Citation: 1229081 B.C. Ltd. & Laine Marie Cooper (Re)
2023 BCEST 111

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 -

1229081 B.C. Ltd. & Laine Marie Cooper

- of Decisions issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2023/170 & 2023/171

DATE OF DECISION: December 11, 2023

DECISION

SUBMISSIONS

Michael Allan McCurrach — legal counsel for 1229081 B.C. Ltd. & Laine Marie Cooper

OVERVIEW

1. These reasons for decision address two separate, but related, applications for reconsideration filed under section 116 of the *Employment Standards Act* ("*ESA*"). Both applications are untimely, and thus the applicants seek extensions of the applicable reconsideration application periods pursuant to section 109(1)(b) of the *ESA*.

2. Tribunal File No. 2023/171 concerns an application for reconsideration of 2023 BCEST 39, an appeal decision issued by Member Roberts on June 13, 2023. Member Roberts dismissed an appeal filed by 1229081 B.C. Ltd. ("employer") regarding a determination issued by Carrie Manarin, a delegate of the Director of Employment Standards ("delegate"), on March 7, 2023. I shall refer to this determination as the "Corporate Determination," and to 2023 BCEST 39 as the "Corporate Appeal Decision."

3. Tribunal File No. 2023/170 concerns an application for reconsideration of 2023 BCEST 40, an appeal decision also issued by Member Roberts on June 13, 2023. Member Roberts dismissed an appeal filed by Laine Marie Cooper ("Ms. Cooper") regarding a determination also issued by delegate Manarin on March 7, 2023. Pursuant to this determination, issued under section 96 of the *ESA*, Ms. Cooper was held personally liable for unpaid wages owed to a former employee ("complainant") of the employer. I shall refer to this determination as the "Section 96 Determination," and to 2023 BCEST 40 as the "Section 96 Appeal Decision."

4. In my view, both applications to extend the reconsideration application periods should be refused. Further, and in any event, even if the application periods were extended, I would nonetheless dismiss both applications, since neither one passes the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98).

PRIOR PROCEEDINGS

5. The employer operates a hair salon and spa at which the complainant was formerly employed. The complainant was initially employed by one of the present applicants, Ms. Cooper, who operated the salon and spa as a sole proprietor. In January 2020, Ms. Cooper incorporated the business as a numbered company (the employer and co-applicant in these proceedings). The business, and the complainant's employment, continued uninterrupted by the transfer. Ms. Cooper is the employer's sole director.

6. On September 16, 2020, the complainant filed an unpaid wage complaint against the employer claiming that the employer had unlawfully made certain deductions from her wages. The complaint was investigated and on October 18, 2022, an employment standards officer issued an Investigation Report in which she summarized the parties' evidence and argument. The investigating officer did not make any findings of fact beyond noting that certain facts were not in dispute. The parties (i.e., the employer, Ms.

Cooper, and the complainant) were invited to provide their responses to the Investigation Report, but none did so.

The Determinations

7. After reviewing the Investigation Report and the other documents on file with the Employment Standards Branch, the delegate determined that the employer had made certain deductions from the complainant's wages, contrary to section 21 of the *ESA*, and thus issued the Corporate Determination pursuant to which the employer was ordered to pay the complainant $4,982.32 on account of unlawful section 21 wage deductions, $199.29 as concomitant vacation pay, and $446.80 as section 88 interest. Thus, the total amount payable to the complainant was $5,628.41.

8. The delegate also levied two separate $500 monetary penalties (see section 98 of the *ESA*) against the employer based on its contraventions of section 18 (failure to pay all wages due on termination of employment) and section 21 of the *ESA*. Accordingly, the employer's total liability under the Corporate Determination is $6,628.41.

9. Section 96(1) of the *ESA* states: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee." Section 98(2) of the *ESA* states: "If a corporation contravenes a requirement of this Act or the regulations, an employee, officer, director or agent of the corporation who authorizes, permits or acquiesces in the contravention is also liable to the penalty."

10. The delegate determined that Ms. Cooper was a corporate director when a portion of the complainant's wages were earned or should have been paid, and that Ms. Cooper was also personally liable for the two monetary penalties levied against the employer. The delegate calculated Ms. Cooper's section 96(1) unpaid wage liability to be $1,937.07 (including section 88 interest), and further determined that she was also liable for $1,000 on account of the two monetary penalties by reason of section 98(2). Thus, the delegate issued the Section 96 Determination against Ms. Cooper in the total amount of $2,937.07.

The Appeal Proceedings

11. Ms. Cooper filed appeals on her own behalf, and on behalf of the employer, alleging that the delegate failed to observe the principles of natural justice in making the determinations, and on the ground that additional evidence, not previously submitted to the Employment Standards Branch, was now available (see sections 112(1)(b) and (c) of the *ESA*). In light of the nature of the submissions made on appeal, Member Roberts also considered whether the delegate had erred in law (section 112(1)(a) of the *ESA*).

12. Member Roberts dismissed both appeals under section 114(1)(f) of the *ESA*, finding that neither appeal had any reasonable prospect of success. Member Roberts confirmed the Corporate Determination and the Section 96 Determination under section 115 of the *ESA*.

13. Member Roberts rejected the "natural justice" argument stating (Corporate Appeal Decision, para. 35):

> There is nothing in the appeal submission that establishes that the Director failed to provide the Employer with an opportunity to know the allegations made by the Employee, or to respond to them. The record discloses that the Investigative delegate communicated with Ms. Cooper on

several occasions during the investigation and provided her with the Report. The Employer was expressly asked to carefully review the Report and note any errors or clarifications. She did not do so. The Adjudicative delegate was therefore entitled to assume that the evidence and submissions of the parties was accurately reflected in the Report and based the Determination on the information set out in it.

14. Member Roberts found that the "new evidence" tendered on appeal did not satisfy the stringent test for admissibility as set out in *Davies et al.*, BC EST # D171/03. In particular, *all* of the evidence submitted on appeal was available, and could have been provided to the Employment Standards Branch, during the course of the complaint investigation process (Corporate Appeal Decision, para. 39). Member Roberts held that the delegate did not err in law in determining the complaint was not statute-barred, did not err in her section 88 interest calculation, and did not err in determining that wage deductions had been made contrary to section 21 of the *ESA* (Corporate Appeal Decision, paras. 43-44).

15. As for Ms. Cooper's appeal of the Section 96 Determination, Member Roberts noted, first, that the grounds of appeal appeared to relate solely to the Corporate Determination. Second, Ms. Cooper did not dispute that she was a corporate director when a portion of the complainant's total unpaid wage claim against the employer crystallized. Further, the evidence contained in the section 112(5) record was "ample…to support the conclusion that Ms. Cooper authorized, permitted or acquiesced in the Employer's contravention[s] of the *ESA*" (Section 96 Appeal Decision, para. 21). Ms. Cooper was made aware of her potential personal liability for the complainant's unpaid wages prior to the issuance of the Section 96 Determination (para. 23). No new evidence was tendered relating to Ms. Cooper's status as a corporate director.

16. As noted above, Member Roberts dismissed both appeals, and confirmed both determinations.

THE APPLICATIONS FOR RECONSIDERATION

17. The two appeal decisions were issued on June 13, 2023. An application for reconsideration of an appeal decision "may not be made more than 30 days after the date of the order or decision" (*ESA*, section 116(2.1)).

18. Ms. Cooper retained legal counsel on behalf of herself and the employer. On November 3, 2023, well past the 30-day reconsideration application deadline, counsel contacted the Tribunal by telephone to inquire into the status of applications for reconsideration filed by Ms. Cooper and 1229081 B.C. Ltd. A Tribunal Registry Administrator advised counsel that as at that date no applications for reconsideration had been received by the Tribunal. On the same date, counsel emailed a series of documents to the Tribunal including:

- a letter dated July 13, 2023, addressed to the Tribunal indicating that he had been retained as counsel for the purpose of filing reconsideration applications relating to both the Corporate Appeal Decision and the Section 96 Appeal Decision;
- separate completed "Reconsideration Application Forms" for each of the employer and Ms. Cooper (both dated July 12, 2023); and
- written submissions supporting both applications.

19. There is nothing in the material before me demonstrating that the present applicants, at any time, advised the Director of Employment Standards, or the complainant, of their intention to seek reconsideration of the two appeal decisions (see *Serendipity Winery Ltd.*, BC EST # RD108/15 at paras. 18-23).

20. With respect to the applicants' brief submissions regarding the merits of the applications, the employer says that the delegate's finding (which was upheld on appeal) that the employer made unlawful wage deductions contrary to section 21 "was a factual finding…made in error." The employer flatly asserts that it "never directly or indirectly withheld wages from the [complainant]." Further, and in any event, the employer says that the amounts wrongfully withheld were incorrectly calculated.

21. The employer says, as it did on appeal, that the 2-year delay from when the complaint was first filed (September 16, 2020) until the Investigation Report was issued (October 18, 2022) constituted a failure to observe the principles of natural justice. The employer says that "the Investigative Delegate did not start investigating the complaint for nearly two years," and that this was a denial of natural justice.

22. On this point, it should be noted that the section 112(5) record (which was provided to the employer as part of the appeal process) shows that the investigating delegate first contacted the complainant on February 25, 2022, and first interviewed Ms. Cooper on March 8, 2022. Thus, although there was significant delay in getting the complaint investigation underway, the delay was in the range of 17 months, not 2 years. The employer now says:

> The fact that the Investigative Delegate did not start investigating this case for nearly two years was itself a denial of natural justice and fairness. In this time important evidence may have been lost or discarded which could have assisted the Applicant to better respond to the allegations made in the complaint. As a result of this delay the Applicant was severely disadvantaged warranting a cancellation of the original Determination.

23. I note that the employer has not identified *any* evidence that was lost or discarded that would have been relevant to this dispute. The employer has not identified any specific prejudice it suffered as a result of the delay involved in adjudicating this matter.

24. With respect to the timeliness of the complaint, the employer says the following:

> …the Tribunal affirmed that the date the complaint was filed was on September 16, 2020, which would put the Employee dangerously close to being statue barred from making the complaint. The Applicant contends that it has never been provided with sufficient information or evidence with respect to how the Director of Employment Standards determines on what date a complaint is considered received. Without this information the Applicant was unable to make the necessary inquires to efficiently determine if the Employee was statute barred from making the complaint. Considering how close the Employee was to being statute barred from making the complaint, it was of the upmost importance that the Applicant be provided with all necessary information to assist the Applicant's defense. As a consequence, the Applicant submits that the Tribunal erred in determining that no error in law was made with respect to the determination that the Employee was not statute barred from filing a complaint.

25. There is no merit to the employer's submission regarding whether the complaint was statute-barred. The section 112(5) record (which, as noted above, was provided to the employer) clearly shows that the

complaint was filed on September 16, 2020. The complainant's employment ended on May 27, 2020, and thus the complaint was filed well within the 6-month period provided for in section 74(3) of the *ESA*.

26. Insofar as Ms. Cooper's application is concerned, it relates solely to the monetary penalties and the application of section 98(2) of the *ESA*: "[Ms. Cooper] respectfully submits that 1229081 B.C. LTD. did not contravene a requirement under ESA and therefor the Applicant, as a director of 1229081 B.C. LTD. cannot be liable for a penalty under Section 98 of ESA."

The Application to Extend the Reconsideration Application Period

27. On November 9, 2023, the Tribunal's Registrar sent an email to the applicant's legal counsel seeking documentary corroboration that, as counsel had asserted, the reconsideration applications were first filed on July 13, 2023. The Registrar advised counsel that "the Tribunal's mail server has been searched and there is no record of the Tribunal receiving an application for reconsideration from you on July 13, 2023 [and there] is also no record that the Tribunal sent you an email confirming receipt of a Reconsideration Package on or about July 13, 2023." The Registrar asked counsel to "provide the Tribunal [by November 24, 2023] with confirmation that the email attaching the reconsideration package for both applications for reconsideration was delivered to the Tribunal's email and/or an email from the Tribunal confirming receipt of your applications."

28. On November 10, 2023, the applicants' legal counsel provided a copy of an email to the Tribunal with the subject line: "Reconsideration Applications for Tribunal Decision Numbers 2023 BCEST 39 and 2023 BCEST 40." The email also refers to an attachment: "Reconsideration Package – Cooper.pdf." The body of the email reads as follows: "Please see attached. Submitted at 2:02 pm on July 13, 2023. Thank you." In his November 10, 2023 letter to the Tribunal, counsel states:

> We do not have a confirmation of receipt from the Tribunal with respect to the July 13th email as we were of the understanding that the Tribunal does not provide a confirmation email. Unfortunately, we were also appreciative of the time it might take hear a response to the Reconsideration Application so did not follow up on this matter sooner. We did receive verbal confirmation from a registrar Administrator that the forwarded email sent on November 3, 2023 was received.
>
> Accordingly, we would request that that Tribunal grant an extension to the reconsideration period for both these matters as it is evident that the Reconsideration Application was submitted within the required time frame by the correct means, but was unfortunately not received by the Tribunal.

29. Other than asserting that the applications were sent to the Tribunal by electronic mail on July 13, 2023 (exactly 30 days after the date of the appeal decisions), and providing a copy of an email message dated July 13, 2023, counsel has not provided any further evidence or argument to support the application to extend the reconsideration application periods. I should also note that there is no confirmation in the record before me demonstrating that the July 13, 2023 email was *actually sent*. It may simply have been drafted and never sent. If the email was sent, and not delivered, current email platforms automatically generate and send an "undeliverable" message to the sender. Thus, if the email was sent, counsel should have been notified that it was not delivered to the addressee (i.e., the Tribunal). Further, counsel could

have provided further documentary corroboration that the email was actually sent (for example, an appropriately redacted copy of the email "sent" log for July 13, 2023), but did not do so.

30. I find counsel's explanation regarding why no "follow up" was undertaken until November 3, 2023 (nearly four months later), to be problematic. Given that the applications were purportedly sent on the very last day of the reconsideration application period, I would have thought the prudent course would be to at least contact the Tribunal within a day or so of July 13, 2023 to confirm that the applications had been received. Further, since the Tribunal *never* sent any confirmation that the July 13, 2023 email and attachments had been received, counsel's failure to make a timely inquiry (say, within at least 2 or 3 weeks) is also problematic.

FINDINGS AND ANALYSIS

31. On the basis of the evidentiary record before me, I find that the reconsideration applications were not filed until November 3, 2023, a date well after the 30-day application period had expired. There is no credible and cogent evidence that the applications were actually filed with the Tribunal on July 13, 2023. I am not satisfied that there is a credible explanation for the failure to file timely applications. The applicants have not, in my view, adequately explained why they waited until November 3, 2023 to file their applications (other than to assert, without a proper evidentiary foundation, that the applications were previously filed on July 13, 2023). The applicants have not adequately accounted for the period from July 13 to November 3, 2023 to explain why no follow-up inquiries with the Tribunal were made, at any time, let alone in a timely fashion after July 13, 2023. As previously stated, I find that these two applications were *not* filed with the Tribunal on July 13, 2023. In light of these findings, I am not prepared to extend the reconsideration application periods under section 109(1)(b) of the *ESA*. Accordingly, and on that basis, both applications are dismissed.

32. In any event, even if I were prepared to extend the reconsideration application periods, I consider both applications to be wholly devoid of merit.

33. The employer's application, as noted above, is predicated on three separate grounds: first, that the delegate erred in finding that there had been a breach of section 21 of the *ESA*; second, that there was a breach of natural justice by reason of delay; and, third, that the original complaint was statute-barred. I have already observed, above, that the complaint was not statute-barred.

34. As for the first ground, a finding of fact can constitute an error of law, but only if there was no proper evidentiary foundation for the finding in question. In this instance, the delegate's findings regarding section 21 are set out at pages R4-R8 of her "Reasons for the Determination" issued concurrently with the Corporate Determination. The delegate's reasons are rational, transparent, and intelligible. The employer claimed that the deductions in question were authorized by the complainant's written employment agreement, but was unable to produce a copy of that agreement. There was a dispute between the parties regarding how the complainant's commissions were to be calculated, and the delegate indicated that she preferred the complainant's evidence on this score. The delegate did not prefer the complainant's evidence in a vacuum – the employer's own payroll records corroborated the complainant's position, and the delegate's calculation of the improper deductions was based on the employer's "service reports" as complemented by the complainant's own records. Thus, it cannot be said that the delegate's findings

were "made in error." I agree with, and adopt, Member Roberts' observations on this point at para. 44 of the Corporate Appeal Decision.

35. The Tribunal has issued many decisions regarding whether delay in investigating a complaint constitutes a breach of the principles of natural justice. There must be evidence of inordinate delay coupled with proof of prejudice attributable to the delay (see, for example, *Elisha Besinger*, 2021 BCEST 76; *John Curry*, 2022 BCEST 2; *Aldergrove-Langley Taxi Ltd.*, 2022 BCEST 42; and *Silverthorn Investments Inc.*, 2023 BCEST 9). The employer's submission on this point does not reference a single Tribunal or judicial decision. Even if one could fairly characterize a delay of about 17 months to be "inordinate" (and, in light of the caselaw, I am not necessarily satisfied that would be a fair characterization), I note that the employer has not provided any specific evidence of prejudice flowing from the delay. Rather, the employer has only made vague assertions of prejudice. Thus, I am not satisfied that there was a breach of natural justice in this case.

36. Turning to Ms. Cooper's application, it is solely grounded on the assertion that the employer never contravened any provision of the *ESA* (section 21 in particular) and, that being the case, Ms. Cooper cannot be held liable for any penalties under section 98. Given my findings regarding the employer's contraventions, this argument is untenable.

ORDER

37. The employer's and Ms. Cooper's reconsideration applications are not properly before the Tribunal since they were not filed within the applicable statutory reconsideration application period. In any event, neither application is meritorious.

38. Pursuant to section 116(1)(b) of the *ESA*, both reconsideration applications are dismissed, and the Corporate Appeal Decision and the Section 96 Appeal Decision are confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal