Employment Standards TRIBUNAL

Citation: Luciana Palmieri (Re)
2023 BCEST 70

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Luciana Palmieri
("appellant")

- of Determinations issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2023/067 and 2023/071

DATE OF DECISION: September 5, 2023

DECISION

SUBMISSIONS

Vito Palmieri on behalf of Luciana Palmieri

INTRODUCTION

1. I have before me two, essentially identical, appeals of separate determinations issued by Dawn Sissons, a delegate of the Director of Employment Standards ("delegate"). The two appeals have been filed under section 112(1)(b) of the *Employment Standards Act* ("*ESA*") by Luciana Palmieri ("appellant"). Section 112(1)(b) of the *ESA* states that an appeal may be filed on the ground that the delegate failed to observe the principles of natural justice in making a determination.

2. A review of the appellant's appeal submissions indicates that the appellant also asserts (although she did not expressly use this term) that the delegate erred in law (a separate ground of appeal established by section 112(1)(a) of the *ESA*). Accordingly, and in light of the Tribunal's decision in *Triple S Transmission Inc.* (BC EST # D141/03), I will also address the "error of law" ground of appeal.

3. As will be seen, I do not consider these appeals to be meritorious and, accordingly, both are dismissed under section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion now follow.

THE DETERMINATIONS

4. On May 5, 2023, the delegate issued a determination (and accompanying reasons) ordering the appellant to pay a former employee ("EN") a total of $9,252.58, including section 88 interest ("EN Determination"). In addition, and also by way of the EN Determination, the delegate levied four separate $500 monetary penalties against the appellant (see section 98 of the *ESA*), thus bringing the total amount payable under the EN Determination to $11,252.58. Tribunal File No. 2023/067 concerns the appeal of the EN Determination.

5. On May 15, 2023, the delegate issued a second determination (and accompanying reasons) against the appellant concerning her former employee "BB". This determination ("BB Determination") is substantially similar (and in some respects, identical) to the EN Determination. By way of the BB Determination, the delegate ordered the appellant to pay BB $9,677.82, including section 88 interest, as well as four separate $500 monetary penalties. Thus, the appellant's total liability under the BB Determination is $11,677.82. Tribunal File No. 2023/071 concerns the appeal of the BB Determination.

6. I shall refer to EN and BB jointly as the "complainants."

FACTUAL BACKGROUND

7. The complainants, at all material times, were a couple who resided in the appellant's residential 18-suite apartment building in Kamloops, and served as the building's "resident caretakers." There is no dispute regarding the complainants' status as "resident caretakers" as defined in section 1(1) of the *Employment*

Standards Regulation ("*Regulation*"). The complainants resided in a suite set aside for the building managers, and served as the building's resident caretakers from November 8, 2019 to June 12, 2020. There is a dispute regarding whether the complainants quit their employment or were dismissed.

8. "Resident caretakers" must receive at least the compensation set out in section 17 of the *Regulation* – in this case, as fixed by section 17(a), for their employment from November 8, 2019 to May 31, 2020:

> "for an apartment building containing 9 to 60 residential suites, $831.45 a month plus $33.32 for each suite"

and for the period from Jun 1, 2020 to the end of their employment on June 12, 2020:

> "for an apartment building containing 9 to 60 residential suites, $876.36 a month plus $35.12 for each suite".

9. In her appeal, the appellant stresses that the complainants were employed under a "General Agreement/Contract", which both complainants signed on November 10, 2019. Pursuant to this agreement, the complainants together received a "basic salary" of $800 per month plus $500 per month for "monthly extras", which included a $300 monthly rent rebate and a $100 monthly allowance for "phone" ($25) and "gas" ($75). The agreement also provided for a $100 monthly "occupancy bonus". Thus, the total guaranteed amount payable to the complainants each month was $1,200. The agreement also provided for additional payments on an *ad hoc* basis (for example, cleaning a suite when vacated by a tenant and "small jobs" not part of their regular duties) to be paid at $15/hour.

10. With respect to this agreement, it should be noted that any attempt to "contract out" of the minimum wage, otherwise payable under section 17(a) of the *Regulation*, is null and void pursuant to section 4 of the *ESA*. To the extent that the complainants' compensation fell below the regulatory minimum (as the delegate determined), the compensation provision in the agreement had no lawful effect, and the minimum wage as set out in section 17(a) would apply. The fact that the compensation provision was unlawful does not affect the legality of any other provisions of the agreement, provided they can independently stand as lawful obligations.

11. The appellant did not maintain complete and accurate records regarding the complainants' hours of work. The complainants maintained that they generally worked six days each week, with Sundays off. In determining the complainants' days of work, hours worked, and wage payments received, the delegate principally relied on evidence (including bank records) submitted by BB (but also corroborated, in part, by the appellant's bank records). As recorded in the delegate's "Reasons for the Determination" appended to each Determination, the parties agreed that wages were paid by bank transfer to BB's account on a monthly basis, generally near the end of the month. The wages paid were gross amounts, without any source deductions (for example, for income tax, CPP or EI).

12. Since the complainants were employees, not independent contractors, source deductions should have been made, and the appellant should have separately remitted employer contributions to the relevant federal government agencies.

13. The delegate rejected the appellant's position that there was only a "single job" as resident caretaker for the building, and that that the complainants effectively shared this one position. The delegate also noted

that although the appellant could have designated, in writing, one of the two complainants to be the sole resident caretaker (pursuant to section 35(3) of the *Regulation*), there was no written designation in this case. Had there been such as designation, only the designated resident caretaker would have been subject to the section 17 minimum wage provision, and otherwise subject to section 35 (which also states that resident caretakers are not entitled to either daily or weekly overtime pay).

14. The delegate determined that EN earned a total of $10,094.54 during her employment, but had only received $2,400 in wages. Accordingly, EN had an unpaid wage claim for the difference ($7,694.54). The delegate rejected EN's claim that she was entitled to additional wages on account of "additional tasks" payable at $15 per hour as per the employment agreement. The delegate also determined that EN was not entitled to any statutory holiday pay since there was no evidence that she worked on any statutory holiday, and "the average days' [*sic*] pay for these statutory holidays has already been included in the form of the minimum wage monthly salary" (delegate's reasons, page R6). In the absence of any cogent evidence from the appellant showing that EN quit her employment, the delegate awarded EN one week's wages as compensation for length of service payable under section 63 of the *ESA* ($331.21). Finally, the delegate awarded EN 4% vacation pay on the wages determined to be owing ($417.03).

15. The delegate's reasons supporting the BB Determination are, in many respects, identical to those issued in relation to the EN Determination. The delegate determined that BB was a resident caretaker, and thus entitled to be paid the applicable minimum wage as set out in section 17 of the *Regulation*. The delegate calculated BB's earned wages at $10,094.54 (the same amount as earned by EN) and, after deducting the wages that he was paid ($2,400), awarded BB $7,694.54 on account of unpaid wages (i.e., the same amount awarded to EN). However, since there was undisputed evidence that BB did complete "additional tasks" not included within the scope of his general resident caretaker duties, the delegate ordered the appellant to pay BB a further $345.00 (23 hours at $15 per hour) for that additional work. As was the case with EN, and using the same reasoning as in EN's case, the delegate did not award BB any statutory holiday pay. In the absence of cogent evidence showing that BB quit his employment, the delegate awarded BB one week's wages as section 63 compensation for length of service ($346.21). Finally, the delegate awarded 4% vacation pay ($430.83) on BB's unpaid wages.

THE APPELLANT'S REASONS FOR APPEAL

16. In addition to the appellant's written submissions setting out her reasons for appealing both determinations, and as part of her overall appeal submissions, the appellant also submitted a large volume of other documents including bank statements and other banking records, documents relating to the complainants' tenancy and proceedings before the Residential Tenancy Branch, copies of e-mails, copies of invoices and cheques, handwritten notes, copies of photographs, and copies of various correspondence. Most of these documents are only marginally relevant, or entirely irrelevant, to the issues that are properly before me in these two appeals.

17. The appellant attached an identical 5-page written submission to the Appeal Forms filed in relation to her appeals of both the EN Determination and the BB Determination and, subsequently, filed another written submission with respect to both appeals. The appellant also filed a separate submission solely in relation to the appeal of the BB Determination. These submissions, to a large degree, are redundant. In these documents various assertions are made, but there is no clear explication regarding how or why the delegate failed to observe the principles of natural justice in making the determinations. Further, as noted

above, some of the assertions are more appropriately addressed as alleged errors of law, and I will address these assertions under that statutory ground of appeal.

18. So far as I can determine, the appellant's "natural justice" ground of appeal is principally based on the assertion that the complaint investigation process was inadequate, and that the appellant was not given a fair opportunity to respond to the complainants' position, or to the legal issues that were raised by the complaints.

19. The bulk of the appellant's submissions raise matters that are more properly framed as alleged errors of law, rather than as breaches of the principles of natural justice. In general, these allegations fall into several separate categories: first, the appellant says that the delegate improperly ignored relevant evidence in rendering her decision; second, the delegate erred in failing to give full effect to the parties' employment contract; third, the delegate erred in calculating the complainants' unpaid wage entitlements; fourth, the delegate did not take into account the residential tenancy dispute between the appellant and the complainants; fifth, the delegate erred in determining that the complainants did not quit their employment, and erred in placing a burden of proof on the appellant regarding the "quit versus terminated" issue; and sixth, the delegate failed to appreciate that the complainants essentially perpetrated a fraud on the appellant (i.e., "they are working the system, perpetrating another scam by simply lying about the facts").

ANALYSIS AND FINDINGS

20. I will first address whether the delegate failed to observe the principles of natural justice in making the determinations, and then turn to the various assertions that might be characterized as alleged "errors of law".

Natural Justice

21. The principles (or rules) of natural justice are, in essence, common law directives intended to ensure that administrative decision-makers render their decisions in a fair and impartial manner. These principles demand that a party be given a fair opportunity to present their position to the decision-maker, and to respond to the evidence and argument presented by all adverse parties. To a degree, this latter principle is codified in section 77 of the *ESA*: "If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond." The principles of natural justice also demand that decision-makers render reasoned decisions that intelligibly explain how they arrived at their ultimate decision.

22. In this case, there is no suggestion that the delegate was, or appeared to be, biased against the appellant, or was otherwise predisposed to decide the dispute in favour of the complainants.

23. The section 112(5) record in this matter shows that both complainants filed complaints which, in turn, were provided to the appellant together with other documents that the complainants submitted to the Employment Standards Branch. The complaints were originally assigned to an Employment Standards Branch officer to be investigated. This process culminated in an "Investigation Report", dated January 17, 2023, that was delivered by electronic mail to the parties that same day. Prior to issuing this report the

investigating officer had several telephone or electronic communications with the appellant's representative (at least seven by my count).

24. The report, which was not a decision on the merits, summarized the issues in dispute, set out the parties' positions, and attached documents the parties had previously submitted relating to the dispute. The parties were asked to provide their response to the report, and they did so. As noted in her reasons appended to the two determinations, the delegate prepared her reasons based on the information on file, the investigation report, and the parties' responses to that report.

25. In my view, the section 112(5) record shows that the appellant was given a full and fair opportunity to present her evidence and argument, and to respond to the complainants' position. The appellant was clearly aware of the nature of the issues in dispute, and the complainants' position regarding those issues. The delegate's reasons clearly articulate the basis for each of the two determinations, and while the appellant obviously disagrees with most of the delegate's findings, I cannot conclude that the delegate's findings, as set out in her reasons, are unintelligible. While it is true that the delegate did not delve into certain issues (for example, the tenancy dispute between the parties), I am satisfied that the delegate comprehensively addressed all of the issues that were properly before her. In short, I am not satisfied that there is any merit to the appellant's assertion that the delegate failed to observe the principles of natural justice in making either determination.

Alleged Errors of Law

26. I have already noted that the delegate did not delve into the evidence relating to some matters (such as the parties' tenancy dispute). It was not an error of law for the delegate to refuse to address that issue due to the simple fact that the Director of Employment Standards does not have any jurisdiction with respect to disputes arising under the *Residential Tenancy Act*. Having reviewed the section 112(5) record, I am satisfied that the delegate did not ignore any relevant and probative evidence in the course of rendering her decisions with respect to the two complaints.

27. The delegate determined that the compensation provided for in the parties' employment contract was unlawful by reason of section 4 of the *ESA*. To the extent that the compensation provided for in the contract fell below the minimum standard set out in section 17 of the *Regulation*, that provision was null and void. The delegate did not err in refusing to enforce an unlawful contractual provision.

28. The delegate rejected the appellant's position that there was a "single job" that was shared by the two complainants – a conclusion the appellant now challenges on appeal. There was ample evidence before the delegate that, in fact, both complainants were employed as resident caretakers. The contract itself identifies both complainants as parties to the agreement, and both are signatories to the agreement, each being separately described as a "manager". There is absolutely no evidence in the record that the appellant ever designated, in writing, only one of the complainants to be the resident caretaker for the building (see section 35(3) of the *Regulation*), and then provided a copy of such a designation to the person so designated (see section 35(4) of the *Regulation*).

29. Further, the contract contains no provision stating that the complainants were hired to share a single position. The contract appears to be a standard form contract prepared by the appellant. Thus, even if the agreement were ambiguous on this latter point (and I do not find that it is), the ambiguity would have to

be resolved in the complainants' favour, consistent with the *contra proferentem* rule. The section 112(5) record includes correspondence in which the appellant describes the complainants as "co-managers" of the building; another letter signed by the appellant refers to the complainants as being "in my employ as co-managers of my small apartment building." A document posted in the building after the complainants' employment ended – a notice from the new building manager to the "Tenants of Colonial Manor" – states that the complainants "are No Longer Managers of this building." In light of this evidence, I am unable to conclude that the delegate erred in finding that the appellant separately employed each of the complainants as a resident caretaker.

30. The delegate's calculations regarding the complainants' unpaid wage entitlements were based on, first, the minimum wage provided for in section 17 of the *Regulation*, and, second, on the evidence from BB regarding the complainants' typical work schedule. I have already held that the delegate did not err in determining that both complainants were resident caretakers entitled to the minimum wage prescribed by section 17 of the *Regulation*.

31. Although the appellant was required, by section 28 of the *ESA*, to keep payroll records that included, among other things, "the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis", the appellant failed to produce such records, even though there was a valid demand for production. Section 27 of the *ESA* requires an employer to provide wage statements to an employee each pay period that includes "the hours worked by the employee" in that pay period – the appellant also failed to comply with that provision of the *ESA*. The appellant could have, and under the *ESA should* have, maintained accurate payroll information for each complainant. This information could then have been submitted to the Employment Standards Branch during the investigation. However, the appellant apparently never kept proper payroll records – at the very least, no compliant records were ever provided to the Employment Standards Branch.

32. In the absence of proper records from the appellant, the delegate, as she noted in her reasons, based her calculations on the best evidence available, namely, BB's records. The delegate did not err in law in applying the best evidence rule. I should also add that the delegate did not slavishly accept the complainants' position – EN was not awarded any wages for so-called "additional tasks", and the delegate did not award BB the full amount of his "additional tasks" claim. Neither complainant was awarded any statutory holiday pay, since there was insufficient evidence that either complainant actually worked on any statutory holiday. In my view, and with respect to all of the unpaid wage awards set out in the two determinations, the delegate carefully weighed the evidence before her and issued an award consistent with that evidence.

33. Section 63 of the *ESA* states that compensation for length of service ("CLS") is presumptively payable to most indefinite term employees whose employment ends, and who did not receive the statutorily-mandated prior written of notice of termination. However, section 63(3)(c) also states that CLS is not payable if the employer had just cause for dismissal. The appellant never argued that she had just cause for dismissal; indeed, she maintains that she never dismissed the complainants but, rather, they quit.

34. Section 63(3)(c) further states that CLS is not payable if the employee "terminates the employment", or "retires from employment." More generically, these latter two exceptions are referred to as the "quit" provisions. The delegate determined that the appellant failed to prove that either complainant quit their employment, and thus each was entitled to CLS (one week's wages in each case, given their tenure).

35. The delegate, in each of her separate reasons, indicated that there was an onus on the appellant to demonstrate that either complainant voluntarily quit their employment. In both instances, the delegate stated that the appellant "needs to show that [the complainant] quit [their] employment" and "the onus is also on [the appellant] to show that [the complainant] quit [their] employment to discharge the liability for paying compensation for length of service." The appellant says that placing such a burden on her is "absurd" and that, in any event, she (or, rather, her husband) provided evidence to the effect that the complainants told him they were quitting their employment. The appellant maintains that this statement is "proof" that the complainants quit. However, such a statement is not irrefutable "proof" of anything, it is merely a statement that forms part of the evidentiary record that was before the delegate. I note that the complainants had a very different story to tell, namely, that the appellant terminated their employment, and concurrently issued an eviction notice.

36. With respect to the question of who must prove what in a "quit" situation, the Tribunal's decision in *Fellnermayr*, 2020 BCEST 126 at para. 61, is particularly apposite:

> The Employer also alleges that the Delegate improperly reversed the burden of proof at the hearing when he required the Employer to demonstrate that the Complainant was not entitled to compensation for length of service. I disagree. Compensation for length of service is a statutory benefit to which employees are entitled based on their length of tenure. In this instance, there was no dispute as to the length of time the Complainant was employed by the Employer. Once that was established, it was for the employer to establish grounds that might disentitle the Complainant to the benefit. The evidentiary burden associated with the analysis was outlined succinctly in *Re Grant Howard*, BC EST # D011/07, at paragraph 75:
>
>> …It is not necessary for an employee to prove a wrongful dismissal in order to claim payment for length of service compensation under the *Act*. The employee needs only to establish the fact of employment for a term longer than the qualifying period and the fact of termination. The *Act*, in subsection 63(3), allows an employer to discharge the statutory liability for length of service compensation by providing notice, or a combination of notice and compensation, paying compensation or by showing the employee has quit, retire [*sic* retired] or engaged in conduct that provides just cause for termination.

37. In the face of conflicting evidence, the delegate was simply not satisfied that the appellant had demonstrated on a balance of probabilities that the complainants voluntarily quit their employment. It was not a "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235) for the delegate to reach this conclusion on the basis of the evidence before her.

38. Further, a "quit" that is precipitated by a "constructive" (or deemed) dismissal does not disentitle the employee to CLS. Section 66 of the *ESA* states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." By failing to pay the wages to which the complainants were legally entitled under their employment contracts and the *ESA*, the appellant effectively dismissed the complainants as a matter of law, in which case, CLS was payable to them.

39. Finally, I do not accept the appellant's assertion that the complainants attempted to perpetrate a "scam", and concocted a story to justify their *ESA* complaints. The evidence before the delegate supports the complainants' position that they did not receive their statutory and regulatory entitlements as set out in both the *ESA* and the *Regulation*.

40. In my view, and after considering the appellant's reasons for appeal, I am satisfied that neither of these two appeals has a reasonable prospect of succeeding and, that being the case, both appeals must be dismissed under section 114(1)(f) of the *ESA*.

ORDERS

41. Pursuant to section 114(1)(f) of the *ESA*, these two appeals are dismissed.

42. Pursuant to section 115(1)(a) of the *ESA*, both the EN Determination and the BB Determination are confirmed as issued in the total amounts of $11,252.58 and $11,677.82, respectively, together with whatever additional interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal