Citation: Finale Entertainment Inc. (Re)
2022 BCEST 9

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Finale Entertainment Inc.
(the "applicant")

- 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.: 2022/004

DATE OF DECISION: January 26, 2022

DECISION

SUBMISSIONS

Frank (Yuntongfei) Huo — on behalf of Finale Entertainment Inc.

INTRODUCTION

1. This is an application for reconsideration of 2021 BCEST 99 (the "Appeal Decision") filed by Finale Entertainment Inc. (the "applicant"). This application is filed pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. In my view, this application fails to pass the first stage of the *Milan Holdings* test and, as such, must be dismissed. My reasons for reaching that conclusion are set out, below.

PRIOR PROCEEDINGS

3. The applicant operates a nightclub and lounge in Vancouver. On November 20, 2019, Stephen Brooks (the "complainant") filed a section 74 complaint alleging that the applicant failed to pay him wages in accordance with his employment contract. Arun Mohan, a delegate of the Director of Employment Standards (the "delegate"), conducted an investigation into the complaint. The delegate issued a Determination, and his accompanying "Reasons for the Determination" (the "delegate's reasons"), on April 6, 2021.

The Determination

4. The complainant was the manager of the applicant's nightclub. His employment was terminated, allegedly for cause. The delegate upheld the applicant's position that the complainant was terminated for just cause. Accordingly, the delegate refused to award the complainant any compensation for length of service (see section 63 of the *ESA*).

5. The nightclub did not open until May 2019, although the complainant's employment contract commenced as of November 1, 2017. The complainant was engaged to undertake various tasks in order to ready the club for its opening. The delegate determined that the complainant was "working" for the applicant during the pre-opening period from November 2017 to May 2019. The complainant was dismissed on December 21, 2019.

6. An important factual dispute between the parties concerned the proper characterization of a $50,000.00 payment (paid by the applicant), and a subsequent $22,350.11 payment (paid by way of a personal cheque from the daughter of one of the applicant's principals), that were both paid to the complainant in mid-December 2019. The applicant argued that these payments represented a full and final settlement of all of the complainant's claims against the applicant, whereas the complainant maintained that the payments were to reimburse him for business expenses he had incurred on the applicant's behalf. No final release was ever executed, and neither the $50,000.00 bank draft, nor the $22,350.11 cheque, indicated on their

face that each was paid as part of a final settlement agreement. The delegate, after considering the conflicting evidence on the point, held (at page R17 of his reasons) as follows:

> I find that the bank draft and the personal cheque were not provided to settle the dispute or any component of it, be it wages, expenses, or both. Instead, since they were provided for services rendered to the Employer, both amounts will treated [*sic*] as wages, as discussed below.

7. The delegate held that the complainant was owed $11,512.19 on account of unpaid regular wages and vacation pay plus section 88 interest, after accounting for the $72,350.11 in payments already received. In addition, the delegate levied three $500.00 monetary penalties against the applicant (see section 98 of the *ESA*). The total amount payable under the Determination was $13,423.45.

The Appeal Decision

8. The applicant appealed the Determination, asserting that the delegate failed to observe the principles of natural justice in making the Determination (see section 112(1)(b) of the *ESA*). Tribunal Member Groves issued the Appeal Decision, dismissing the appeal, on December 16, 2021.

9. As noted above, a central issue before the delegate concerned whether the complainant's claim had been settled. The delegate rejected the applicant's position in this regard and the applicant, on appeal, challenged that decision. The applicant also challenged two of the three monetary penalties that were levied against it.

10. Tribunal Member Groves rejected the applicant's "natural justice" ground of appeal, holding, at paras. 34 – 35, that there was no evidence of a natural justice breach, and that the applicant's appeal more properly should be considered as raising an "error of law" issue (see section 112(1)(a) of the *ESA*):

> A challenge to a determination on the basis that there was a failure to observe the principles of natural justice raises a concern that the procedure followed by a delegate of the Director was unfair. Two principal components of fairness are that a party must be informed of the case that is alleged against it, and it must be offered an opportunity to be heard in reply. A third component is that the decision-maker be impartial.
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> The submissions of the Employer reveal no plausible basis on which the Determination ought to be disturbed on natural justice grounds. The unfairness the Employer alleges does not relate to the procedures followed by Delegate Mohan in his investigation, or to any perceived bias. Rather, the Employer disputes the validity of findings of fact Delegate Mohan made to support the orders in the Determination. The Employer argues those findings were incorrect. In substance, therefore, the Employer's submission is that Delegate Mohan committed errors of law.

11. With respect to the "error of law" ground of appeal, Tribunal Member Groves held that he was entitled to consider that ground notwithstanding the applicant's failure to formally raise an "error of law" in its appeal documents (*see Triple S Transmission Inc.*, BC EST # D141/03). However, Tribunal Member Groves was not satisfied that the delegate had erred in law (paras. 38 – 39):

> …the Employer has failed to persuade me that it has met the burden on it to establish that Delegate Mohan's findings of fact it questions were irrational, perverse, or inexplicable. It disagrees with them, to be sure, but that is insufficient. There was, in my opinion, probative evidence before Delegate Mohan sufficient to warrant a conclusion that no enforceable

> settlement of all the financial issues in dispute between the Complainant and the Employer had been agreed to, at any time. Absent a finding of such a settlement, it was entirely appropriate that Delegate Mohan imposed an administrative penalty because the Employer failed to pay the Complainant the outstanding wages Delegate Mohan determined were owed to him, in a timely way, or at all, following the Complainant's termination.
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> Regarding the Employer's claim that no penalty pursuant to section 46 of the *Regulation* should have been imposed in this instance, because it was the Complainant's duty as general manager of the Club to keep proper records, section 28 of the *ESA* makes it plain that it is an employer's obligation to keep the required records. Employers may not avoid this obligation by purporting to delegate their statutory duty to employee designates.

12. Tribunal Member Groves dismissed the applicant's appeal.

THE APPLICATION FOR RECONSIDERATION

13. The applicant's application for reconsideration is simply an unvarnished attempt to have this Tribunal set aside the delegate's finding of fact with respect to the "settlement" issue, and to reargue essentially the same position that was first advanced before the delegate, and then again on appeal. The sole basis for the reconsideration application is captured in the following assertion by the applicant:

> … [the complainant] was willingly [*sic*] to accept the $72,350.11 amount to settle all wages and expenses with the Company prior to his departure. In return, the Company agreed not to purse [*sic*] any legal actions or file police reports against [the complainant]. It is unlawful [the complainant] changed his mind [*sic*] after he accepted the $72,350.11 payment.

14. The delegate fully addressed this matter in his reasons and, as noted in the Appeal Decision (at para. 36), a finding of fact cannot be characterized as an error of law unless the finding is "irrational, perverse, or inexplicable". The delegate considered the conflicting evidence regarding the two payments made to the complainant, and ultimately concluded that these payments were not part of a global settlement agreement. Rather, the payments reflected "services rendered to the Employer" by the complainant. The delegate credited these payments to the applicant in determining the total amount of regular wages and vacation pay that was owed to the complainant. The delegate's finding in this regard, based as it was on a proper evidentiary foundation, cannot be overturned on appeal.

15. The Tribunal observed in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98, that the reconsideration process is not intended to afford a dissatisfied party with yet another opportunity to re-litigate a matter that has already been lawfully determined. A section 116 application that merely asks the Tribunal to "effectively 're-weigh' evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence)" must fail.

16. The evidence tendered before the delegate fell well short of demonstrating, on a balance of probabilities, that the parties had concluded a valid settlement agreement. The delegate was certainly entitled to conclude, based on the evidence before him, that the two payments in question did not constitute payments made as part of global settlement agreement but, rather, were payments reflecting earned, but unpaid, wages.

17. This application does not pass the first stage of the *Milan Holdings* test and, accordingly, must be dismissed.

ORDER

18. Pursuant to section 116(1)(b) of the *ESA*, this application is dismissed and the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal