Citation: Freshslice Holdings Ltd. (Re)
2023 BCEST 69

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 -

Freshslice Holdings Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves

FILE NO.: 2023/104

DATE OF DECISION: September 5, 2023

DECISION

SUBMISSIONS

Vincent Li — counsel for Freshslice Holdings Ltd.

OVERVIEW

1. Freshslice Holdings Ltd. ("Employer") applies for a reconsideration ("Application") of a decision of a member ("Member") of the Employment Standards Tribunal ("Tribunal") dated June 13, 2023, and referenced as 2023 BCEST 41 ("Appeal Decision"). The Application has been brought pursuant to section 116 of the *Employment Standards Act* ("*ESA*").

2. This matter arose when Behrooz Rabiei ("Complainant"), a former employee of the Employer, filed a complaint under section 74 of the *ESA* ("Complaint") alleging that the Employer had failed to pay him overtime wages, statutory holiday pay, and vacation pay. The Complainant did not pursue an additional complaint that the Employer had failed to pay him compensation for length of service.

3. A delegate ("Investigating Delegate") of the Director of Employment Standards ("Director") investigated the Complaint and issued an Investigation Report ("Report") summarizing the evidence and submissions delivered by the parties. Neither the Complainant nor the Employer challenged the statements contained in the Report.

4. A second delegate ("Adjudicating Delegate") of the Director issued a determination of the Complaint on December 21, 2022 ("Determination"). In it, the Adjudicating Delegate ordered that the Employer pay to the Complainant overtime wages, statutory holiday pay, vacation pay, and accrued interest totalling $8,783.04. The Determination also ordered that the Employer pay $1,500.00 in administrative penalties. The total found to be owed was, therefore, $10,283.04.

5. The principal issue arising from the investigation was whether the Employer was exempted from paying the wages claimed in the Complaint because the Complainant was a manager. The Adjudicating Delegate concluded that, despite elements of the wording in his employment agreement describing duties indicative of a managerial role, the Employer had not established that the Complainant fell within the definition of a "manager" set out in section 1(1) of the *Employment Standards Regulation* (the "*Regulation*" or "*ESR*") because the principal duties the Complainant performed for the Employer could not be characterized, to any material degree, as supervising or directing human or other resources. That being so, the Adjudicating Delegate determined that the Complainant was not a manager for the purposes of the *ESA*.

6. The Employer appealed the Determination pursuant to section 112 of the *ESA*. The Employer alleged that the Adjudicating Delegate had erred in law, and that evidence had become available that was not available at the time the Determination was being made.

7. The Employer delivered its appeal to the Tribunal one day more than two months beyond the final date established for an appeal that is set out in the *ESA*. Pursuant to section 109(1)(b) of the *ESA*, the Employer requested an extension of the time for the filing of its appeal so that it might be heard on its merits.

8. The Member declined to order an extension of time and, in the alternative, concluded that there was no reasonable expectation the appeal would succeed on the merits. The Member ordered that the Determination be confirmed.

9. The Application alleges that a reconsideration should occur because the Member erred in law.

10. The salient materials I have before me are the Employer's Appeal Form and the Application, its submissions in support of both, the Determination and its accompanying Reasons ("Reasons"), the Appeal Decision, and the record the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*.

ISSUES

11. Should the Appeal Decision be reconsidered?

12. 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?

ARGUMENTS

13. The Employer submits that the Appeal Decision reveals errors of law. It argues that the Member erred in (a) declining to find that the criteria for the granting of an extension of time for the filing of its appeal had been established, and in (b) failing to give due consideration to the fact that the Employer was acting as a self-represented lay party when deciding that the grounds of appeal offered by the Employer were insufficient to establish a strong *prima facie* case for its appeal.

14. In the Appeal Decision, the Member alluded to, and applied, the oft-cited criteria set out in *Re Niemisto*, BC EST # D099/96, the Tribunal has consistently applied when determining whether an extension of time for the filing of an appeal should be granted. They are:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- There has been a genuine and ongoing *bona fide* intention to appeal the Determination;
- The responding party and the Director have been made aware of the intention;
- The respondent party will not be unduly prejudiced by the granting of an extension; and
- There is a strong *prima facie* case in favour of the appellant.

15. The Member noted, too, that the *Niemisto* criteria are not exhaustive, and that other, perhaps unique, criteria may also be considered.

16. The Member concluded that the Employer had satisfied none of the criteria necessary to justify an extension of time for the delivery of its appeal.

17. A review of the Application reveals that the nub of the Employer's submissions is that, as regards to its request that an extension be granted, one other, unique criterion should have been considered in this case. It asserts that the Employer "was not represented by any legally trained individual, be it a lawyer or legal advocate," as the Tribunal must have known from the documents the Employer delivered for the purposes of its appeal. The Employer contends that the Member should have considered the Employer's self-represented status as a criterion when deciding whether the legal grounds for an extension of the time for it to appeal had been established, and the Member's failure to do so constitutes an error of law.

18. More specifically, the Employer asserts that its self-represented status required the Member to provide it "latitude, liberalism, and the benefit of any doubt" regarding the criteria it would be expected to satisfy if it were to be successful in its request for an extension, and its submission that new evidence should be admitted for the purposes of establishing a *prima facie* case, as well as the adjudication of the appeal on the merits. Given that the Employer was a lay party it says it could not reasonably be expected to have any more than a superficial understanding of the Tribunal's procedures or the consequences of its failure to abide by them. The Employer states it was unaware of several of the criteria set out in the *Niemisto* case, and the Director provided it with no effective guidance. The Employer argues, therefore, that it was an error warranting a reconsideration that the Member failed to acknowledge these factors and "appeared to simply expect self-represented parties to know it *[sic]* would be held to the *Niemisto* standard lest they suffer the consequences of a rejected application."

19. Regarding the criterion applied by the Member that the Employer's delay in delivering its request for an appeal in this case was excessive, which meant greater prejudice to the Complainant if an extension were to be granted, the Employer contends that the Member's conclusion was in error because there was no evidence led by the Complainant or the Director that any undue prejudice would, in fact, arise in this case if an appeal on the merits were to proceed.

20. In the Appeal Decision, the Member concluded that the new evidence the Employer sought to adduce in the appeal proceedings, suggesting that the Complainant was a manager, should not be admitted. The reasons the Member gave were that (a) the evidence could, with reasonable diligence, have been discovered and delivered during the investigation at first instance, (b) the Employer did not, with any degree of specificity, address the Complainant's assertion that he was a manager during the course of the investigation of the Complaint, and (c) the documents merely affirmed what was contained in other documents that were, in fact, tendered during the investigation. Those other documents contained references to the Complainant's job title and job description which were suggestive of a managerial role but, as the Adjudicating Delegate found as a fact, they were largely inconsistent with the non-managerial principal employment duties the Complainant performed during his tenure.

21. The Member also declined to accede to the Employer's assertion that the Determination revealed an error of law. The Member observed that the Employer's submission contained no suggestion that the Adjudicating Delegate misinterpreted or misapplied any relevant legal requirement or principle when deciding that the Complainant was not a manager. Instead, the thrust of the Employer's position was to state, simply, that the Complainant was, in fact, a manager, to argue that the factual conclusions drawn

by the Adjudicating Delegate regarding the principal employment duties performed by the Complainant were incorrect, and to offer the new evidence to which I have referred.

22. The Member noted that the Tribunal has no jurisdiction to disturb a delegate's findings of fact unless it can be shown the delegate has committed an error of fact that also constitutes an error of law. The test for determining whether such an error has occurred is stringent. One characterization of the test is that the delegate's findings of fact must be perverse or inexplicable. Here, a review of the investigative record, and the Determination, led the Member to decide that the findings of fact made by the Adjudicating Delegate were adequately supported on the material delivered by the parties during the investigation of the Complaint, and so there was no basis for a conclusion that the Adjudicating Delegate had committed any such errors of fact.

23. The Employer challenges these findings in the Appeal Decision, and it argues, therefore, that the Member erred in deciding the Employer had failed to establish a strong *prima facie* case for an extension of the time to appeal. The Employer asserts that the Member applied "an overly legalistic and technical approach". They state that the Member should have provided more "latitude" to the Employer. The Employer says that the Member's approach amounted to "[p]enalizing an unsophisticated self-represented party for failing to recognize that certain specific evidence is relevant and material,….", and so it was inconsistent with the willingness to provide lay parties the 'benefit of the doubt' the Employer submits other decisions of the Tribunal have identified, and which it asserts is implicit in sections 2(b) and (d) of the *ESA*. For clarity, it will be recalled that section 2(b) of the *ESA* states that it is a purpose of the statute "to promote the fair treatment of employees and employers." The purpose identified in section 2(d) is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

ANALYSIS

24. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 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.

25. 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.

26. The attitude of the Tribunal towards applications under section 116 is derived in part from an acknowledgement of certain 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.

27. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Re Milan Holdings Ltd.*, 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.

28. 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. 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 (see *Re Middleton*, BC EST # RD126/06).

29. 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.

30. I have decided that the Application fails to overcome the threshold test for a reconsideration pursuant to section 116. I am not persuaded that the Employer has raised questions of fact, law, principle, or procedure emerging from the Appeal Decision which are so important that a reconsideration of it is warranted.

31. A party wishing to achieve success in an appeal must identify, and establish, one or more of the grounds for appeal set out in section 112(1) of the *ESA*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

32. There are many decisions of the Tribunal affirming that when an issue arises whether a self-represented party has identified the correct legal basis for an appeal the Tribunal will seek to avoid an overly legalistic or technical approach (see, for example, *J. C. Creations Ltd. (c.o.b. Heavenly Bodies Sport)*, BC EST # RD317/03; *Triple S. Transmission Inc. (c.o.b. Superior Transmissions)*, BC EST # D141/03). Instead, the Tribunal will provide such a party considerable latitude, and a large and liberal view of the party's words, so that the Tribunal may determine the substance of the party's submission, and not merely the form it takes, to discern if the submission engages one or more of the three named statutory grounds for an appeal.

33. However, all of that said, there must at least be some substance of an argument on the merits that is discernible in the material that is provided, and which may be seen to engage a named ground. It follows

from this admonition that the mere fact a party is a lay person, acting on their own behalf, without more, will be insufficient to identify, and establish, a statutory ground for an appeal.

34. In my view, the approach to be followed when the Tribunal seeks to determine whether a self-represented party has identified and established a statutory ground of appeal should apply in the same way when the Tribunal is asked to consider if some other remedy within its jurisdiction should be granted; for example, an order extending the time for an appeal, which the Employer sought in this case.

35. The Tribunal is an adjudicative body that is subject, broadly, to an obligation requiring it to observe the principles of natural justice. One of those principles is that it must act as a neutral arbiter, and it must avoid proceeding in a manner that raises a reasonable apprehension of bias. Here, the inescapable inference to be drawn from the argument set out in the Application is that if the Member were to have avoided committing a reviewable error of law when deciding the appeal the Employer's self-represented status required the Member not merely to give the Employer wide latitude regarding the assessment of its submissions, but some measure of assistance regarding the legal principles it should consider not only when it made its request for an extension, but also when it set out its arguments regarding its grounds for the appeal, as well as the type of evidence it should consider offering in support of its submissions.

36. I cannot accept this argument. In my opinion, the correct legal conclusion is exactly the opposite of the one for which the Employer contends. If the Member had elected to provide the assistance the Employer states it required, the Member indeed would have fallen into error, because the Member would have set aside the Tribunal's role as a neutral arbiter and would, instead, have adopted a posture which would have transformed it into an advocate for the Employer. In no way can a process in which an arbiter becomes an advocate for one of the parties be deemed to be fair and impartial.

37. The Employer's posture in the Application must be distinguished from a situation where a party responding to a complaint may be successful in asserting that it has not, as section 77 of the *ESA* directs, been provided with a reasonable opportunity to respond to material information and arguments submitted by a complainant, or otherwise discovered during an investigation, which may be said to bear directly on an adjudication of a key issue on the merits. The facts presented here are entirely different. In this case, the Employer makes no claim that the Director withheld pertinent information regarding the facts supporting the Complainant's assertion that he was not a manager, which the Employer should have had an opportunity to address before the Determination was issued. Rather, the Employer's challenge is based on its conviction it should have "received actual efforts from the Director to accommodate its unfamiliarity with the process", and further that the Director should have accommodated its status as a self-represented party by providing it with "guidance on the scope of evidence that may be necessary to address the issues at hand." The provision of such pro-active efforts, or guidance, is not, however, what adherence to section 77, or to the principles of natural justice more generally, requires. It follows, therefore, that no reviewable error arises in this case from the fact the Appeal Decision makes no reference to, nor does it acknowledge the need to grant special latitude for, the Employer's status as a self-represented party.

38. It must be remembered, too, that the burden of establishing an entitlement to a remedy falls on the party seeking it, whether they are legally represented or not. In this case it was the Employer who sought the extension of the time to appeal. The imposition of a burden implies with it an obligation to determine

what the legal requirements for establishing the entitlement will be and, in turn, the evidence which may be available to support the assertion that a grant of the remedy is warranted.

39. In this instance, the Employer offered no explanation for its delay, except to say that it had searched out new documents supporting its position at first instance that the Complainant was a manager. As the Member noted, even if the new documents tendered on appeal were to be admitted, either to assist the Employer in establishing a *prima facie* case, or on the merits of the appeal generally, they were not probative of the matter at issue in the Complaint – whether the Complainant should be denied the relief he had sought because he was a manager. As the Member stated in the Appeal Decision (paragraph 48):

> …The material provided, and the submissions made by Freshslice relative to it, only attempt to do what the deciding Delegate stated in the Determination should not be done, which is to attempt to use titles to determine Mr. Rabiei's status under the *ESA*, rather than focussing on the actual duties performed by him. Simply stating Mr. Rabiei, on paper, is a manager is not determinative where the evidence does not show his principal employment duties bring him within the definition of manager in the *Employment Standards Regulation*.

40. The burden resting on the Employer, generally, also acts to negate its argument made in this Application that the Member erred in deciding that the Employer had failed to establish the Complainant would not be unduly prejudiced by the delay associated with a late-filed appeal, where neither the Complainant nor the Director offered any evidence that an extension would create that result. I concur with the comments of the Member in the Appeal Decision that there is always prejudice to a beneficiary of a determination where the Tribunal grants an extension, and that the prejudice increases with the length of the delay before a party delivers an appeal beyond the time specified in the legislation. This is especially the case where, as the Member noted here, the delay was significant, and no compelling reason was given why it occurred. In circumstances such as these, the onus was on the Employer to establish that no undue prejudice would be visited upon the Complainant if an extension were to be granted. The Employer provided no evidence or compelling argument to the Member aimed at satisfying its burden.

41. For all of these reasons I agree with the conclusion drawn by the Member that since the Employer offered nothing of substance to satisfy its burden on any of the grounds established for an extension set out in *Niemisto*, the Employer's request for that relief should be denied. The fact that the Employer presented as a self-represented party during the appeal proceedings, standing alone, is insufficient to persuade me that the Member committed any error regarding that issue which warrants a reconsideration of the Appeal Decision.

ORDER

42. Pursuant to section 116 of the *ESA*, I order that the Appeal Decision referenced as 2023 BCEST 41 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal