Citation: Roman Shalagin (Re)
2022 BCEST 53

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Roman Shalagin

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: David B. Stevenson

FILE NO.: 2022/131

DATE OF DECISION: August 24, 2022

DECISION

SUBMISSIONS

Roman Shalagin — on his own behalf

OVERVIEW

1. Roman Shalagin ("Mr. Shalagin") seeks reconsideration of a decision of the Tribunal, 2022 BCEST 43 (the "original decision"), dated July 7, 2022.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director's delegate") on February 2, 2022.

3. The Determination was made by the Director's delegate on a complaint filed by Mr. Shalagin, who alleged his former employer, Mercer Celgar Limited Partnership ("Mercer Celgar"), had contravened the *Employment Standards Act* (the "*ESA*") by failing to pay annual vacation pay and compensation for length of service.

4. The Director's delegate found, applying section 31(b) of the *Employment Standards Regulation* (the *"Regulation*"), the *ESA* did not apply to Mr. Shalagin and, exercising the authority granted in section 76 of the *ESA*, decided no further action would be taken on his complaint.

5. An appeal of the Determination was filed by Mr. Shalagin alleging the Director's delegate had erred in law and failed to observe principles of natural justice in making the Determination.

6. In dismissing the error of law ground of appeal, the Tribunal Member making the original decision addressed, and rejected, the central argument under this ground made by Mr. Shalagin: that the Director's delegate had erred in law in finding section 47(1) of the *Chartered Professional Accountants Act* (the *"CPAA"*) is not an exhaustive list of the duties governed by that Act. In respect of that finding, the original decision states, following the analysis in paras. 36-46:

> Accordingly, when section 47(1) of the CPAA is considered using the modern approach to statutory interpretation, I find that the Delegate did not err in determining that the occupation governed by the CPAA is not limited to the services listed in section 47(1) of the CPAA. (at para. 47, original decision)

7. The Tribunal Member making the original decision also addressed the arguments that the Director's delegate had failed to observe principles of natural justice by:

   i. allowing Mr. Shalagin's resume to be introduced into evidence by Mercer Celgar;

   ii. accepting evidence from the Organization of Chartered Professional Accountants of British Columbia ("CPABC") relating to their interpretation of section 47 of the *CPAA*; and

   iii. failing to understand and adequately deal with the circumstances relating to Mr. Shalagin's failing to acknowledge, until confronted with an admission made by him in a Supreme Court

action brought by him against Mercer Celgar, that he was bound by the CPA's Code of Conduct.

8. The natural justice ground of appeal was dismissed in the original decision. The dismissal of that ground is not challenged in this application.

9. In result, the Tribunal Member making the original decision confirmed the findings and conclusion of the Director's delegate in the Determination, which is summarized at pages R13-R14 of the Determination, that:

> The Complainant is listed as a member in the CPA directory with the designations CPA and CGA. Additionally, subsequent to receiving his CGA and CPA designation, the Complainant was promoted twice; one in 2016, to Senior Financial Analyst and given an increase in salary to $105,000 and again in 2019 to Senior Financial Analyst – Team Lead and given another increase in salary to $123,000. The Respondent submits the Complainant would not have received these promotions without the CPA designation; they were not simply a result of good performance as the Complainant suggests. I find it unlikely the Complainant would have been promoted into a position managing others without having a CPA designation. Given the Complainant used his financial expertise to develop budgets, perform cost accountability, perform month end tasks, was appointed to the Cost Reduction Task Force, assisted SR&ED filing as well as other duties described above. I therefore find the Complainant used his skills as a CPA in his role as Senior Financial Analyst.

10. The above findings and conclusion were based on the evidence provided, which is outlined on page R12 of the Determination, and the Director's delegate's assessment of the relative merits of the respective parties' positions. This application continues to assert the above result is an error of law. This assertion, and the response to it in the original decision, shall be addressed in my analysis.

11. This application seeks to have the original decision set aside and the matter be referred back to the Director of Employment Standards for investigation.

ISSUE

12. 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 appeal decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should cancel the original decision and refer the matter back to a new appeal panel of the Tribunal or to the Director of Employment Standards for investigation.

ARGUMENTS

13. Mr. Shalagin submits this is an appropriate case for reconsideration as it engages an error that goes to fundamental principles directing the interpretation and application of the *ESA* and to some of the objectives laid out in section 2 of the *ESA*.

14. While the submission made by Mr. Shalagin in this application is heavily weighted with principles and propositions about which there is no controversy, the principal point made in this application is the

continuing assertion – made to the Director's delegate during the complaint process and to the Tribunal in the appeal – that, for the purposes of the *ESA*, section 47(1) of the *CPAA* is inclusive of all the duties governed by that Act and that any other conclusion is an error of law.

15. In the reconsideration application submission, Mr. Shalagin has reintroduced two additional, and alternative, arguments:

1) the *CPAA* is ambiguous about what comprises the profession of chartered accountant and that being the case, when deciding whether an employee is excluded by section 31(b) of the *Regulation*, only those duties and functions described in section 47(1), which is submitted to be the only "clear list of duties" in the *CPAA*, should govern the result; and

2) the Director's delegate, and, by extension, the Tribunal Member making the original decision, erred in law in finding he was a person *"carrying on the profession governed by"* the *CPAA* in his employment with Mercer Celgar.

16. The above arguments are identical to those made in the appeal under the ground of error of law, were considered, and dismissed in the original decision.

17. On the principal point argued in this application, Mr. Shalagin submits the error made in the original decision flows from a failure to read the *ESA* in a broad and generous manner and to resolve doubtful language in favor of the employee.

18. A similar contention is made to support the first of the alternate arguments set out above.

ANALYSIS

19. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *ESA* reads:

> ***116*** *(1) On an 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 served with an order or a decision 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.*
>
> *(4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

20. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is *"to provide fair and efficient procedures for resolving disputes over the application and interpretation"* of its provisions. Another stated purpose, found in section 2(b) is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Inc.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST #RD046/01, the Tribunal explained the reasons for 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 deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

22. The Tribunal has accepted an approach to applications for reconsideration that resolves itself into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not available to the original panel;
- inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

23. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised in the reconsideration.

24. I find this application does not warrant reconsideration.

25. In answer to the submissions made by Mr. Shalagin in support of this application, I shall first address the continuing assertion that there was an error of law in the interpretation and application of the scope of the exclusion found in section 31(b) of the *Regulation* in the context of the principles directing the exercise of discretion under section 116 of the *ESA*.

26. It is not the function of a reconsideration panel to change the original decision unless the applicant can demonstrate some manifest error in it that justifies intervention and correction.

27. I am not satisfied any error in the original decision, or other circumstance that requires intervention, has been shown. Based on the material before the Tribunal Member making the original panel, I completely endorse the basis for the disposition of the appeal.

28. In making this finding, I confirm that it was not an error of law, nor, if necessary, do I find it was unreasonable, for the Director's delegate to accept the view of the CPABC that section 47 of the *CPAA* did not represent an exhaustive list of the duties that comprise the profession of accounting and, it follows, there is no error of law in the acceptance of that finding by the Tribunal Member making the original decision. The Director's delegate was entitled to prefer, as a matter of evidence, the interpretation of section 47 offered by the CPABC to that offered by Mr. Shalagin – as, in the words of the Director's delegate, "they are the authority tasked by the government of British Columbia to administer the CPA Act."

29. While it may not be appropriate to prefer the view of the CPABC in every case where a disagreement arises over what employees are excluded by section 31(b) of the *Regulation*, in this case the information provided by CPABC, which is summarized on pages R10-R11 of the Determination, is a reasoned analysis by them explaining section 47 of the *CPAA* is a provision which governs members who are providing accounting services to the public that require a licence to do so and the description of the services governed under that provision is a "subset" of the practice of accounting, not an exhaustive list of accounting. CPABC says accounting also includes "performing audit and other assurance engagements, issuing various certifications, and providing declarations or opinions on financial information". Their description of services falling under the rubric of the practice of accounting accurately describes the functions the Director's delegate found were performed by Mr. Shalagin in his capacity as Senior Financial Analyst.

30. It follows that I entirely agree with the Tribunal Member making the original decision that the Director's delegate made no error of law in finding section 47 of the *CPAA* was not inclusive of the functions persons excluded from the *ESA* by section 31(b) of the *Regulation* would perform.

31. In response to the first alternative argument, once it is decided that section 47(1) of the *CPAA* is not inclusive of the occupation governed by that Act, it would be completely unacceptable, and in my view quite improper, for the Tribunal to find that for the purposes of section 31(b) of the *Regulation*, the occupation governed by the *CPAA* is something other, and less, than what is as a matter of law governed by that Act and included in the profession of accounting. The Tribunal Member making the original decision cannot be said to have made any error by not giving effect to this alternative argument.

32. In this sense, I endorse the comments of the Director's delegate who said, at page R13 of the Determination, "[e]xclusions under the Regulation should be interpreted in a narrow manner so not to take away benefits. That said, statutory provisions must not be stretched beyond reasonable limits."

33. In response to the second alternative argument, it is clear, examining the original decision as a whole, that the Tribunal Member accepted the conclusion of the Director's delegate, drawn from the facts provided, weighed, and accepted, that Mr. Shalagin was carrying on the occupation governed by the *CPAA* in his employment with Mercer Celgar. I find no error of law in either the conclusion or the acceptance of it.

34. In any event, the challenge being made by Mr. Shalagin in this argument, at its core, alleges error on the facts: that *the facts* did not show he was *"carrying on the occupation governed by the [CPAA]"*.

35. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director's delegate committed an error of law on the facts, Mr. Shalagin is required to show the findings of fact and the conclusions reached by the Director's delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26-29.

36. Neither the appeal nor this application addresses why the finding of the Director's delegate, and the Tribunal Member's endorsement of it, that the responsibilities exercised by Mr. Shalagin and the duties performed by him placed him within the profession of accountant, is wrong except to say the finding should not have been made since the *CPAA* does not define the "practice of accounting". That kind of a submission does not satisfy the test for showing error of law on the facts and the Tribunal Member making the original decision was quite correct giving it no effect.

37. For the above reasons, the application for reconsideration is denied.

ORDER

38. Pursuant to section 116 of the *ESA*, the original decision, 2022 BCEST 43, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal