Citation: Alex Short & Kelsey Southworth (Re)
2023 BCEST 106

EMPLOYMENT STANDARDS TRIBUNAL

Appeals
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Alex Short & Kelsey Southworth

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2023/131 & 2023/132

DATE OF DECISION: November 29, 2023

DECISION

SUBMISSION

Ming Lin and Ben Krymalowski (articled student) — legal counsel for Alex Short and Kelsey Southworth

INTRODUCTION

1. On April 30, 2021, the B.C. General Employees' Union ("BCGEU") filed a complaint with the Employment Standards Branch on behalf of four individuals, including the two present appellants, Alex Short ("Short"; File No. 2023/131) and Kelsey Southworth ("Southworth"; File No. 2023/132). This complaint was filed under section 74 of the *Employment Standards Act* ("*ESA*"). In general terms, the complainants asserted that they were employed by IDM Youth Services Inc. ("IDM") and were not paid in accordance with the *ESA*. The principal thrust of the complaint was that none of the complainants met the definition of a "live-in home support worker" contained in the *Employment Standards Regulation* ("*ESR*"), and thus had been incorrectly classified (and, therefore, improperly paid) by IDM. Live-in home support workers are subject to a daily minimum wage but are exempted from Part 4 of the *ES*A ("Hours of Work and Overtime").

2. During the investigation of the complaint, IDM, in addition to asserting that the complainants were live-in home support workers, alternatively argued that the complainants were "managers" as defined in the *ESR* when working as "Assistant Managers" or "Resource Managers." "Managers" are exempted from both Part 4 and Part 5 ("Statutory Holidays") of the *ESA*.

3. On February 13, 2023, Courtney Milburn, an employment standards officer ("investigating delegate") issued an "Investigation Report" in which she summarized the parties' evidence but did not make any findings with respect to the issues in dispute. This report was provided to the parties who were invited to provide any further relevant documents, and to otherwise respond to the report. Both IDM (through its legal counsel) and the BCGEU filed submissions by way of response to the Investigation Report.

4. In her Investigation Report, the investigating delegate summarized the following "agreed-upon facts":

> The Complainants worked for [IDM] in one or more of the facilities to provide home support [for the resident clients]…Employees worked two shift types, either a "full 24-hour shift"…or a "half 24-hour shift"…
>
> … Each residence has private bedrooms for the employees on shift. Employees would be assigned a bedroom for their exclusive use during their shift. Each residence also had a bathroom reserved for employee use.
>
> Each private bedroom had a bed, beside table, lamp, chair, and hangers, along with a dresser or closet to store bedding. At each site there was also general hygiene products available for use by employees including soap, shampoo, deodorant, toothpaste, toilet paper and towels.
>
> Some of the residences had separate refrigerators for employees to store food purchased by [IDM] for the exclusive use of the employees, and other residences had one refrigerator to be shared by both the [resident clients] and the employees.

> Following a shift, employees were required to remove any personal items and vacate the room for incoming employees on the next shift. Employees were expected to leave the residence at the end of their shift and were not permitted to be onsite outside of their scheduled shift.

5. On July 31, 2023, Tara MacCarron, a delegate of the Director of Employment Standards ("delegate"), issued a Determination relating to all four complainants. The delegate determined that "the [*ESA*] has not been contravened and no wages are outstanding." In her accompanying "Reasons for the Determination" ("delegate's reasons"), the delegate addressed whether the complainants met the *ESR* definitions of "live-in home support worker" or "manager," determining, first, that all four complainants met the *ESR* definition of live-in home support worker, and second, that none of the complainants met the *ESR* definition of "manager."

THE APPEAL

6. The BCGEU filed an appeal of the Determination on behalf of Mr. Short and Ms. Southworth (jointly, "appellants"), alleging that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see sections 112(1)(a) and (b) of the *ESA*).

7. The alleged errors of law are as follows:

- the delegate's reasons demonstrate that she incorrectly placed an onus on the appellants "to prove that the live-in support home support worker exemption did not apply"; and
- some of the delegate's factual conclusions and inferences were not properly supported by the evidentiary record and, as such, "there is no rational basis for the findings made, and so they are perverse and inexplicable."

8. The alleged breaches of natural justice are as follows:

- "the investigation conducted by the Investigating Delegate was fundamentally incomplete," and that "the information gathered by the Delegate did not provide a sufficient evidentiary basis for a determination of the issues raised by the Complainants."
- While acknowledging that "both sides had the opportunity to make submissions," the appellants say that "the investigation, considered as a whole, did not afford a 'meaningful opportunity to be heard,'" and that, as a result of this inadequate investigation (characterized as "cursory" and "incomplete"), the delegate "did not have the opportunity to make a 'full and fair consideration of the evidence and issues.'"
- The appellants note that the "Investigating Delegate did not speak to any of the Complainants" and thus infer that she "did not interview or gather information from [IDM] directly either."
- The appellants object to the fact that the investigation "proceeded by way of written submissions from counsel and collecting payroll information from [IDM]", and that the investigating delegate "took no meaningful steps to gather further information or evidence that could resolve the conflicting evidence provided by the parties." Further, "when [BCGEU] provided written submissions to the Investigating Delegate, there was no meaningful follow up."

ANALYSIS AND FINDINGS

9. The appellants allege that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. I will address each ground of appeal in turn, commencing with the "natural justice" allegations.

Natural Justice

10. My review of the section 112(5) record in this matter shows that the February 13, 2023 Investigation Report followed a comprehensive factfinding process. BCGEU filed a lengthy submission on June 25, 2022, and IDM's legal counsel filed a submission on November 4, 2022. In addition, the investigating delegate had several electronic communications with the parties.

11. As noted above, the investigating delegate specifically invited both parties to respond to the Investigation Report, and both did so. The BCGEU, in its reply to the Investigation Report, stated that it had "consulted with each Complainant relating to claims made in [IDM's] submissions to provide additional details and clarifications relevant to determining the issue." In my view, there is no merit to the appellants' assertions that the investigation was "incomplete" – the record shows that both parties were given a full and fair opportunity to put their positions forward, and to respond to the other party's position. I do not consider the investigation to have been "cursory" or "incomplete." If the BCGEU wished to provide statements from the appellants, it was free to do so. Instead, the BCGEU provided a summary of their evidence. Despite BCGEU's submission, it is clear that the delegate did gather information from IDM and this information was provided to BCGEU as the appellants' representative. Finally, I do not consider the fact that the investigation proceeded on the basis of written submissions from the parties to be particularly cogent in terms of demonstrating that the investigation was fundamentally flawed or otherwise unfair. I note that there is nothing in the record suggesting that either party sought some sort of oral hearing or a process whereby *viva voce* evidence would be taken.

12. The delegate ultimately determined that the appellants were not "managers," and no appeal has been taken with respect to that finding. The central legal issue now in dispute is whether the delegate erred in law in determining that both appellants were live-in home support workers. BCGEU's principal position on this latter issue is that the delegate erred in making that finding, which I consider to be one of mixed fact and law. That being the case, the delegate's finding should only be set aside if the delegate made a palpable and overriding error in determining that the appellants were live-in home support workers as defined in the *ESR* (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).

13. A live-in home support worker is defined in section1(1) of the *ESR* as meaning "a person who (a) is employed by an agency, business or other employer providing, through a government funded program, home support services for anyone with an acute or chronic illness or disability not requiring admission to a hospital, and (b) provides those services on a 24 hour per day live-in basis without being charged for room and board." BCGEU, in its submissions, focussed on the "room and board" element of the definition, maintaining that the circumstances relating to the appellants' employment were such that they were not provided "room and board."

14. The delegate, in her reasons, did not ignore the appellants' submissions on the room and board issue. Her reasons accurately summarized both parties' evidence and argument on this point (see delegate's

reasons, pages R3-R5 and R6-R9). The appellants say that the delegate's reasons for rejecting the appellants' position that IDM never provided room and board are inadequate. In the administrative context, a decision-maker's reasons for decision must be "transparent, intelligible and justified" (*Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653). The delegate's reasons for concluding that the appellants met the *ESR* definition of a live-in home support worker are set out at pages R10-R14. In my view, the delegate adequately instructed herself with respect to the governing law, adequately addressed the central thrust of the appellants' argument regarding the "live-in home support" issue, and was well aware of the various factual arguments advanced by the appellants in support of their position that they were not live-in home support workers.

15. The delegate clearly explained why several factual matters were not particularly relevant. For example, the delegate noted that the monthly food budget provided allowed for the appellants' food needs, although acknowledging that it might not have covered every particular dietary need of an individual employee or cover "luxury products or indulgent treats" (page R12). The delegate, correctly in my view, noted that the definition in question related to "live-in" workers to be contrasted with other employee statuses in the *ESR* that concern workers who "reside" at the workplace.

16. In advancing their case, the appellants principally relied on the Tribunal's decision in *LMSCL Lower Mainland Society for Community Living*, 2020 BCEST 42 (confirmed on reconsideration: *LMSCL Lower Mainland Society for Community Living*, 2020 BCEST 118), where the Tribunal held that the workers in question were not live-in home support workers. In my view, the delegate intelligibly explained (at pages R12-R14) why that decision was distinguishable from the appellants' circumstances. In my view, the delegate also adequately explained (at page R14) why several other particular points advanced by the appellants were not relevant (for example, matters relating to shift scheduling and the "no guests/no pets" rule).

17. In summary, the section 112(5) record shows that the appellants were afforded a full and fair opportunity to present their evidence and argument, and to respond to the position taken by IDM. The investigation was adequate and the delegate, in her reasons, transparently and intelligibly addressed all of the appellants' central legal and factual arguments.

18. I now turn to the delegate's alleged errors of law.

Errors of law

19. I am not satisfied that the delegate erred in law with respect to the onus of proof. The delegate, at page R10, rightly observed that IDM bore the onus of demonstrating that the appellants fell within the live-in home support worker overtime exemption. The appellants say that despite having correctly directed herself on the governing legal principle with respect to the onus of proof, she nonetheless "placed the onus on the [appellants] to prove that the live-in support worker exemption did not apply."

20. I do not accept this latter assertion. As I read the delegate's reasons, she focussed her attention on the strict wording of the regulatory definition. The delegate accepted the appellants' argument that it was incumbent on IDM to demonstrate that the appellants were provided with, and not charged for, room and board. This is precisely what the regulatory definition mandates. In its June 25, 2022 written

submission filed as part of the complaint investigation process, BCGEU on behalf of the appellants conceded that IDM provided:

- "…bathrooms including one reserved for employee use [and] rooms for employees to sleep in";
- "Employees were only allowed to be in individual rooms for sleeping when working their 24-hour shifts…[and] these rooms contained a bed, sheets and pillows, lamp, garbage can, dresser, and sometimes a fan";
- "Rooms for sleeping had locks [although] they could be opened by the other employee(s) working the same shift or by senior management"; and
- IDM provided bedding for the employees' use.

21. With respect to whether IDM provided "room and board," the delegate noted in her reasons the following facts:

- "the Complainants have their own personal bathrooms stocked with toiletries such as toothpaste, soap, shampoo, and feminine hygiene products (page R11);
- "The monthly food budget for each [facility] allows room to cover the food expenses of the [clients in residence] and the employees" (R11);
- "IDM was only required to provide the Complainants a private bedroom during their scheduled shifts, and the Complainants' requirement to vacate the room at the end of their shifts simply accords with the definition of "live-in" as provided by the [ESA]" (page R12);
- "…the employees of IDM are provided food, and both parties acknowledge money is budgeted in order to allow employees to buy food for themselves. What is more, employees of IDM are allowed to use the amenities inside the [facilities], including the shower, cooking appliances, and laundry" (page R12);
- "Had the legislation intended live-in home support workers to reside at their place of employment rather than stay at the workplace during their shift, I am satisfied the legislation would have used this term, as is used in the definition of a residential care worker…IDM was only required to provide the Complainants a private bedroom during their scheduled shifts, and the Complainants' requirement to vacate the room at the end of their shifts simply accords with the definition of "live-in" as provided by the [ESR]"; (page R12)
- "Both parties confirmed the rooms occupied by the Complainants had locks. The Union argued other employees and [IDM] had the keys to these locks…however…someone having a key to the lock on your door is not an invasion of privacy. Rather, this is a commonplace security and safety measure…IDM and other employee(s) on shift had an additional key to each room, should an emergency situation ensue…The Complainants were also afforded the use of private, individual bathrooms" (page R13);
- "With the exception of Tillicum, Goldstream and Luxton House, the private bedrooms occupied by the Complainants did not double as shared offices and workspaces….the rooms contained typical bedroom furniture like a bed, sheets and pillow, lamp, garbage can, dresser and sometimes a fan….I dismiss the Union's argument that these were shared workspaces,

as the Union has not provided evidence to show these rooms were the only place where employees could complete their administrative work [and] the Union provided no evidence that its storage of surplus items [in a walk-in closet in one of the bedrooms at one of the 13 facilities IDM operates] interfered with the Complainants' ability to use the room exclusively for personal use" (page R13); and

- "Contrary to the Union's allegations the Employer did not allow the Complainants access to the laundry machines and kitchen appliances, the Union has not provided any evidence of a Complainant being written up for doing so…the Employer has confirmed the Complainants were permitted to access these appliances, and I see no reason to suggest the Complainants could not use them for their personal use" (pages R13-R14).

22. In light of these findings, I am not satisfied that the delegate erred in law in rejecting the appellants' position that they were not live-in home support workers as defined in the *ESR*. In my view, having reviewed the section 112(5) record, I am unable to conclude – as the appellants now assert – that the delegate's findings regarding the live-in home support issue were "unsupported by the evidentiary record," and that there was "no rational basis for the [delegate's] findings." More particularly, I am satisfied that the delegate did not err in finding that the appellants' sleeping rooms were not spaces that "doubled as shared offices and workspaces."

23. The appellants argue that IDM's legal obligation was to provide "private personal accommodations"; however, the *ESR* only required IDM to provide, and refrain from charging for, "room and board." The evidence before the delegate was that IDM provided both a private space for the appellants to sleep, and also provided sufficient funds for them to pay for their needed meals (see pages R11-R12) – the very essence of the phrase "room and board" (see *LMSCL Lower Mainland Society for Community Living*, *supra*).

24. The appellants assert that the delegate did not adequately address the "conflicts" in the evidence, and did not adequately explain why she preferred, in some instances, IDM's position over that advanced on behalf of the appellants. However, virtually all of the central facts were not in dispute, and where there was some disagreement between the parties – for example, the extent to which the sleeping rooms provided were "private" – the delegate rationally explained why she considered the rooms made available to the appellants were essentially private in nature (see delegate's reasons, page R13). Similarly, while the delegate acknowledged that some of the rooms had office furniture (such as desks), she intelligibly explained why this fact did not undermine the essentially private nature of the rooms in question (see page R13).

25. In summary, and based on the evidentiary record that was before the delegate, I am unable to conclude that the delegate made any palpable and overriding legal errors when she determined that the appellants were live-in home support workers as defined in the *ESR*. After considering the appellants' submissions, I am not persuaded that the delegate erred in law or failed to observe the principles of natural justice in making the Determination.

ORDER

26. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal