Citation: Luciana Palmieri (Re)
2023 BCEST 107

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Luciana Palmieri

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves

FILE NO.: 2023/155 & 2023/156

DATE OF DECISION: December 1, 2023

DECISION

SUBMISSIONS

Vito Palmieri on behalf of Luciana Palmieri

OVERVIEW

1. The Tribunal has received two separate, but identical applications ("Application") delivered by Luciana Palmieri ("Applicant") seeking a reconsideration of a decision of a Member ("Member") of the Employment Standards Tribunal ("Tribunal") dated September 5, 2023, and referenced as 2023 BCEST 70 ("Appeal Decision"). The Application has been brought pursuant to section 116 of the *Employment Standards Act* ("*ESA*").

2. The matter arose from two complaints ("Complaints") filed with the Director of Employment Standards ("Director") by former employees of the Applicant ("EN" and "BB" – collectively, "Complainants"). Each of the Complainants alleged that the Applicant had contravened the *ESA* when she failed to pay them regular wages, statutory holiday pay, compensation for length of service, and vacation pay.

3. A delegate ("Investigating Delegate") of the Director investigated the Complaints and issued an Investigation Report ("Report") summarizing the evidence and submissions delivered by the parties.

4. A second delegate ("Adjudicating Delegate") of the Director issued determinations of the Complaints ("EN Determination" and "BB Determination" – collectively, "Determinations"). The EN Determination was issued on May 5, 2023. The BB Determination was issued on May 15, 2023. In each of the Determinations the Adjudicating Delegate found that the Applicant had contravened the *ESA*. The Adjudicating Delegate ordered that EN was entitled to be paid $9,252.58. BB's entitlement was found to be $9,677.82. The Adjudicating Delegate also imposed four $500.00 administrative penalties in respect of each of the Complaints. The total found to be owed, inclusive of both Complaints, was, therefore, $22,930.40.

5. The Applicant appealed the Determinations pursuant to section 112 of the *ESA*. She alleged that the Director had failed to observe the principles of natural justice.

6. Pursuant to section 114(1)(f) of the *ESA*, the Member concluded there was no reasonable prospect that the appeals of the Determinations would succeed. The Member ordered that the appeals be dismissed and that the Determinations be confirmed.

7. I have before me the Appeal Forms and the Application delivered on behalf of the Applicant, the Applicant's submissions in support of both, the Determinations and their accompanying Reasons (collectively, "Reasons"), the Appeal Decision, and the record ("Record") the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. I have not requested responding submissions from the Complainants or the Director.

ISSUES

8. Should the Appeal Decision be reconsidered?

9. If so, should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the original panel of the Tribunal or to another panel?

BACKGROUND FACTS

10. I rely on the statements of fact contained in the Report, the Adjudicating Delegate's Reasons, and the Appeal Decision. What follows is a summary of the facts I consider to be salient for the purposes of the Application.

11. The Complainants, a couple at the time, were employed to act as managers of an apartment building operated by the Applicant ("Premises"). There is no dispute that the Complainants were "resident caretakers" as defined in section 1(1) of the *Employment Standards Regulation* ("*Regulation*").

12. Section 17 of the *Regulation* mandates that a resident caretaker must be paid a stipulated minimum wage.

13. The Applicant required the Complainants to sign an employment agreement ("Agreement") setting out monthly wages for the Complainants that were below the minimums provided for in the *Regulation*. Acting on the authority of section 4 of the *ESA*, the Adjudicating Delegate determined, and the Appeal Decision affirmed, that to the extent the terms of the Agreement relating to the remuneration to be paid to the Complainants waived relevant provisions of the *ESA* and its *Regulation*, those terms had no legal effect, and so they were not binding on the parties.

14. The business records regarding the Complainants the Applicant delivered to the Director were incomplete, having regard to the requirements set out in section 28 of the *ESA*. The Applicant explained that most of the pertinent records had been delivered to a purchaser of the Premises after the events relevant to the Complaints had occurred. In the absence of complete records from the Applicant, the Adjudicating Delegate decided that the most reliable evidence of the payments received by the Complainants in return for their work were contained principally in bank records supplied by BB, especially as the entries in those records were in many respects corroborated by other evidence tendered by the Applicant. The Member saw no legal error in this determination on the part of the Adjudicating Delegate.

15. The crux of the Applicant's submission before the Director, which the Applicant repeated to the Tribunal on appeal, was that the Agreement was meant to document the parties' intention that the Complainants would share a single resident caretaker position, and that the monthly remuneration set out in the Agreement was to be split between the two of them. The Adjudicating Delegate declined to accept the Applicant's submission on this point. Her Reasons noted that the Agreement identified both Complainants as resident managers, they both signed the Agreement, and the Agreement nowhere stated explicitly that the position on offer was to be split in the manner suggested by the Applicant. The Adjudicating Delegate also referred to section 35(3) of the *Regulation*, which provides that if two or more persons, each meeting the definition of resident caretaker, live in the same apartment building and are each employed to do the work of a resident caretaker, the employer may designate, in writing, one or more of them as a resident caretaker, and on making such a designation, sections 17 and 35 of the *Regulation* would only apply to

the person so designated. The Adjudicating Delegate concluded that since the Applicant had not designated either of the Complainants to be a resident caretaker pursuant to section 35, it followed that each of them were to be deemed to have been hired separately in that legal capacity. The Member again found no legal error in the Adjudicating Delegate's analysis.

16. The Adjudicating Delegate awarded each of the Complainants compensation for length of service pursuant to section 63 of the *ESA*. The issue of payment of compensation for length of service was disputed by the parties. The Complainants submitted they were "fired" by the Applicant's spouse during a discussion with him when they expressed concerns regarding the condition of a carpet in the manager's suite they were occupying. The Applicant's position was that the Complainants chose to "quit." The Adjudicating Delegate observed that proof of a quit requires clear and unequivocal evidence demonstrating the right has been voluntarily exercised, and that the onus of proving a quit under the *ESA* rests on the employer. The principal evidence relied upon by the Applicant to support a finding the Complainants had quit was what the Applicant's spouse alleged were a series of earlier threats by BB that the couple might do just that, and a further expression of a desire to quit if the carpet was not replaced that was uttered by BB in the discussion referred to above, which led the Applicant's spouse to decide he had "had enough." The Adjudicating Delegate concluded the Applicant had not met the onus of proving the Complainants had voluntarily resigned. Here again, the Member decided the Adjudicating Delegate had committed no legal error.

17. The Applicant's appeals were grounded in the assertion the Determinations should be challenged on the basis that there had been a failure to observe the principles of natural justice. The Member determined there was no merit to these claims. The Member noted that the Applicant received copies of all the relevant materials generated during the investigation of the Complaints, the Applicant was made aware of the issues raised, and she delivered submissions addressing them. There was no suggestion the process was tainted by any bias. The Adjudicating Delegate delivered Reasons that were legally adequate in the sense that they dealt, intelligibly, with all the issues properly before her.

ARGUMENTS

18. The principal argument presented in the Application is that it was unjust for the Adjudicating Delegate to have found, and for the Member in the Appeal Decision to have affirmed, that the Applicant retained the services of two separate resident caretakers when she employed the Complainants, and not the work of two persons to share the duties required in a single resident caretaker position. The Applicant argues she had no motive to offer two positions for two persons, as the volume of work did not support such an arrangement. The Applicant states further that the Agreement was structured to suit the Complainants, at their request, and the Applicant wished to be helpful and to show gratitude for the information the Complainants had provided regarding the unacceptable performance of the previous manager of the Premises.

19. The Applicant submits that this is the truth and substance of her dealings with the Complainants. The argument presented on her behalf emphasizes that if any aspect of that truth and substance resulted in contraventions of the *ESA* and the *Regulation* the failure to comply occurred innocently and unknowingly. The Applicant says further that the Determinations and the Appeal Decision reveal a far too rigid application of the legislative scheme, one that is bereft of "truth or justice or fair play" and any consideration of the "extenuating circumstances" present in this case. Indeed, the Applicant's submission

in the Application asserts the result of the proceedings involving the Complaints so far has been to brand her actions, and those of her husband who has represented her throughout, as "criminal."

20. The Applicant also argues she delivered further documents in the appeal for the purpose of showing that the Complainants were paid more than was calculated in the Determinations. The Applicant contends that the Member should have referred these documents back to the Adjudicating Delegate so that a further review and recalculation of the amounts paid might occur. Instead, the Applicant states, the Member did not refer the matter back, nor did the Member conduct any further recalculation himself. The Applicant argues that this approach reveals unfairness, as the Applicant was denied "the benefit of the doubt."

21. The Applicant acknowledges that many of the pertinent business records for the Premises were lost when the building was sold, but she offered to send some "log books of previous years" to the Investigating Delegate which, she states, would have provided evidence substantiating money paid to the Complainants. The Applicant says the Investigating Delegate asked her not to provide the logbooks to which she referred. She offers to provide them to the Tribunal now.

22. Finally, the Applicant submits that if the Tribunal "is duty bound and subjected to abide by and blindly enforce the [*ESA*] at any cost, even at the cost of truth and justice," she requests "a formal court hearing in front of a formal court judge," where she "can properly defend [herself] in front of an impartial third party."

ANALYSIS

23. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116(1) of the *ESA*, the relevant portion of which reads as follows:

> 116 (1) On 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.

24. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

25. The attitude of the Tribunal towards applications under section 116 is derived in part from an acknowledgement of certain of the purposes of the *ESA* set out in section 2, namely, the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

26. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Director of Employment Standards (Re Milan Holdings Inc.)*, BC EST #D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision

at all. A "yes" answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

27. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal proceedings. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal.

28. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

29. I have decided that the Application should be dismissed. I am not persuaded that the Applicant has raised questions of fact, law, principle, or procedure flowing from the Appeal Decision that are so important they warrant a reconsideration.

30. In my view, the Application is largely an attempt to have the Tribunal re-weigh submissions that were presented to and dealt with by the Member in the appeal proceedings, in the hope that I will reach a different conclusion. As I have stated, reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal. Instead, the Applicant must establish reviewable legal error which taints the Member's conclusions set out in the Appeal Decision.

31. The principal question the parties sought to answer in these proceedings is the proper meaning to be ascribed to the words they used in the Agreement. Determining the intentions of parties to a contract is a fact-finding exercise. The process is an objective one. This means that the exercise is not to determine what the parties subjectively intended, but rather what a reasonable person would objectively have understood to be their intentions derived from the words of the document read as a whole, together with any admissible background information (see G. R. Hall, *Canadian Contractual Interpretation Law*, First Edition, Lexis Nexis, 2007, at page 24).

32. Here, the Applicant has consistently challenged the Adjudicating Delegate's findings of fact, determined objectively, regarding the intentions of the parties when they executed the Agreement. The difficulty this presents for the Applicant is that the *ESA* gives the Tribunal no power to correct errors of fact made by the Director or her delegates unless those errors of fact can be characterized as errors of law.

33. Errors of fact do not become errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, a party will only succeed in challenging a delegate's findings of fact if the party establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (BC CA); *Delsom Estates Ltd. v. Assessor of Area #11 - Richmond/Delta,* 2000 BCSC 289.

34. As the Appeal Decision states, the Adjudicating Delegate rejected, as a matter of objective fact, the Applicant's submission that the Complainants were employed to share a single resident caretaker position. The Appeal Decision confirmed the Adjudicating Delegate's conclusion. The Member's rationale appears at paragraphs 28 and 29 of the Appeal Decision. It reads:

> The delegate rejected the appellant's position that there was a "single job" that was shared by the two complainants – a conclusion the appellant now challenges on appeal. There was ample evidence before the delegate that, in fact, both complainants were employed as resident caretakers. The contract itself identifies both complainants as parties to the agreement, and both are signatories to the agreement, each being separately described as a "manager". There is absolutely no evidence in the record that the appellant ever designated, in writing, only one of the complainants to be the resident caretaker for the building (see section 35(3) of the *Regulation*), and then provided a copy of such a designation to the person so designated (see section 35(4) of the *Regulation*).
>
> Further, the contract contains no provision stating that the complainants were hired to share a single position. The contract appears to be a standard form contract prepared by the appellant. Thus, even if the agreement were ambiguous on this latter point (and I do not find that it is), the ambiguity would have to be resolved in the complainants' favour, consistent with the *contra proferentem* rule. The section 112(5) record includes correspondence in which the appellant describes the complainants as "co-managers" of the building; another letter signed by the appellant refers to the complainants as being "in my employ as co-managers of my small apartment building." A document posted in the building after the complainants' employment ended – a notice from the new building manager to the "Tenants of Colonial Manor" – states that the complainants "are No Longer Managers of this building." In light of this evidence, I am unable to conclude that the delegate erred in finding that the appellant separately employed each of the complainants as a resident caretaker.

35. As these comments of the Member reveal, there was significant tangible evidence supporting the Adjudicating Delegate's conclusions of fact that the Complainants were separately employed as resident caretakers. Therefore, it cannot be said the Adjudicating Delegate acted in a manner that was perverse or inexplicable, and in so doing committed errors of fact that amounted to errors of law. Further, the mere fact that the Adjudicating Delegate, acting reasonably, might have reached a different conclusion is irrelevant.

36. I appreciate these legal conclusions, mandated by the statutory scheme of the *ESA*, do not lead to the result the Applicant asserts the more abstract principles of truth, justice, and fairness should produce in this case. The administrative scheme created in the *ESA* and its *Regulation* requires that findings of fact made by the Director and her delegates must be accepted, absent the types of errors to which I have referred. If the Tribunal were to ignore the Adjudicating Delegate's factual findings, and refuse, therefore, to exercise its jurisdiction in the manner the statute requires, to vindicate the Applicant's perceptions of the truth, it would, in that event, be committing a serious legal error, and acting in a way that would undermine the rule of law.

37. The Applicant also claims that consideration should have been given to her because her contravening the *ESA* and the provisions of the *Regulation* occurred innocently and unknowingly. I suspect there are many employers in this province who have not read the statute, and they may be ignorant of many of its

requirements. However, it is trite to say that ignorance of the law is no excuse for committing an offence (see, for example, section 19 of the *Criminal Code*, R.S.C. 1985 c.C-46). The Applicant's contraventions of the legislation do not mean her actions, or those of her husband representative, have made them criminals, as she suggests the Determinations and the Appeal Decision have found them to be. Nevertheless, the fact that neither she nor her husband representative intended to contravene its provisions is not a basis for deciding that she can escape the legal consequences.

38. Regarding the Applicant's contention that she produced further documents in the appeal proceeding designed to show that the Adjudicating Delegate's calculations of the amounts owed to the Complainants were incorrect, it is not obvious to me which documents the Applicant is referring to, exactly, as she makes no specific reference to them, nor does she set out how they demonstrate the sums set out in the Determinations should be re-calculated. I observe, too, that the Applicant did not claim, specifically, in the appeals, that the appeals should succeed because evidence had become available which was unavailable to her at the time the Determinations were being made (see section 112(1)(c) of the *ESA*).

39. But even if the Applicant had presented such a claim, it is unlikely that it would have been accepted, given that the Applicant tendered no evidence the records in question were "new" in the sense that they could not, with due diligence on her part, have been delivered to the Director before the Determinations were made. As has been stated by the Tribunal, an appeal, and *a fortiori* the reconsideration procedure, are not intended to constitute re-hearings of adjudications made by delegates of the Director at first instance. Instead, the proceedings before the Tribunal are meant to provide a forum where legal errors may be corrected, on specified grounds. It follows that parties to an investigation are expected to act diligently to ensure that the information they present to the Director is sufficient to address the issues that are raised in a complaint. If parties fail to do that, and they attempt, in an appeal, to rehabilitate a case that was unsuccessful before the Director by means of the introduction of other evidence that was available to them during the investigation, but which they did not deliver, it would undermine one of the purposes of the statutory scheme appearing in section 2 of the *ESA* to which I have referred earlier, namely, that the legislation is designed, in part, to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions (see, for example, *Davies et al.,* BC EST # D171/03; *McKay*, BC EST # D146/05).

40. The same analysis applies to the Applicant's offer to supply "log books of previous years" to the Tribunal on this Application which she says the Investigating Delegate declined to review during his investigation. A bald statement from the Applicant that these books would have substantiated payments made to the Complainants is insufficient, at this point in the process, to warrant my interfering with the Appeal Decision. According to the Applicant, many of her pertinent log books were destroyed by the new owner of the Premises. Nowhere does the Applicant explain how the contents of other log books from an earlier period might have assisted her in defending the claims made in the Complaints.

41. The Tribunal has no jurisdiction to request "a formal court hearing in front of a formal court judge." The Tribunal is a creature of its statute, and its powers are limited to those set out in Part 13 of the *ESA*.

42. As the Applicant has failed to establish the requisite foundation for a reconsideration of the Appeal Decision, the Application must be dismissed.

ORDER

43. Pursuant to section 116 of the *ESA*, I order that the Appeal Decision referenced as 2023 BCEST 70 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal