Citation: Alternative Cartage Inc. (Re)
2024 BCEST 54

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 -

Alternative Cartage Inc.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2024/052

DATE OF DECISION: June 5, 2024

DECISION

SUBMISSIONS

Brian Vickers — counsel for Alternative Cartage Inc.

OVERVIEW

1. This is an application by Alternative Cartage Inc. ("applicant") pursuant to section 116 of the *Employment Standards Act* ("*ESA*") for reconsideration of 2024 BCEST 34, an appeal decision issued by Tribunal Member Stevenson on April 17, 2024 ("Appeal Decision").

2. By way of the Appeal Decision, the Tribunal confirmed a determination issued against the applicant on December 19, 2023 ("Determination"), pursuant to which it was ordered to pay a former employee ("complainant"), a delivery driver, the total sum of $51,654.59. Additionally, and also by way of the Determination, the applicant was ordered to pay a $500 monetary penalty based on its contravention of section 18 of the *ESA*.

3. In my view, this application must be dismissed since it does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). My reasons for reaching that conclusion now follow.

PRIOR PROCEEDINGS

4. The Determination was issued by Shannon Corregan, a delegate of the Director of Employment Standards ("delegate"). The delegate also issued her "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination. The delegate addressed several matters in her reasons including the complainant's status (employee or independent contractor?), and whether the applicant unlawfully required the complainant to pay certain business costs contrary to section 21(2) of the *ESA*.

5. The delegate determined that the complainant was an employee, and that the applicant had unlawfully required the complainant to pay certain business costs. The section 21(2) award represents the bulk of the monies due to the complainant under the Determination ($41,937.23).

6. The applicant appealed the Determination, asserting that the delegate erred in law and failed to observe the principles of natural justice making the Determination (see sections 112(1)(a) and (b) of the *ESA*). The Tribunal dismissed the appeal, finding that it had no reasonable prospect of succeeding (see section 114(1)(f)).

THE APPLICATION FOR RECONSIDERATION

7. The applicant's section 116 application is based on the following assertions:

> The Applicant submits that the EST erred by reviewing the Complainant's employment status as a question of mixed fact and law rather than a question of law.

The Applicant submits that the EST erred by reviewing the Complainant's business expenses award as a question of fact rather than a question of law.

The Applicant submits that the Application ought to be granted because it raises important questions of law and principle, which questions are important to the Applicant and the transportation industry as a whole (see Huang (Re), BCEST #D025/05).

The Applicant further submits that the Complainant acted in bad faith during his work with the Applicant and throughout the Complaint process, as a result of which his claimed remedies ought to be reduced or voided.

FINDINGS AND ANALYSIS

8. I will address the applicant's four arguments in turn.

Employee or contractor?

9. Whether an individual is an employee or an independent contractor is not a pure question of law. Rather, this issue is a question of mixed fact and law, given that the decision-maker must apply a legal standard to a particular set of facts (see *Housen v. Nikolaisen*, 2002 SCC 33 and *1536378 Ontario Limited (B-Pro Grooming) v. Canada (National Revenue)*, 2007 FCA 334 at para. 5; see also *North Shore Home Services Ltd.*, 2018 BCEST 14, reconsideration refused: *North Shore Home Services Ltd.*, 2018 BCEST 52). Further, and in any event, Member Stevenson did not err in concluding that there was no proper basis for setting aside the delegate's finding that the complainant was an employee.

Section 21(2)

10. Insofar as the section 21(2) business costs award is concerned, I similarly consider this issue to be one of mixed fact and law, rather than a pure question of law. Section 21(2) of the *ESA* states: "An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations." The phrase "business costs" is not defined in the *ESA* or in the *Employment Standards Regulation*. Accordingly, the decision-maker must consider the nature of the expenditure in question in relation to the employer's business operations, and then determine if the employer wrongly required the employee to pay, or contribute to, the expenditure in question. In other words, the decision-maker must make findings of fact with respect to the essential nature of the expenditure (a factfinding exercise), and then determine whether the employer breached section 21(2) in relation to the expenditure in question (i.e., apply a legal standard to a set of facts). I note that the applicant has not provided any legal authority for its assertion that the determination of whether an employer contravened section 21(2) is a pure question of law, as distinct from a question of mixed fact and law.

11. The applicant alternatively says that even if the complainant was properly awarded compensation representing recovery of business costs under section 21(2), "then these expenses are better categorized as wages rather than expenses." In accordance with its obligations under the *ESA*, the applicant should have paid the business costs in question directly, or otherwise should have reimbursed the complainant for these expenses. "Allowances or expenses" are not considered to be "wages" under the *ESA*. However, unreimbursed business costs are "deemed to be wages" under section 21(3), and are recoverable as if they were "wages."

12. The applicant says that adding the section 21(2) award to the commission wages that were actually paid to the complainant (the commission was based on a percentage of the value of the deliveries the complainant made on behalf of the applicant), results in a situation whereby the complainant's total compensation exceeds "100% of the value of the deliveries that he made." The applicant characterizes such a situation as "absurd," and tantamount to an "unjust enrichment" in favour of the complainant. This argument was advanced on appeal, and Member Stevenson specifically addressed it at paras. 63-65 of the Appeal Decision. I agree with, and adopt, Member Stevenson's analysis regarding this particular matter.

Implications for the transportation industry

13. In my view, this application does not raise any new and significant issue of general importance to the transportation industry. The Tribunal has issued literally hundreds of decisions addressing the "employee versus contractor" issue. The legal principles governing this question have been clearly articulated in this jurisprudence. Every "worker status" dispute requires the decision-maker to apply the applicable legal standards to the individual facts at hand. The applicant asserts that "it is critically important that employers and workers have a clear understanding of the rights and obligations of their relationship," and that they "understand how this work will be categorized, as mis-categorization will have significant repercussions" including "adverse tax consequences and gaps in insurance coverage".

14. In response to these latter assertions, I would simply observe that an employer can review the Tribunal's caselaw regarding the "employee versus contractor" issue (all of the relevant decisions are posted on the Tribunal's website) and is free to obtain appropriate legal advice if the employer has some doubt about whether a particular worker is an employee or an independent contractor. There is no great mystery regarding the legal principles surrounding this issue and, for my part, I fully endorse the delegate's finding that the complainant was an "employee" as defined in the *ESA*.

15. The applicant says that the "employee versus contractor" was never "properly adjudicated." I reject this assertion as being factually inaccurate. The delegate comprehensively addressed the issue, at pages R3 to R7 of her reasons, as did the Tribunal at paras. 28 to 45 of the Appeal Decision.

Bad Faith

16. With respect to the whether the complainant acted in "bad faith," section 76(3)(c) of the *ESA* authorizes the Director of Employment Standards to dismiss a complaint that was filed in bad faith. In a submission to the Employment Standards Branch dated April 20, 2023, filed in response to the complaint, the applicant sought to have the complaint dismissed for having been filed in bad faith. The delegate specifically addressed this submission at pages R6-R7 of her reasons. The delegate, correctly in my view, rejected the applicant's "bad faith" argument.

17. The applicant did not appeal the delegate's "bad faith" finding. Accordingly, Member Stevenson did not address this matter in the Appeal Decision. That being the case, I do not consider this matter to be properly before me on an application to reconsider the Appeal Decision. However, even if this issue is properly before me, I consider the applicant's "bad faith" argument to be both factually and legally misconceived, and entirely without merit. In this latter regard, I adopt the delegate's analysis of this issue as set out in her reasons.

Milan Holdings

18. In *Milan Holdings*, *supra*, the Tribunal established a two-stage test for the consideration of section 116 reconsideration applications. Before the Tribunal will fully consider the application on its merits (the second stage), the applicant must first demonstrate that it:

> …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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. (*Milan Holdings*, page 7)

19. A simple statement of disagreement with an appeal decision, no matter how strongly asserted, without cogent and probative evidence and argument that the decision was wrongly decided, will not move an applicant past the first stage. At the first stage of the *Milan Holdings* test, an applicant must advance a clear and compelling case:

> …the following factors have been held to weigh against a reconsideration: …
>
> Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence). (*Milan Holdings*, page 7)

20. In my view, this application largely reiterates the arguments that were advanced – and properly rejected – in the appeal. Overall, I am not persuaded that, even on a *prima facie* basis, there is any reasonable justification for setting aside or otherwise varying the Appeal Decision. Accordingly, the application must be dismissed.

ORDER

21. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal