Citation: National Storage & Warehousing Inc. (Re)
2023 BCEST 74

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 -

National Storage & Warehousing Inc.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/108

DATE OF DECISION: September 18, 2023

DECISION

SUBMISSIONS

David Brown — legal counsel for National Storage & Warehousing Inc.

OVERVIEW

1. This is an application for reconsideration filed by National Storage & Warehousing Inc. ("applicant") under section 116 of the *Employment Standards Act* ("*ESA*"). The application concerns 2003 BCEST 46, an appeal decision issued on June 23, 2023, by Tribunal Member Roberts ("Appeal Decision").

2. By way of the Appeal Decision, Member Roberts confirmed a Determination issued by Michael Thompson, a delegate of the Director of Employment Standards ("delegate"), on April 4, 2023. The delegate awarded $15,930.50 to a former employee of the applicant ("complainant"). The delegate also levied five separate $500.00 monetary penalties against the applicant. Thus, the applicant's total liability under the Determination is $18,430.50.

3. 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) and, accordingly, must be dismissed.

PRIOR PROCEEDINGS

4. The applicant operates a storge facility situated in West Kelowna that includes self-service storage lockers, and RV and boat storage. The complainant was employed from October 2013 to March 2021.

5. On February 22, 2021, the complainant filed an unpaid wage complaint seeking over $40,000.00 in unpaid wages, most of which represented a claim for overtime pay. An Employment Standards Branch officer conducted an investigation into the complaint, which culminated in an "Investigation Report" dated February 27, 2023 ("Investigation Report"). The Investigation Report was forwarded to the parties for their review and comment. Both parties provided written responses to the Investigation Report.

6. On April 4, 2023, the delegate issued the Determination and his accompanying "Reasons for the Determination" (the "delegate's reasons"). A central issue in dispute between the parties was whether the complainant was a "manager" as defined in section 1(1) of the *Employment Standards Regulation* ("*Regulation*"). "Managers" are not entitled to statutory overtime pay or statutory holiday pay otherwise payable under the *ESA* (see sections 34(f) and 36 of the *Regulation*). The delegate held that the complainant was not a manager, and thus she was entitled to both overtime pay ($9,115.38) and statutory holiday pay ($3,830.00). The delegate also awarded the complainant annual vacation pay ($1,930.57) and section 88 interest ($1,054.55), thus bringing the total amount of the complainant's unpaid award to $15,930.50.

7. The delegate also levied five separate $500.00 monetary penalties under section 98 of the *ESA* in light of the applicant's contraventions of sections 28 (failure to keep required payroll records), 40 (failure to pay earned overtime pay), 45 (failure to pay statutory holiday pay), 46 (failure to pay premium pay for working

on a statutory holiday), and 58 (failure to pay vacation pay) of the *ESA*. As previously noted, the applicant's total liability under the Determination is $18,430.50.

8. The applicant appealed the Determination, asserting that the delegate erred in law, and that it had "new evidence" (see sections 112(1)(a) and (c) of the *ESA*). Although not formally identified as a ground of appeal in its Appeal Form, Member Roberts also considered whether there had been a breach of the principles of natural justice (section 112(1)(b) of the *ESA*).

9. Member Roberts dismissed all three grounds of appeal, ultimately finding that the appeal had no reasonable prospect of succeeding (section 114(1)(f) of the *ESA*).

10. With respect to the applicant's so-called new evidence, Member Roberts observed (Appeal Decision, paras. 37-39):

> None of the material submitted on appeal meets the test for new evidence. Much of the documentation was before the Investigative delegate and considered by the Adjudicative delegate when he made his decision. As such, it is not new. The material which was not before the Investigative or Adjudicative delegates was clearly available at the time the Determination was being made and ought to have been submitted to the Investigative or Adjudicative delegates during the complaint adjudication process.
>
> Furthermore, the Employer's new argument that the Employee was 'overpaid' ought to have been submitted either during the investigation process, or in response to the Investigative delegate's Report. Considering the Adjudicative delegate's finding that the Employer failed to maintain payroll records in accordance with the *ESA*, I am not persuaded that this argument would have led him to a different conclusion on this issue in any event.
>
> In effect, the Employer seeks to have the Tribunal "re-weigh" evidence already considered by the Adjudicative delegate because it disagrees with his conclusion. An appeal is an error correction process, not an opportunity to re-argue a case that has already been presented to the Director.

11. The applicant's principal argument under the "error of law" ground of appeal was in relation to the delegate's determination that the complainant was not a "manager" as defined in the *Regulation*. Member Roberts rejected this argument, holding (at paras. 48-51):

> Since managers are excluded from overtime provisions of the *ESA*, an employer has the burden of demonstrating that an employee is not entitled to those benefits. Merely identifying someone as a "manager" in a job description or stating that they are "salaried" does not necessarily lead to a conclusion that they are a manager for the purposes of the *ESA*.
>
> The Adjudicative delegate considered the actual duties performed by the Employee as well as the amount of time she spent at each and determined that while the Employee performed some managerial functions, her principal employment responsibilities were not managerial in nature. I am not persuaded that the Adjudicative delegate erred in this conclusion.
>
> The Employer presented no reliable evidence to refute the Employee's assertion that much of her work involved bookkeeping functions, paying bills, paying invoices and making GST and PST remittances. The Employer understood the Employee was spending a significant amount of time on paperwork. The record contains emails from the Employer to the Employee regarding the

> amount of time she was spending at those tasks and suggesting that she engage the assistance of others.
>
> The Employer argues that the Employee was the sole person in charge of staff and daily operations, that she delegated responsibilities to others, had signing authority and decision-making privileges on hiring subcontractors and entering into business contracts in addition to submitting payroll. While the Employee may well have exercised these tasks which were managerial in nature, I am not persuaded the Adjudicative delegate erred in concluding that those were not her principal duties.
>
> [underlining in original text]

12. The applicant also appeared to argue that the delegate erred in law with respect to his treatment of the evidence relating to the complainant's hours of work. In this latter regard, it should be noted that the applicant did not maintain proper payroll records, and had no records whatsoever regarding the complainant's actual working hours. The delegate relied on the best evidence available, namely, the complainant's time records. Member Roberts was not satisfied that the delegate erred in proceeding in this fashion (paras. 54-56):

> In the absence of any reliable contradictory evidence, the Adjudicative delegate found the Employee's records to be reliable. I find that the Adjudicative delegate's conclusion was entirely reasonable on the evidence before him.
>
> The Employer now asserts, without any evidence, that the Employee "embezzled" from the company and that her records were "dishonest." These assertions fall short of demonstrating an error of law.
>
> Similarly, the Employer's new argument that the Employee's one-time payment for overtime, in the amount of $5,000, renders her ineligible for further overtime lacks any legal or factual foundation.

13. Finally, and even though the "natural justice" ground of appeal had not been specifically advanced, Member Roberts held that there was nothing in the record to support that ground of appeal (para. 58): "There is nothing in the appeal submission that establishes that the Director [of Employment Standards, acting through her delegates] failed to inform the [applicant] of the allegations or denied it an opportunity to respond either to the allegations or to the Investigation Report."

THE APPLICATION FOR RECONSIDERATION

14. Although the applicant filed a timely "Reconsideration Application Form", it did not set out its reasons for seeking reconsideration in its original application. Rather, the applicant sought an extension of the reconsideration period so that it would have adequate time to prepare its submissions. Since I do not find this application to be meritorious, I do not plan to rest my decision on the applicant's failure to provide proper reasons for seeking reconsideration within the section 116(2.1) time period.

15. Regarding the merits of the application, the applicant advances the following arguments:

> Member Roberts failed to comply with the principles of natural justice and denied the Applicant a fair hearing by refusing to consider the new evidence provided by the Applicant during the appeal process;

> Member Roberts made a mistake in law by confirming the Delegate's finding that the Complainant was not a "manager";
>
> Member Roberts misunderstood or failed to deal with a serious issue, that being that the Applicant had made a gratuitous payment of $5,000 to the Complainant that should have been taken into account by the Delegate when determining what, if any, amount was owed to the Complainant;

FINDINGS AND ANALYSIS

"New Evidence"

16. Section 112(1)(c) of the *ESA* sets out the "new evidence" ground of appeal. This provision specifically requires that evidence being tendered (for the first time) on appeal must meet a stringent requirement, namely, that "evidence has become available that was not available at the time the determination was being made" (my underlining). The appellant must explain why the evidence was not available when the determination was being made, as well as when and how it became available. The "new evidence" must also be credible and probative.

17. The so-called "new evidence" tendered by the applicant on appeal clearly failed to meet the strict criteria for admissibility set out in *Davies et al.* (BC EST # D171/03). Most importantly, all of this evidence *was available* at the time the Determination was being made. Indeed, as Member Roberts noted in her decision, the applicant actually submitted much of this evidence to the Employment Standards Branch during the course of the complaint investigation process. The documents that were not submitted to the Employment Standards Branch were available, and could have been submitted if the applicant had desired to do so. Member Roberts also rightly rejected evidence with respect to an argument that had never been advanced during the investigation (i.e., that the complainant had been overpaid).

18. The applicant, in its reconsideration submission, says:

> The newly tendered documents, which are attached to these submissions, demonstrate that the Complainant considered herself a manager and had the authority to act as "agent" for the Applicant when signing important documents, such as the fire inspection report. It would be unreasonable to conclude that anyone other than a manager would have such authority and thus refusing to consider the documents because they could have been provided earlier was an error. The Applicant did not fully comprehend what was required to prove that the Complainant was a manager until the Determination and thus it was unfair to exclude the newly tendered documents during the appeal process.

19. These so-called "newly tendered" documents are no more admissible on reconsideration than they were on appeal. Almost all of the documents are to be found in the section 112(5) record (i.e., these documents were before the delegate when the Determination was being made). The "fire inspection report" is dated "11/01/2019" and thus regardless of whether the inspection was conducted in January or November of 2019, this document was "available", and could have been submitted to the Employment Standards Branch during the course of the complaint investigation process. Although this document describes the complainant as a "manager", that depiction does not necessarily mean that the complainant was a "manager" as defined in the *Regulation*. The applicant has also included another document, dated March

29, 2016, in which the complainant is described as a manager (this document is also inadmissible under the *Davies* criteria). The Tribunal's caselaw is replete with individuals who had job titles that included "manager" and, yet, upon a careful examination of their actual job duties, they were determined not to be managers for purposes of the *ESA*. Finally, the fact that an employee was authorized to sign a document as the agent for their employer does not imply that the employee is a manager under the *Regulation*. For example, many sales representatives have agency authority to bind their employers to sale agreements but, despite that authority, they are not "managers" as defined in the *Regulation*.

Natural Justice

20. The applicant says that "the failure to consider relevant evidence is a breach of natural justice: *C and C Taxi Inc.*, BC EST #D084/13." However, the *C and C* decision was predicated on a finding that the Director's delegate did not consider documents that *were* delivered to the Employment Standards Branch. The Tribunal is not obliged to consider, on appeal, documents that are not otherwise admissible under section 112(1)(c) of the *ESA*.

21. The applicant further says that Member Roberts failed to comply with the principles of natural justice based on the following argument:

> …this is a situation in which the principles of natural justice and the duty to provide a fair hearing mandate that the Tribunal review Member Roberts' decision to exclude the new evidence provided to her during the appeal process. The Applicant was unrepresented during the investigative process which resulted in the Determination. The Applicant was also unrepresented during the appeal process which resulted in the Appeal Decision. Accordingly, the Applicant, who is not fully versed in the nuances of evidentiary thresholds, was denied a fair hearing when Member Roberts excluded the new evidence and refused to entertain the Applicant's newly advanced argument.

22. I find it difficult to conceive how a *correct* ruling regarding evidence submitted under section 112(1)(c) can somehow be converted to a *failure* to abide by the rules of natural justice. Whether or not the applicant had legal representation is wholly irrelevant to the issue – evidence otherwise inadmissible cannot be transformed into admissible evidence simply because the party tendering the evidence does not have legal representation. I should also add that a large majority of parties appearing before the Tribunal are self-represented and, in recognition of that situation, the Tribunal has posted a great deal of helpful information on its website regarding the appeal process generally, and the statutory grounds of appeal, in particular.

Was the complainant a "manager"?

23. The question of whether an employee is a "manager" is largely a fact-driven exercise. The determination of this question does not depend on whether the employee is paid by salary (rather than an hourly wage), or on the employee's job title, although I note that the complainant's actual job title, as set out in the Investigation Report, was "manager and bookkeeper." Apart from bookkeeping (which occupied a substantial portion of her time during her last few years of employment), I note that although the complainant's duties included some tasks that a "manager" might perform, most of the complainant's tasks would not ordinarily be characterized as fundamentally "managerial" in nature, such as "customer service", "forklift driving", "booking storage units", "collecting rent payments and issuing lien notices",

"liaison with police", "ordering all supplies", "paying bills and making deposits", "processing move-ins and move-outs", "running account receivable reports and invoices to be submitted to the accounting department", "inventory control by counting and reordering supplies when needed", "scheduling and facilitating auctions of abandoned or delinquent tenants' belongings when necessary", "maintaining a clean, tidy and well-organized physical office and building", "checking and cleaning the office, warehouse, storage building and RV Yard", "building maintenance/inspections and cleaning schedule", "performing minor maintenance as required", and "organizing snow and ice removal for the facility."

24. The delegate examined the complainant's duties and made the following determination (at page R3):

> …Section 1 of the Regulation defines a manager as an individual whose principal employment duties consist of managing and/or directing an employer's human or other resources. [The applicant] provided a list of job duties performed by [the complainant], only one of which (supervising, training, and coaching staff members) appears to have been managerial. While the [applicant] has argued that [the complainant] worked with essentially no supervision and full autonomy, the description of [the complainant's] duties does not indicate that [the complainant] spent any significant portion of her time independently directing or supervising staff or other [applicant] resources, and as such I find that she was not principally employed as a manager.

25. I note that the delegate's determination was largely based on the applicant's own document outlining the complainant's duties. Further, whether or not an employee works independently does not determine that employee's status. Many non-managerial employees work independently – they simply carry out their assigned tasks with minimal supervision. The key point is whether the employee is principally supervising and directing human and other resources. I am not satisfied that Member Roberts erred in upholding the delegate's determination that the complainant was not a "manager" as defined in the *Regulation*.

The $5,000 payment

26. There does not appear to be any serious dispute about the fact that the complainant received a $5,000 payment near the end of 2020. As recorded in the February 27, 2023 Investigation Report, the complainant says that this payment was precipitated by the complainant's request for compensation relating to "at least 100 days of overtime." The complainant says she was paid $5,000 pursuant to the following agreement: "[the applicant] would give [the complainant] a one-time payment of $5,000.00 and she would get every Friday off for one year. She did receive $5,000 but the only Friday she ever got off work as a result of this agreement was January 22, 2021."

27. However, the Investigation Report also indicates that the applicant recorded this payment as a "Christmas bonus": "An email dated June 23, 2021 from [name omitted], bookkeeper, to [the applicant's principals] refers to a Christmas Bonus cheque (December 2020) to Ms. McGuire for $5,000."

28. The Investigation Report does not reach any conclusion about the nature of the $5,000 (i.e., whether it was paid to resolve an overtime dispute, or was paid as a Christmas bonus). The applicant's written response to the Investigation Report did not include any discussion about the $5,000 payment.

29. In its submission on appeal, the applicant made the following assertion regarding the $5,000 payment: "We submit the [$5,000] cheque for evidence and allege that this agreement was an understanding in lieu of overtime she felt she was entitled to. This renders her eligibility for any further overtime payment null

and void." Thus, the applicant did not seek to have the $5,000 payment "set-off" against any overtime pay otherwise payable. Rather, it appears that the applicant asserted that this payment effectively amounted to a settlement, or waiver, or perhaps triggered the application of the doctrine of promissory estoppel (although none of these terms was used), regarding the complainant's right to pursue any further unpaid overtime pay.

30. The delegate did not specifically address this latter "settlement/waiver/estoppel" argument in his reasons. He simply stated, at page R4 of his reasons: "I find then that [the complainant] has been paid for 1,928.5 regular hours during the recovery period, or $55,629.75. I find that she is owed $9,115.38 in outstanding overtime wages." The wage recovery period in this case runs from March 31, 2020 to March 31, 2021. The $5,000 payment was made sometime in December 2020, perhaps for overtime worked in the prior months. It is not clear from the delegate's reasons whether he considered the $5,000 payment, but took the view that the hours in question were worked outside the wage recovery period, or that the payment was, in fact, a Christmas bonus and, therefore, a discretionary payment not included within the statutory definition of "wages". It may be that the delegate included the $5,000 payment as part of the $55,629.75 that was paid to the complainant during the wage recovery period.

31. The applicant's legal counsel, in his written submission, referred to this payment as "a gratuitous payment of $5,000 to the Complainant that should have been taken into account by the Delegate when determining what, if any, amount was owed to the Complainant" (my underlining).

32. As noted above, on appeal, the applicant never asked for the $5,000 payment to be credited toward its overtime liability as set out in the Determination. The applicant's position was that, as a matter of law, the payment was made pursuant to an agreement that effectively extinguished its entire overtime pay liability to the complainant. This latter position, of course, stands in marked contrast to its *own document* – namely, an internal e-mail, dated June 23, 2021, from the applicant's bookkeeper to the applicant's principals (page 105 of the section 112(5) record) – which states that the $5,000 payment was recorded as a "Christmas bonus."

33. The $5,000 payment is referenced at para. 18 of the Appeal Decision. Member Roberts notes that this payment was only part of the consideration for the alleged December 2020 agreement; the complainant was also promised that she would no longer have to work on Fridays. However, the complainant only continued to work until January 22, 2021, at which time she went on medical leave (she later resigned on March 31, 2021).

34. Member Roberts addressed the $5,000 payment expressly in light of the applicant's position with respect to it – i.e., that the payment extinguished the applicant's further overtime pay liability. Member Roberts rejected this argument stating, at para. 56 of the Appeal Decision, that "the [applicant's] new argument that the Employee's one-time payment for overtime, in the amount of $5,000, renders her ineligible for further overtime lacks any legal or factual foundation." In making this observation, Member Roberts was, in my view, undoubtedly correct. There was no clear evidence that a valid agreement had been reached regarding the extinguishment of the complainant's overtime entitlement – the applicant apparently breached the agreement and, in any event, section 4 of the *ESA* would invalidate such an agreement.

35. The applicant's *own records* show that that it did not treat the payment as a settlement of an overtime claim but, rather, a Christmas bonus. The applicant submitted, as part of its submission on appeal, a copy

of the statement relating to the $5,000 payment. This statement indicates that on December 22, 2020, a cheque was issued to the complainant. The statement itemization reads as follows: "Valley First – chq Merry Christmas". A discretionary Christmas bonus is not considered to be a payment of "wages" for purposes of the *ESA*. In addition, the applicant's legal counsel says that the $5,000 payment was a "gratuitous" payment and, that being the case, there is no justification for treating it as a payment in relation to earned regular wages or overtime wages.

ORDER

36. This application for reconsideration of the Appeal Decision is dismissed. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal