Citation: Ashton College Ltd.
2025 BCEST 12

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 -

Ashton College Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

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| PANEL: | Kenneth Wm. Thornicroft |
| SUBMISSIONS: | Colin Fortes, on behalf of Ashton College Ltd. |
| FILE NUMBER: | 2024/157 |
| DATE OF DECISION: | January 29, 2025 |

# DECISION

## OVERVIEW

1. This is an application by Ashton College Ltd. ("Ashton College"), made pursuant to section 116 of the *Employment Standards Act* (*ESA*), for reconsideration of 2024 BCEST 101 (the "Appeal Decision").

2. In my view, this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, accordingly, it is dismissed. My reasons for reaching this conclusion now follow.

## PRIOR PROCEEDINGS

3. Ashton College operates an online career college. Ashton Education Ltd. ("Ashton Education") provides administrative and other support services to Ashton College. The complainant, "JK" (the "complainant") formerly worked for Ashton Education as an instructor.

4. JK's complaint was investigated and ultimately a delegate of the Director of Employment Standards ("delegate") issued a Determination (and accompanying "Reasons for the Determination" – the "delegate's reasons"). The Determination and the delegate's reasons were issued on May 27, 2024. The delegate made several findings, including:

- Ashton College and Ashton Education were a single employer as provided for in section 95 of the *ESA*;
- the complainant was an indefinite employee (not an independent contractor), and his employment spanned the period from March 14, 2013, to January 18, 2023;
- Ashton College failed to pay the complainant vacation pay that became payable during the wage recovery period (see section 80 of the *ESA*) as required by the *ESA*;
- Ashton College also failed to pay the complainant statutory holiday pay that was earned during the wage recovery period; and
- the complainant was dismissed without just cause and accordingly was entitled to section 63 compensation for length of service.

5. Following these findings, the complainant was awarded about $5,800 on account of vacation pay, section 63 compensation, and section 88 interest. Additionally, the delegate levied two separate $500 monetary penalties against Ashton College and Ashton Education based on the demonstrated contraventions of section 58 (vacation pay) and section 63 of the *ESA*.

6. Ashton College appealed the Determination, alleging that the delegate erred in law and that there had been a failure to comply with the principles of natural justice during the investigation process (see sections 112(1)(a) and (b) of the *ESA*).

7. While accepting that the complainant was an "employee" as defined in section 1(1) of the *ESA*, Ashton College alleged that the delegate erred in finding that he was continuously employed from

2013 to January 2023, and thereby entitled to vacation pay at the rate of 6% (rather than 4%), and 8 weeks' wages as compensation for length of service. Ashton College further asserted that, in fact, the complainant had been paid vacation pay as it was "blended" or otherwise included in his regular hourly wage. Ashton College also seemingly argued that the complainant did not qualify for any statutory holiday pay.

8. As for its "natural justice" ground of appeal, Ashton College claimed that the investigation was tainted by "bias" on the part of the investigator, that the investigation was not sufficiently thorough, and that the failure to hold an oral hearing constituted a breach of natural justice. Ashton College also asserted that the delegate ultimately issued the Determination based solely on hearsay evidence and thus it should be set aside.

9. Ashton College's appeal was dismissed and the Determination was confirmed as issued.

## THE APPLICATION FOR RECONSIDERATION

10. In a brief written submission, set out below, Ashton College challenges the Appeal Decision regarding the complainant's period of continuous service which, in turn, affected his entitlement to vacation pay and section 63 compensation. Ashton College says the following:

> The Panel Member…erred in law and fact by concluding that the [complainant] had been continuously employed by [Ashton College] since 2013 thereby entitling the [complainant] to compensation for length of service and vacation pay at the rate of 6% rather than 4%.
>
> The Panel Member erred in ignoring the fact that the [complainant] was employed under a series of short term contracts of employment which had a definite start and end date, that there were extended periods of time when the [complainant] did not receive short term contracts from [Ashton College] and there were instances when, after receiving short term contracts, these were cancelled due to a lack of enrolments which [the complainant] accepted without complaint. The fact that [the complainant] was employed under a series of short-term contracts pointed clearly to the fact that there was no continuous employment relationship between [Ashton College] and the [complainant].
>
> Furthermore, the Panel member erred in holding that successive short-term contracts over several years demonstrated an expectation of continuity by both parties. The contracts were clearly not schedules as argued by the [complainant] and this is clear from the language of the contracts entered into between the [Ashton College] and the [complainant].

## FINDINGS AND ANALYSIS

11. As noted above, Ashton College now concedes that the complainant was an "employee" for the purposes of the *ESA*, but contests the delegate's finding (upheld on appeal) that he was continuously employed as and from March 14, 2023 until his termination in mid-January 2023.

12. The complainant served as a "sessional instructor" with Ashton College teaching courses that were offered during a scheduled academic term, typically on a "one class per week" basis. Ashton College

asserted that each instructional term represented, in effect, a separate and independent fixed-term contract. The section 112(5) record includes a letter, dated March 14, 2013, from Ashton College to the complainant offering him "a position of Sessional Instructor for our Ashton Education Accounting programs," and further advised him that "courses will be allocated and you will be informed of the course allocations for the next cohort." As I understand the situation, prior to each term the complainant signed a "short-term teaching contract" which identified the course he would teach in the upcoming term and his compensation for teaching that course.

13. By letter dated June 10, 2015, Ashton College advised the complainant that he was being offered "an appointment to our faculty pool" which "does not guarantee a teaching contract with Ashton College." This June 10th letter also stated: "At any time during your inclusion in the faculty pool, you may terminate this arrangement or be terminated by Ashton College." On February 26, 2020, Ashton College sent the complainant a further "Addendum to Offer of Appointment" confirming an increase in his hourly rate. On January 12, 2021, Ashton College sent another letter to the complainant headed: "Offer of Appointment to the Communications in the Digital Workplace – Continuing Education Faculty Pool." The terms set out in the latter January 12th letter were largely the same as those contained in the earlier June 10, 2015, letter.

14. The parties' relationship appeared to continue until January 17, 2023, when Ashton College sent a letter to the complainant advising him that he was being "remove[d]…from instructing further classes."

15. There is nothing in the record to show that the complainant was terminated by Ashton College at any time prior to January 17, 2023. So far as I can determine, Ashton College never issued a Record of Employment to the complainant prior to January 17, 2023, nor did it ever pay him section 63 compensation (or give him written notice in lieu of payment) as would have been required if he were being terminated from his employment. The parties' relationship appears to have been an ongoing employment relationship with the complainant working on a part-time basis. I note that the *ESA* does not distinguish between full-time and part-time employment. Like many (perhaps even most) part-time employees, throughout the parties' employment relationship the complaint worked on an intermittent basis. However, a "break" of several days or even several weeks between work assignments, does not constitute, of itself, a termination of employment.

16. Ashton College's argument that the complainant was employed under a series of independent short-term contracts was rejected by the delegate, and again by the Tribunal on appeal. In particular, the delegate relied on the Tribunal's decisions in *Delphi International Academy et al*. (see BC EST # D166/02, BC EST # D426/02, and BC EST RD # 558/02)—involving a closely analogous situation—in determining that there was an ongoing employment relationship. On appeal, Ashton College reiterated its position that there was no "continuous" employment; however, this argument was rejected (see Appeal Decision at paras. 57-61). I fully agree with, and thus endorse, the Panel Member's reasoning on this point.

17. An application for reconsideration is assessed in light of the principles set out in the *Milan Holdings* decision, *supra*, which established a two-stage analytical framework. Under this framework, the applicant must, as a preliminary matter, show that there is a presumptively meritorious argument that the appeal decision should be varied or cancelled (for example: Is there a reasonable argument that the appeal decision is wrong in law?; or, Were there significant procedural justice failings

relating to the adjudication of the appeal?). If the applicant cannot meet this initial burden, the application will be summarily dismissed. If there is some presumptive merit to the application, the Tribunal will, after hearing from all parties, engage in a more searching assessment of the merits of application.

18. In this case, Ashton College has simply reiterated the very same argument it unsuccessfully advanced before the delegate, and then again on appeal, namely, that the parties were not in a "continuous" employment relationship. Ashton College has not presented any new evidence or argument which would call into question the Tribunal's ultimate finding on this issue. In my view, this application fails to pass the first stage of the *Milan Holdings* test and, on that basis must be dismissed. Further, and in any event, I consider that the Panel Member correctly decided the issue now raised in this application.

## ORDER

19. Pursuant to section 116(1) of the *ESA*, this application for reconsideration is dismissed and the Appeal Decision is confirmed.

*/S/Kenneth Wm.Thornicroft*

**Kenneth Wm. Thornicroft**
**Member**
**Employment Standards Tribunal**