Employment Standards TRIBUNAL

Citation: Match MG Field Canada Inc. (Re)
2023 BCEST 94

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 -

Match MG Field Canada Inc.
("Match")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves

FILE NO.: 2023/142

DATE OF DECISION: November 1, 2023

DECISION

SUBMISSIONS

Edward O'Dwyer counsel for Match MG Field Canada Inc.

OVERVIEW

1. Match MG Field Canada Inc. ("Match") requests a reconsideration ("Application") of a decision of a Member ("Member") of the Employment Standards Tribunal ("Tribunal") dated August 8, 2023, and referenced as 2023 BCEST 60 ("Appeal Decision"). The Application has been brought pursuant to section 116 of the *Employment Standards Act* ("*ESA*").

2. The matter arose when Connor-Catherine Irene Smith ("Complainant") delivered a complaint ("Complaint") to the Director of Employment Standards ("Director") pursuant to section 74 of the *ESA* alleging that Match had contravened the statute when it failed to pay the Complainant overtime wages, statutory holiday pay, and vacation pay.

3. A delegate ("Investigating Delegate") of the Director investigated the Complaint and issued an Investigation Report ("Report") summarizing the evidence and submissions delivered by the parties.

4. A second delegate ("Adjudicating Delegate") of the Director issued a determination ("Determination") of the Complaint on February 24, 2023. In it, the Adjudicating Delegate ordered that Match pay to the Complainant wages, overtime wages, statutory holiday pay, vacation pay, and accrued interest totalling $4,736.67. The Determination also ordered that Match pay $2,500.00 in administrative penalties. The total found to be owed was, therefore, $7,236.67.

5. The principal issue confronting the Adjudicating Delegate was whether the Complainant was an employee entitled to the benefits provided for in the *ESA* or, as Match argued, the Complainant was an independent contractor. The Adjudicating Delegate determined that the Complainant was an employee.

6. Match appealed the Determination pursuant to section 112 of the *ESA*. It alleged that the Director had failed to observe the principles of natural justice.

7. The Member concluded there was no merit to the appeal. The Member ordered that the Determination be confirmed.

8. I have before me the Appeal Form and the Application delivered by Match, its submissions in support of both, the Determination and its accompanying Reasons ("Reasons"), the Appeal Decision, and the record ("Record") the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. I have not requested responding submissions from the Complainant or the Director.

ISSUES

9. Should the Appeal Decision be reconsidered?

10. 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

11. Match contends that the Appeal Decision raises questions of law, fact, principle, and/or procedure which are so significant that a reconsideration is warranted. It submits that the Appeal Decision should be cancelled, monies paid by Match pursuant to the Determination be returned to it, and the matter be referred back to the original panel, or to another panel, of the Tribunal.

12. Match asserts several specific grounds for reconsideration in its Application.

13. First, Match submits that the Appeal Decision is inconsistent with the decision of the Tax Court of Canada in *Match Action Inc. v. M.N.R.,* 2018 TCC 171. In that case, Match argues, the court found individuals retained by a related entity, who were performing work duties similar to those performed by the Complainant, were to be characterized as independent contractors. Match contends that as the facts of the two cases are so similar, it was an error for the Member to fail to consider the Tax Court decision when determining whether the Adjudicating Delegate erred in law.

14. Second, Match submits that it was an error for the Member to have affirmed the Adjudicating Delegate's conclusion regarding the Complainant's status when, Match says, the Adjudicating Delegate relied on evidentiary factors that were legally irrelevant, or alternatively, should not have been accorded significant weight.

15. Third, Match argues the Member erred in affirming what Match submits were the Adjudicating Delegate's erroneous findings of fact that the Complainant could not subcontract her work or negotiate the amounts she would be paid for it. Match submits the evidence before the Adjudicating Delegate established that the Complainant was free to do both, and the mere fact the Complainant did not subcontract, or attempt to re-negotiate her remuneration, provides no basis for a conclusion that she did not do so because Match refused to give her permission.

16. Fourth, Match says the Member failed to consider its submission that the Investigating Delegate was biased against Match. It argues that the references in the Investigating Delegate's notes to Match as "ER" and the Complainant as "EE" give the appearance that the Investigating Delegate approached the matter from the outset with the view that the Complainant was an employee, and not an independent contractor. Match submits that the Investigating Delegate should have used neutral language to describe the parties and, since he did not do so, there is a reasonable apprehension that he approached the investigation having already made up his mind that the Complainant was an employee.

17. Fifth, Match contends that the Member should have decided there was a failure to observe the principles of natural justice because the Adjudicating Delegate neglected to interview Match before issuing the Determination. Given what Match alleges were the differing positions of the parties on points of substance, Match submits that the failure of the Adjudicating Delegate to give Match "the opportunity to speak" was procedurally unfair.

ANALYSIS

18. 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.

19. 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.

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

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

22. 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 proceedings. 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).

23. 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.

24. I have decided that the Application should be dismissed. I am not persuaded that Match has raised questions of fact, law, principle, or procedure flowing from the Appeal Decision that are so important they warrant a reconsideration. My reasons follow.

25. I will respond to the submissions of Match in the order noted earlier.

Should the Member have considered the decision of the Tax Court of Canada in Match Action Inc. v. M.N.R. 2018 TCC 171?

26. Match argues that it was an error for the Member to fail to consider the authority of the *Match Action Inc.* Tax Court of Canada decision when determining whether the Adjudicating Delegate was correct in finding the Complainant was an employee. I disagree.

27. As the Tribunal observed in *Koivisto*, BC EST # D006/05, decisions considering a person's status for the purposes of federal tax, pension, and employment insurance legislation are of no substantial assistance when determining whether the person is an employee or an independent contractor pursuant to the *ESA*, because the statutory definitions and purposes in the *ESA* and the relevant federal statutes are quite different. It is the application of the definitions and purposes of the *ESA* which determines an individual's status for the purposes of a complaint under the *ESA*, and not the interpretative principles that are applied in proceedings where federal legislation concerned with different policy objectives is engaged.

28. More recently, in *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147, the British Columbia Court of Appeal considered a submission that a previous Tax Court of Canada determination that a party was an independent contractor under the federal *Income Tax Act* must, of necessity, also establish the status of the party for the purposes of the *ESA*, due to the application of the doctrine of issue estoppel. The Court rejected the submission. In doing so, the Court affirmed that administrative decision makers may adapt common law or equitable principles to their administrative context, and they are not required to apply such principles in the same manner as courts for their decisions to be reasonable. The Court stated further that words like "employee" may mean different things in different statutory contexts, that expertise in *ESA* issues rests with the Director and the Tribunal, who have been assigned the role of interpreting and applying the will of the legislature as expressed in the statute, and to allow principles of formulae like issue estoppel or *res judicata* to supplant a decision of a legislatively mandated authority would undermine the integrity of the administrative scheme.

29. If, during the appeal proceedings, Match had made the argument the *Match Action Inc.* decision should be considered by the Member, it would have been legally permissible for the Member to have declined to do so on the strength of the authorities to which I have referred. However, there was no mention of the *Match Action Inc.* decision or the possibility of the application of issue estoppel or *res judicata* in any of the submissions delivered by Match for the purposes of the appeal. In my view, the Member cannot be accused of falling into error in the appeal for failing to consider authorities, or submissions, which were never tendered.

Did the Member err in affirming the Adjudicating Delegate's analysis of the legal factors supporting a conclusion the Complainant was an employee?

30. Match submits that the Adjudicating Delegate misconstrued the legal factors it was necessary for him to consider when he determined the Complainant was an employee. Match says further that it was an error for the Member to have affirmed the Adjudicating Delegate's analysis.

31. Match refers to a passage in the Reasons where the Adjudicating Delegate stated: "I place a great deal of weight on the fact that the Complainant performed work for clients of the Respondent and the scope of work was determined between the Respondent and its clients, not involving the Complainant." Match

argues these factors were not relevant or, alternatively, they should not have been accorded significant weight when determining whether the Complainant was an employee or an independent contractor.

32. In support of its submission, Match again relies on decisions examining the application of federal tax legislation where the decision-makers did not consider it relevant to a determination of a worker's status that the worker performed work for clients of the person who hired them, or that the scope of the work was established by the hirer, the client, or both.

33. As I have stated, the focus of the analysis in each of the decisions on which Match relies is a different statutory scheme. Here, the Adjudicating Delegate's comment must be placed within the context of what is required to be demonstrated under the *ESA.*

34. Earlier in the Reasons, the Adjudicating Delegate identified, correctly, that the *ESA* is remedial legislation designed to provide minimum benefits to persons who fall within an expansive, inclusive definition of "employee", and that an interpretation of the statute that extends its protections is to be preferred over one that does not.

35. A critical question central to resolving the matter of the Complainant's status the Adjudicating Delegate sought to answer was whether the Complainant was in business for herself, which meant that she and Match were operating separate businesses, or whether the Complainant was performing work as an essential component of the business of Match alone.

36. It is in this sense that the passage from the Reasons referred to by Match must be assessed. The fact that the Complainant performed work for clients of Match, rather than clients that were hers, and the scope of the work was not determined by her, but by Match and its clients, was telling because it aided in leading the Adjudicating Delegate to conclude that the Complainant was carrying on the business of Match, and not on behalf of her own business. I am unable to conclude that the Adjudicating Delegate's line of reasoning on this point was an error, as the purpose of it was to assist him in determining whose business the Complainant was conducting. It follows that the Member was not wrong in affirming the Adjudicating Delegate's analysis.

37. The Adjudicating Delegate did place significant weight on this factor. However, it was not the only factor that convinced the Adjudicating Delegate the Complainant was an employee for the purposes of the *ESA*. For example, given the $18.00 hourly rate of pay the Complainant earned, the Adjudicating Delegate concluded there was no meaningful opportunity for the Complainant to subcontract any of her work. Moreover, the hourly rate was set by Match, without negotiation. The work tasks the Complainant performed were set by Match and its clients, not by the Complainant, and while the Complainant may have had some discretion in the way she carried out her work, the Adjudicating Delegate found that the discretion was no greater than one would expect to see in an employment relationship. Finally, many of the materials the Complainant utilized in her work, along with attire identifying the Complainant as a representative of Match, were supplied by the company, which also supported a finding the Complainant was working as an employee.

38. I am not persuaded the passage from the Reasons noted by Match, and affirmed by the Member, reveals an error of law.

Did the Member err in affirming the Adjudicating Delegate's findings of fact that the Complainant could not subcontract her work, or negotiate the amounts she would be paid for it?

39. Match argues that since the Complainant's contract for her work did include express terms stipulating what she could not do, but no term prohibiting her from subcontracting her work, it was an error for the Member to have affirmed the Adjudicating Delegate's finding that the Complainant was not permitted to subcontract her work. Similarly, Match contends that it was an error for the Member to have affirmed the Adjudicating Delegate's finding that since no negotiations occurred by the parties regarding the Complainant's wage rate, no negotiations were possible. Instead, Match says the fact the Complainant did not hire helpers, and she did not negotiate her hourly rate, "is merely a reflection of lack of business acumen or simply inaction on [the Complainant's] part." The inference Match wishes the Tribunal to draw is that it was an error for the Adjudicating Delegate, and therefore the Member, to have relied on these factors to support a determination that the Complainant was, on balance, an employee of Match and not an independent contractor.

40. Again, I take issue with the interpretations of Match regarding the evidence relating to these matters.

41. The evidence relating to the Complainant's ability to subcontract was in conflict. The position of Match was that the Complainant could subcontract her work without its approval. The Complainant denied this. Given that reality, the Adjudicating Delegate relied on other circumstantial evidence from which it could be inferred that the opportunity to subcontract was, from a practical perspective, meaningless due to the fact the Complainant was only being paid $18.00 per hour. Moreover, since there was no mention of a right to subcontract in the Complainant's contract, which the Adjudicating Delegate stated he would have expected to see if it was authorized, the evidence of the Complainant on the point was to be preferred.

42. Regarding the matter of the Complainant's wage rate, the Adjudicating Delegate accepted the Complainant's evidence that her wage rate was set by Match, and there was no negotiation regarding the terms of the Complainant's remuneration, either before the parties' working relationship commenced, or thereafter. The focus of the Adjudicating Delegate's discussion of this point was again related to his need to decide whose business the Complainant was conducting with her work. The evidence relating to the determination by Match of the Complainant's rate of pay was at least one factor implying to the Adjudicating Delegate that the Complainant was conducting the business of Match with her work, and not her own business.

43. These were findings of fact it was within the purview of the Adjudicating Delegate to make. As the Member observed, the Tribunal has no power to correct errors of fact made by the Director or her delegates, unless those errors of fact can be characterized as errors of law.

44. Errors of fact do not become errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if they establish that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions

set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

45. In my opinion, the Adjudicating Delegate's findings of fact to which I have referred, and the inferences drawn from them, all of which the Member affirmed in the Appeal Decision, were adequately supported by some evidence appearing in the Record. The findings, and the inferences drawn, are not, therefore, perverse or inexplicable. The mere fact that the Adjudicating Delegate, acting reasonably, might have reached different conclusions is irrelevant.

46. Accordingly, I decline to accept that the Member erred in affirming the Adjudicating Delegate's findings on these points in issue.

Did the Member fail to consider the submission of Match alleging the Investigating Delegate was biased?

47. Match argues there is a reasonable apprehension the Investigating Delegate was biased against it. Match asserts that the references in the Investigating Delegate's notes to Match as "ER" and the Complainant as "EE" give the appearance that the Investigating Delegate approached the matter from the outset with the view that the Complainant was an employee, and not an independent contractor. Match submits, therefore, that it was an error for the Member to have declined to find that there was a failure to observe the principles of natural justice during the investigative phase of the proceedings before the Director.

48. In my opinion, Match misconceives what material was before the Member in the appeal and what the Member actually did in the Appeal Decision.

49. The ground pursuant to section 112 of the *ESA* on which Match delivered its appeal was that the Director had failed to observe the principles of natural justice in making the Determination. By far the majority of the submissions made by Match in the appeal related to the factors Match believed were relevant to a determination that the Complainant was an independent contractor, and not an employee. However, the substance of one of the submissions from Match relating to natural justice concerns emanating from the Determination was set out in an email communication sent to the Tribunal by Match, dated April 5, 2023, in which a representative of Match stated:

> I do not feel Match received their fair fight within this decision. I requested another officer to review my claim since the [Investigating Delegate] had already made his case prior to listening to our reasoning.

50. While Match requested from the Tribunal, and was granted, an extension of time to deliver a further submission for the purposes of its appeal, that further submission contained no other particulars substantiating the claim of Match that the investigation and adjudication of the Complaint by the Director was procedurally unfair. More specifically, Match made no allegation, during the appeal proceedings, that the use by the Investigating Delegate of the letters "ER" and "EE" to refer to Match and the Complainant in his notes created a reasonable apprehension of bias.

51. Since this specific argument was never presented to the Member, it cannot be suggested that the Appeal Decision reveals error because the Member failed to consider it.

52. The Appeal Decision did, in fact, consider the natural justice submission offered by Match, in the email form noted earlier. By way of introduction, the Member reminded the parties that an appeal under the *ESA* is an error correction process, with the burden resting on an appellant to establish that an error occurred in the proceedings involving the Director relating to one of the grounds of appeal set out in section 112. Regarding an allegation of a failure to observe the principles of natural justice, the Member observed, and I agree, that an appellant cannot merely claim that a proceeding was unfair. Instead, the party must present some tangible evidence of facts that support its contention.

53. In this instance, having regard to the material tendered by Match in the appeal, the Member concluded, and I again agree, that Match had offered no evidence of objective substance demonstrating that either the Investigating Delegate or the Adjudicating Delegate had failed to provide Match with an opportunity to present its position in response to the Complaint, or that either of them were predisposed to decide that the Complainant was an employee of Match, and not an independent contractor.

54. This is sufficient to dispose of this submission by Match on this Application. I digress, however, to say that even if Match had referred in its materials filed in its appeal to the “ER” and “EE” notations in the Investigating Delegate’s notes forming part of the Record, I would not have concluded that the Investigating Delegate’s practice was sufficient to generate a reasonable apprehension of bias. It is clear from the materials in the Record, and neither party disputes, that the Investigating Delegate took pains to describe with care the different factual matters that each party sought to have addressed. There is no indication in the Record, or in any submission delivered by Match during the investigation of the Complaint, that the Investigating Delegate suppressed information, or otherwise attempted to taint the process in favour of the Complainant.

55. In these circumstances, I interpret the Investigating Delegate’s utilization of the “ER” and “EE” notations as nothing more than a shorthand method he chose to identify the parties for his own purposes, and not, as Match submits, a mode of address establishing that the Investigating Delegate had unlawfully pre-determined the legal personality of the working relationship the parties had created.

Did the Member err in concluding there was no failure to observe the principles of natural justice when the Adjudicating Delegate did not interview Match before issuing the Determination?

56. In accord with the Director’s current process, the Investigating Delegate conducted an investigation of the Complaint, and issued the Report setting out the relevant facts gleaned from his communications with the parties concerning the central issues to be addressed. Thereafter, the Adjudicating Delegate reviewed all the material contained within the Complaint file, including the Report, before preparing the Determination.

57. Match contends that since the parties took differing positions regarding the matters at issue in the Complaint, it was necessary, so as to avoid a failure of natural justice, for Match to “be given the opportunity to speak with” the Adjudicating Delegate before the Determination was issued.

58. I reject this assertion. I agree with the statements setting out the legal requirements relating to this point that appear in the Appeal Decision. The Member said this, in part, in paragraph 31:

> …To be clear, it is not required that a delegate, whether investigating or deciding a complaint, speak directly to any of the parties. What is required is that a party know the nature of the complaint and have an opportunity to respond to the complaint and present their position.

59. The Member's comments are derived in part from a reading of section 77 of the *ESA***,** which sets out the relevant requirements, as follows:

> 77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

60. What constitutes "reasonable efforts" is a fluid concept, which largely depends on the factual circumstances that present themselves in a specific case. Here, the Record reveals that Match had ample opportunity to know, and to respond to, the substance of the Complaint. Match took full advantage of the opportunities provided to respond with submissions pertinent to the issues that the Complaint sought to address. There is nothing in the Application which suggests that either the Investigating Delegate or the Adjudicating Delegate denied Match an opportunity to make a submission or, indeed, that Match ever requested a meeting at which it might "speak with" the Adjudicating Delegate, and the Application does not explain what information or arguments from Match existed that it could only deliver verbally.

61. The submission of Match asserting that the Member should have found a failure of natural justice because the Adjudicating Delegate did not "speak with" Match is without merit.

ORDER

62. Pursuant to section 116(1) of the *ESA*, I order that the Appeal Decision referenced as 2023 BCEST 60 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal