

Citation: Anilyn Baylon and Caroline Gallegos (Re)
2021 BCEST 65

EMPLOYMENT STANDARDS TRIBUNAL

Appeals

- by -

Anilyn Baylon and Caroline Gallegos
(the “Employees”)

- 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 Nos.: 2021/031 & 2021/032

DATE OF DECISION: August 6, 2021

DECISION ON PRELIMINARY APPLICATION

SUBMISSIONS

Jonathon Braun	on behalf of Anilyn Baylon and Caroline Gallegos
Susan McCormack	on behalf of the directors of the Alexander McCormack Client Support Group Society
Laurel Courtenay	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision concerns a preliminary issue that has arisen with respect to the Employees' appeal of a March 5, 2021 determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director").
2. In appealing the Determination, the Employees rely on a number of Tribunal decisions. They also rely on two unpublished determinations issued by the Director in respect of parties unrelated to this appeal.
3. The Tribunal sought submissions from the parties on whether the Employees could rely on the unrelated determinations in advancing their appeal.

ARGUMENTS

4. The Director opposes the Employees' reliance on the unrelated determinations for three reasons: 1) doing so would be unfair to the Employer, who has no access to unpublished decisions; 2) the decisions contain the private information of persons who are strangers to the matters in the current appeal and have not consented to disclosure of that information; and 3) the decisions are not necessary for the just determination of this appeal.
5. The Director contends that sharing the determinations would be a violation of the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The Director says that disclosure of the personal information of those who come before the Director can only be made in accordance with FIPPA, and that under section 22(3)(d) of FIPPA, disclosure of personal information that relates to employment history is presumed to be an unreasonable invasion of a person's personal privacy. The Director submits that although the parties to an appeal are not subject to FIPPA, the Tribunal ought not assist in the unreasonable invasion of a third party's privacy.
6. Both the Employer and the Director also submit that it would be unfair for the Employees to rely on unpublished determinations of the Director, as the Employer does not have access to the Director's determinations, which are not publicly available. The Employer argues that to allow the Employees to rely on these decisions would be contrary to one of the stated purposes of the *Employment Standards Act* (the "ESA"); that is, the fair treatment of employees and employers.

7. Finally, the Director submits that the Tribunal has the final say in the employment standards system on questions of law (sections 112 and 115 of the *ESA*) and the Tribunal is not bound by the Director's interpretation. In other words, the Director argues that the unpublished determinations do not create legal precedent. The Director says that there is nothing in the *ESA* that permits the Tribunal to consider unpublished determinations in relation to parties who are strangers to the appeal before the Tribunal.
8. The Director contends that the Determination under appeal provides the Director's reasoning in respect of the specific facts of this case, and that the *ESA* specifies that the Director is a party to all appeals before the Tribunal to enable the Tribunal to obtain the Director's position on broad interpretation issues.
9. The Employees argue that it is a matter of fairness that they be able to rely on previous determinations by the Director's delegates. They say that although the Employer does not have access to determinations because they are not published, any unfairness stems from the Director's own practices and procedures, and the Director therefore cannot rely on its own practices and procedures to the extent they create unfairness. The Employees say the Tribunal should "issue a formal recommendation" that determinations of Director's delegates be made public, thereby ensuring fairness and accountability in the Director's decision making.
10. The Employees contend that making the Director's decisions publicly available "holds decision-makers accountable and ensures greater consistency in these decisions."
11. The Employees argue that the two unrelated determinations upon which they wish to rely relate to broad issues of interpretation and law. They contend that the determinations "discuss important principles that have extremely salient and probative application to the present matter" and that denying them the ability to rely on these determinations would be extremely prejudicial and "hinder the Tribunal's ability to render a just decision."
12. With respect to the privacy issue, the Employees say they are able to obtain the written consent of the employees identified in the two determinations on which they wish to rely, or they could provide copies of the decisions with all personal information redacted.

ANALYSIS

13. Under the *ESA*, the Director is tasked with investigating and resolving complaints alleging breaches of the *ESA*. Complaints may be resolved in a number of ways, which include a delegate of the Director issuing a determination. If a party is dissatisfied with a determination issued by a Director's delegate, they may appeal it to the Tribunal, which has exclusive jurisdiction under the *ESA* to hear and decide appeals of determinations (and reconsiderations of its appeal decisions).
14. In this appeal, the central question is whether the Delegate erred in his interpretation of the *ESA* in making the Determination. Because they are the first instance decision-makers, the Director's delegates have a role in the initial interpretation of the *ESA*: *British Columbia Securities Commission*, BC EST # RD121/07. However, the correctness of any interpretation of the *ESA* in a determination is decided by the Tribunal.

15. Accordingly, the “source” of employment standards law for purposes of appeal under section 112 of the *ESA* (and also for purposes of reconsideration under section 116 of the *ESA*) is a Tribunal decision, not a determination.
16. As the Tribunal explained in *Park Lane Ventures Ltd.*, BC EST # D211/03, the correct interpretation of the *ESA* is developed through the Tribunal’s jurisprudence, which delegates of the Director are expected to follow and apply:
- ... The decision of the Director to substitute her opinion for that of the Tribunal in order to develop her own interpretation of the [*ESA*] eliminates the Tribunal’s decision-making autonomy and ignores the intention of the legislature, which, through Section 110 and 112, has deemed it appropriate that the Tribunal have the final say on matters of law under the [*ESA*]...
- ...
- I do not contest the view that, as a matter of law, neither the Tribunal [n]or the Director are bound by the doctrine of *stare decisis*. Notwithstanding, there are valid reasons for respecting decisions made by the Tribunal. The rationale for the doctrine of *stare decisis* is the desirability of uniformity and consistency....
- The public has a right to expect that the [*ESA*] will be applied in a consistent fashion.
17. Accordingly, while determinations are examples of delegates of the Director applying the *ESA* as interpreted by the Tribunal, the determinations are not themselves legally authoritative. This is evident from the scheme of the *ESA*, which provides that the Tribunal “must make its final decision in writing and give reasons for the decision”: section 51 of the *Administrative Tribunals Act*, made applicable to the Tribunal by section 103 of the *ESA*.
18. By contrast, there is nothing in the *ESA* that compels the Director to publish any of its determinations. In fact, the Director has no statutory obligation to issue written reasons for a determination unless the person named in it requests reasons within 7 days of being served with a copy of the determination (section 81(1.1-1.3) of the *ESA*). Only a person named in a determination may appeal it to the Tribunal.
19. In my view, this statutory scheme makes clear that determinations are not authoritative sources of law with respect to the correct interpretation of the *ESA*. They are merely examples of delegates of the Director applying the *ESA* to the particular facts before them. They are intended to be for the benefit of the immediate parties to the dispute or complaint which the determination resolved. They are not intended to be of any utility to any other party or circumstance: that is why the *ESA* does not require them to be published.
20. During the investigation, the parties cited Tribunal authority on the issue of statutory interpretation to the delegate. The Tribunal must now decide whether the delegate erred. The correctness of any interpretation by the Director’s delegates is determined by the Tribunal without regard for how other cases may have been decided before the Director.
21. Accordingly, it is not necessary or helpful to cite determinations to the Tribunal; the fact that a delegate may have interpreted or applied the *ESA* a certain way in a certain set of circumstances does not affect the Tribunal’s decision.

22. To the extent the Employees argue that it is a matter of fairness that they be able to rely on previous determinations by the Director's delegates, I disagree. As I have noted above, the Tribunal has the final say in the employment standards system on questions of law and the Tribunal is not bound by the Director's interpretation. The determinations relate to individual circumstances and do not create legal precedent. The Employees are able to make submissions to the Tribunal without relying on the determinations. Accordingly, I find no fairness issues arise by not permitting the Employees to rely on the unrelated determinations.
23. In light of my conclusion, I find it unnecessary to address the parties' arguments on the application of *FIPPA*.

ORDER

24. I decline to allow the Employees to rely on unpublished decisions of the Director. However, I allow the Employees the ability to make submissions without relying on the unrelated determinations.

Carol L. Roberts
Member
Employment Standards Tribunal