Citation: PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., 0922182 B.C. Ltd. 2024 BCEST 113

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 -

PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd.

("Applicants")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Kerem Tirmandi, legal counsel for PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd.
FILE NUMBER:	2024/110
DATE OF DECISION:	November 13, 2024

DECISION

OVERVIEW

1. PR Seniors Housing Management 2 Ltd., 1111369 B.C. Ltd., and 0922182 B.C. Ltd. ("applicants") apply for reconsideration of 2024 BCEST 65, an appeal decision issued on July 25, 2024 ("Appeal Decision"). This application is made pursuant to section 116 of the *Employment Standards Act* (*ESA*).

2. By way of the Appeal Decision, the Tribunal confirmed a Determination issued by Kirsten Dzavashvili, a delegate of the Director of Employment Standards ("delegate"), on December 29, 2023, pursuant to which the applicants (as well as 2034976 Alberta Inc.) were ordered to pay $29,660.53 to a former employee ("complainant"). In addition, the delegate levied two $500 monetary penalties against these latter firms based on their contraventions of sections 58 and 63 of the *ESA* (see section 98 of the *ESA*). Accordingly, the applicants' total liability under the Determination is $30,660.53.

3. In the *Milan Holdings* decision (see *Director of Employment Standards (re Milan Holdings Inc.)*, BC EST # D313/98), the Tribunal established a two-stage analytical framework for addressing section 116 reconsideration applications. The first stage requires the Tribunal to assess the application to determine if it "raise[s] 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," and whether "the applicant has made out an arguable case of sufficient merit to warrant the reconsideration."

4. In my view, this application – which is largely based on the very same arguments that were fully considered and properly rejected on appeal – does not pass the first stage of the *Milan Holdings* test. Accordingly, this application is dismissed.

PRIOR PROCEEDINGS

5. The complainant filed a section 74 complaint in which she sought unpaid vacation pay and section 63 compensation for length of service. The complaint was investigated, resulting in an "Investigation Report" (IR) issued by an Employment Standards Branch (ESB) officer on November 30, 2022. The IR was provided to the parties for their review and comment. Over one year later the delegate, relying on the IR and the other evidence and argument that the parties had submitted, issued the Determination and her accompanying "Reasons for the Determination" ("delegate's reasons").

The Determination

6. The delegate determined that the complainant was entitled to vacation pay in the amount of $10,615.39, and section 63 compensation for length of service in the amount of $15,384.62, together with section 88 interest ($3,660.52). The delegate rejected the applicants' position that there was just cause to dismiss the complainant. This latter section 63 award, confirmed on appeal, is not being challenged in this application.

7. The delegate calculated the complainant's unpaid vacation pay entitlement based on two separate considerations. First, the complainant had a vacation "carryover" entitlement of 30 days, and

second, she had a pro-rated entitlement of 9.04 days for 2020. After accounting for the 26.04 days that were paid to her following her dismissal, the delegate found that the complainant was owed a further 13 days on account of unpaid vacation pay. The complainant's compensation for length of service award was based, given her tenure with the applicants', on four weeks' wages plus concomitant 4% vacation pay.

The Appeal Decision

8. The appeal of the Determination was filed in the name of West Coast Seniors Housing Management Limited Partnership, although the style of cause in the Appeal Decision identified the present applicants as the appellants. In her reasons, the delegate stated that the three applicants carried on business as "West Coast Seniors Housing Management Limited Partnership", and were the general partners in that latter limited partnership along with a fourth entity, 2034976 Alberta Inc. I note that this fourth entity is not a named applicant in this section 116 application. For purposes of this section of my reasons, I shall simply refer to the parties that appealed the Determination as the "appellant."

9. The appeal of the Determination was based on all three statutory grounds – error of law, failure to observe the principles of natural justice, and "new evidence" (see sections 112(1)(a), (b) and (c) of the *ESA*).

10. The "error of law" ground was based on an assertion that the complainant failed to properly document her vacation days and ongoing entitlement and, as a result, was awarded more vacation pay than she was entitled to receive. Indeed, in its appeal documents (as set out in para. 4 of the Appeal Decision), the appellant sought an order cancelling the Determination and directing the complainant to pay the appellant $25,383.81, the amount allegedly "overpaid" to the complainant on account of vacation pay. It should be noted that there is no provision in the *ESA* enabling the Director of Employment Standards or the Tribunal to issue an order requiring an employee to pay money to their current or former employer. Section 22(4) of the *ESA* permits an employer to make a deduction from an employee's wages where there is a "written assignment of wages to meet [a credit obligation including] an advance of wages to the employee from the employer, including vacation pay." However, there was no such written assignment from the complainant in this case.

11. The appellant also alleged that the delegate erred in law in rejecting its "just cause" argument. With respect to this latter issue, the appellant argued that it had just cause to dismiss the complainant based on her performance deficiencies. As previously noted, the complainant's section 63 entitlement is not being challenged in this application.

12. The appellant's "natural justice" ground of appeal arose from the delegate's treatment of the parties' conflicting evidence in relation to the complainant's accrued vacation pay as of the date of her termination.

13. The appellant's "new evidence" consisted of various payroll records submitted to support its position that the delegate erred in determining the complainant's unpaid vacation pay entitlement.

14. The Tribunal refused to admit the appellant's "new evidence" because it *was* available at the time the Determination was being made, was not particularly credible, and was not probative with respect to the question of the complainant's accrued vacation pay entitlement as of her termination.

15. Insofar as the alleged errors of law were concerned, the Tribunal rejected the appellant's position that the delegate erred in finding that it did not comply with section 28 of the *ESA* (which concerns an employer's record-keeping obligations). With respect to the delegate's calculation of the complainant's vacation pay entitlement, the Tribunal noted that it was based on the appellant's own records, and that the delegate did not err in determining the complainant's vacation allotment "carryover" from one year to the next.

16. With respect to the section 63 compensation for length of service award, the Tribunal held that the delegate correctly identified the governing legal principles surrounding "just cause," and properly applied those principles to the facts at hand.

17. Finally, the Tribunal rejected the appellant's natural justice argument. A key element of the appellant's argument on this score was a statement made by the ESB officer who investigated the complaint in an email to the appellant's legal counsel: "I don't believe the Decision Maker will find any vacation pay is outstanding." While characterizing this comment as possibly "ill-advised," the Tribunal member noted it was nonetheless a statement of opinion that was not binding on the delegate, nor could it be taken as an assurance that the appellant did not need to file any further evidence, particularly since the statement was made after the appellant had already filed its final submission regarding the complainant's vacation pay claim.

18. The Tribunal confirmed the Determination, having found that none of the asserted grounds of appeal was meritorious.

THE APPLICATION FOR RECONSIDERATION

19. The applicants base their application on the following grounds:

a. Mistake of Fact/Clerical Error – the Tribunal Member miscalculated the vacation days owed to [the complainant] based on the [applicants'] new evidence.

b. Mistake of Law – the Tribunal Member erred in its assessment of credibility of the [applicants'] new evidence.

c. Mistake of Law – the Tribunal Member erred in failing to order an Oral Hearing to address central concerns relating to credibility.

d. Mistake of Law – the Tribunal Member erred in his interpretation and application of the Principles of Natural Justice as it relates to assurances provided by the Investigating Officer to the [applicants] during the course of the investigation.

20. I will address each of these grounds in turn.

FINDINGS AND ANALYSIS

21. As noted above, the applicants' burden in a section 116 application is to raise an arguable case that the Appeal Decision should be varied or set aside. If the applicants cannot pass this initial bar, the application will be dismissed. Accordingly, I will now review the applicants' arguments to determine if there is some presumptive merit to any of them.

Miscalculation of vacation days and the treatment of the applicants' "new evidence"

22. The complainant's contractual vacation entitlement was described in the delegate's reasons as follows (at page R3):

> As per her contract, the Complainant was entitled to 20 vacation days a year. These vacation days were available to use at the beginning of the calendar year. In circumstances when the full year was not worked, vacation days were prorated. The Complainant was allowed to carry over any unused vacation days to the next year.

23. The applicants tracked the complainant's vacation pay allotment using a program called "ADP Workforce Software." The applicants maintained that the complainant failed to record in this system all the vacation days she had taken. The complainant's employment ended on June 9, 2020. The delegate determined that the "best evidence," namely, a screenshot of her ADP account as of May 31, 2020, showed that the complainant had 30 vacation days "carried over" as of the date of her termination.

24. The delegate held that the complainant was entitled to 9.04 vacation days for 2020 (a prorated amount based on her 20-day entitlement) plus the 30-day carryover for a total of 39.04 days as of her termination. The applicants paid the complainant the equivalent of 26.04 vacation days following her termination thus leaving a 13-day shortfall ($10,000.01) payable to her. The delegate awarded the complainant this latter amount on account of vacation pay together with an additional $615.38, being the concomitant vacation pay on her section 63 compensation for length of service award.

25. The applicants appealed the vacation pay award and submitted "new evidence" to support their position that the delegate erred in calculating the complainant's unpaid vacation pay entitlement. The Tribunal refused to admit this evidence, holding that it was not "new" (Appeal Decision, para. 50), or "particularly credible" (para. 52), or probative (para. 59).

26. On reconsideration, the applicants say that the Tribunal erred in refusing to admit its "new evidence," arguing that the Tribunal Member erred in characterizing this evidence as being "of recent origin" (para. 52). The applicants submit that the November 27, 2023, date stamp on the "ADP Balance Sheet and Calendar" report simply reflects the date that the report was generated, not the date that the information within the report was initially recorded. However, even if the applicants are correct on this point, the fact remains that this evidence was "available" at the time the Determination was being made and, on that account alone was inadmissible. In this regard, I refer to and adopt the Tribunal member's analysis found at paras. 50-51 and 53-54 of the Appeal Decision regarding the "availability" of the evidence.

27. Further, the Tribunal also held that the "new evidence" was not probative. I concur with, and adopt, the Tribunal member's conclusion on this point as set out in para. 59 of the Appeal Decision.

28. It follows that I do not accept the applicants' arguments regarding the Tribunal member's treatment of its "new evidence," or with respect to the calculation of the complainant's unpaid vacation pay entitlement.

Failure to hold an oral hearing

29. The Determination was issued following an investigation that was conducted by an ESB officer, not the delegate. As part of the investigation process, the officer issued the IR dated November 30, 2022. The IR was provided to the parties for their review and comment. The applicants' legal counsel (not the same counsel who represented the applicants in the appeal and who represents the applicants in this application) provided a response to the IR on December 14, 2022, and also a separate written submission on January 10, 2023. The applicants did not request an oral hearing in either submission.

30. So far as I can determine, the applicants' only request for an oral hearing is contained in its written submission filed on appeal. The request for an oral hearing appears to have been grounded in the applicants' argument regarding the complainant's vacation pay award: "Given the discrepancies in the respective records of vacation time, at the least, *a deeper inquiry or formal hearing* should have been conducted to reconcile these differences" (my *italics*). The applicants did not specifically argue that the ESB should have conducted an oral hearing and as previously noted, never made a formal request for an oral hearing regarding the complaint when the matter was before the ESB. Nevertheless, the applicants' argument regarding the need for an oral hearing does not appear to have been specifically addressed in the Appeal Decision.

31. In its submission filed in this section 116 application, the applicants now appear to be arguing that the *Tribunal* should have conducted an oral hearing of the appeal (or perhaps should have referred the matter back to the Director of Employment Standards for the purpose of conducting an oral hearing): "…it was incumbent on the Tribunal Member to order an oral hearing to resolve the issues to ensure a fair, accurate, and non-arbitrary assessment of the evidence." While conceding that the Tribunal is not required to hold an oral hearing, the applicants say that this case involved competing stories that necessitated an oral hearing so that "each party can state its case fairly."

32. The applicants' argument on appeal was that the ESB should have held an oral hearing – or at least should have conducted "a deeper inquiry" (although the applicants never explained what a "deeper inquiry" might have entailed). The applicants, who have been represented by legal counsel throughout this entire matter, never applied to the Tribunal for an oral hearing of the appeal. That being the case, I do not believe it would be appropriate, at this late juncture, to "refer the matter back to the original panel or another panel" for purposes of conducting an oral hearing (see section 116(1)(b) of the *ESA*).

33. Further, and in any event, I reject the applicants' base position that an oral hearing was required because the vacation pay issue "involves a serious question of credibility." The delegate's finding that the complainant had a 30-day vacation entitlement "carryover" was, as noted at para. 67 of the Appeal Decision, based on the applicants' own internal records. The so-called "credibility issue" appears to reside solely within the applicants' own evidence. The complainant, for her part, consistently maintained throughout the investigation into her complaint that she had a vacation "carryover." I am not persuaded that a party is entitled to an oral hearing for the purpose of challenging its own previously submitted evidence.

Mistake of law and natural justice

34. The applicants' argument on this score, which concerns a statement made by the investigating officer in an email to the applicants' legal counsel, is essentially identical to that advanced on appeal. The Tribunal member, at paras. 86-92 of the Appeal Decision, fully described the applicant's argument and set out his reasons for rejecting it. I agree with, and adopt, the Tribunal member's reasons regarding this matter.

35. The investigating officer's statement regarding the complainant's vacation pay claim was contained in an email to the applicants' legal counsel dated October 13, 2022, in which the officer informed the applicants' legal counsel that the complainant would not withdraw her vacation pay claim: "She believes that she had 48 days of vacation remaining when she was terminated and was only paid out for 17 days. She is alleging she is owed another 31 days of vacation pay." The officer's October 13th email continues, with the officer providing an ill-advised opinion that she did not *believe* (*i.e.*, a statement of opinion from someone who was not the decision-maker) that the complainant would be awarded any additional vacation pay.

36. This latter statement had no force of law and did not constitute a determination of the complainant's vacation pay claim. The section 112(5) record includes several communications from the officer to the applicants that confirm the officer was merely gathering the parties' evidence and argument for the purposes of preparing a summary report, and that she would *not* be the final adjudicator of the complainant's claims.

37. I reject the applicants' assertion that the officer's statement was tantamount to an "assurance" that the complainants' vacation pay claim would ultimately be dismissed. Critically, the officer in her October 13, 2022 email specifically invited the applicants to provide further evidence corroborating its position that the complainant was not entitled to any additional vacation pay beyond the 26.04 days that were paid to her following her dismissal: "You may wish to provide additional wage statements for any vacation dates that are contentious to show that she was paid vacation pay for specific dates or that she continued to receive salary when she requested vacation time. Please provide the wage statements by 4pm October 18, 2022."

38. For the record, I also wish to note that in his written submission, legal counsel for the applicants incorrectly identified this email (which can be found at page 92 of the section 112(5) record) as having been sent on October 15, 2022, and that the deadline for reply was October 12, 2022.

39. In any event, the applicants' legal counsel replied to the officer by an email sent on October 18, 2022: "See attached paystubs for [the complainant's] last 8 weeks of her employment. I've also attached paystubs for the other contentious periods as set out in the attached spreadsheet from June 2017 onwards as I cannot obtain the records prior to this date." These are some of the records the delegate had before her when she was determining the complainant's unpaid vacation pay entitlement.

40. The IR was issued on November 30, 2022, and it itemized (at pages IR6 and IR7) the "agreed-upon facts" regarding the complainant's vacation pay claim:

> On March 9, 2020, the Complainant emailed the payroll manager, [name omitted], and asked how many vacation days she had available to use. [The payroll manager] replied

that she had 31 days carried over from previous years and 20 more for 2020. At the end of her employment, the Complainant was paid out 26.04 days of vacation pay.

41. The complainant's position regarding her vacation pay claim was summarized in the IR as follows (at page IR11): "With 48 days remaining and 26.04 days of vacation paid out at the end of employment, the Complainant believes she is entitled to an additional 21.96 days of vacation pay." At pages IR9-IR10, the officer detailed the applicants' evidence and recorded its final position that the complainant had, in fact, been "overpaid 6.96 vacation days." The officer also noted that the applicants had "provided the attached documentation to show their accounting of the vacation days accrued and taken, as well as wage statements covering most of the disputed days."

42. The IR thus clearly set out the parties' conflicting positions regarding the complainant's vacation pay entitlement claim. If the applicants had additional documents to support their position regarding the complainant's vacation pay claim, they should have provided them to the investigating officer either before the IR was issued, or in their counsel's responses to the IR filed on December 14, 2022, and January 10, 2023. I do not consider the officer's October 15, 2022, opinion regarding the merits of this claim to be a proper justification for the applicants' failure to provide further evidence to support their position, including, in particular, the evidence eventually submitted on appeal as "new evidence." As previously noted, I find that the Tribunal member correctly found that this latter evidence was not admissible under section 112(1(c) of the *ESA*.

SUMMARY

43. This application is essentially a reiteration of the arguments advanced and rejected on appeal. I am not satisfied that the Tribunal member erred in his treatment of the complainant's vacation pay claim, or in rejecting the applicants' "new evidence," or in his treatment of the investigating officer's opinion about the merits of the complainant's vacation pay claim. While the Tribunal member did not specifically address the applicants' request for an oral appeal hearing, I note that under section 103(d) of the *ESA* and section 36 of the *Administrative Tribunals Act*, the Tribunal is not required to hold an oral appeal hearing. In my view, for the reasons previously set out, the Tribunal was not required to hold an oral appeal hearing in this case, nor would it have been appropriate to refer the matter back to the Director for the purpose of holding an oral complaint hearing.

ORDER

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

/S/ Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal