Employment Standards TRIBUNAL

Citation: Anilyn Baylon and Caroline Gallego (Re)
2022 BCEST 33

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Anilyn Baylon and Caroline Gallego
(the "Employees")

- 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: Robert E. Groves

FILE Nos.: 2022/002 and 2022/003

DATE OF DECISION: June 14, 2022

DECISION ON PRELIMINARY APPLICATION

SUBMISSIONS

Jonathan Braun	counsel for Anilyn Baylon and Caroline Gallego
Susan McCormack	on behalf of the directors of the Alexander McCormack Client Support Group Society
Jordan Hogeweide	delegate of the Director of Employment Standards

OVERVIEW

1. Anilyn Baylon and Caroline Gallegos (the "Employees") have applied for a reconsideration of a decision of the Employment Standards Tribunal (the "Appeal Panel") dated December 10, 2021 (the "Appeal Decision"), referenced as 2021 BCEST 97. The application has been brought pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. This matter arose following complaints (the "Complaints") delivered to the Director of Employment Standards by the Employees alleging that their former employer, Alexander McCormack Client Support Group Society (the "Employer"), had failed to pay them wages and compensation for length of service that were owed, improperly charged them for some of its business costs, and misrepresented terms of employment.

3. In a determination issued on March 5, 2021 (the "Determination"), a delegate of the Director (the "Adjudicative Delegate") ordered that the Employer, having been found to have contravened the *ESA*, was required to pay wages and other compensation, together with a sum for interest and penalties, totalling $63,438.04.

4. The Employees and the Employer filed appeals of the Determination, pursuant to section 112 of the *ESA*.

5. The Appeal Decision allowed the appeals, in part. The Appeal Panel found that the Determination revealed error when it held that the Employees had performed a type of employment for the Employer defined in the *Employment Standards Regulation* that was inapplicable in the circumstances. Accordingly, the Appeal Panel varied the Determination, and referred the matter back to the Director to determine the Employees' wage entitlements, if any.

6. In addition, the Appeal Panel, at paragraph 102 of the Appeal Decision, referred to sections 78(1)(a) and 114(2)(b) of the *ESA*, which discuss the potential assistance the Director and the Tribunal, respectively, may provide to encourage parties to reach negotiated settlements. The Appeal Panel said this:

> I appreciate that addressing these complaints has been both challenging and time-consuming for all parties, both at the initial complaint stage as well as during the appeal. In keeping with the spirit and intent of sections 78(1)(a) and 114(2)(b) of the *ESA*, I would recommend that the parties attempt to resolve the outstanding issues between themselves, either with or without Branch or Tribunal assistance.

7. The Employees delivered their section 116 application for reconsideration to the Tribunal on January 10, 2022.

8. On February 22, 2022, the Employer delivered written material to the Tribunal advising that it wished to attempt to resolve the Complaints "per the recommendations set out in 2021 BCEST 97." Attached to that communication was a copy of an email letter marked "Without Prejudice" from the Employer to counsel for the Employees that contained an offer to settle.

9. In a later communication received by the Tribunal on March 29, 2022, the Employer advised, among other things, that it had received no substantive response to its offer from the Employees, and that it was unsure whether settlement discussions were "ongoing".

10. In other correspondence, the Employer requested that its communications relating to its settlement offer which had been received by the Tribunal on February 22, 2022, and March 29, 2022, be included in the record if the Employees' application for reconsideration were to be decided on its merits.

11. The Tribunal then invited the parties to deliver submissions addressing the question whether the information regarding settlement efforts contained in the correspondence from the Employer received by the Tribunal on February 22 and March 29 should be included in the record as the Employer had requested.

12. The Employees, the Adjudicative Delegate, and the Employer have all delivered submissions.

ISSUE

13. Should the Tribunal include the Employer's correspondence of February 22, 2022, and March 29, 2022, regarding settlement of the Complaints in the record if the Employees' application for reconsideration is considered on the merits, as requested by the Employer?

ARGUMENTS

14. The Employees vehemently oppose the Employer's request. They argue that the issues raised in their application for reconsideration address legal errors discernible in the Appeal Decision. They say the settlement correspondence generated by the Employer in no way relates to those issues, and so it is irrelevant, in the same way that the failure of the parties to reach a settlement would be irrelevant to a consideration of the merits of the Employees' section 116 application. The Employees assert further that settlement negotiations are meant to be confidential if they are to be successful, and the Employer's email to counsel for the Employees contained in the February 22, 2022, material is clearly marked "Without Prejudice".

15. While acknowledging that the February 22, 2022, material contains a settlement offer that is clearly marked "Without Prejudice", the Adjudicative Delegate states that since "the letter does not appear to contain any substantive evidence with respect to the issues in the appeal decision, the Director…leaves the matter to the Tribunal's discretion."

16. The Employer submits that its settlement offer was delivered in response to the invitation of the Tribunal in the Appeal Decision and so it should be included in the record. The Employer states further that statements made by the Adjudicative Delegate during discussions with representatives of the Employer regarding settlement, and the likely outcome should the Complaints be referred back to the Director, which the Employer alluded to in its correspondence received by the Tribunal on March 29, 2022, have led the Employer to be concerned that "any re-calculation of wages may be inherently biased to reflect a monetary amount similar to that stated in the original Determination."

ANALYSIS

17. I have decided that I must deny the Employer's request, with but one caveat to which I will refer later.

18. Sections 78(1)(a) and 114(2)(b) of the *ESA* read as follows:

> 78 (1) The director may do one or more of the following:
>
> (a) assist in settling a matter investigated under section 73.1 or a complaint made under section 74;
>
> 114 (2) Before considering an appeal, the tribunal may
>
> …
>
> (b) recommend that an attempt be made to settle the matter.

19. These provisions serve an important purpose within the legislative scheme. They are meant to encourage parties to consider settling a dispute by mutual agreement, rather than bear the risks associated with an adjudication by a third party. That being so, sections 78(1)(a) and 114(2)(b) should be read in a way that recognizes a different set of procedures for the resolution of a dispute than is mandated by the statute when an adjudication is contemplated.

20. The *ESA* does not stipulate how the settlement negotiations might be conducted, or the purpose for which communications made during the negotiations might be utilized, should the negotiations fail. However, at common law, the default rule is that communications of this sort are privileged and, therefore, they are inadmissible in adjudicative proceedings that are commenced with a view to deciding the dispute that the parties sought to settle.

21. A useful statement of the policy considerations supporting the rule appears in Sopinka J., Lederman S. N., and Bryant, A. W., *The Law of Evidence in Canada*, (Butterworths, 1992) at page 719:

> It has long been recognized as a policy interest worth fostering that parties be encouraged to resolve their private disputes without recourse to litigation, or if an action has been commenced, encouraged to effect a compromise without resort to trial. In furthering these objectives, the courts have protected from disclosure communications, whether written or oral, made with a view to reconciliation or settlement. In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession that they would be prepared to offer could be used to their detriment if no settlement was forthcoming….

22. Here, it is true that it is the Employer who attempted to commence a settlement negotiation when it submitted a settlement offer. Notwithstanding the fact that the Employer's February 22, 2022, communication containing its offer to settle was marked "Without Prejudice", the Employer makes no claim of privilege and, indeed, it wishes its settlement communications to be included in the record for consideration by the Tribunal when the section 116 application for reconsideration is adjudicated.

23. Moreover, to the extent the Employer's settlement offer may be said to constitute an admission, it is not an admission of liability, or a statement conceding that it acted in a way that was unlawful. Instead, the February 22, 2022, and March 29, 2022, communications simply reveal a desire on the part of the Employer to "buy peace".

24. The Employer offers no rationale for its assertion that the subject communications should form part of the record for the purposes of the adjudication of the section 116 application, apart from referring to the recommendation appearing in the Appeal Decision that the parties attempt to resolve the dispute themselves, "either with or without Branch or Tribunal assistance." It does not of necessity follow, however, that if the parties were to attempt to settle, either with or without the assistance of the Branch or the Tribunal, the communications generated during the settlement negotiations must be included in the record before the Tribunal panel adjudicating the section 116 application on its merits. I draw this conclusion because no plausible connection has been established between the statements in the February 22, 2022, and March 29, 2022, materials relating to the Employer's efforts to settle the dispute, and the substance of the legal challenges that have been presented by the Employees in their section 116 application for reconsideration. That being so, the statements in the February 22, 2022, and March 29, 2022, materials relating to the Employer's efforts to settle the dispute, and the settlement offer it made therein, are unhelpful, because they are irrelevant. It follows that they cannot be admitted and should not form part of the record in the section 116 application.

25. I must address one caveat. In its March 29, 2022, submission, and in its submission on the preliminary question addressed in this decision, the Employer raises a concern that the Adjudicating Delegate may have pre-judged any subsequent decision to be made should the Complaints be referred back to the Director following a decision in the section 116 application on its merits. As a concern of this nature may relate to one of the potential orders which might form part of the Tribunal's disposition of the section 116 application, I wish to make it clear that my reasons in this decision do not preclude the parties from addressing this concern, should they wish, once I have adjudicated the application for reconsideration on its merits. Therefore, if my decision on the section 116 application includes an order that the Complaints should be referred back to the Director, the parties will be at liberty, at that time, to deliver submissions to the Tribunal addressing the allegation of potential bias on the part of the Adjudicating Delegate the Employer has introduced, and the directions, if any, the Tribunal should make for the Director to follow regarding that issue when the Complaints are considered afresh.

ORDER

26. Subject to the caveat to which I have referred, the Employer's request that the Tribunal include the Employer's correspondence of February 22, 2022, and March 29, 2022, regarding settlement of the Complaints in the record if the Employees' application for reconsideration is considered on the merits is denied.

Robert E. Groves
Member
Employment Standards Tribunal