Citation: Burt Feng (Re)
2022 BCEST 74

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 -

Burt Feng
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2022/194

DATE OF DECISION: December 19, 2022

DECISION

SUBMISSIONS

Burt Feng — on his own behalf

INTRODUCTION

1. This is an application for reconsideration of 2022 BCEST 62, an appeal decision issued by a Tribunal Member on September 27, 2022 (the "Appeal Decision"). The application has been filed by Burt Feng (the "applicant") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). The applicant was also the appellant in the Appeal Decision.

2. In my view, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST #D313/98) because it does not raise a presumptively meritorious case for reconsideration. Accordingly, the application must be dismissed. My reasons for reaching that conclusion now follow.

PRIOR PROCEEDINGS

3. On April 12, 2022, Mathew Osborn, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination, and his accompanying "Reasons for the Determination" (the "delegate's reasons"), in relation to an unpaid wage complaint filed by the applicant against his former employer, Chef Hung Noodle Shop Ltd. (the "employer").

4. The delegate dismissed the complaint under section 76(3)(b) and (i) of the *ESA* on the basis that one component of the applicant's wage claim had been settled and, with respect to the balance of the applicant's claim, because it concerned wages that became payable outside the statutory wage recovery period (see subsection 80(1)(a) of the *ESA*).

5. The Determination included a text box at the bottom of the one-page Determination setting out "Appeal Information", and advising that the deadline for appealing the Determination to the Tribunal was 4:30 PM on May 6, 2022. On May 6, 2022, the applicant filed an Appeal Form, using the form the Tribunal has posted on its website. The applicant identified his ground of appeal, by checking off the appropriate box in Part 6 of the form, as follows: "The Director of Employment Standards failed to observe the principles of natural justice in making the Determination" (see section 112(1)(b) of the *ESA*). The applicant also indicated, in Part 5 of the form, that he was seeking an extension of the appeal period to August 6, 2022 (see section 109(1)(b) of the *ESA*). In Part 8 of the Appeal Form, the applicant indicated, again by checking the appropriate box on the form, that he had attached a separate sheet setting out some of his reasons for appealing the Determination, and that he would provide additional reasons by August 6, 2022. In a letter appended to the Appeal Form, the applicant stated that he required "additional time to collect and prepare the whole supporting documents which is a complicated process during the appeal period", and that he might be retaining legal counsel to assist him. In his attachment, the applicant did not explain, even in a perfunctory way, how or why the delegate failed to observe the principles of natural justice.

6. On September 27, 2022, and without receiving submissions from either the delegate or the employer, a Tribunal Member issued the Appeal Decision, dismissing the appeal. The Tribunal Member made the following findings:

- "…I find that the need to compile documents or review any materials with another individual, without more, does not represent a reasonable or credible explanation for the failure to perfect the appeal in the time frame required." (para. 21)
- "…even if the Appellant had required this extra time to seek legal and/or financial advice or support, there is no evidence either that he sought nor obtained such advice. The documents provided by the Appellant on August 8, 2022 are most of the very same pay stubs provided by the Appellant to the Delegate during the investigation, but for three pay stubs from early 2017 that are not found in the Record." (para. 22)
- "…there is nothing on the face of the Determination, or the reasons for Determination that would suggest a failure to observe the principles of natural justice, nor that the Director erred in law (although this ground has not been identified)." (para. 28)
- "There is no dispute that the outstanding overtime wages sought by the Appellant precede this [section 80(1)(a)] 12-month limitation period, and, accordingly, the Director cannot, by law, order their payment. While the Appellant may well have worked overtime hours for which he was not appropriately compensated, the hours and pay periods he points to occurred earlier than the 12-month limitation set out in section 80. " (paras. 31-32)

7. The Tribunal Member refused the applicant's application to extend the appeal period in order to allow the applicant to gather more information and/or documentation and dismissed the appeal under section 114(1)(b) – "the appeal was not filed within the applicable time limit". Further, the Tribunal Member noted that even if the appeal were considered to be timely, it must nonetheless be dismissed as having no reasonable prospect of succeeding (section 114(1)(f)): "…to the extent that submissions received within the statutory appeal period may be viewed as complete, the Appeal is nevertheless dismissed under section 114(1)(f) as disclosing no reasonable prospect of success." (para. 36).

THE APPLICATION FOR RECONSIDERATION

8. On October 27, 2022, the applicant filed an application for reconsideration of the Appeal Decision. The applicant filed a completed "Application for Reconsideration" (the form is posted on the Tribunal's website) and attached a 2-page memorandum. In his reconsideration application, the applicant requested an extension to January 26, 2023, and in a later memorandum filed on October 31, 2022, provided the following explanation (reproduced in full) as to why he required additional time:

> I am writing this letter to ask the judge to extend my statutory period of de novo consideration. I know that sufficient and favorable evidence and materials are essential in preparing every case requested. Therefore, I need to have enough time to prepare my appeal materials based on the following points.
>
> 1. I can discuss the specifics of the appeal process with my attorney. This requires sufficient time for my representative to prepare my materials.
>
> 2. I need time to organize my materials and the list of materials I need to file. All of this needs to be done in plenty of time.

> 3. I will do everything I can to find witnesses and testimony that will prove that my former employer owes me overtime pay.
>
> Therefore, based on the above factors, I request Your Honor to consider my statutory reconsideration period.

9. The applicant also attached 35 pages of wage statements to his October 31, 2022 memorandum. Insofar as the underlying basis for the reconsideration application is concerned, the applicant says the following:

> As mentioned in the previous disclosure, the ruling issued on April 12, 2022, held that the amount of compensation arising from the portion involving the period from March 19, 2019, to March 19, 2020, has been settled by both parties.
>
> However, I mentioned in the additional material submitted on August 8, 2022, that I was in the period from November 6, 2016, to June 1, 1028 [*sic*], and from June 15, 2018, to August 23, 2019. During this period, the employer did not pay me the overtime pay that I deserved according to the relevant regulations of the Employment Basic Law. This is obviously an illegal act of the employer. I did not receive any compensation from my employer for the overtime hours I incurred while working. This has nothing to do with the length of the retrospective period because my legitimate income interests are not protected as they should be. The total overtime pay is $7473.63, and the illegal behavior for the length of time was about three years.
>
> In the final judgment of dismissal, items 14 and 15 mentioned, "I did not state that I did not provide any further comments on his overtime pay." Therefore, I have to state that in the additional material I submitted on August 8, 2022, Pay and mark unpaid overtime and have a clear breakdown of overtime hours on the payslip. At that time, I was entirely responsible for dealing with many overtime hours based on the increase in the order volume of the restaurants in each branch. As a result, I did not get the pay I deserved, which is totally disrespectful to the results of my work and inconsistent with the equal rights and legal system of Canadian citizens. Therefore, I implore the judge handling my case to reconsider this request based on the law, humanity and equal rights of citizens.

FINDINGS AND ANALYSIS

10. Apart from the timeliness of the applicant's appeal, his appeal was dismissed under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding. The asserted ground of appeal was that the delegate failed to observe the principles of natural justice, but the applicant failed to provide any evidence or argument to support this ground of appeal. As I read the applicant's appeal submissions, the central thrust of his challenge to the Determination was that the delegate erred in law by failing to award him wages outside the statutory wage recovery period.

11. The applicant's unpaid wage complaint was filed on July 29, 2020. In this complaint, the applicant stated that his last day of work was March 19, 2020, and he advanced a claim for approximately $9,200 representing unpaid overtime pay earned during the period from September 16, 2016 to October 24, 2019.

12. As summarized in the delegate's reasons (page R3), the applicant's wage claim for the period March 19, 2019, to March 19, 2020, was settled with the employer, and the settlement funds were disbursed to the applicant on April 8, 2022. Accordingly, the delegate dismissed this aspect of the complaint under section

76(3)(i): "The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if…(i) the dispute that caused the complaint is resolved, including by way of a settlement agreement made under section 78." However, the applicant continued to assert a claim for wages that became payable prior to March 19, 2019 (this claim spanned the period from September 16, 2016, to March 18, 2019), and this claim was not included in the settlement agreement.

13. Section 80(1)(a) of the *ESA* limits the amount of wages that may be recovered as follows: "The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment". The delegate, applying this latter subsection, correctly determined that the applicant's wage recovery period commenced March 19, 2019.

14. The B.C. Court of Appeal held, in *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCA 553, that section 76(3) of the *ESA* confers a discretion on the Director (para. 14). Accordingly, the delegate considered whether he should exercise his discretion and continue to investigate the complaint with respect to the applicant's claim for wages that became payable prior to March 19, 2019. The delegate, without referring to *Karbalaeiali*, held:

> Section 76(3)(b) provides the Director discretion to stop investigating a complaint if the Act does not apply to the complaint…
>
> …For the period of June 2016 to March 18, 2019, I find the Act does not apply to recovery of the wages the Complainant alleged he is owed, as those wages do not fall within the recovery period prescribed by the Act. Therefore, I am exercising my discretion as the Director's delegate to stop investigating this complaint pursuant to section 76(3) of the Act.

15. In my view, the delegate erred when he determined that the *ESA* did "not apply to the complaint". Clearly, the *ESA did* apply; otherwise, the delegate would not have had any statutory authority to facilitate a section 78 settlement. Further, had there not been a settlement, the delegate would have had the statutory authority to investigate and determine the applicant's unpaid wage entitlement. This is not a case where the *ESA* did not apply to a complaint because, for example, the complainant worked for a federally-chartered bank, or was a partner in a partnership rather than an employee – in either situation, the *ESA* does not apply and a complaint filed in such circumstances could be properly dismissed under section 76(3)(b).

16. With respect to the applicant's pre-March 19, 2019 unpaid wage claim, the delegate's task was not to determine, in the context of a complaint that *was* properly before him, whether the *ESA* governed the parties' relationship, but rather to interpret and apply the *ESA*, and particularly the section 80(1)(a) unpaid wage liability provision, in the course of determining the applicant's *ESA* entitlement, if any.

17. I do not see anything in section 76(3) that gives the Director of Employment Standards a discretionary power to extend a complainant's unpaid wage recovery period – and the employer's concomitant maximum unpaid wage liability – as specified in section 80(1). However, there *is* a discretionary power set out in section 80 itself, namely, subsection 80(3): "Despite subsections (1) and (2), the director may, in prescribed circumstances, extend the 12 months referred to in subsection (1) (a) or (b) or (2) (a) (i) or (ii), as applicable, to 24 months." However, there are presently no "prescribed circumstances", and that being the case, in my view, the section 80(1) 12-month "wage recovery/employer liability" period is effectively

a "hard cap" not capable of being extended by the exercise of the Director's discretion. As previously noted, in my view, there is nothing in section 76(3) that gives the Director a separate discretion to extend the section 80(1) 12-month wage recovery/employer liability period.

18. Accordingly, and while I prefer to follow a somewhat different analytical path than the delegate and the Tribunal Member, I nonetheless arrive at the same result – the applicant's claim for wages that became payable prior to March 19, 2019, is a claim that has no reasonable prospect of succeeding in light of section 80(1)(a) of the *ESA*. I fully endorse the delegate's finding (at page R4): "The Act is remedial legislation, but the remedies set out in it have limits [and the] Director lacks jurisdiction to collect wages that were not or did not become payable within the recovery period."

19. Notwithstanding the delegate's statement that the "Director lacks jurisdiction to collect wages that were not or did not become payable within the recovery period", the delegate nonetheless indicated that he had a statutory discretion to extend the 12-month wage recovery/employer liability period. The delegate indicated that this statutory discretion flowed from section 76(3) of the *ESA*, presumably relying on *Karbalaeiali*. The delegate ultimately refused to exercise this asserted discretion in favour of extending the 12-month wage recovery/employer liability period (see para. 14, above). Further, although the delegate indicated that he was exercising his "discretion", in effect, the delegate simply strictly applied the section 80(1) wage recovery/employer liability limitation provision without giving any consideration to other factors that might have influenced the exercise of his discretion.

20. It is important to stress that *Karbalaeiali* concerned the Director's discretion to receive and adjudicate an untimely complaint (i.e., a complaint filed outside the section 74(3) 6-month complaint period). Section 76(3)(a), repealed in August 2021, formerly provided as follows: "The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if (a) the complaint is not made within the time limit specified in section 74 (3) or (4)". The Director's discretionary authority to extend the time for filing a complaint is now set out in section 74(5), which requires both "special circumstances" and proof of "injustice". The Court of Appeal's comments in *Karbalaeiali* regarding the Director's discretion to receive an untimely complaint should be understood in the context of the actual legislative provisions, and the particular dispute, that was before the court in that case.

21. *Karbalaeiali* did not concern the section 80(1) wage recovery/employer liability provision. To the extent the delegate's reasons can be read as holding that the Director has a statutory discretion to extend the 12-month wage recovery/employer liability period, I consider that finding to be an error in law. As noted above, in my view, under the *ESA* and its accompanying regulations as presently constituted, the Director has no discretionary statutory authority to extend the section 80(1) 12-month limitation period.

22. Insofar as this section 116 application is concerned, it matters not whether the applicant can, with additional time (and perhaps with the assistance of legal counsel), gather further evidence and better organize the documents he now has, in an effort to buttress his pre-March 19, 2019 unpaid wage claim. Neither the delegate, nor the Tribunal Member, made any findings about whether the applicant actually worked overtime, and thus was entitled to overtime pay, during the period from September 16, 2016, to March 18, 2019. The applicant's claim for unpaid overtime that became payable prior to March 19, 2019, even if he worked but was not paid for overtime during this period, is absolutely foreclosed by section 80(1)(a) of the *ESA*, and this aspect of his complaint was correctly rejected.

ORDER

23. This application for reconsideration is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal