Employment Standards TRIBUNAL

Citation: 1140668 B.C. Ltd. and Rose Ester Roja Pino (Re)
2024 BCEST 29

EMPLOYMENT STANDARDS TRIBUNAL

Applications for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

1140668 B.C. Ltd.

– and –

Rose Ester Roja Pino

- of Decisions issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NOS.: 2023/168 and 2023/169

DATE OF DECISION: March 22, 2024

DECISION

SUBMISSIONS

Rose Ester Roja Pino — on her own behalf and on behalf of 1140668 B.C. Ltd.

OVERVIEW

1. I have before me two, essentially identical, applications for reconsideration of two appeal decisions, 2023 BCEST 82 and 2023 BCEST 83, both issued on October 4, 2023. The former decision concerns an appeal of a determination issued against a corporate employer, and the latter decision concerns an appeal of a separate determination issued against a director of that corporation. These applications were filed under section 116 of the *Employment Standards Act* ("*ESA*"). This latter provision gives the Tribunal a discretionary authority to vary or cancel an appeal decision.

2. The two applicants are, respectively, a business corporation which was ordered to pay unpaid wages to a former employee, and a director of that corporation who was also ordered to pay the wages in question. The applicants ask the Tribunal to "reconsider your decision and dismiss this wrongful case against me."

3. Both applications are untimely and, in any event, do not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards (Re Milan Holdings)*, BC EST # D313/98), which governs reconsideration applications. Accordingly, both applications are dismissed.

PRIOR PROCEEDINGS

4. The applicant 1140668 B.C. Ltd. ("employer") is a construction company headquartered in Penticton. The applicant Rose Ester Roja Pino ("Ms. Pino") was the employer's sole director until June 8, 2020, and one of two directors as of December 17, 2021, when Andres Victor Figueroa ("Mr. Figueroa"), Ms. Pino's former spouse, also became a director.

5. On March 10, 2020, an individual, who had formerly been employed as a finishing carpenter with the employer ("complainant"), filed an unpaid wage complaint. This complaint was the subject of an investigation and Mr. Figueroa represented the employer throughout that investigation. The employer's principal position was that the complainant was an "independent contractor" rather than an "employee" and, as such, the Director of Employment Standards had no authority to issue a wage payment order against it under the *ESA*. The employer also contested certain aspects of the complainant's unpaid wage claim.

The Determinations

6. On November 7, 2022, a delegate of the Director of Employment Standards ("delegate") issued a determination ordering the employer to pay the complainant a total of $8,156.92, including section 88 interest. The delegate also levied three separate $500.00 monetary penalties against the employer (for contraventions of sections 18, 21, and 28 of the *ESA*), thus bringing the employer's total liability under the determination to $9,656.92. I shall refer to this determination as the "Corporate Determination."

7. The Corporate Determination was served on the employer by ordinary mail, delivered to its registered and records office. The Corporate Determination was also served on each of its two directors by delivering a copy by ordinary mail.

8. As of mid-December 2022, the employer had not paid any monies owed under the Corporate Determination. Accordingly, on December 16, 2022, the delegate issued a determination, in the total amount of $8,201.07, against Ms. Pino under section 96 of the *ESA*. This latter amount reflected the unpaid wages owed to the complainant under the Corporate Determination, together with additional accrued section 88 interest. The delegate did not levy any monetary penalties against Ms. Pino under section 98(2) of the *ESA*. I shall refer to this determination as the "Section 96 Determination."

9. Section 96(1) of the *ESA* states: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee."

10. As set out in a text box in each of the two determinations, an appeal of the Corporate Determination was required to be filed with the Tribunal by December 15, 2022, and an appeal of the Section 96 Determination had to be filed by January 23, 2023 (see section 112(3) of the *ESA*).

The Appeals

11. Neither the employer nor Ms. Pino filed a timely appeal of the determination issued against them. As noted in the Tribunal Member's decisions regarding the appeals filed with respect to the two determinations, the appeal of the Corporate Determination was filed over seven months after the applicable appeal period expired, and the appeal of the Section 96 Determination was filed more than six months after the applicable appeal period expired.

12. The appeals that were filed were essentially identical, and appear to have been instituted as a result of collection proceedings undertaken by the Director of Employment Standards.

13. Since both appeals were filed after the statutory appeal period had expired, each appellant sought an extension of the applicable appeal period under section 109(1)(b) of the *ESA*. An application to extend an appeal period is considered in light of several of factors first set out in *Niemisto*, BC EST # D099/96. These factors include, among other things, a consideration of the appellant's explanation for failing to file a timely appeal, whether the respondent(s) would be unduly prejudiced by an extension, and the presumptive merit of the appeal itself.

14. As noted in the Tribunal Member's separate decisions, the appellants wholly failed to explain why they failed to file a timely appeal and, with respect to the merits of the appeals, neither appeal had any reasonable prospect of succeeding.

15. The Tribunal Member refused to extend either appeal period, and dismissed both appeals under subsections 114(1)(b) and (f) of the *ESA*.

THE APPLICATIONS FOR RECONSIDERATION

16. An application for reconsideration must be filed no more than 30 days after the date of the appeal decision in question (see section 116(2.1) of the *ESA*). The two appeal decisions were each issued on October 4, 2023. Mr. Figueroa, who acted on behalf of the employer and Ms. Pino during the investigation, first contacted the Tribunal on November 2, 2023, but he failed to file a complete reconsideration application at that time, and the documents he did file related solely to the appeal decision confirming the Corporate Determination (2023 BCEST 82).

17. Over the next several months, Mr. Figueroa made three separate requests for an extension of the deadline the Tribunal had given him to file the requisite documents to support the reconsideration applications. These extension requests were granted, but expressly on the basis that the extensions did not constitute an extension of the statutory reconsideration period. Mr. Figueroa stated that he planned to retain legal counsel (which apparently never happened), and needed more time to prepare his evidence and argument in support of the reconsideration applications. His fourth and final request was for an extension to February 16, 2024. However, the Tribunal's Registrar advised Mr. Figueroa that a previous dispensation allowing him until February 12, 2024, would stand, and that if he failed to meet that deadline the two reconsideration files would be closed.

18. Mr. Figueroa never filed his evidence and argument by the February 12, 2024, deadline and, accordingly, on February 15, 2024, the Tribunal's Registrar advised Mr. Figueroa that since he failed to provide any evidence or legal argument to support the reconsideration applications, the two files were now closed.

19. On February 20, 2024, Ms. Pino emailed the Tribunal advising that although she had previously allowed Mr. Figueroa "to speak and write on my behave" [*sic*], he was "no longer authorized to speak or write on my behalf." In her February 20, 2024, email, Ms. Pino made several arguments that might be characterized as reasons for setting aside the appeal decisions, including:

- the delay in adjudicating this dispute was excessive;
- the complainant was incorrectly characterized as an employee when, in fact, he was an independent contractor;
- she was "discriminated and persecuted by the Employment Standards Organization";
- the Employment Standards Branch "never took into consideration that this are two companies" [*sic*]; and
- she was not able to afford legal counsel and, although this is not stated in her email, presumably she was arguing that this fact prejudiced her ability to properly address the legal and factual matters relating to the complaint and the two appeal decisions.

20. On February 22, 2024, the Tribunal's Registry Administrator responded to Ms. Pino and requested that she file a complete "application for reconsideration" in relation to each appeal decision by no later than February 26, 2024. On February 26, 2024, Ms. Pino filed a reconsideration application in relation to EST File No. 2323/168 [*sic*], which is the reconsideration file relating to the appeal of the Corporate Determination (the actual file number is 2023/168). On February 27, 2024, the Tribunal's Operations Manager emailed Ms. Pino requesting her to confirm whether she intended that the single

reconsideration application filed would apply to both reconsideration applications. On February 28, 2024, Ms. Pino confirmed, by email, that she wished the single application to apply to both appeal decisions. Ms. Pino never filed any further submissions with respect to the merits of the two applications, beyond the arguments made in her initial February 20, 2024, email.

ANALYSIS

21. In essence, there are two preliminary matters that must be addressed with respect to the present applications. First, both are untimely, and thus are not properly before the Tribunal unless an extension of the reconsideration application periods is granted. Second, and contingent on the first, I must consider, as directed by *Milan Holdings*, whether these applications raise a serious and significant question of law, fact, principle, or procedure. If the applications pass the first stage of the *Milan Holding* test, I would then be required to consider the applications on their merits.

22. Neither the employer nor Ms. Pino provided any evidence or argument in support of the applications for reconsideration until February 20, 2024 – a point in time about 4 ½ months after the appeal decisions were issued, and thus about 3 ½ months after the statutory reconsideration period expired. The only reason advanced by Ms. Pino in support of extending the reconsideration application period is that she is financially struggling, and was thus unable to retain legal counsel. She also says that she did not have the "experience" to address the matter on her own, and thus left things in Mr. Figueroa's hands.

23. In my view, this is not a proper case to extend the reconsideration application periods. Ms. Pino, for whatever reason, authorized Mr. Figueroa, her former spouse and fellow corporate director, to attend to matters on behalf of the employer and on her own behalf. The record shows that Mr. Figueroa was given a fair and reasonable opportunity (indeed, in my view, a more than fair and reasonable opportunity) to provide evidence and argument in support of the reconsideration applications but, ultimately, he never provided any submission regarding the merits of the two applications. The Tribunal has never held that one's financial inability to retain legal counsel is a proper justification for extending an appeal or reconsideration application period. I might also note that the vast majority of parties appearing before the Tribunal are not legally represented, and that the Tribunal has prepared a great deal of resources – all readily available on its website – to assist lay parties in preparing their cases.

24. Section 2(d) of the *ESA* states that one of the purposes of the legislation is to ensure fair and efficient resolution of disputes. The delay here is troubling, particularly given that it follows an earlier unjustified failure to file timely appeals. I do not think it appropriate, in the absence of any justifiable reason for failing to file a timely application, to extend the reconsideration application period governing either application.

25. Further, even if I were inclined to extend the reconsideration application periods, these applications on their face, are wholly lacking in merit. I will now briefly address each of Ms. Pino's asserted grounds for reconsideration (other than her financial inability to retain legal counsel, which I have already addressed).

26. I do not consider the delay involved here constitutes a breach of the principles of natural justice. The original complaint was filed on March 10, 2020. This complaint was the subject of an investigation, in which Mr. Figueroa actively participated, and resulted in a "preliminary findings" report issued on April 22, 2022. The parties were given a fair opportunity to participate in the investigation and to respond to

the preliminary findings. The delegate issued the Corporate Determination on November 7, 2022, and, when no payment was forthcoming, the Section 96 Determination on December 16, 2022.

27. The Tribunal has consistently held that while a delay such as that involved here is not ideal, in light of well-established legal authority (for example, the Supreme Court of Canada's decision in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44), the delay involved here, especially given the absence of clear prejudice to the employer or to Ms. Pino attributable to the delay, does not constitute a breach of the principles of natural justice.

28. The question of the complainant's status – "employee" or "independent contractor"? – was thoroughly canvassed during the investigation, in the delegate's "Reasons for the Determination" accompanying the Corporate Determination, and yet again in the appeal decision relating to the Corporate Determination (2023 BCEST 82). In my view, the delegate's determination that the complainant was an employee, as defined in section 1(1) of the *ESA*, did not constitute an error of law on the delegate's part. I am of the view that the evidence before the delegate amply supported his finding that there was an employment relationship.

29. There is absolutely nothing in the record to substantiate Ms. Pino's assertion that she was the victim of discrimination or persecution by anyone at the Employment Standards Branch. This assertion stands as a bald, wholly uncorroborated, allegation.

30. Ms. Pino's assertion that there were two legally separate companies is not accurate. The section 112(5) record shows that the employer was originally incorporated as "Penticton Horizon Development Ltd." on November 8, 2017, at which time Ms. Pino was the corporation's sole director. On June 8, 2020, the corporation was dissolved under section 422 of the *Business Corporations Act* for having failed to file annual reports.

31. Section 346(1)(a) and (b) of the *Business Corporations Act* state: "Despite the dissolution of a company under this Act, (a) a legal proceeding commenced by or against the company before its dissolution may be continued as if the company had not been dissolved, and (b) a legal proceeding may be brought against the company within 2 years after its dissolution as if the company had not been dissolved." In addition, section 347 of the *Business Corporations Act* states: "…the liability of each director, officer, shareholder and liquidator of a company that is dissolved continues and may be enforced as if the company had not been dissolved."

32. On December 17, 2021, the corporation was restored under section 356 of the *Business Corporations Act*. Section 364(4) of the *Business Corporations Act* states: "A company that is restored is deemed to have continued in existence as if it had not been dissolved, and proceedings may be taken as might have been taken if the company had not been dissolved."

33. When the corporation was restored, its name was changed to "1140668 B.C. Ltd.," and both Ms. Pino and Mr. Figueroa became its only directors.

34. The complainant's unpaid wages were earned during the period from September 16, 2019, to February 14, 2020, and, as noted above, his complaint was filed on March 10, 2020 (i.e., all relevant events occurred

before the employer corporation was dissolved on June 8, 2020) and, in any event, once the corporation was restored, by statute, the corporation must be treated as if it never was dissolved.

35. In summary, and in light of the above discussion, there is no factual or legal merit to Ms. Pino's "two companies" argument.

36. A determination issued under section 96 may be appealed, but only on limited grounds – principally, whether the director was, in fact, a director when the employee's unpaid wage claim crystallized, whether the "2-month" wage liability was correctly calculated, and whether any section 96 defence applies. Ms. Pino concedes that she was a corporate director during the relevant time frame, and she has not challenged the delegate's wage calculations, nor has she raised any statutory defence. Thus, there is no proper basis for varying or cancelling the Section 96 Determination.

37. Since there is no presumptive merit to any of Ms. Pino's arguments regarding either appeal decision, I find that neither reconsideration application passes the first stage of the *Milan Holdings* test and, accordingly, both applications must be dismissed.

ORDER

38. Pursuant to section 116(1)(b) of the *ESA*, these reconsideration applications are dismissed, and Tribunal appeal decisions 2023 BCEST 82 and 2023 BCEST 83 are both confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal

Notice: Page 1 of this decision has been amended in accordance with the corrigendum issued by the Tribunal on March 27, 2024. The Date of Decision on page 1 of this decision has been corrected to March 22, 2024.