Employment Standards TRIBUNAL

Citation: Shawn Christopher Neubauer (Re)
2018 BCEST 19

An appeal

- by -

Shawn Christopher Neubauer carrying on business as Diesel Monkey
(the "Applicant")

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE NO.: 2018A/7

DATE OF DECISION: February 21, 2018

DECISION

SUBMISSIONS

Shawn Christopher Neubauer — on his own behalf, carrying on business as Diesel Monkey

INTRODUCTION AND BACKGROUND FACTS

1. This is an application to extend the time for requesting an appeal of a determination and it is made pursuant to subsection 109(1)(b) of the *Employment Standards Act* (the "*ESA*") which reads as follows: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following…(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired."

2. The relevant facts may be briefly summarized. On October 20, 2017, Carrie H. Manarin, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination against the present applicant, Shawn Christopher Neubauer (the "Applicant"), pursuant to which the Applicant was ordered to pay a former employee (the "complainant") the total sum of $2,698.27 on account of unpaid wages and interest. The Determination was issued following an oral complaint hearing held on September 6, 2017.

3. Further, and also by way of the Determination, the delegate issued a single $500 monetary penalty (see section 98) against the Applicant based on his failure to comply with section 63 of the *ESA* (failure to pay compensation for length of service on termination of employment). Thus, the total amount payable under the Determination is $3,198.27.

4. On October 20, 2017, the delegate issued the Determination and her accompanying reasons (the "delegate's reasons"). The delegate's reasons indicate that the complainant worked as a mechanic for the Applicant – who operates on a commercial transport repair business known as "Diesel Monkey" – from March 4, 2015, to April 26, 2017. The complainant's hourly wage was $33.

5. The Applicant terminated the complainant, alleging he had "just cause" to do so (see subsection 63(3)(c) of the *ESA*) and, as such, was not obliged to pay the complainant section 63 compensation for length of service. However, based on the evidence before her, the delegate was not satisfied that there was just cause for dismissal and, accordingly, awarded the complainant two weeks' wages plus concomitant vacation pay and interest.

6. The Determination, at the bottom of the second and last page, contains a text box providing information about the appeal process. I have reproduced the information in the text box in full:

> **Appeal Information**
>
> Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on November 27, 2017.
>
> The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

7. Notwithstanding the clear directions contained in the Determination regarding the appeal process and appeal deadline (the latter presumably calculated in accordance with the "deemed service" provisions found in section 122 of the *ESA*), the Applicant did not file an appeal with the Tribunal until January 5, 2018. Thus, the Applicant now seeks an extension of the appeal period.

FINDINGS AND ANALYSIS

8. In *Niemisto*, BC EST # D099/96, the Tribunal identified several factors that should be taken into account when assessing whether the appeal period should be extended in a particular case:

- Is there is a reasonable and credible explanation for failing to file the appeal within the statutory time limit?
- Has the applicant demonstrated a genuine ongoing intention to appeal the Determination?
- If so, has this intention been brought to the respondents' (including the Director's) attention?
- Would a respondent party suffer undue prejudice if the appeal period were to be extended? and
- Is the appeal presumptively meritorious?

9. The Applicant's explanation for having filed a late appeal is set out, in full, below:

> Please be advised that we are requesting an extension to the appeal period, after the appeal period has expired, to January 5/2018. The reason why we are requesting this extension is because at the time the appeal was submitted we were new comers to this process and were unaware that the Director of Employment Standards and the Employment Standards Tribunal were two different government bodies. As a result, of our misunderstanding the appeal was only submitted to the Director of Employment Standards Fax #250-356-1886 [*Note*: this is the fax number for the Director's Victoria head office] on Nov 24/2017 prior to the appeal expiring. [*sic*]
>
> When we were subsequently advised that if you wish to file an appeal the form must be sent to the Employment Standards Tribunal in Vancouver, we assumed that the paper work we had submitted was not received by the Director of Employment Standards due to time delays and this paper was in the process of being distributed to all the required government bodies regarding the appeal.
>
> Please approve our extension and proceed with the appeal process as though the paper work had been submitted before the original deadline.

10. The Applicant has submitted a copy of his original fax dated November 24, 2017. The fax cover sheet indicates that it is addressed to the "Director of Employment Standards" and that there are 18 pages in total being transmitted. The pages include a letter, dated November 24, 2017, addressed to the Tribunal at its correct Vancouver address. The transmission also included an Appeal Form (Form 1) indicating that the appeal is based on a breach of the principles of natural justice (subsection 112(1)(b) of the *ESA*) – this form is dated October 24, 2017. In the accompanying November 24 letter (2 pages), the Applicant sets out his arguments that the delegate did not properly assess the evidence before her and that the complainant obviously "lied" regarding the events in question that precipitated his dismissal.

11. As noted above, the Determination was issued on October 20, 2017, and I presume that the Appeal Form was dated October 24, 2017, in error since all of the other documents in the Applicant's materials suggest that the appeal was erroneously filed with the Director of Employment Standards on November 24, 2017. The Applicant does not indicate when he first received the Determination; further, he does not indicate when he first learned that he had filed his appeal with the Director rather than the Tribunal, but I believe that it is reasonable to assume that this would have occurred relatively close in time to November 24, 2017; finally, he does not explain why there was a delay from the time he first filed his materials with the Director (presumably, on November 24, 2017) until he finally filed them with the Tribunal on January 5, 2018.

12. There is nothing in the material before me to indicate that the Applicant ever advised the complainant, prior to January 5, 2018, that he was intending to appeal the Determination. As of November 27, 2017, and not having been advised that the Applicant had filed a valid appeal of the Determination, the complainant would have been legitimately entitled to believe that he was the beneficiary of a final order for the payment of compensation for length of service.

13. There is also nothing in the material before me to indicate that the Applicant, after November 24, 2017, and prior to January 5, 2018, ever communicated with the Tribunal to confirm that his appeal had been properly filed. One wonders why he would not have done so, since over a month elapsed to January 5, 2018, and prior to that latter date he had not received any communication from the Tribunal confirming receipt of his appeal.

14. I am also troubled by the Applicant's explanation that he was "unaware" that the Tribunal was a separate and independent body from the Employment Standards Branch. Could the information in the text box (see above) found at the bottom of the second page of the Determination have been any clearer? – "The Employment Standards Tribunal *is separate and independent from* the Employment Standards Branch" (my *italics*). In addition, the text box included the Tribunal's website where one can find detailed information regarding the appeal process under a tab entitled "Appeals".

15. Finally, and with respect to the one asserted ground of appeal – breach of natural justice – I am unable to see how there was a breach in this case. The delegate presided at an oral complaint hearing where both parties were given an opportunity to present their own case and challenge the other party's evidence. There was conflicting evidence at the hearing and the delegate was thus required to evaluate the evidence and determine what was the more likely scenario. Making an adverse finding of fact against a party is not tantamount to breaching the principles of natural justice.

16. Turning more directly to the just cause issue before the delegate, the Applicant alleged that the complainant made several work-related errors, and was dishonest in relation to those errors, in a relatively short space of time prior to his dismissal. The Applicant's letter of dismissal, dated April 21, 2017, indicated that the complainant was being dismissed because he lied to the Applicant about a service issue relating to a customer's vehicle and on April 19, 2017, "left work early without advising your supervisor".

17. The complainant testified that with respect to the incident referred to as the "trailer hitch" matter, he undertook a proper repair (and there was no evidence before the delegate to the contrary) and that the hitch might have failed (it detached during transit) due to other reasons, for example, the vehicle hitting a bump in

the road. With respect to the testing of a "turbo booster" (which was jointly undertaken with another employee), although he did not have the proper equipment to properly test the part (and he advised the Applicant accordingly), he did so with the equipment at hand and believed (as did the other employee) that the booster was working properly. Finally, regarding his leaving work early on April 19, the complainant testified he left work about 45 minutes early because: i) he was not feeling well (and had been unwell for a few days by that point), and ii) had to get to the airport in order to board a flight that had been booked for some three months. The complainant speculated that his "just cause" termination was a pretext because the Applicant had hired a new mechanic at a lower wage that was being paid to the complainant. The delegate made no affirmative finding in that regard. Of course, the Applicant would not have been required to pay any section 63 compensation for length of service had he simply given the complainant two weeks' written notice of termination.

18. The delegate made certain credibility findings adverse to the Applicant and, in particular, she was not satisfied, after considering the evidence, that the Applicant had *bona fide* concerns about the complainant's performance, given that the Applicant did not take any immediate steps to address the alleged performance problems when he first learned of them and, indeed, continued to permit the complainant to work on other customers' vehicles. She preferred the complainant's version of events, finding it to be more consistent with several undisputed facts. Although the delegate characterized the complainant's behaviour in leaving work early on April 19 to be "insubordinate", she was not persuaded – and nor am I – that this single event, when set against the complainant's otherwise good work record, justified summary dismissal without compensation. Without using this terminology, the delegate was no doubt persuaded that dismissal was a disproportionate response to the misconduct in question (on this latter point, see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161).

19. As noted above, the Applicant has characterized the delegate's treatment of the disputed evidence before her as a breach of natural justice; however, I am not persuaded that there is any merit to the "natural justice" ground of appeal. In my view, it is more accurate to say that the Applicant's principal challenge to the Determination is based on an alleged error of law (subsection 112(1)(a) of the *ESA*) – namely, that the delegate erred in law in finding that the Applicant failed to demonstrate that he had just cause for dismissal (or, more correctly, the delegate made an error of mixed fact and law – see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

20. Although "error of law" is not the ground of appeal the Applicant asserted on his Appeal Form, I am nonetheless of the view that this is the more appropriate ground of appeal given the assertions advanced by the Applicant in his appeal documents. Accordingly, I will also address this ground of appeal (see *Triple S Transmission Inc.*, BC EST # D141/03).

21. The question of whether an employer has "just cause" for dismissal is one of mixed fact and law and, when evaluating whether there is cause in a given case, the decision-maker must first determine the proper legal standard and then, second, make findings of fact and then, third, apply the proper legal standard to the facts at hand. The decision-maker could fall into error in misstating the governing legal principles, or in finding facts without a legitimate evidentiary foundation, or in making a "palpable and overriding error" in applying the proper legal standard to the facts at hand. In the instant case, the delegate applied the proper legal standard and, in the face of conflicting evidence made certain findings of fact, none of which I would characterize as erroneous as a matter of law. Finally, I see no error in the delegate's ultimate conclusion that

the Applicant had failed to prove just cause (and, it should be noted, in a just cause case, the burden of proving cause lies on the employer).

Summary

22. Thus, and by way of summary, after considering the *Niemisto* factors, I am not prepared to exercise my discretion to extend the appeal period in this case.

23. However, even if I have erred in not extending the appeal period, I would nonetheless dismiss this appeal because, in my judgment, it has no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). In my view, the delegate did not fail to observe the principles of natural justice in making the Determination and, further, it cannot be said that her decision is tainted by legal error.

ORDERS

24. The Applicant's application to extend the time for requesting an appeal is refused.

25. Pursuant to subsections 114(1)(b) and (f) of the *ESA*, this appeal is dismissed.

26. In accordance with subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $3,198.27 together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal