Citation: 1137422 B.C. Ltd. (Re)
2023 BCEST 2

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

1137422 B.C. Ltd.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: Brandon Mewhort

FILE NO.: 2022/185

DATE OF DECISION: February 10, 2023

DECISION

SUBMISSIONS

Keith J. Murray	counsel for 1137422 B.C. Ltd.
Jennifer Sencar	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by 1137422 B.C. Ltd., carrying on business as Four Points by Sheraton Vancouver (the "Appellant"), of a determination issued by Sarah Beth Hutchinson, a delegate of the Director of Employment Standards (the "Adjudicating Delegate"), dated September 2, 2022 (the "Determination"). The appeal is filed pursuant to section 112(1)(a) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Adjudicating Delegate found the Appellant contravened section 63 of the *ESA* by failing to pay Lok Tung Leung (the "Employee"), a former employee of the Appellant, compensation for length of service. In making the Determination, the Adjudicating Delegate considered the applicability of the exemption in section 65(1)(d) of the *ESA*, which exempts employers from liability to pay compensation for length of service where the employment contract is "impossible to perform due to an unforeseeable event or circumstance…". The Adjudicating Delegate found that the COVID-19 pandemic and associated government restrictions was "an unforeseeable event or circumstance"; however, in her view, the pandemic did not result in the Employee's employment contract being "impossible to perform", and therefore the exemption in section 65(1)(d) did not apply.

3. In its appeal, the Appellant submits that the Adjudicating Delegate erred in law in determining that the exemption in section 65(1)(d) of the *ESA* did not apply. For the reasons given below, I dismiss the appeal and order that the Determination be confirmed pursuant to section 115 of the *ESA*.

ISSUE

4. The issue here is whether, in making the Determination, the Adjudicating Delegate erred in law in determining that the Appellant was not entitled to rely on the exemption in section 65(1)(d) of the *ESA*, which would have relieved it of its obligation to pay the Employee compensation for length of service.

THE DETERMINATION

5. The Appellant operates a hotel in Richmond, British Columbia, near the Vancouver International Airport. The Employee was a front desk agent and ultimately a front desk supervisor at the hotel from February 19, 2014, to May 15, 2020, when her employment was terminated. The Employee did not receive any compensation for length of service once terminated and she filed a complaint with the Employment Standards Branch under section 74 of the *ESA*.

6. The Appellant submitted during the investigation that its operations were significantly impacted financially by the COVID-19 pandemic and the associated government restrictions. The Appellant provided

evidence of reduced hotel occupancy and argued that, as a result, it was not possible to continue to employ the same number of staff. The Appellant did confirm, though, that the hotel continued to operate, and it continued to employ some employees, including in the Employee's position.

7. The Adjudicating Delegate found that, for section 65(1)(d) of the *ESA* to apply, the employer must establish it was both impossible to perform the employment contract, and that the impossibility of performance was due to an unforeseen event or circumstance. The Adjudicating Delegate found that the regular and ordinary meaning of "impossible" is "not able to occur or be done", and that financial hardship, even if severe, is not sufficient to meet the bar of impossibility. Accordingly, the Adjudicating Delegate found that, while the COVID-19 pandemic was an unforeseeable event or circumstance, it did not result in the Employee's employment contract being impossible to perform.

8. The Adjudicating Delegate ordered the Appellant to pay the Employee compensation for length of service and the associated vacation pay, plus interest. The Adjudicating Delegate also imposed a mandatory administrative penalty.

ARGUMENTS

9. Below I summarize the arguments of the Appellant and Jennifer Sencar, another delegate of the Director of Employment Standards (the "Responding Delegate"). The Employee did not file any submission in this appeal.

The Appellant's arguments

10. The Appellant argues that an employment contract requires an employer to provide productive work to its employee if it can do so. Where there is no productive work to perform due to an unforeseeable event or circumstance, the employment contract is properly considered to be impossible to perform and the exemption under section 65(1)(d) of the *ESA* should be applied.

11. In other words, the Appellant argues the proper application of section 65(1)(d) is to determine whether, as a result of an unforeseeable event or circumstance, there was productive work for the specific employee under their specific employment contract. If there is no productive work for that specific employee, even if there is productive work for other employees, then the employment contract of that employee is impossible to perform for the purposes of section 65(1)(d).

12. The Appellant argues that the test cannot be whether "work is possible" or whether "it is possible to keep the business operating regardless of profitability". The Appellant submits that, under such an interpretation, section 65(1)(d) could never be invoked short of the employer ceasing its business operations completely, which, in its view, was not the intention of the Legislature.

The Responding Delegate's arguments

13. The Responding Delegate argues that, while it is well known the COVID-19 pandemic and the associated government restrictions resulted in decreased occupancy rates in the hotel industry and significant financial impacts, the exception in section 65(1)(d) of the *ESA* does not apply where it is only uneconomical, but not impossible, for an employer to perform the employment contract.

14. The Responding Delegate argues that the *ESA* is benefits conferring legislation and is to be interpreted broadly and liberally to meet its objectives. Accordingly, the exemption in section 65(1)(d) of the *ESA* should be interpretated and applied narrowly.

The Appellant's reply arguments

15. The Appellant acknowledges that the words in the *ESA* are to be given a liberal construction and interpretation, and the exceptions in section 65 should be construed narrowly. However, the Appellant argues the exceptions cannot be construed so narrowly that they lose all practical meaning or to disproportionately burden employers.

16. The Appellant reiterates that its argument is that section 65(1)(d) applies where an employer is unable to provide productive work for an employee due to an unforeseeable event or circumstance. The Appellant makes clear that it is not arguing that section 65(1)(d) should apply where continued employment is only "uneconomic".

ANALYSIS

17. The Appellant bears the burden of demonstrating that the Adjudicating Delegate made an error of law: see e.g., *Multintel Education Ltd. (Re)*, 2019 BCEST 109 at para 18. The Tribunal has adopted the following definition of an error of law, which was set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12)*, 1998 CanLII 6466 (BC CA):

a. a misinterpretation or misapplication of a section of the Act;

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

18. The Appellant argues that the Adjudicating Delegate misapplied section 65(1)(d) of the *ESA*, which, as discussed above, exempts employers from liability to pay compensation for length of service where the employment contract is "impossible to perform due to an unforeseeable event or circumstance…".

19. In considering this issue, section 65(1)(d) of the *ESA* must be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the *ESA*, the object of the *ESA*, and the intention of the legislature. This is generally known as the modern approach to statutory interpretation: see *Re Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837 (SCC).

20. Employment standards legislation should be interpreted in a manner "which encourages employers to comply with the minimum requirements of the Act, and so extends its protections to as many employees as possible": *Machtinger v. HOJ Industries Ltd.*, 1992 CanLII 102 (SCC) ("*Machtinger*"). This approach is consistent with the purpose stated in section 2(a) of the *ESA*, which is to ensure employees in British Columbia receive at least the basic standards of compensation and conditions of employment.

21. In *488699 B.C. Ltd. (Re)*, BC EST #D206/99, this Tribunal discussed the purpose of section 65(1)(d) of the *ESA* as follows:

> Section 65(1)(d) codifies the common law doctrine known as "frustration" whereby a contract (such as a contract of employment) is deemed discharged, or ended, if some external event, beyond the control of either party, renders the continued performance of the agreement impossible. When a contract has been ended by a "frustrating event" there is no need for either party to terminate the agreement by giving notice of termination since the contract has already been discharged by operation of law. It must be remembered, however, that both under the common law and section 65(1)(d) of the *Act*, the contract must be "impossible" to perform by reason of the unforeseeable event or circumstance in question--in this case, the onus of proving such an event or circumstance rests with the employer.

22. There are several other cases in which this Tribunal has held section 65(1)(d) of the *ESA* codifies the common law doctrine of frustration: see e.g., *Anna Brill-Edwards (Re)*, 2019 BCEST 56 at para 47; *Brisebois (Tune Town Childcare Centre) (Re)*, BC EST # D135/16 at para 33; and *Polycryl Manufacturing (1998) Inc. (Re)*, BC EST # D360/01.

23. The Appellant relies on *Molly B. Stevens (Re)*, 2022 BCEST 1 ("*Stevens*"), a relatively recent decision of this Tribunal, to argue that, where there is no productive work to perform due to an unforeseeable event, the employment contract is properly considered to be impossible to perform. In that case, the Tribunal commented that it would have upheld the delegate's decision that section 65(1)(d) extinguished the employee's right to compensation for length of service had it not cancelled the determination for unrelated reasons (see para 78). The Appellant argues that *Stevens* demonstrates the proper application of section 65(1)(d), because this Tribunal commented that the employee's "services were no longer required as and from mid-March 2020 for the simple reason that there was no work for her to do" (at para 77).

24. However, I agree with the Responding Delegate that *Stevens* is distinguishable because, in that case, the employer, which was a catering business, had either laid off or terminated most of its employees due to the COVID-19 pandemic restrictions by the end of March 2020 (with a few exceptions who worked their last shifts in April and May), and the employer made a voluntarily assignment into bankruptcy on May 11, 2020. In other words, in *Stevens*, all the employees were terminated shortly after the COVID-19 pandemic restrictions began, which resulted in there being no productive work for *any* of the employees.

25. The Appellant also relies on *Canadian Forest Products Ltd. (North Central Plywood Division) v. PPWC, Local 25*, 193 LAC (4th) 31, [2010] BCCAAA No 33 ("*Canfor*"), for the same proposition. However, I agree with the Responding Delegate that *Canfor* is also distinguishable because, in that case, the impossibility threshold was met due to the mill being destroyed by fire, resulting in there being no productive work for *any* of the employees. The Arbitrator in *Canfor* held (at para 53): "…The fire substantially destroyed the mill. It was no longer capable of producing plywood or anything else of value. There was no business left, nor any productive work to be performed by the employees."

26. The Arbitrator in *Canfor* was not persuaded that the Legislature intended to adopt the common law doctrine of frustration when it enacted section 65(1)(d) of the *ESA*. The Arbitrator noted that section 65(1)(d) does not include an express reference to the doctrine of frustration like the applicable legislation in Ontario does. The Arbitrator concluded that:

> While the principles underlying the common law doctrine of frustration might provide some assistance in interpreting the words used in Section 65(1)(d), the principles reflected in the quote from Driedger, *Construction of Statutes* above must predominate. The meaning given to the words "impossible to perform" and "unforeseeable event or circumstance" must accord with a harmonious interpretation of that provision "within the scheme of the Act, the object of the Act, and the intention of Parliament."

27. The Arbitrator in *Canfor* discussed *Labyrinth Lumber Ltd. (Re)*, BC EST #D407/00 ("*Labyrinth*"), as being consistent with this approach, which is also a case relied on by the Responding Delegate. In *Labyrinth*, the employer laid off numerous employees due to an adverse ruling under the USA/Canada Softwood Lumber Agreement. This Tribunal upheld the determination finding that a significant impact on the profitability of the business did not make the employment contracts impossible to perform. This Tribunal held (emphasis added):

> …I accept the position of the Director that the validity of this argument turns on a consideration of the terms "impossible" and "unforeseeable" in paragraph 65(1)(d). Section 63 and 64 of the *Act* would apply to the employees unless it was *both* impossible to perform the employment contract *and* that impossibility of performance was due to an unforeseeable event or circumstance.
>
> The term "impossible" connotes that something is not capable of occurring or being accomplished or dealt with; or is unable to exist, happen or be achieved. That does not describe the circumstances of this case. Even in the appeal, while asserting that the unilateral ruling under the US/Canada Softwood Lumber Agreement had a significant impact on the profitability of the business, Labyrinth does not indicate that continuing the employment contracts was impossible in the foregoing sense. I accept that it made good business sense for Labyrinth to attempt to reduce its losses by laying-off its employees, but keeping in mind that paragraph 65(1)(d) has the effect of removing a minimum statutory benefit from employees, it is consistent with the objectives and the intention of the *Act* to give that provision a narrow interpretation.

28. The Appellant argues that *Labyrinth* is distinguishable, because "one cannot dispute" the effect of the pandemic on a hotel whose business is focused on airport travellers was more significant than the impact of the adverse ruling under the USA/Canada Softwood Lumber Agreement. However, the Appellant does not provide any basis for this assertion. This Tribunal noted in *Labyrinth* that a total of 100 employees were terminated, which seems like the result of a significant effect from the adverse ruling.

29. The Appellant also argues that *Labyrinth* is distinguishable because this Tribunal determined the adverse ruling under the USA/Canada Softwood Lumber Agreement was not an unforeseeable event or circumstance for the purposes of section 65(1)(d) of the *ESA*. However, in this case, whether the COVID-19 pandemic and associated government restrictions were an unforeseeable event or circumstance is not at issue – they clearly were – so the Appellant's argument in this regard is of no assistance to it.

30. The Responding Delegate also relies on *Burnaby Crescent Employer Company Ltd v Unite Here Local 40*, 2021 CanLII 46975 (BC LA) ("*Burnaby*"), which is strikingly similar to this case. In *Burnaby*, the employer operated a hotel that was significantly impacted by the COVID-19 pandemic and associated government restrictions, which resulted in employees being terminated. The union conceded that the pandemic was an unforeseeable event or circumstance, so the question was whether the employment contract of each terminated employee was "impossible to perform" as a result. The Arbitrator concluded (at para 44):

> In the present case, a series of regulatory constraints collapsed demand for the Employer's offerings. Those events led to a shortage of available work. Nonetheless, the Employer retained its capacity to employ persons in the continued operation of its business. Therefore, I conclude the employment contracts at issue are possible to perform and the exception provided by Section 65(1)(d) of the Act does not apply.

31. The Arbitrator in *Burnaby* relied on *Labyrinth* and discussed their reasoning as follows (at para 43):

> In making this determination, the rules of statutory interpretation direct that I give the concept of impossibility its ordinary and grammatical meaning. Any ambiguity in that regard must be resolved in favour of a meaning that extends the group termination benefit to as many employees as possible, consistent with remedial objective of the Act. It is in keeping with that direction that the BC EST adopted a narrow construction of that word in Labyrinth, namely: something that is not capable of occurring or being accomplished or dealt with; or is unable to exist, happen or be achieved: at p. 4. I adopt that interpretation for the same reasons.

32. The Appellant argues that *Burnaby* is distinguishable and wrongly decided. *Burnaby* is distinguishable, the Appellant says, because, in that case, the hotel was not situated near the airport specifically catering to airport clientele, like the Appellant's hotel was in this case. The Appellant argues that *Burnaby* was wrongly decided for the reasons it raises in this appeal. In the Appellant's view, the availability of work for other employees is not relevant – the only question that is relevant is whether there was productive work for the specific employee that was terminated.

33. I disagree with the Appellant's interpretation. Under that interpretation, if an employer is unable to provide the same amount of productive work to all its employees due to an unforeseeable event or circumstance as it did before that event or circumstance, then section 65(1)(d) necessarily applies and relieves the employer of its obligation to pay compensation for length of service to the employees it chooses to terminate to adjust to the reduced amount of productive work. In my view, such an interpretation would be inconsistent with the modern approach to statutory interpretation, the guidance from the Supreme Court of Canada in *Machtinger*, and the objects of the *ESA*.

34. In my view, whether other employees continue to be employed, particularly in the same position as the terminated employee, may be a relevant factor in determining whether the employment contract of the terminated employee was impossible to perform for the purposes of section 65(1)(d) of the *ESA*, and the Adjudicating Delegate did not err having taken that factor into consideration. That does not necessarily mean the exemption in section 65(1)(d) will never apply if other employees continue to be employed – i.e., a business must not necessarily close entirely for section 65(1)(d) to apply. Every case must be decided on its own facts.

35. *Verigen v Ensemble Travel Ltd.*, 2021 BCSC 1934 ("*Verigen*"), a case not raised by either of the parties in this appeal, is also inconsistent with the Appellant's interpretation. While the Court in *Verigen* considered the common law doctrine of frustration rather than section 65(1)(d) of the *ESA* (see para 58), the Court's analysis still assists in interpreting the words used in section 65(1)(d), as discussed in *Canfor*.

36. In *Verigen*, the defendant was an international travel agency, and its business was significantly impacted by the COVID-19 pandemic and associated government restrictions. That led to the defendant laying off

over half of its employees, one of which was the plaintiff. The plaintiff sought damages for wrongful dismissal.

37. In determining whether the plaintiff's employment contract was frustrated, the Court in *Verigen* discussed the common law test for frustration and how, for it to be met, a circumstance or event must alter the nature or purpose of the obligation itself. The Court held at paras 60 and 61 (emphasis added):

> So too here, the collapse in the travel market goes to ETL's "ability to perform", rather than "the nature of the obligation itself." This case is unlike the CRT decisions relied upon by ETL, where the very subject matter of the contract had been lost due to discrete, pandemic-related events. Although much of the consumer demand driving the business on which ETL and its members depend has abated, at least for the time being, not all of it has, and then not permanently. Moreover, although ETL chose to terminate a large part of its work force in the summer of 2020, at least some positions have been preserved and a recently opened vacancy has been filled. ETL chose to relinquish Ms. Verigen's branch of the business with a view to cutting operating costs so that it could better weather an ongoing storm. The fact that the pandemic had admittedly not brought about a frustration of the contract as of July 2020 makes it implausible for ETL to maintain that the contract had become frustrated only a few weeks later.
>
> For those reasons, I have concluded that Ms. Verigen's employment contract was not frustrated by the pandemic and that she is therefore entitled to damages for wrongful dismissal.

38. In my view, the principles in the authorities discussed above can be summarized as follows:

a. While section 65(1)(d) of the *ESA* codifies the common law doctrine of frustration, it must still be read in its entire context and in its grammatical and ordinary sense harmoniously with the scheme of the *ESA,* the object of the *ESA*, and the intention of the legislature – i.e., section 65(1)(d) must be interpreted in accordance with the modern approach to statutory interpretation.

b. Employment standards legislation should be interpreted in a manner that encourages employers to comply with the minimum requirements of the *ESA*, and so extends its protections to as many employees as possible. This is consistent with the purpose of ensuring employees in British Columbia receive at least the basic standards of compensation and conditions of employment.

c. Section 65(1)(d) of the *ESA* has the effect of removing a minimum statutory benefit from employees, so it is consistent with the objectives and the intention of the *ESA* to give it a narrow interpretation.

d. Whether other employees continue to be employed, particularly in the same position as the terminated employee, may be a relevant factor in determining whether the employment contract of the terminated employee was impossible to perform for the purposes of section 65(1)(d) of the *ESA*. However, that does not necessarily mean a business must close entirely for section 65(1)(d) to apply – every case must be decided on its own facts.

39. When applying those principles to this appeal, I find that the Adjudicating Delegate did not err in law in determining that the Appellant was not entitled to rely on the exemption in section 65(1)(d) of the *ESA*. Accordingly, I dismiss the Appellant's appeal.

ORDER

40. I order that the Determination be confirmed pursuant to section 115 of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal