Employment Standards TRIBUNAL

Citation: 1170017 B.C. Ltd. (Re)
2021 BCEST 56

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

1170017 B.C. Ltd.
(the "Applicant")

- 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.: 2021/027

DATE OF DECISION: June 23, 2021

DECISION

SUBMISSIONS

Min Su (Joshua) Yang — legal counsel for 1170017 B.C. Ltd.

INTRODUCTION

1. This is an application filed by 1170017 B.C. Ltd. (the "applicant") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2021 BCEST 23, issued on March 8, 2021 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal dismissed the applicant's appeal of a Determination issued on July 31, 2020, by Shane O'Grady, a delegate of the Director of Employment Standards (the "delegate"). The delegate ordered the applicant to pay $68,896.49 to three former employees of the applicant (the "complainants"), and also levied $3,500 in monetary penalties (see section 98) against the applicant. Accordingly, the applicant's total liability under the Determination is $72,396.49.

2. This dispute arose from unpaid wage complaints filed by three individuals who worked in a now-defunct restaurant in Victoria. The Determination, and the delegate's extensive (37 single-spaced pages, including unpaid wage calculation schedules) "Reasons for the Determination" (the "delegate's reasons), were issued following an investigation by the delegate. During the investigation, the applicant was represented by legal counsel (not the same counsel who represented the applicant on appeal and on this application). The three complainants were also represented by legal counsel during the delegate's investigation.

3. The Tribunal dismissed the applicant's appeal under section 114(1)(f) of the *ESA* on the basis that it had no reasonable prospect of succeeding. The applicant now seeks reconsideration of the Appeal Decision, arguing that the Tribunal Member on appeal made certain legal errors, and that the decision is tainted by breaches of the principles of natural justice.

4. The applicant filed a timely application for reconsideration, but also sought an extension of the reconsideration application period, to May 7, 2021, so that it could file further "Reasons and Arguments". Apart from the brief application to extend the reconsideration period (about 1/3 of a page), the applicant filed a 9-page memorandum of argument in support of its reconsideration application. By letter dated April 7, 2021, the Tribunal advised the applicant that it would consider any further submissions filed by May 7, 2021, but specifically noted that this dispensation was "not an extension to the statutory reconsideration period". The applicant never did file any additional submissions.

5. In my view, this application must be dismissed since it does not raise a serious question of law, fact, principle or procedure so as to pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). My reasons for reaching that conclusion now follow.

PRELIMINARY MATTER – APPLICATION OF THE *CHARTER*

6. In its memorandum appended to its Reconsideration Application Form, the applicant raised arguments grounded in the *Canadian Charter of Rights and Freedoms*. In particular, the applicant says that by reason

of section 32, the *Charter* applies to "the Tribunal to carry out delegated government functions such as regulation and adjudication".

7. Some of the documents that were submitted to the delegate in the course of his investigation were written in Korean. Apart from section 32, the applicant says that the delegate failed to comply with the provisions of section 14 of the *Charter* ("A party or witness in any proceedings who does not understand or speak the language in which the proceedings are conducted or who is deaf has the right to the assistance of an interpreter"). The applicant argues that "since there is severe and palpable inconsistency in terms of the translation from Korean into English of almost all evidentiary documents presented by both parties, the delegate should have taken appropriate verification process to decide which party's translation of the foreign documents is correct" [*sic*].

8. On appeal, the applicant also advanced an argument regarding some of the translated documents that were before the delegate. However, this argument was not based on section 14 of the *Charter* – the applicant's *Charter* argument was advanced for the first time on this section 116 application. In the Appeal Decision (at paras. 59 – 62), the Member addressed the applicant's argument regarding the translated documents as follows:

> Much of the Employer's ground of appeal is an attempt to reargue facts already considered by the delegate. Counsel for the Employer also submits a large amount of "new evidence" on appeal, some of which relates to the accuracy of the Korean language documents submitted to the delegate. Counsel asserts that the documents submitted by H.C. were "mistranslated," and "manipulated in bad faith," and provides his own interpretation of some of the words. For example, Counsel, who appears to be a native Korean language speaker, suggests that the partnership agreement contains references to H.C. as "Gaab" and Mr. Choi as "Eul," and that those terms have particular meanings. He argues that the delegate ought to have obtained certified translations of those documents, and his failure to do so constitutes an error of law.
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> Counsel argues that because of what he asserts is improper translation of the evidence, all of the Employees' affidavits and supporting documents "should not be considered as legitimate evidence." Counsel requested that the Tribunal "order the complainants to translate all their affidavits and supporting documents by a certified translator who is accredited by the Society of Translators and Interpreters of B.C."
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> It is not the Tribunal's role on appeal to make any such order. Both parties were represented by counsel throughout the investigation, and presumably had sufficient facility with the English language to both enter into legal agreements (including lease agreements and incorporation documents) as well as instruct counsel. If the Employer had concerns with the quality of the English language translation of any document, he ought to have raised his concerns to the delegate through his lawyer. Given that the Employer had many opportunities to review and respond to the documents at first instance, it is not now open to him to challenge that interpretation. Furthermore, while the delegate had the authority to request that the parties provide him with an English version of the documents translated by a certified interpreter/translator, he was under no duty to independently obtain an "official" English language version, particularly given that the parties were represented by counsel.
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> Finally, when Counsel provides his own English language version of the documents and makes arguments based on that version, he risks becoming a witness in the case, which is a contravention of the Canadian Bar Association's Code of Professional Conduct.

9. With respect to section 32 of the *Charter*, while I accept that the Tribunal is required to conduct its affairs in a *Charter*-compliant manner, that is a separate matter from whether the Tribunal can interpret and apply the *Charter*'s provisions in the course of adjudicating a section 112 appeal or a section 116 reconsideration application. In short, the Tribunal cannot interpret and apply the *Charter* since, in accordance with section 103(e) of the *ESA* and section 45 of the *Administrative Tribunals Act*, the Tribunal "does not have jurisdiction over constitutional questions relating to the *Canadian Charter of Rights and Freedoms*".

10. In this application, the applicant says that the Tribunal Member "misconstrued the duty of the delegate when reviewing the documents originally written in a foreign language which leads to rendering unreasonable conclusion [*sic*] that 'he was under no duty to independently obtain an "official" English language version, particularly given that the parties were represented by counsel'".

11. Apart from the fact that the Tribunal has no "*Charter*" jurisdiction (section 103(e) of the *ESA* and section 45 of the *Administrative Tribunals Act*), I have some additional observations regarding the applicant's *Charter* argument insofar as it concerns the translated documents. First, I am not satisfied that section 14 of the *Charter* has any application in this case – the delegate conducted an investigation into the complaints and did not preside at an oral evidentiary hearing. Second, the parties, as was noted by the Tribunal Member on appeal, decided what documents they would submit to the delegate for his consideration, and they also apparently prepared their own translations. If there were serious concerns about any of these documents, those concerns should have been raised with the delegate, rather than being raised for the very first time on appeal. Third, both parties were represented by legal counsel and it was up to counsel, not the delegate, to raise questions with respect to the accuracy or veracity of any of the documents. Finally, I entirely agree with, and adopt, the Member's treatment of the applicant's arguments on appeal with respect to the accuracy of any of the translated documents.

12. I now turn to the balance of the applicant's arguments advanced in this application.

THE RECONSIDERATION APPLICATION – ANALYSIS AND FINDINGS

13. The principal natural justice/procedural justice challenge to the Appeal Decision is predicated on the assertion that the Tribunal Member was, or appeared to be, "biased" against the applicant and/or its legal counsel. As noted above, the applicant's counsel purported to act as both a translator and an expert linguist in his appeal submissions to the Tribunal. The Tribunal Member observed, at para. 62, that "when Counsel provides his own English language version of the documents and makes arguments based on that version, he risks becoming a witness in the case, which is a contravention of the Canadian Bar Association's Code of Professional Conduct." The applicant's counsel says that the Member's observation (which I consider to be entirely accurate) demonstrates that the Member "has a serious bias against the counsel who is bilingual, English and Korean, and reached the conclusion that the documents were translated by himself even though it is not true at all, rendering her decision as patently unreasonable". I should note that the Member never stated that counsel *prepared* the impugned document translations that were provided to the delegate – the Member merely commented on counsel's stated opinion regarding the correct translation regarding some of the documents.

14. At para. 58 of his appeal submission (and I am using this particular reference simply to illustrate my point), the applicant's counsel indicated he was submitting the following "new evidence" on appeal:

> New evidence has been found that HC was referred to as 'Gaab' and HJC was referred to as 'Eul' in the partnership agreement written in Korean. In the Republic of Korea, 'Gaab' is recognized as the party who has a superior position, whereas 'Eul' is acknowledged as the party who has an inferior position when both parties enter into a business contract including the partnership agreement. This kind of contract, reflecting the terminology of 'Gaab' and 'Eul', has been pervasively recognized and used by all Korean speaking people, not only in the Republic of Korea but also overseas Korean community. Pursuant to the 'Standard Labour Contract' in the Republic of Korea, 'Gaab' stands for an employer and conversely 'Eul' means an employee.

15. I have reviewed the section 112(5) record and the applicant's submissions on appeal. I see nothing in these documents that leads me to conclude that the above excerpt, for example, was based on an interpretation of the document prepared by a qualified translator. It appears to me, and despite counsel's contrary assertion, that this argument was developed and advanced by the applicant's counsel based on his own fluency in the Korean language. In any event, I do not conclude that the Member's observation about lawyers giving evidence in matters in which they are engaged as counsel, indicates any actual or apparent bias. Further, I should also note that I entirely agree with, and adopt, the Member's treatment of the applicant's so-called "new evidence" submitted on appeal (see Appeal Decision, paras. 63 – 66).

16. The applicant advanced other instances of the Member's treatment of the applicant's arguments as constituting evidence of bias. As I read the applicant's counsel's submission, he appears to be saying that an adverse decision with respect to his arguments is tantamount to evidence that the Member was biased against either him or the applicant. There is nothing in the material before me that would suggest the Member was predisposed against the applicant or its counsel by reason of some extraneous consideration.

17. The applicant's counsel asserts: "…the [Member] ignored almost all evidentiary documents or could not fully understand the main issues of the case, and then made an unreasonable decision from a reasonable person's perspective, which is regarded as a breach of procedural fairness due to personal bias". Although the Member did wholly disregard some "evidence", in my view, that was entirely appropriate in the circumstances. For example, the Member refused to delve into several unfounded allegations of misconduct levied against the complainants (para. 53):

> Counsel also advances serious allegations on appeal that had not been advanced during the investigation process, including that the Employees, collectively or individually, engaged in "witness tampering," "manipulation of evidence with malice" and "perjury." I note that the Employer, who was represented by a different counsel throughout the investigation process, advanced no such allegations. Counsel provides no evidence in support of these allegations and I find them to be entirely without merit.

I entirely agree with the Member's treatment of these allegations.

18. Similarly, the Member did not engage in a detailed analysis of so-called "new evidence" that was neither "new" nor admissible on appeal. Again, I entirely agree with the Member's approach to this "evidence" (see Appeal Decision, paras. 63 – 66).

19. In summary, I find, the applicant's "bias" arguments are unsupported by any cogent and probative evidentiary foundation and are without merit. Finally, I feel compelled to observe that the allegations of

bias - unsupported as they are - advanced by the applicant's counsel against the Member – are unseemly, and that I would have expected better from a member of the provincial bar.

ORDER

20. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

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Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal