Citation: Vancouver Dispensary Society (Re)
2023 BCEST 57

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 -

Vancouver Dispensary Society

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/079

DATE OF DECISION: July 26, 2023

DECISION

SUBMISSIONS

Nathan Lidder — legal counsel for Vancouver Dispensary Society

INTRODUCTION

1. This is an application for reconsideration filed by Vancouver Dispensary Society ("applicant") pursuant to section 116 of the *Employment Standards Act* ("*ESA*"). The application concerns an appeal decision issued by Tribunal Member Chapnick on May 8, 2023 (2023 BCEST 27; "Appeal Decision").

2. By way of the Appeal Decision, Member Chapnick confirmed a Determination issued by a delegate of the Director of Employment Standards ("delegate") on December 29, 2022. The delegate determined that the applicant dismissed a former employee ("complainant") without just cause and, that being the case, owed him a total of $1,570.71 representing two weeks' wages as section 63 compensation for length of service ("CLS"), concomitant section 58 vacation pay, and section 88 interest. Further, the delegate levied a single $500 monetary penalty against the applicant (see section 98) based on its contravention of section 18 of the *ESA* – failure to pay all wages due on termination of employment. Thus, the total amount payable under the Determination is $2,070.71.

3. The applicant says that the Member "misapprehended the evidence and erred in law" in two distinct respects. Presumably, although this is not expressly set out in the applicant's written submission, the applicant seeks an order varying the Appeal Decision such that the original Determination is cancelled.

4. In my view, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). Accordingly, this application must be dismissed. My reasons for reaching that conclusion are set out, below.

PRIOR PROCEEDINGS

5. The delegate issued her "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination. As set out in these reasons, the applicant operates a drug testing and dispensary business in Vancouver. The complainant worked for the applicant as a Fourier Transform Infrared Resicopy Technician and also, under a separate wage arrangement, as a Harm Reduction Worker. The complainant's period of employment spanned the period from mid-July 2019 to early September 2020.

6. The delegate's reasons addressed two separate issues: first, whether the applicant was dismissed without just cause, and thus entitled to CLS; and second, whether the applicant deducted business costs from the complainant's pay, contrary to section 21(2) of the *ESA*.

7. The delegate determined that the applicant did not have just cause to dismiss the complainant, but held in the applicant's favour on the section 21(2) issue. The complainant did not appeal that latter finding.

8. The applicant appealed the Determination, initially on the "error of law" and "natural justice" grounds of appeal, but later it also relied on the "new evidence" ground of appeal (see sections 112(1)(a), (b) and (c) of the *ESA*). As noted above, Member Chapnick confirmed the Determination. The Member held that the delegate did not err in finding that the complainant was dismissed without just cause. The Member also held that the applicant's "natural justice" argument was not meritorious, and that its so-called "fresh evidence" did not meet the *Davies et al.* (BC EST # D171/03) criteria governing the admissibility of previously unavailable evidence on appeal.

THE APPLICATION FOR RECONSIDERATION

9. The Appeal Decision was issued on May 8, 2023. On May 23, 2023, the applicant filed a "Reconsideration Application Form", but did not provide any reasons supporting its application. Rather, it sought an extension to July 7, 2023, so that "counsel may be available for the [applicant] to assist them in their application for reconsideration". I note that the Reconsideration Application Form was filed by the same legal counsel who represented the applicant in the appeal and during the investigation into the complaint.

10. On May 30, 2023, the Tribunal's Registry Administrator advised the applicant's legal counsel that its submissions on the reconsideration application must be filed by July 7, 2023, but also cautioned that this new deadline did not constitute an extension of the statutory reconsideration period.

11. On July 7, 2023, the applicant's legal counsel filed written submissions in support of the reconsideration application. The applicant says that the Member "misapprehended the evidence and erred in law" in two separate respects.

ANALYSIS

12. I commence my analysis by noting that this application was not perfected within the statutory 30-day application period (see section 116(2.1) of the *ESA*). Although the applicant filed a Reconsideration Application Form within the 30-day period, this application was not supported by any written reasons or argument. The only explanation advanced for this omission was that the applicant needed more time so that its legal counsel (who has been involved in this matter continuously as and from the commencement of the investigation) would be "available…to assist [the applicant] in their application for reconsideration". There is nothing in the applicant's materials to explain *why* its legal counsel was not able to prepare a written submission in support of the application within the 30-day period. As will be seen, the submission that was filed (on July 7, 2023) was essentially a "cut and paste" document compiled from written submissions previously filed in the appeal.

13. However, and apart from the question of timeliness, in my view, this application does not raise, in the language of *Milan Holdings*, any "questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases" (page 7). Accordingly, I will not rest my decision solely on the fact that this application was not perfected within the 30-day application period.

14. The first alleged error of law concerns events that occurred during the investigation into the complaint by a delegate other than the delegate who issued the Determination. I shall refer to this other delegate as the "Investigating Delegate". The applicant previously advanced this same alleged error, and it was

addressed in the Appeal Decision, as a "natural justice" issue. In any event, the central thrust of the applicant's argument on this score is that the Investigating Delegate "closed" the investigation, only to subsequently (and improperly) "re-open" it.

15. The applicant's argument on this matter that it now advances on reconsideration is essentially identical to the argument it previously advanced on appeal. I have in the table, below, set out the text of the arguments advanced in the applicant's reconsideration and appeal submissions:

Applicant's Reconsideration Application submitted July 7, 2023	Applicant's Appeal Submission submitted March 1, 2023
Reconsideration Ground No. 1: The record shows that in November 2021 [the Investigating Delegate] advised the Complainant that the case was closed. On November 9, 2021, [the Investigating Delegate] advised [the applicant] that she would begin writing the Investigation Report on November 10, 2021. On November 10, 2021, the Complainant emailed [the Investigating Delegate] and said "I've decided that I cannot end things here. You took over six months to get back to me, and then closed a case when I told you my employers lied to you. That's unacceptable. […] If I need to interact with one of your superiors, I can do that. But the Government of BC will NOT fail me this time." Shortly after the Complainant sent [the Investigating Delegate] the November 10 email, [the Investigating Delegate] emailed [the applicant] to request more information. A plain, objective, and reasonable viewing of the record strongly suggests that [the Investigating Delegate] made the decision to close the case, and unilaterally decided to reopen the case based on the Complainant's words without providing [the applicant] the opportunity to make submissions on the reopening of the case. In doing so, [the Investigating Delegate] was in violation of the rules of procedural fairness and principles of natural justice (right to be heard) as outlined in *Baker v. Canada (Minister of Citizenship)* 1999 SCC 699. In addition, [the Investigating Delegate's] actions gave rise to a reasonable apprehension of bias as outlined in *Committee for Justice & Liberty v. Canada (National Energy Board)*, [1978] 1 SCR 369.	*Appeal Ground No. 4:* The record shows that in November 2021 [the Investigating Delegate] advised the Complainant that the case was closed. On November 10, 2021 the Complainant emailed [the Investigating Delegate] and said "I've decided that I cannot end things here. You took over six months to get back to me, and then closed a case when I told you my employers lied to you. That's unacceptable." [...] "If I need to interact with one of your superiors, I can do that. But the Government of BC will NOT fail me this tine [sic]" Once the case was closed it was incumbent on [the Investigating Delegate] not to accept further submissions from either party. Clearly, [the Investigating Delegate] accepted further submissions from the Complainant and reversed the decision to close the case without hearing from the [applicant]. In doing so, [the Investigating Delegate] was in violation of the rules of procedural fairness and principles of natural justice (right to be heard) as outlined in *Baker v. Canada (Minister of Citizenship)* 1999 SCC 699.

16. The only differences between the two submissions are that the applicant now also advances a "bias" argument – never previously advanced – based on the *Committee for Justice & Liberty v. Canada (National Energy Board)* decision, and it also refers to another decision *Weldwood of Canada v. British Columbia (Workers' Compensation Board)*, [1998] B.C.J. No. 2430, which it says "is closely analogous here and should be followed". I have not reproduced the applicant's one-paragraph submission regarding the *Weldwood* decision. I do not agree that the *Weldwood* decision is relevant since it is predicated on a wholly distinct factual matrix.

17. As explained in the *Milan Holdings* decision, the Tribunal should not entertain an argument on reconsideration that is, effectively, a request to "'re-weigh' evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence)" (page 7). The applicant's argument regarding the conduct of the Investigating Delegate was fully addressed in the Appeal Decision at paras. 25 to 27. I am not persuaded that Member Chapnick erred in his treatment of this particular issue. Indeed, I entirely agree with, and adopt, the Member's analysis of the issue.

18. As for the new "bias" allegation, it is not appropriate to advance this argument on reconsideration, as it should have been raised in the appeal. Further, so far as I can determine, the applicant never raised a bias issue with either the Investigating Delegate following receipt of her investigation report (although the applicant was invited to reply to that report), or with the delegate prior to the issuance of the Determination. In any event, I am not satisfied that the Investigating Delegate's conduct shows that there was a reasonable apprehension of bias on her part.

19. The applicant's second alleged legal error concerns the just cause issue. During the original investigation, the applicant alleged that it had just cause to dismiss the complainant based on three separate incidents, two of which occurred during the complainant's employment, with the other being a post-employment matter. The so-called "First Incident" concerned the complainant's dealings with a client in late August 2020. This incident is comprehensively described in the delegate's reasons at pages R3-R5, and is also summarized in para. 5 of the Appeal Decision.

20. As was the case with the applicant's argument regarding the Investigating Delegate's conduct (i.e., whether she "closed" the investigation only to later "re-open" it), the applicant's argument on reconsideration regarding whether the "First Incident" provided just cause to terminate the complainant's employment is largely identical to that advanced on appeal. Although framed somewhat differently, the applicant's "just cause" argument advanced on reconsideration is essentially the same argument as that advanced as "Appeal Ground No. 1" in its March 1, 2023, appeal submission. As I previously noted, the reconsideration process is not intended to afford an applicant an opportunity to simply have the Tribunal re-weigh evidence in an effort to have the Tribunal come to a different conclusion.

21. Member Chapnick's analysis of the "First Incident", and whether it constituted just cause for dismissal, is set out in paras. 16 to 20 of the Appeal Decision. In my view, the Member applied the proper governing legal principles regarding this question of mixed fact and law, and his assessment of the evidence in relation to those principles is not tainted by any "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235). On the evidence, it was open to the delegate to determine that the "First Incident" did not give the applicant just cause for dismissal, and Member Chapnick did not err in upholding that decision.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal