Citation: AWC Developments Ltd. (Re)
2021 BCEST 96

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

AWC Developments Ltd.
("AWC")

- 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.: 2021/093

DATE OF DECISION: November 26, 2021

DECISION

SUBMISSIONS

Henry Amayo	on behalf of AWC Developments Ltd.
Dawn Rowan	delegate of the Director of Employment Standards

INTRODUCTION

1. This is an untimely application by AWC Developments Ltd. ("AWC"), made pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), for reconsideration of 2019 BCEST 11, issued on January 23, 2019 (the "Appeal Decision"). The Appeal Decision confirmed a Determination issued on July 4, 2018 by Dawn Rowan, a delegate of the Director of Employment Standards (the "delegate").

2. By way of the Determination, the delegate ordered AWC to pay $19,926.45 on account of unpaid wages owed to six former employees (the "complainants"). Further, and also by way of the Determination, the delegate levied five separate $500.00 monetary penalties against AWC (see section 98) based on its contraventions of sections 17, 18, 21 and 45 of the *ESA* and section 46 of the *Employment Standards Regulation*. Accordingly, the total amount payable by AWC under the Determination is $22,426.45.

3. This reconsideration application was filed on October 20, 2021. On October 21, 2021, AWC also filed a request seeking a section 113 order suspending the effect of the Determination. AWC did not provide any justification for this request other than to assert (without any evidence) that "the demand made against [AWC] were misrepresented by Mr. Gilmore [one of the complainants awarded wages under the Determination] and others and should be reviewed and reconsidered by the Panel further their decision the demand should be temporary suspended" (*sic*). AWC did not indicate in its section 113 application that it had deposited the total amount payable under the Determination with the Director of Employment Standards (see section 113(2)(a) of the *ESA*), nor did it propose to deposit a specific lesser sum (see section 113(2)(b)). In a later submission filed on November 19, 2021, AWC made several assertions relating to the alleged merits of its application, but did not provide any arguments regarding its section 113 application.

4. In my view, this application must be dismissed due to the fact that it is untimely and otherwise wholly devoid of merit. That being the case, I do not find it necessary to address AWC's section 113 application.

PRIOR PROCEEDINGS

5. The delegate issued the Determination on July 4, 2018, and on July 26, 2018, following a section 81(1.1) request from AWC, issued her "Reasons for the Determination" (the "delegate's reasons"). AWC had until August 13, 2018 to appeal the Determination to the Tribunal (calculated in accordance with section 112(3) of the *ESA*). AWC filed an appeal of the Determination on November 14, 2018, more than three months after the appeal period expired. AWC's appeal was based on the "new evidence" ground of appeal (section 112(1)(c) of the *ESA*).

6. The Appeal Decision was issued on January 23, 2019. The Tribunal dismissed the appeal under sections 114(1)(b) and (f) of the *ESA*, finding firstly, that the appeal was not filed within the applicable time limit (and that it would not be appropriate to extend the appeal period) and, secondly, that the appeal had no reasonable prospect of succeeding.

7. With respect to the timeliness of the appeal, and AWC's application to have the appeal period extended under section 109(1)(b), the Tribunal noted the following in refusing AWC's extension application (at paras. 4 and 30 – 31):

> The appeal was delivered to the Tribunal on November 14, 2018, more than three months after the statutory time period for filing an appeal had expired. The Appeal Form was accompanied by a request to extend the time period for filing the appeal. Although requested on the appeal form, AWC has provided no reason for the failure to meet the statutory time period; there is a vague reference to Henry Amayo ("Mr. Amayo"), who is representing AWC in this appeal and is identified on the Appeal Form and the section 112(5) record (the "Record") as the president of AWC, as being depressed, seeing doctors, and visiting the hospital ER on several occasions. Nothing has been provided to support those assertions.
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> . . .
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> In this case the length of delay is excessive and what little explanation for the delay that has been provided is neither reasonable nor credible. This appeal was filed more than three months after the expiry of the statutory appeal period. The request to provide further information was delivered to the Tribunal more than five months after expiry of the statutory appeal period.
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> There is no indication during the appeal period that AWC had formed any intention to appeal the Determination.

8. As noted above, the Tribunal also held that the appeal had no reasonable prospect of succeeding, observing (at paras. 39 – 41):

> The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such 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 conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA.*
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> I find the evidence provided by AWC with the appeal, and the information sought to be added, as described in its January 9, 2019, reply to the request from the Tribunal, do not meet the considerations for accepting and considering new evidence.
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> The proposed evidence is not "new"; it was available and could, applying a reasonable degree of diligence, have been provided to the Director during the complaint process had AWC opted to

participate in that process. Neither is the proposed evidence credible or probative in the sense required when considering an application to submit new evidence on appeal.

9. Apart from the untimeliness and general lack of merits of the appeal, the Tribunal also noted that AWC had, essentially, refused to meaningfully participate in the delegate's investigation which, in turn, justified dismissing the appeal under the *Tri-West Tractor*/*Kaiser Stables* principle (at paras. 45 – 46; 48):

> In my view this appeal also fails on the principle expressed in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.
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> A party is not permitted to refuse or fail to participate in the complaint process and, subsequent to a Determination being issued, seek to advance a case to the Tribunal on appeal, when the facts should have been advanced to the Director during the complaint process. The process before the Tribunal is in the nature of an appeal, where the appellant must demonstrate error in order to succeed. In my view, the Director cannot be said to have "erred" in a fact-finding process that AWC failed to participate in.
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> . . .
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> The very limited response of AWC to the efforts of the Director seek their participation in the complaint process and the refusal to comply with the Demand for Employer Records (while contending the Determination is wrong on matters concerning the employment of most of the Complainants with AWC, hours of work and wage rate) persuades me that AWC should not be allowed to challenge the Determination in this appeal.

AWC'S APPLICATION FOR RECONSIDERATION

AWC's Application to Extend the Reconsideration Application Period (section 109(1)(b) of the ESA)

10. AWC's application is extraordinarily late. AWC's section 116 application was filed on October 20, 2021 – 33 months, or about 2 ¾ years, after the Appeal Decision was issued. Pursuant to section 116(2.1), the application was required to have been filed within 30 days of the date of the Appeal Decision. AWC's explanation for this very long delay in filing its reconsideration application is as follows:

> On July 26th, 2021, **AWC Developments** and **A.H.H/ Fromco** entered a 25-day Trial in and Around October 1st of 2021, A Judgement was made with an Order by the Supreme court to pay out **AWC Developments ltd** an amount of $100,00 as well as **Washington Properties** an amount of $15,000 plus $65,000 of interest amount of the lean amount put in place by Washington Properties in Lieu of Mr. Gilmore's Lien claim. With the Order in place, we have clear developments regarding the individuals and the claim against **AWC DEVELOPMENTS LTD.** With the material and evidence that are currently in place we are requesting it is reasonable for the extension request.
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> **We are questing that the decision be reconsidered, and proper measures be taken.**
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> (*sic*, **boldface** in original text)

11. In my view, this "explanation" falls well short of justifying why AWC failed to file a timely reconsideration application. AWC has consistently failed to pursue the Tribunal's processes in timely manner – its appeal was filed more than three months after the appeal period had expired. Further, and as discussed in the

Appeal Decision at paras. 12 – 20, despite the delegate's repeated efforts to engage AWC in her investigation, it resolutely failed to participate.

12. This application is astonishingly late. The application concerns a Tribunal decision that was issued about one year before the Covid-19 pandemic even arrived in this province, and thus that circumstance certainly cannot be used as an excuse. The B.C. Supreme Court trial to which AWC refers (*A.H.H. Construction Services Ltd. v Washington Properties (QEP) Inc*., 2021 BCSC 1912), was conducted in the summer of 2021, and the court's decision was issued on October 1, 2021. I simply do not appreciate why AWC could not have filed its application well before this action was ever tried. AWC places such great stock in this B.C. Supreme Court decision, however, as is discussed, below, this decision is simply not relevant to the application that is before me.

AWC's Reasons in Support of its Reconsideration Application

13. As recounted in the delegate's reasons (at page R4), three of the complainants (including David Gilmore) were previously employed by a firm known as AHH Construction Services Ltd. ("AHH") until the end of September 2017. Their employment ended when their work at a construction site in Vancouver located at Cambie Street and 35th Avenue "stalled and there was not enough work for all the employees of AHH and AWC". AWC secured new work as a subcontractor at a project in Surrey and "AWC hired Mr. Gilmore [and two other complainants] to work at the Surrey site as employees of AWC. Mr. Gilmore was hired as a foreman." The delegate's reasons continue:

> There was a falling out between Mr. Gilmore and Mr. Amayo [AWC's sole director and its representative in both the appeal and this application] in late October 2017 and Mr. Amayo told Mr. Gilmore [and the other two complainants] to leave the Surrey site. AWC paid for only some of the work they performed.

14. In its "Written Reason and Argument for Reconsideration" (appended to its reconsideration application form), AWC says that Mr. Gilmore, two other named complainants "and several individuals made a False claim against [AWC] for unpaid wages" [*sic*] that was allegedly orchestrated by Mr. Gilmore and Nicole Serdar (incorrectly identified by AWC as "Sedar").

15. Ms. Serdar is the president of AHH. She was not one of the six complainants named in the Determination, and was not awarded any wages under the Determination. However, the delegate interviewed her during the course of her investigation. The delegate's reasons (at page R5) recount Ms. Serdar's evidence as follows:

> On April 23, 2018, Ms. Serdar submitted a letter to the Employment Standards Branch stating that Mr. Gilmore [and two other complainants] had been transferred onto AWC's payroll as of the beginning of October 2017. Ms. Serdar provided emails between herself and Mr. Amayo giving Mr. Amayo the employee information to add them to AWC payroll.

16. Apart from the "false statements" and conspiracy allegations (involving Mr. Gilmore and Ms. Serdar), AWC says the following, apparently arising out of the B.C. Supreme Court proceedings:

- AHH "during the witness stand also admitted that they had payed the individuals noted above (including Mr. Gilmore) or the individuals that were mentioned in the **Employment Standards** demand" (*sic*; **boldface** in original text);

- "Also acknowledging that Mr. Gilmore was at no time an employee of AWC Developments as noted on the **Employment Standards** claim" (*sic*; **boldface** in original text); and
- "Mr. Gilmore/Nicole Sedar have been constantly using the system and people to slander and defame our company as well as others in malicious acts as well as making themselves enriched."

17. The reasons for decision in the B.C. Supreme Court action, 2021 BCSC 1912, do not address any of the complainants' unpaid wage claims that the delegate adjudicated in her Determination and reasons. The claims addressed in the B.C. Supreme Court action solely concern the Vancouver, not the Surrey, construction project. None of the complainants, save Mr. Gilmore and one other individual (who is identified as a "worker"), are even mentioned in the decision. Ms. Serdar is mentioned only twice, and is described as the "owner" of AHH. Mr. Gilmore is described in the reasons (at para. 60) as having "[taken] a full-time job elsewhere in the fall of 2017, which meant he could no longer provide daily on site supervision", consistent with the delegate's findings that he was hired by AWC in late September. The reasons for decision in the B.C. Supreme Court action do not address whether Mr. Gilmore was an independent contractor, rather than an employee of AWC, insofar as his work at the Surrey construction site was concerned. As previously noted, the court's reasons simply do not concern the Surrey site.

18. Insofar as Mr. Gilmore's unpaid wages are concerned (determined to be nearly $8,400.00 under the Determination), the delegate noted that AWC issued him a payroll cheque and wage statement for the period from September 24 to October 7, 2017 – this payment was credited to AWC. Mr. Gilmore's unpaid wage claims concerns his work for AWC, not AHH, during September and October 2017 at the Surrey construction site.

19. AWC's current position that Mr. Gilmore was not its employee should have been placed before the delegate during her investigation. Raising this issue on appeal, or on reconsideration, is not appropriate in light of the *Tri-West Tractor/Kaiser Stables* principle. Further, and in any event, there is no credible evidence in the record demonstrating that Mr. Gilmore was an independent contractor with respect to the work he performed at the Surrey site. Indeed, if Mr. Gilmore was not an AWC employee, why did that firm issue him a payroll cheque and a wage statement as if he were an employee?

20. There is no credible evidence that AHH ever paid Mr. Gilmore, or any of the other complainants, for all of their work undertaken as AWC employees at the Surrey construction site. Finally, if AWC or its principal Mr. Amayo believes that Mr. Gilmore – or others – have defamed them, the proper forum for that action is the B.C. Supreme Court, not the Employment Standards Tribunal (which has no jurisdiction over common law defamation claims).

CONCLUSION

21. This application is untimely, and I am not prepared to extend the reconsideration application period. Apart from the fact that this application is untimely, it is entirely without merit and, therefore, fails to pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). Accordingly, this application must be dismissed on that basis as well.

22. In light of these conclusions, I do not find it necessary to address AWC's suspension request, as it is now moot. I should add, merely for the sake of completeness, that I would have been prepared to suspend the Determination only if the entire amount payable under it was first deposited with the Director of Employment Standards.

ORDER

23. AWC's application to extend the time period for requesting reconsideration of the Appeal Decision is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal