to have the Appeal Decision reconsidered is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal