Citation: Chaser Holdings Corp. (Re)
2024 BCEST 23

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 -

Chaser Holdings Corp.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves

FILE No.: 2024/003

DATE OF DECISION: March 11, 2024

DECISION

SUBMISSIONS

Noah Abrahams — counsel for Chaser Holdings Corp.

OVERVIEW

1. Chaser Holdings Corp. ("CHC") requests a reconsideration ("Application") of a decision ("Appeal Decision") of a Member ("Member") of the Employment Standards Tribunal ("Tribunal") dated December 11, 2023, and referenced as 2023 BCEST 110. The Application is brought pursuant to section 116 of the *Employment Standards Act* ("*ESA*").

2. The matter arose when Marie Tate and Maritama Carlson ("Complainant Tate" and "Complainant Carlson"–collectively, "Complainants") filed complaints (collectively, "Complaints") pursuant to section 74 of the *ESA,* alleging that CHC had failed to pay them wages as required during periods in 2021 when they performed work for the company.

3. CHC responded to the Complaints. It argued that no wages were owed to the Complainants, in part because they had performed work as independent contractors, and not as employees pursuant to the *ESA*.

4. An investigating delegate of the Director of Employment Standards ("Director") investigated the Complaints and issued reports for each of them on July 18, 2022.

5. A second delegate ("Deciding Delegate") issued a determination of the Complaints ("Determination") on May 17, 2003. In the Determination, the Deciding Delegate determined that the Complainants were employees for the purposes of the *ESA*. In addition, the Deciding Delegate found that CHC had contravened section 18 of the *ESA* and ordered CHC to pay to the Complainants wages in the combined amount of $13,703.66, an amount for interest, and an administrative penalty of $500.00, for a total amount owed of $14,203.66.

6. CHC appealed the Determination pursuant to section 112 of the *ESA*. It alleged that the Director erred in law in making the Determination (section 112(1)(a)), and that evidence had become available that was not available when the Determination was being made (section 112(1)(c)).

7. In his Appeal Decision, the Member concluded that the Determination should be confirmed. The Member stated that there was no merit to the appeal, it had no reasonable prospect of succeeding, and so it must be dismissed pursuant to *ESA* section 114(1)(f).

8. I have before me the Appeal Form and the Application delivered on behalf of CHC, its submissions in support of both, the Determination and the Deciding Delegate's 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*. I have not requested responding submissions from the Complainants 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. CHC submits, correctly, that the *ESA* provides benefits applicable to a person who is an employee, as the term is defined in the statute. The legislation provides no benefits for persons who are properly characterized as independent contractors.

12. CHC has argued throughout the proceedings associated with the Complaints that the work services of the Complainants were retained by it in their capacity as independent contractors, and not as employees. It repeats this assertion in the Application.

13. CHC contends it was an error of law for the Appeal Decision to have confirmed the Deciding Delegate's finding that the Complainants were entitled to the protection of the *ESA* because they performed their work for CHC as employees, and not as independent contractors. CHC argues that the Member applied an incorrect legal approach in affirming this aspect of the Determination because, it asserts, the Deciding Delegate's conclusion that the Complainants were employees was inadequately supported by the evidentiary record, with the result that there was no rational basis for it, and so it was perverse and inexplicable.

14. CHC submits further that the Appeal Decision "failed to deal with a serious issue." It asserts that the Member failed to consider whether certain documents referred to as the Start Packs for the Complainants were "legitimate employment documents." CHC submits that they were not. I infer that CHC is alleging that this constitutes a further error of law that arises from the Appeal Decision.

ANALYSIS

15. 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.

16. 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.

17. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation 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.

18. 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.

19. 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 (Reflexology and Stress Clinic)* BC EST # RD126/06).

20. 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.

21. I have decided the Application must be dismissed at the first stage of the inquiry. I am not persuaded that CHC has raised questions of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that they warrant reconsideration. My reasons follow.

22. In many of its decisions, the Tribunal has observed that the grounds on which it may conclude a delegate has erred in law in making a determination include findings that the delegate has acted without any evidence, or on a view of the facts which could not reasonably be entertained (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (BCCA)).

23. Elsewhere, the Tribunal has stated that the appellate test for establishing an error of law on the facts is stringent, and requires a party to establish that a delegate's findings of fact, and the conclusions drawn from them, are inadequately supported, or wholly unsupported, by the evidentiary record, with the result that there is no rational basis for them, and so they are perverse or inexplicable (see *3 Sees Holdings Ltd. (Jonathan's Restaurant)*, BC EST # D041/13).

24. CHC does not appear to dispute any of these formulations of the pertinent tests.

25. CHC asserts, and the Deciding Delegate also noted, that there were several important factors relating to the parties' working relationships supporting an inference that the Complainants were hired as independent contractors. They included findings that the Complainants used their own equipment, they were hired for set periods of time and for specific projects, they set their own schedules, they were paid flat fees for their services, and their services were non-exclusive. CHC submits, however, that the existence of these circumstances must lead inexorably to a conclusion that the Complainants were contractors, and not employees. CHC submits, too, that it was perverse and inexplicable, and therefore unreasonable, for the Deciding Delegate to conclude otherwise, and an error for the Member to have

neglected to provide reasons for affirming the Deciding Delegate's conclusion other than to state that the Deciding Delegate applied the established legal principles.

26. I disagree.

27. In its appeal submission, CHC included the following statement of the applicable law, with which I concur:

> Further, pursuant to the Supreme Court of Canada case of *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.,* 2001 SCC 59, there is no single conclusive test which can be universally applied to determine whether a person is an employee or an independent contractor. The relative weight of each factor will depend on the particular facts and circumstances of the case. The central question is whether the person is performing services as a person in business on their own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor.

28. As I have stated, the Deciding Delegate acknowledged the presence of factors supporting a finding that the Complainants were independent contractors. I say also that if those factors were the sole factors at play in this case, they might inexorably have led the Deciding Delegate, and therefore the Member, to have affirmed such a result. However, they were not the only relevant factors the Deciding Delegate was obliged to consider.

29. In answer to the basic question of whether the Complainants were performing their work in business for themselves, or as an integral part of the business of CHC, the Deciding Delegate observed that the positions the Complainants occupied were fundamental to the successful fulfilment of CHC's production goals, and so, on balance, it was correct for the Deciding Delegate to conclude that the Complainants were carrying on the business of CHC, rather than any strictly separate businesses of their own.

30. In addition, the Deciding Delegate noted that the Complainants' work did not carry with it any real possibility for profit or risk of a loss, and CHC exercised significant control over the Complainants' daily efforts, both of which are well-recognized indicia of employment relationships.

31. CHC does not contend that the Deciding Delegate applied an incorrect legal test. Instead, it argues that the evidentiary factors it identified which supported a finding of independent contractor status should have been viewed conclusively, in the sense that any other legal outcome must be unreasonable. However, since there were other relevant factors revealed by the evidence that pointed to the Complainants being employees, it cannot be said that the Deciding Delegate acted without any evidence. Furthermore, as the evidence relied upon by the Deciding Delegate, to which I have referred, bore directly on factors for determining status that are identified in the authorities, I am not persuaded that the Deciding Delegate acted on a view of those facts which could not reasonably be entertained. Indeed, it would, in my opinion, have constituted a reviewable error if the Deciding Delegate had not considered, and weighed, all the competing factors that had been revealed in the evidentiary record.

32. Notwithstanding this, CHC also claims that the Member provided no detailed reasons explaining why it was right for the Tribunal to confirm the legal conclusion reached by the Deciding Delegate on this point. It argues further that it was an error for the Member to reject CHC's effort on appeal to demonstrate that certain of the Deciding Delegate's findings of fact and the legal conclusions derived from them were "unsupported."

33. Again, I must disagree.

34. In my view, it is incorrect for CHC to say that the Member's reasons appearing in the Appeal Decision were insufficiently detailed. The Member's analysis of the grounds for CHC's appeal was lengthy, covering thirty paragraphs in the Appeal Decision.

35. For example, regarding the reasons why the conclusion in the Determination that the Complainants were employees should be confirmed, the Member said this, in part, in paragraph 53 of the Appeal Decision:

> I find the deciding Delegate…made no error in applying the appropriate provisions and principles, or the general law, to the issue of the status of [the Complainants] under the *ESA*. I fully endorse the analysis undertaken by the deciding Delegate of the legal principles and considerations applicable to the question of whether these persons were employees under the *ESA*. The operative legal principles that apply to the question of employee status are well-established and have been consistently applied; there is nothing in the Determination that deviates from those principles.

36. Later, the Member made the following statement, in paragraph 63 of the Appeal Decision, which places in proper focus his rationale for rejecting CHC's contention that the Determination revealed an error of law:

> Simply disagreeing with the conclusion of the deciding Delegate, which was made by applying the legal principles of the *ESA* to the relevant facts as found, and asking the Tribunal to reassess that conclusion based on assertions of fact and arguments that have been addressed by the deciding Delegate in the Determination is entirely inconsistent with the error-based approach required for setting aside a determination under section 112 of the *ESA*.

37. These, and other, statements in the Appeal Decision demonstrate that the Member did not fail to provide adequate reasons for confirming the Determination. Instead, they show that the Member's reasons took the form of his adopting, and incorporating by reference, the Deciding Delegate's legal rationale for the conclusion the Complainants were employees for the purposes of the *ESA*.

38. As the Member also noted, in paragraph 37 of the Appeal Decision, an appeal under section 112 of the *ESA* is an error-correction process, with the burden on an appellant to persuade the Tribunal there is an error in a determination under one of the statutory grounds. Put differently, the burden in the appeal was on CHC to show that the Determination was legally wrong. Absent such a demonstration, there was no burden on the Tribunal to explain why the Determination was legally correct.

39. The Member also provided reasons why it was proper to reject CHC's attempt to show that certain of the Deciding Delegate's findings of fact and the legal conclusions derived from them were "unsupported."

40. A significant aspect of CHC's submissions in the appeal was its contention that it was incorrect for the Deciding Delegate to have found as a fact that CHC documents which had been generated for the Complainants, referred to as "Start Packs," should be utilized to establish their status as employees. CHC argued before the Deciding Delegate, and again on appeal, that the Start Packs were "illegitimate" and, indeed, fraudulent, because, it asserted, they were prepared by Complainant Carlson for herself and

Complainant Tate, and because they were never authorized or signed by an authorized principal of the company.

41. CHC contends that the Member "simply neglected to consider the issue of whether [the Start Packs] were legitimate." I cannot accept this assertion. It again assumes, incorrectly, that it is a role of the Tribunal to revisit a delegate's findings of fact on a *de novo* basis, absent a determination that the findings reveal the delegate has erred in law.

42. That said, the Member did, in fact, address CHC's submission regarding the Start Packs, in the context of CHC's claim that an affidavit sworn by a principal of the company should be admitted as "new evidence" for the purposes of its appeal under section 112(1)(c). The Member declined to accept the statements in the affidavit regarding the Start Packs because they repeated assertions that the documents were "illegitimate" which had been made by CHC during the investigation conducted prior to the issuance of the Determination, and so the evidence was not, in that sense, "new." The Member also noted that the principal's comments simply contradicted the Deciding Delegate's findings of fact without explaining why those findings, and the conclusions drawn from them, were legally wrong.

43. More particularly, CHC nowhere addressed in substance the Deciding Delegate's rationale for accepting that the Start Packs were legitimate (at R6, and again at R11-R12 of the Reasons). The reasons the Deciding Delegate gave were that CHC did not appear to have communicated to the Complainants that the Start Packs were inaccurate, or to have delivered alternative documentation thereafter that articulated the true nature of their relationship. As for CHC's assertion that the Start Pack documents for Complainant Tate were not signed by a principal of the company and so, by implication at least, the signature on them was fraudulent, the Deciding Delegate noted that the principal who would have been responsible for signing the documents, and who said he did not sign them, had initially averred that the Complainants had been paid all their wages, when he knew or ought to have known that this was incorrect. For these reasons the Deciding Delegate concluded it was proper to prefer the evidence of the Complainants as to the veracity of the Start Packs.

44. CHC argues further that the Deciding Delegate, and later the Member, relied on the Start Packs as the critical factor supporting the conclusion that the Complainants were employees.

45. In my opinion, CHC mischaracterizes the approach taken by the Deciding Delegate.

46. Far from relying on the Start Packs as the principal element in his analysis, the Deciding Delegate took pains to state (at R6 and R12 of the Reasons) that the mere fact the contract documents in the case described the Complainants as employees, "does not necessarily make it so." Later (at R7 and R13 of the Reasons), the Deciding Delegate made specific reference to section 4 of the *ESA* and observed that since the parties could not contract out of the legislation, it mattered not how they described their relationship. Instead, what mattered was the parties' true relationship, having regard to the provisions of the statute.

47. Further, as noted above, the consideration the Deciding Delegate expressly stated to be fundamental when deciding the primary issue arising from the Complaints (at R7 and R13 of the Reasons) was not the proper interpretation of the Start Packs, but rather "whose business is it?" That being so, it cannot be said the existence of the Start Packs was the critical factor informing the Deciding Delegate's conclusion that the Complainants were employees.

48. The Member's Appeal Decision confirmed the Deciding Delegate's analysis because CHC failed to establish that it was legally incorrect. I am not persuaded CHC has demonstrated any substantive basis for a finding that the Member may have erred in doing so.

ORDER

49. Pursuant to section 116 of the *ESA*, I order that the Appeal Decision referenced as 2023 BCEST 110 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal