Employment Standards TRIBUNAL

Citation: Jong Woo Park (Re)
2024 BCEST 30

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 -

Jong Woo Park
("Mr. Park")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Shafik Bhalloo, K.C.

FILE No.: 2023/183

DATE OF DECISION: March 22, 2024

DECISION

SUBMISSIONS

Jong Woo Park — on his own behalf

OVERVIEW

1. Jong Woo Park ("Mr. Park") seeks reconsideration of a decision of the Tribunal, 2023 BCEST 97 ("original decision"), dated November 9, 2023.

2. The original decision considered an appeal of a determination issued by a delegate of the Director of Employment Standards ("deciding delegate"), on February 1, 2023 ("Determination").

3. The Determination arises out of a complaint filed by Mr. Park with the Employment Standards Branch on July 12, 2021, alleging that 1067216 B.C. Ltd. contravened the Employment Standards Act ("*ESA*") by failing to pay him regular wages and annual vacation pay over a period of 17 months ("Complaint").

4. By way of background, the Determination notes that 1067216 B.C. Ltd., operating under the name Canhan Trading and/or Can Han Cosmetics and Kitchenware ("Canhan"), operated a cosmetics business in Surrey, BC and Mr. Park was its Purchasing Manager from 2016 to July 12, 2021.

5. The Complaint was investigated by a delegate of the Director ("investigating delegate"), who ultimately produced an Investigation Report ("Report").

6. The Report, which is dated August 5, 2022, was sent to Mr. Park and to 1067216 B.C. Ltd., its director, and its legal representative.

7. Both parties were given an opportunity to address the findings made in the Report.

8. The Report delineated the following matters that are identified as "[a]greed-upon facts":

> 1067612 B.C. Ltd. [*sic*] carrying on business as Canhan Trading.
>
> Jong Woo Park (Mr. Park or the Complainant) brought the idea of a cosmetics business to his brother-in-law, Sean Choi (Mr. Choi), in 2016. The business, which would become Canhan Trading, was one of several businesses operated within the legal entity 1067612 B.C. Ltd. (1067612 or the Respondent) [*sic*]. Canhan Trading bought cosmetic products from South Korea and sold them in Canada. The business relationship between Mr. Park and the Respondent was terminated on July 12, 2021.

9. The Report also outlined the positions and evidence of each party. Both parties filed responses to the Report and the deciding delegate relied on the Report as an accurate reflection of the parties' evidence and positions regarding the issues adjudicated in the Determination, namely: (i) whether Mr. Park was an 'employee' as defined in section 1 of the *ESA* and (ii) if so, was Mr. Park owed any wages?

10. In concluding that Mr. Park was the "controlling mind" of the business during the statutory recovery period (from July 12, 2020, to July 12, 2021), the deciding delegate reasoned as follows (at p. R4):

> … There is no dispute that the Complainant was one of two initial investors that started Canhan in 2016 while the Complainant lived in South Korea and his partner/brother-in-law, Sean Choi (Choi), lived in British Columbia, Canada. The parties agree they started Canhan when the Complainant brought cosmetic samples from South Korea to Choi's home. There is sufficient evidence to show that the Complainant invested his own funds to purchase products, made decisions independently for Canhan, and received profits when the business was dissolved in 2021.

11. Accordingly, the Determination found the *Employment Standards Act* ("*ESA*") did not apply to Mr. Park and no further action would be taken on his Complaint.

12. Mr. Park appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination.

13. In dismissing the natural justice ground of appeal, the Tribunal Member said:

> 35. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.,* BC EST # D014/05:
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> > Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96).
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> 36. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Mr. Park was provided with the opportunity required by principles of natural justice to present his position to both the investigating and the deciding Delegates. Mr. Park has provided no objectively acceptable evidence showing otherwise.
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> 37. There is nothing in the reasons, record, appeal forms, or submissions showing that the investigating Delegate or the deciding Delegate failed to comply with the principles of natural justice (or with the requirements of section 77 of the *ESA*) in making the Determination. The record, containing a substantial amount of material and extensive submissions from Mr. Park, shows that he was aware of the position taken by Canhan on his complaint and that he was given a full opportunity to respond before the Determination was made.

> 38. The matters raised in his initial appeal submission do not demonstrate a failure to observe principles of natural justice.
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> 39. As a general response to the many points made in the appeal submissions, none of those points, which include references to a delayed process, no argument on issues, and no residence in Canada, are evidence of a failure by the investigating and/or deciding Delegates to observe principles of natural justice.

14. While Mr. Park did not raise error of law as a ground of appeal, the Tribunal Member found that Mr. Park was effectively alleging that the deciding delegate made several errors of law in making the Determination. The Tribunal Member identified these errors to include the following: Mr. Park contended that the deciding delegate misinterpreted the *ESA* in finding Mr. Park was not an employee; misapplied a general principle of law in addressing the concept of the 'controlling mind'; made numerous errors on the facts, principally acting on a view of the evidence that could not reasonably be entertained; and adopted a method of assessment that was wrong in principle in finding Mr. Park was not an employee under the *ESA*.

15. The Tribunal Member subsequently went on to delineate the principles engaged in the appeal of the Determination stating:

> 45. First, the central conclusions being challenged in this appeal – whether Mr. Park was a "controlling mind" of Canhan and whether he should be considered an employee for the purposes of the *ESA* – are questions of mixed law and fact. In B*ritco Structures*, the Tribunal considered the application of the *Gemex* test to questions of mixed fact and law, and concluded that "error of law" should not be applied so broadly as to include errors of mixed law and fact which do not contain extricable errors of law.
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> 46. Second, the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law: see *Britco Structures Ltd.*, BC EST #D260/03. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.
>
> 47. The test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.
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> 48. To expand the above point, it is not sufficient for Mr. Park to simply deny facts or assert a version of the facts that are not in accord with the findings of the deciding Delegate; in order to seek a change in the findings of fact made in the Determination, Mr. Park is required to show the findings of fact and the conclusions and inferences reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26-29.

16. The Tribunal Member then considered the critical factors that persuaded the deciding delegate to conclude that Mr. Park was a 'controlling mind' of Canhan, namely:

- Mr. Park was one of two initial investors of Canhan in 2016;
- Mr. Park invested his own funds into Canhan to purchase products, made decisions independently for Canhan, and received profits when the business was dissolved in 2021;
- For the purpose of facilitating immigration, Mr. Park and Mr. Choi created the *appearance* of an employment opportunity for Mr. Park with Canhan;
- Mr. Park and Mr. Choi created employment documents – an offer of employment and an employment agreement – that were never followed in practice nor intended to create a binding contract of employment;
- Canhan, with Mr. Park's knowledge, created T4s for the years 2020 and 2021, falsely reporting wages there were wages paid to Mr. Park in those years; and
- In 2021, Mr. Park and Mr. Choi negotiated the terms under which the business of Canhan would be dissolved, which included Mr. Park receiving 75% of the equity from the closure and having the money that was paid by Canhan in payroll taxes arising from the false T4 reporting and the service fees paid to Service Canada for the Labour Market Impact Assessment deducted from his equity share.

17. The Tribunal Member found the facts relied upon by the deciding delegate strongly support the finding that Mr. Park was a controlling mind of Canhan. In the result, the Tribunal Member concluded:

> 52. There was no error of law in the finding made and the result is perfectly consistent with the approach taken by the Tribunal to the status of the "controlling mind" of a corporation under the *ESA*, which was first enunciated in the *Barry McPhee* decision and has been applied in several decisions since.
>
> 53. The concept of 'controlling mind' under the *ESA* has been developed and applied for the purposes of the *ESA*. To answer one of the arguments made by Mr. Park, how that concept is addressed and applied in other contexts, demonstrated by those cases cited in his submissions, has no particular application in the context of this appeal.
>
> 54. The deciding Delegate did not apply a wrong principle to the complaint or misinterpret the *ESA*. The deciding Delegate provided a correct legal principle to the actual relationship between Mr. Park and Canhan and made a decision on the facts and in accordance with the provisions of, and for the purposes of, the *ESA*.

18. The Tribunal Member next reviewed the following factors the deciding delegate considered relevant to the question whether Mr. Park should be found an employee under the *ESA*:

- The lack of credibility in the employment documents;
- The work he performed for Canhan was not separate or distinct from the work he performed in his role as its controlling mind;

- The work he performed for Canhan in Canada was no different from the work he performed for Canhan in South Korea, where the evidence showed he was exercising all of the authority and responsibility for the running of the business;
- In all the time he was 'working' for Canhan in Canada (more than 17 months), Mr. Park was never paid a wage, and no evidence there was ever an expectation of receiving wages; and
- Mr. Park independently tracked his expenditures for the business, had an intimate knowledge of how Canhan operated, and was aware his days and hours worked were not being tracked.

19. The Tribunal Member concluded that the decision of the deciding delegate on the status of Mr. Park – i.e. that Mr. Park was not an 'employee' within the meaning of the *ESA* - considered factors relevant to that question and was made within the legal framework of the *ESA* and firmly rooted by the evidence provided.

20. In dismissing Mr. Park's appeal as having no merit and no reasonable prospect of succeeding, the Tribunal Member said that Mr. Park has *not* shown that the findings, conclusions, and inferences reached by the deciding delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record or that there is no rational basis for the conclusions reached and so they are perverse or inexplicable. In the Tribunal Member's view, Mr. Park was effectively asking for the evidence to be re-evaluated and the factual findings changed.

ISSUE

21. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision.

EXTENSION TO THE RECONSIDERATION PERIOD

22. Before summarizing Mr. Park's submissions, it should be noted that on December 11, 2023, the Tribunal received Mr. Park's email with an incomplete reconsideration application containing some written submissions but without the Reconsideration Application Form. In his email he requested "more time … to get legal advice for this application" as he was in Korea, and it was "impossible" for him to contact a Canadian lawyer. On the same date, the Tribunal requested Mr. Park to provide the Tribunal with a completed Reconsideration Application Form and a completed Applicant Contact Information Form. The Tribunal also requested that he indicate in his Reconsideration Application Form the date he wished to submit his additional written submission. Mr. Park responded on the same date with links to the Reconsideration Application Form and Contact Information Form. The Tribunal advised him that it does not access links and that he should submit both forms in formats the Tribunal accepts. The Tribunal received both forms in the proper format the next day, on December 12, 2023. In his Reconsideration Application Form, Mr. Park requested an extension to the statutory reconsideration period to February 29, 2024, to file additional written submissions. The Tribunal granted Mr. Park's request for an extension and informed him that he should provide his written reasons and arguments and any supporting documents by no later than 4:00 p.m. on February 29, 2024. On February 29, 2024, Mr. Park emailed the Tribunal his additional written submissions and documents.

23. The matter of Mr. Park's request to extend the reconsideration period is only a live matter before this Tribunal if his reconsideration application is not dismissed. In such case, the Tribunal will seek submissions on Mr. Park's request to extend the reconsideration period and on the merits of his application from the other parties.

SUBMISSIONS OF MR. PARK

24. I have read and considered Mr. Park's entire submissions which I find somewhat repetitive. I will only summarize those submissions I find to be necessary for purposes of deciding this reconsideration application, particularly because the submissions are very repetitive.

25. In his first set of submissions received by the Tribunal on December 11, 2023, Mr. Park contends:

- He entered a contract of employment with 1067216 BC Ltd. as a purchasing manager of the cosmetics business of the company.
- There is no evidence for the deciding delegate's finding that Canhan is a cosmetics business of 1067216 BC Ltd. and he is the "controlling mind" of Canhan.
- 1067216 BC Ltd. and Cahan are separate legal entities and the former "owns" two businesses, namely, Bean Factory and Watertech but not Canhan.
- Canhan has no relation with any of 1067216 BC Ltd., Bean Factory or Watertech and should not be a "related party" in the Complaint or this proceeding.
- The deciding delegate relied on a "false allegation" that Canhan was related to 1067216 BC Ltd. and that he, Mr. Park, was the latter's "controlling mind" to deny his claim and Complaint.
- 1067216 BC Ltd. was established on March 4, 2016, and owns Beanfactory business which came into existence on September 16, 2016, and Watertech which came into existence on March 3, 2017. Mr. Park visited Sean Choi ("Mr. Choi"), the director of 1067216 BC Ltd., in August 2016 and Canhan came into existence on October 5, 2016.
- As Canhan came into existence after the start of Beanfactory and before Watertech, "[i]t would be a weird conclusion if the owner of 1067216 BC ltd. gave [Mr. Park] 'controlling status' of the company which had been already established before [Mr. Park] visited and introduced cosmetics business to [Mr. Choi]."
- There was no reason to establish Canhan "separately" after Mr. Park's visit to Vancouver.
- If 1067216 BC Ltd. is doing business as Canhan "it does not matter whether the ownership belongs to Canhan or 1067216 BC ltd." but if the two are independent entities, then "it becomes a significant issue".
- 1067216 BC Ltd. issued invoices for cosmetics sales and asked customers to send money to 1067216 BC Ltd. and not Canhan. Mr Park's work benefited 1067216 BC Ltd. and therefore, it is "natural to conclude that [Mr. Park] worked for 1067216 BC ltd., [and] not for Canhan."
- If he is "not a controlling mind of 1067216 BC ltd." then his "work must be actions of [an] employee."

- The finding of the deciding delegate that Mr. Park is the "controlling mind of Canhan must be revoked" and a new ruling is necessary after a thorough investigation of Mr. Park's relationship with 1067216 BC Ltd.

26. In the balance of the first set of submissions, Mr. Park goes on to "challenge details of decisions." By this he means both the Determination and any parts in the original decision where the Tribunal Member relies upon and analyzes the findings of facts of the deciding delegate. I have very carefully reviewed this part in the first set of submissions, and I do not find it necessary to reiterate the submissions here. It suffices to say that the submissions in total challenge the findings of facts of the deciding delegate in the Determination and the Tribunal Member's reliance on those findings or decision to not interfere with those finding in making the original decision. Throughout his submissions, Mr. Park, when disputing the deciding delegate's findings of facts, offers his alternative narrative or version of the facts which, in most cases, was rejected by the deciding delegate in the Determination.

27. In the second set of submissions of Mr. Park made on February 29, 2024, as in the first set of submissions, he largely, if not wholly, disputes the evidence of 1067216 BC Ltd. and the findings of the deciding delegate in the Determination. He states that counsel for 1067216 BC Ltd. in his letter "set up a few facts" that became the 'Background Facts' for the Determination and the original decision. The "letter" he refers to appears to be the "Respondent's Reply" document, dated August 2, 2022, prepared by counsel for 1067216 BC Ltd. which was presented to the investigating delegate and forms part of the record at pages numbered 149 to 160 inclusive. Mr. Park states in the preamble to his lengthy second submissions "I will point out some major facts which [are] false" and based on "wrong background" so that the "decisions" – the Determination and original decision – may be reconsidered. Mr. Park then meticulously proceeds to dispute certain evidence of 1067216 BC Ltd. submitted in the Respondent's Reply before the Determination was made and presents his alternative evidence most of which is a rehash of the position he advanced in the investigation of the Complaint and also in the first set of his submissions in his reconsideration application. While I have read Mr. Park's second set of submissions closely and carefully, I do not find it necessary to set out these submissions here. As with the first set of submissions, they are in the nature of a dispute with the deciding delegate's findings of facts and the original decision to the extent the Tribunal Member decided not to interfere with those findings of facts.

ANALYSIS

28. Section 116 of the *ESA* delineates the Tribunal's statutory authority to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
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> 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.
>
> (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.

(2.1) The application may not be made more than 30 days after the date of the order or decision.

(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.

(3) An application may be made only once with respect to the same order or decision.

29. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications. The following principles bear on the analysis and result of this reconsideration application.

30. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Ekman Land Surveying Ltd.*, BC EST # RD413/02)

31. *In Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso),* BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

32. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.),* BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:

(i) whether the reconsideration application was filed in a timely fashion;

(ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;

(iii) whether the application arises out of a preliminary ruling made in the course of an appeal;

(iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases;

(v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

33. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, I find Mr. Park's application does not warrant the exercise of the Tribunal's discretion in favour of a reconsideration of the original decision.

34. Mr. Park's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra.* The application fails to make out an arguable case of sufficient merit to warrant a reconsideration; it does not raise any important questions of law, fact, principle, or procedure of importance to the parties and/or their implications for future cases. It also does not show *any* error in the original decision, or present other circumstances that requires this panel to intervene.

35. What is abundantly transparent in Mr. Park's submissions is that he is attempting to reargue the issues advanced before the Director and subsequently, in the appeal of the Determination. Mr. Park, undoubtedly, is dissatisfied with the deciding delegate's findings of fact and the outcome in the Determination. In his appeal of the Determination, he unsuccessfully attempted to have the Tribunal Member reweigh the evidence with a view to accepting his version of the facts and setting aside the Determination. He is now trying to do the same in this reconsideration application. Section 116 of the ESA was not intended to provide a second or, in this case, a third opportunity to an unsuccessful party to challenge findings of facts by the deciding delegate. The Tribunal has consistently ruled against exercising its reconsideration power under section 116 where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Director (and where there is no compelling new evidence or no evidence that an important finding of fact was made without a rational basis in the evidence): *Re Image House Inc*., BC EST # D075/98 (Reconsideration of BC EST # D418/97); *Alexander (c.o.b. Peregrine Consulting)* BC EST # D095/98 (Reconsideration of BC EST # D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub*), BC EST # D478/97 (Reconsideration of BC EST # D186/97).

36. I find that Mr. Park has failed to show any error in the original decision and has failed to show a strong *prima facie* case or any other reason for exercising my decision in favour of reconsideration.

37. In the result, Ms. Park's reconsideration application is denied.

ORDER

38. Pursuant to section 116(1)(b) of the *ESA*, the original decision, 2023 BCEST 97, is confirmed.

Shafik Bhalloo, K.C.
Member
Employment Standards Tribunal