Citation: Evergreen Demolition Ltd. (Re)
2023 BCEST 51

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Evergreen Demolition Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/082

DATE OF DECISION: July 07, 2023

DECISION

SUBMISSIONS

Liam M. Robertson — legal counsel for Evergreen Demolition Ltd.

OVERVIEW

1. This is an application by Evergreen Demolition Ltd. (the "applicant") for reconsideration of 2023 BCEST 24, an appeal decision issued by Tribunal Member Groves on May 1, 2023 (the "Appeal Decision"). This application is made pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. By way of the Appeal Decision, Member Groves confirmed a Determination issued by a delegate of the Director of Employment Standards pursuant to which the applicant was ordered to pay over $18,000 to a former employee and, additionally, to pay $2,000 in monetary penalties.

3. The Tribunal assesses section 116 reconsideration applications in accordance with the two-stage test set out in the seminal "Milan Holdings" decision (see *Director of Employment St*andards, BC EST # D313/98). Under this test, the Tribunal will first assess whether the application raises a question of law, fact, principle or procedure which is so significant that it should be reviewed because of its fundamental importance. At this first stage the Tribunal will assess, for example, whether the appeal decision in question is seemingly predicated on a serious error in law, or whether the process that preceded the issuance of the appeal decision was fundamentally unfair in an administrative law sense. An application will not pass the first stage where its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the initial decision-maker, or the Tribunal on appeal (as distinct from tendering compelling new evidence or demonstrating that an important finding of fact was made without a rational evidentiary basis). If an application passes the first stage of the *Milan Holdings* test, the Tribunal will then undertake a more searching review of the appeal decision, allowing all parties to be heard as part of that review.

4. In my view, this application does not pass the first stage of the *Milan Holdings* test and, that being the case, it must be dismissed. My reasons for reaching that conclusion are set out, below.

PRIOR PROCEEDINGS

5. On August 4, 2020, a former employee of the applicant (the "complainant") filed an unpaid wage complaint seeking about $19,000 in unpaid wages (mostly overtime pay).

The Determination

6. On October 13, 2022, and following an investigation (which included the preparation of an "Investigation Report" dated August 5, 2022), Tara MacCarron, a delegate of the Director of Employment Standards (the "delegate") issued a Determination and her accompanying "Reasons for the Determination" (the "delegate's reasons").

7. The delegate determined that the applicant owed the complainant a total of $18,148.09, including section 88 interest. The bulk of this unpaid wage award ($12,681.10) represented unpaid overtime pay. The delegate also awarded the complainant $1,972.45 for unpaid regular wages, $2,014.70 for vacation pay and $463.17 for statutory holiday pay. In addition, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against the applicant (see section 98 of the *ESA*) based on its contraventions of section 18 (payment of wages on termination of employment), 28 (maintenance of payroll records), 40 (overtime pay), and 58 (vacation pay) of the *ESA*. Accordingly, the total amount payable by the applicant under the Determination is $20,148.09.

8. The delegate's reasons note that the applicant operates a demolition business headquartered in Coquitlam (but it carries on business throughout the greater Vancouver area), and that the complainant was employed as a "project manager/estimator" from May 13 to July 17, 2020. The complainant was paid an annual $100,000 salary.

9. According to the complainant, although his duties and responsibilities as set out in his employment agreement largely focused on project costing, negotiation, and implementation, "he frequently worked long days at [the applicant's customers'] sites to get jobs finished [and] split his time roughly 50/50 between estimating and operating equipment, with slightly more time operating equipment" (delegate's reasons, page R3).

10. The complainant also provided the following evidence regarding his job duties, as recorded in the delegate's reasons:

- "One of the Complainant's responsibilities was to supervise labourers on the [applicant's] worksites. However, the Complainant often had to step into the role of a labourer himself to finish jobs." (page R3)
- "The Complainant did not manage a budget as part of his job responsibilities, nor did he have signing authority for the [applicant]. The Complainant also did not have the authority to hire or fire employees." (page R3)
- "In July of 2020, the Complainant sent a text message to Mr. Graham [the applicant's sole director and officer] to express his frustration with working long days on the equipment." (page R4)
- "As the Complainant did not have signing authority for the [applicant], the Complainant also did not have the discretionary power to make major purchases for the [applicant]. The Complainant explained that every equipment operator for the [applicant] was able to make small purchases, however, the Complainant would be required to get quotes on large purchases of equipment and Mr. Graham would be the one to make the decision to approve those purchases." (page R4)
- "The employees' schedules were made by Mr. Graham and Codie Nagy (Mr. Nagy), the [applicant's] assistant manager." (page R4)

11. The complainant also provided evidence from a work colleague who stated that the complainant frequently used concrete cutting tools at a particular worksite during a two-month project in the summer of 2020.

12. The applicant provided evidence that the complainant was not hired to be a labourer, and that his compensation was in line with that of an estimator and project manager. However, Mr. Graham also provided evidence that the complainant "spent more of his time at work alongside the labourers he managed than with finding new work" (page R7). Mr. Graham stated that the complainant was "responsible for setting his own hours" and that he "could not say how the Complainant allocated his time as [the applicant] did not track [the complainant's] hours" (page R7).

13. Mr. Graham also stated that the complainant had equipment purchasing authority and "influenced" employees' work schedules (pages R7-R8). The applicant provided evidence from four other individuals to the effect that the complainant was more of a project supervisor than a labourer.

14. Ultimately, and in the face of conflicting evidence, the delegate determined that the complainant was not a "manager" as defined in section 1(1) of the *Employment Standards Regulation* (the "*Regulation*"). Pursuant to sections 34(f) and 36 of the *Regulation*, Part 4 (Hours of Work and Overtime) and Part 5 (Statutory Holidays) of the *ESA* do not apply to "managers". A "manager" is defined as meaning "(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or (b) a person employed in an executive capacity" (my underlining). The applicant never argued that the complainant was employed in an executive capacity.

15. The delegate acknowledged that the complainant performed some duties that fell within a managerial sphere. However, the delegate determined that the complainant's *principal* duties were as a labourer, and that, on balance, he did not have sufficient autonomy, discretion, and independent purchasing authority to be characterized as a manager. Further, the delegate determined that the complainant did not have meaningful control over, or significant responsibilities associated with, supervision and direction of the applicant's human resources (delegate's reasons, pages R10-R11).

16. The delegate calculated the complainant's unpaid wage entitlement by relying on the complainant's records (the applicant conceded it did not have records concerning the complainant's hours of work), which she found to be "the best and only evidence available" (page R12). I also note that the complainant's witness corroborated the complainant's evidence regarding significant overtime hours (see delegate's reasons, page R6).

The Appeal Decision

17. On November 7, 2022, the applicant appealed the Determination, 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*). On May 1, 2023, after receiving submissions from the applicant, the complainant, and the delegate, Member Groves issued the Appeal Decision. Member Groves dismissed the appeal and confirmed the Determination.

18. A central issue before the delegate, and on appeal, was whether the complainant was a "manager" as defined in the *Regulation*. Member Groves accepted the delegate's finding that although the complainant held the title of "project manager", a consideration of his entire job duties and functions led to the conclusion that he was not a "manager" as defined in the *Regulatio*n.

19. Another central aspect of the applicant's appeal was that the delegate failed to appropriately weigh and consider the evidence before her, and that it was denied a fair opportunity to respond to the complainant's evidence.

20. Member Groves' findings with respect to the applicant's "error of law" ground of appeal as it related to the complainant's status were as follows (Appeal Decision, paras. 35-36, 40, and 46):

> …I decline to find the Delegate's analysis of the evidence to have been perfunctory, that she gave improper weight to some aspects of the evidence over others, that she acted on a view of the facts that could not reasonably be entertained, or that she failed to apply the relevant legal tests properly.
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> …the substance of the [applicant's] appeal challenging the Delegate's treatment of the evidence on the critical points at issue is that the Determination embodies factual conclusions with which the [applicant] disagrees. That, however, is an insufficient basis to support a successful appeal. The fact that a reasonable person, viewing the evidence that was presented, might have reached different conclusions is of no moment unless, as the authorities state, the conclusions drawn are perverse or inexplicable.
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> The Delegate did observe that the Complainant performed certain actions that were consistent with managerial status. The Complainant did, for example, act as a supervisor and foreman on the projects for which he was responsible, he did prepare cost estimates, he did make price-limited purchases on behalf of the [applicant], and he did assist in the search for other potential employees. Still, the Delegate concluded that these actions were not the Complainant's principal employment responsibilities, that is, they did not outweigh the significant amount of time he spent performing work as a concrete cutter labourer during much of his tenure.
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> In my view, given the relative lack of knowledge on the part of the [applicant] regarding the extent to which the Complainant might be working as a labourer, it was not unreasonable for the Delegate to have relied on the evidence of the Complainant in support of her finding that the [applicant] had failed to establish that the principal employment responsibilities of the Complainant were managerial.

21. Member Groves' findings with respect to the applicant's "error of law" ground of appeal as it related to the complainant's overtime claim were as follows (Appeal Decision, para. 47):

> …Employers have an obligation to control the workplace, and if they do not want an employee to work overtime hours, they must not only direct the employee not to work beyond the hours of work set out in the employee's employment contract, they must also supervise the employee and record the employee's hours of work to ensure that no overtime hours are being worked (see *Re Geotivity,* BC EST #D056/05). Here, the Complainant's employment agreement set out his hours of work to be Monday to Friday from 7:00 am to 3:00 pm. The [applicant] admitted to the [Employment Standards Branch] Investigator that he never advised the Complainant not to work overtime hours. Moreover, the [applicant] did not keep track of the Complainant's hours of work, nor did it record them as required by section 28 of the *ESA*. Indeed, it is the penalty for its failure to keep proper payroll records which is the sole penalty in the Determination the Employer does not dispute.

22. On appeal, the applicant also challenged the Determination as it concerned the $2,014.70 vacation pay award. The applicant asserted that the complainant did not undertake any work during a 4-day "vacation"

in Alberta, and that the delegate erred in considering this to be compensable working time. The delegate held, at page R13 of her reasons:

> …I am satisfied the Complainant performed work during his trip to Alberta, even though it may not have been the primary reason for the trip. Other than the [applicant's] spreadsheet documenting employees' scheduled days off, the [applicant] has not provided any additional evidence to support its claim the Complainant requested or took vacation time on these four days. The text messages provided by the [applicant] in which the Complainant asks the [applicant] to drive him to the airport on June 18, 2020 is not evidence of the Complainant requesting time off work but, rather, evidence the Complainant had to be at the airport. What is more, according to the Complainant's July 10, 2020 wage statement, he had not yet used or been paid for any of his accrued vacation time. It was only upon his termination the [applicant] retroactively attributed his accrued vacation pay to these four days.

23. Member Groves confirmed the complainant's vacation pay award stating (Appeal Decision, para. 48):

> As for the [applicant's] submission the Complainant should not be awarded vacation pay because the Complainant was paid his salary for days spent on a trip to Alberta, I see no reason to disturb the Delegate's finding that the trip was not intended to be a vacation. The evidence the Delegate accepted was that the Complainant made the trip to take delivery of equipment to be used in the [applicant's] business. There was, in addition, no contemporary documentary record of the trip indicating it was to constitute vacation time, and it did not become an issue until the [applicant] removed the line for vacation pay in the Complainant's final paycheque at the time of his resignation.

24. Finally, and with respect to the applicant's "natural justice" arguments, Member Groves held as follows (Appeal Decision, paras. 52, 55-56, and 57-58):

> My review of the record reveals an investigatory process in which the elements of the Complaint were communicated to the [applicant], the Investigator was more than diligent in providing the [applicant] with the relevant evidence delivered by the Complainant, and the [applicant] was provided with ample time to respond to the Investigator's queries when the importance of the matter is considered, including, for example, time relief for the delivery of a response when the [applicant's] principal was ill. On this point, it is well to remember that section 77 of the *ESA* merely requires that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond. This means that the right to respond is not absolute. It is sufficient that the person under investigation be provided with enough details of the claim to make the opportunity to respond meaningful [sic] (see *Bero Investments Ltd.,* BC EST #D035/06). In my view, that standard was met in this case.
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> The [applicant] submits that the appeal is warranted because the investigation and determination of the Complaint reveals bias. An allegation of bias against a decision-maker is serious and should not be made speculatively, which means it should not be made unless supported by sufficient evidence to demonstrate to a reasonable person there is a sound basis for apprehending that the person against whom it is made did not bring an impartial mind to bear upon the case (see *Re Zadehmoghadami (cob E-Hot Wired Computers),* BC EST #D171/05, and *Re Dang,* BC EST #D184/05). The onus of demonstrating bias lies with the person who is alleging it. The burden is a heavy one. A real likelihood or probability of bias must be demonstrated; a mere suspicion or

> an impression of bias is insufficient to establish it (see *Re Gallagher (cob Mid Mountain Contracting),* BC EST #D124/03).
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> The [applicant's] concerns relating to bias are…largely based on subjective impressions of the [Employment Standards Branch] Investigator's disposition regarding the substance of the Complaint, and they fall short of establishing bias to the requisite standard.
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> The Affidavit [submitted by the applicant on appeal] alleges, in addition, that the Investigator was "advocating" for the Complainant, and therefore acting unfairly, when the Investigator advised the [applicant] of the potential adverse outcomes that a final determination of the Complaint might incorporate, and then communicated a settlement proposal the Investigator had received from the Complainant. The [applicant's] submission in reply also claims that the record reveals the Investigator "favouring" the Complainant when the Investigator provided what the [applicant] characterizes as "legal advice" to the Complainant regarding the probability of success should the Complaint proceed to the issuance of a determination, and commentary as to the substance of a settlement offer proposed by the [applicant].
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> These messages were delivered after the Report had been issued and the Complaint had been assigned for determination to a different delegate. I reject the submission that the Investigator's informing the parties of possible outcomes and the risks inherent in proceeding to a determination, or his communicating and commenting upon settlement offers can be construed as revealing a bias in favour of the Complainant. Since it was the Investigator who had performed the investigation, he was in the best position to express a view as to the [applicant's] potential exposure, not only to an order for the payment of wages, but also to an order that the [applicant] pay administrative penalties should the Complaint remain unresolved before a determination was issued. It was also open to the Investigator to explain to the Complainant the possibilities for failure regarding aspects of the Complaint. Moreover, section 78 of the *ESA* provides express authority to the Director, and therefore delegates, to assist in settling complaints.

25. As previously noted, Member Groves dismissed the appeal and confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

26. The applicant says that the Determination "was unsupported by evidence and statistically impossible", and that Member Groves erred in confirming the Determination. The application is largely predicated on two basic assertions. The applicant says that the Appeal Decision contains several "incongruencies", mainly in relation to the question of the complainant's status (i.e., was he a "manager"?), and also regarding the treatment of the complainant's records relating to his hours of work.

FINDINGS AND ANALYSIS

27. There was inconsistent evidence before the delegate regarding the complainant's actual job duties. Although it would appear that the complainant was hired to serve in what might be characterized as a "managerial" position, the reality of the situation was somewhat different. The complainant clearly took the position that he had little, if any, independent authority, and he spent a substantial portion of his time as a labourer – evidence that was confirmed by his witness. The applicant's principal, Mr. Graham, also conceded that the complainant appeared to have "spent more of his time at work alongside the labourers

he managed than with finding work", and that he "needed him to bring in new work as a project manager, not focus on equipment operation" (page R7).

28. The complainant provided the *only* cogent evidence with respect to his working hours and as noted in the Appeal Decision, at para. 47:

> The [applicant] admitted to the Investigator that he never advised the Complainant not to work overtime hours. Moreover, the Employer did not keep track of the Complainant's hours of work, nor did it record them as required by section 28 of the *ESA*.

In other words, there was evidence before the delegate that supported her findings both as to the complainant's status and his total working hours. There is no basis for suggesting that there was no proper evidentiary foundation for the delegate's findings regarding the complainant's actual working hours.

29. At its core, this application is, in my view, a simple plea to have another member of the Tribunal re-weigh the evidence and come to a different conclusion than that reached by the two previous decision-makers. This is not an appropriate application of the Tribunal's reconsideration power.

30. In any event, I agree with both the delegate and Member Groves that the weight of the evidence supported a finding that the complainant was not a "manager". The burden of showing that the complainant was a "manager" as defined in the *Regulation* rested with the applicant and, quite simply, it failed to discharge its evidentiary burden in this regard. The applicant's actual job duties, as recounted in the evidence, demonstrate that the complainant's *principal* duties during his period of employment with the applicant were not fundamentally managerial in nature.

31. The applicant notes that Member Groves, at para. 14 of the Appeal Decision, referred to the "detailed records of work kept by the Complainant" but, at para. 41, described the complainant's time logs as "short on the details of all the duties the Complainant performed". The applicant refers to these two separate characterizations of the complainant's time records as an incongruity.

32. For my part, I do not see that there is any incongruity. The complainant's time records *are* detailed as to the actual hours worked each day but, at the same time, lack specificity about the precise nature of the work undertaken. For example, the complainant's time log (a coil-bound "day-timer" daily/hourly record) consistently show, in handwritten notes, the number of hours worked each day and the shift length (e.g., "7 to 5"; "10" – this latter number almost always circled) with a brief explanatory notation (e.g., "Office/shop" or simply a job site notation such as "Oakridge"). Thus, the complainant's daily diary is a detailed record regarding his hours worked each day (and shift start/end times), but is of not much probative value in terms of the actual duties undertaken each day. That being the case, the delegate quite correctly in my view, took the diaries as to the best evidence of the complainant's working hours, but put much more stock in the parties' and witnesses' statements when it came to determining what work the complainant actually undertook each day.

33. As I previously observed, there was some conflicting evidence before the delegate (particularly regarding the complainant's status), but the weight of this evidence, on a balance of probabilities, supported the delegate's findings both as to the complainant's status and his working hours during his employment with the applicant.

34. In my view, there is no merit to the applicant's assertion that the Appeal Decision is tainted by "perverse and inexplicable error".

35. This application does not pass the first stage of the *Milan Holdings* test and, as such, must be dismissed.

ORDER

36. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal