Employment Standards TRIBUNAL

Citation: Captain Foods Ltd. (Re)
2022 BCEST 17

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Captain Foods Ltd.
("CFL")

- 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: Shafik Bhalloo

FILE No.: 2022/052

DATE OF DECISION: March 3, 2022

DECISION

SUBMISSIONS

Ricky Chhokar — on behalf of Captain Foods Ltd.

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the *"ESA"*), Captain Foods Ltd. ("CFL"), a meat packaging business in Surrey, BC., seeks reconsideration of a decision of the Tribunal issued on January 10, 2022 (the "original decision").

2. The original decision considered an appeal of a determination issued by Tara MacCarron, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on September 1, 2021 (the "Determination").

3. The Determination was made by the Director on a complaint filed by Manoj Kamboj ("Mr. Kamboj"), a driver employed with CFL from June 15, 2020 to October 10, 2020, that CFL owed him wages for the hours he worked in September 2020 (the "Complaint"). The Director completed an investigation of the Complaint and determined that Mr. Kamboj was owed wages for 173 regular hours and 17.25 overtime hours in September 2020, including statutory holiday and vacation pay. The Determination concluded that CFL was liable to pay to Mr. Kamboj a total of $3,209.72, including accrued interest. The Determination also levied $1,000 in administrative penalties against CFL for violation of sections, 18 and 28 of the *ESA*.

4. On October 12, 2021, the last day for filing an appeal of the Determination, CFL appealed the Determination pursuant to section 112(1)(b) and (c) of the *ESA* on the grounds that the Delegate failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available at the time the Determination was being made.

5. At the same time, CFL also applied for an extension of time to the statutory appeal period to October 27, 2021, because it wanted to submit more GPS tracking data to challenge Mr. Kamboj's evidence of his hours worked presented to the Delegate in the investigation of the Complaint.

6. In its written submissions for an extension, CFL submitted that it would have the GPS tracking data by the end of the following week, which would have been the week of October 18 to 22, 2021.

7. On October 14, 2021, the Tribunal requested that CFL submit the additional documents by no later than 4:30 p.m. on November 4, 2021. However, CFL failed to comply with the Tribunal's deadline and did not submit any additional documents.

8. On January 10, 2022, Tribunal Member Richard Grounds (the "Tribunal Member") denied CFL's request for an extension and dismissed CFL's appeal. The Tribunal Member meticulously set out his reasons in the original decision.

9. With respect to CFL's natural justice ground of appeal, the Tribunal Member observed that "[t]he principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker." In the case at hand, the Tribunal Member observed that CFL was afforded notice of the issues and provided an opportunity to respond. He also noted that the Delegate was an impartial decision maker and there was no evidence of any bias on the Delegate's part. He also observed that the role of the Tribunal is not to make a fresh decision based on evidence that was before the Delegate; but only to determine whether the grounds of appeal are sufficient to overturn the Delegate's decision. In this case, other than relying on potential new evidence, the Tribunal Member concluded that CFL did not identify any failures on the part of the Delegate that would support a finding of breach of natural justice on the Delegate's part.

10. With respect to the request for an extension of statutory appeal period, the Tribunal Member noted that section 114(1)(b) of the *ESA* provides that the Tribunal may dismiss all or part of an appeal, if the appeal was not filed within the applicable time limit. The Tribunal Member also noted that there is no automatic right to an extension of the time limit to appeal and referred to the Tribunal's decision in *Niemisto* (BC EST # D099/96), where the Tribunal identified the following non-exhaustive criteria to consider when deciding whether to extend an appeal period:

a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

b) there has been a genuine, and on-going *bona fide* intention to appeal the Determination;

c) the respondent party, as well as the Director, have been made aware of this intention;

d) the respondent party will not be unduly prejudiced by the granting of an extension; and

e) there is a strong *prima facie* case in favour of the appellant.

11. The Tribunal Member noted that while CFL filed its appeal and its extension application before the expiry of the appeal period, the considerations that apply in deciding whether to extend the statutory deadline to appeal in this case are substantially the same as if the request had occurred after the expiry of the appeal period: *Ctour Holiday (Canada) Ltd.,* 2021 BCEST 73. The Member then went on to review the non-exhaustive criteria in *Re Niemisto* in context of the specific facts in this case. In deciding to deny CFL's application for an extension, the Tribunal Member reasoned as follows (at paras. 29 – 33):

> The Appellant has not provided the GPS tracking data to the Tribunal. Accordingly, the Appellant has not exhibited an on-going intention to appeal the Determination.
>
> The Appellant did not advise the Respondent or the Director of the Appellant's intention to appeal.
>
> There is some prejudice to the Complainant if the extension is granted, because to allow the extension would invalidate the certainty of the deadline to appeal noted in the Determination.
>
> The Appellant has appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination and that new evidence has become available. The Appellant's proposed evidence in support of the appeal is the GPS tracking data for the vehicle used by the Complainant. The Appellant submits this GPS tracking data will prove that

> the Complainant's evidence was not accurate. As noted above, the Appellant has not provided the GPS tracking data to the Tribunal.
>
> The proposed new evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination based on the evidence gathered for the investigation. …

12. The Tribunal Member also observed that while CFL did not provide the GPS tracking data in the appeal, had it done so, it would not have been admissible as new evidence under section 112(1)(c) because it would not have passed the first of the four conjunctive requirements for admitting new evidence on appeal in *Bruce Davies et al.* (BC EST # D171/03) at paras. 34 – 36:

> The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. The GPS tracking data was discoverable by the Appellant with the exercise of due diligence and could have been presented to the Delegate of the Director for the investigation. In fact, the Appellant did provide some simplified GPS data to the Delegate, but the Delegate did not find it to be reliable.
>
> The Appellant has not met the first stage of the test to admit new evidence on appeal. Given the evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination and no new evidence will be admitted, the Appellant does not have a strong *prima facie* case.
>
> I have considered the above relevant factors to determine whether or not an extension to the statutory time limit for the Appellant to appeal the Determination should be granted. Given the factors discussed above, I am not satisfied that an extension should be granted.

13. In the result, the original decision confirmed the Determination.

14. On February 8, 2022, the Tribunal received CFL's Reconsideration Application Form and written submissions seeking to have the original decision reviewed and either varied or cancelled.

ISSUE

15. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision.

SUBMISSIONS OF CFL

16. In support of CFL's reconsideration application, Ricky Chhokar ("Mr. Chhokar"), the Key Accounts Manager of CFL, submits that:

a) He disagrees with the original decision.

b) CFL emailed the Tribunal GPS records for both their vehicles on November 3.

c) The Director preferred the handwritten timecards prepared by Mr. Kamboj over the electronic GPS records of CFL which showed Mr. Kamboj's delivery truck was at CFL's premises.

d) He never said Mr. Kamboj's text messages were fake; only that he texted Mr. Kamboj when to start work the next day because Mr. Kamboj was working on a part-time basis for CFL.

e) The Director seems to view CFL and its current employee who "was responsible [for] me[e]ting drivers [at the] end of [the] day to collect cheque[s] and cash that we got from our customers" as lying while Mr. Kamboj, with his "fake handwritten card" is viewed as telling the truth.

f) If the Director wanted to speak with a former employee of CFL and not a current one, then the Director should have told him so and he would have provided the Director their telephone numbers.

g) From the outset, CFL said that Mr. Kamboj lodged his complaint because he wanted a job letter for immigration purpose and the Director "supported him to obtain a fake job l[e]tter to get immigration in Canada" and perhaps he, too, should have supported Mr. Kamboj to get a job letter to save CFL "around $4,000" ordered in the Determination.

h) In the telephone recording submitted in evidence, Mr. Kamboj said "he got paid for both months in one cheque" but according to the Director that is not what Mr. Kamboj meant or said in the call.

i) In October, Mr. Kamboj worked for 6 days and CFL gave him a cheque for 130.45 hours. How could someone have worked 130.45 hours in 6 days. When was the last time Mr. Kamboj worked more than 8 hours a day for CFL? Does this not mean that CFL paid Mr. Kamboj "for both months together?"

j) The Delegate told him to give Mr. Kamboj a job letter and he would "take [the] complain[t] back"; therefore, Mr. Kamboj was not "real[l]y worried about [the] money" he claimed he was not paid by CFL; "[h]e was blackmailing me to get [the] job l[e]tter through your [the Director's] office".

k) The Determination is "one sided' because the Director "ignor[ed] everything" and simply considered Mr. Kamboj's "written card [as] solid [proof] against all the [proof]" CFL submitted.

l) The only thing CFL did not have before were Mr. Kamboj's handwritten cards because CFL did not retain them before, but it does now. However, nothing else he or CFL submitted to the Director appears to have mattered in the decision, including the following:

    (i) the statement of a current employee who received Mr. Kamboj at the end of his shift;

    (ii) text message that shows that Mr. Kamboj is a part-time worker;

    (iii) "45 hours in 6 days";

    (iv) telephone recording in which Mr. Kamboj says that he got paid; and

    (v) GPS record[s].

ANALYSIS

17. Section 116 of the *ESA* delineates the Tribunal's statutory authority to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
>
> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (2.1) The application may not be made more than 30 days after the date of the order or decision.
>
> (2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.
>
> (3) An application may be made only once with respect to the same order or decision.

18. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

19. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Eckman Land Surveying Ltd.*, BC EST # RD413/02).

20. In *Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso),* BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

21. In *Re: British Columbia (Director of Employment Standards) ((sub nom) Milan Holdings Ltd.) (*BC EST #D313/98), a two-stage approach was delineated for the exercise of the Tribunal's reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the

application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:

a) whether the reconsideration application was filed in a timely fashion;

b) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;

c) whether the application arises out of a preliminary ruling made in the course of an appeal;

d) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases;

e) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

22. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, I find CFL's application does not warrant the exercise of the Tribunal's discretion in favour of a reconsideration of the original decision. CFL's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra.* More particularly, CFL has failed to make out an arguable case of sufficient merit to warrant a reconsideration; it has not raised any important questions of law, fact, principle or procedure of importance to the parties and/or their implications for future cases. It has not shown any error in the original decision, or presented other circumstances that requires this panel to intervene.

23. Mr. Chhokar's submissions, summarized in paragraph 16 above, amply show that CFL's primary focus is to have the reconsideration panel re-weigh evidence already provided to the Director in the investigation of the Complaint. CFL made a similar attempt in its appeal of the Determination previously; it is now attempting to have a "third-kick at the can" in its application to reconsider the original decision. As indicated above, I find there is no reviewable error in the original decision. To the contrary, I find the decision of the Tribunal Member in the original decision is both well reasoned and persuasive. In the circumstances, this panel will not exercise its discretion in favour of reconsideration. CFL's application is denied.

24. Lastly, I note that in his submissions, Mr. Chokkar says that CFL emailed the Tribunal GPS records for both their vehicles on November 3. However, the Tribunal's letter to the parties on November 8, 2021, states that CFL was requested to provide any additional documents in support of their appeal by November 4, 2021, but the Tribunal had not received the requested documents from CFL (as at November 8, 2021). It is curious that if CFL had sent the GPS records to the Tribunal on November 3, as contended by Mr. Chhokar, why would CFL not produce the email and the GPS records in its reconsideration application. In the circumstances, it is open to this panel to draw an adverse inference that the unproduced documents do not exist or were never sent to the Tribunal or would not have been helpful to CFL. In any event, I agree with the Tribunal Member in the original decision, that even if the GPS records had been produced by CFL, they would not have been admissible as new evidence under section 112(1)(c) because they would not

have passed the first of the four conjunctive requirements for admitting new evidence on appeal in *Bruce Davies et al.*, *supra*.

ORDER

25. Pursuant to section 116 of the *ESA*, the original decision, 2022 BCEST 3, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal