Employment Standards TRIBUNAL

Citation: C. Keay Investments Ltd. (Re)
2018 BCEST 5

An appeal

- by -

C. Keay Investments Ltd. carrying on business as Ocean Trailer
("Ocean Trailer")

- 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: David B. Stevenson

FILE NO.: 2017A/138

DATE OF DECISION: January 22, 2018

DECISION

SUBMISSIONS

Jackie Grant	on behalf of C. Keay Investments Ltd. carrying on business as Ocean Trailer

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), C. Keay Investments Ltd. carrying on business as Ocean Trailer ("Ocean Trailer") has filed an appeal of a Determination issued by Tamara Henderson, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on October 4, 2017.

2. The Determination found Ocean Trailer had contravened Part 8, section 63 of the *ESA* in respect of the termination of Darryl E. Wilson ("Mr. Wilson") and ordered Ocean Trailer to pay Mr. Wilson wages in the amount of $12,652.94, an amount that included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $13,152.94.

3. This appeal is grounded in error of law by the Director in making the Determination. Ocean Trailer seeks to have the Determination varied by the Tribunal or cancelled and referred back to the Director.

4. The Appeal Form was accompanied by a request to extend the time period for filing an appeal.

5. In correspondence dated November 27, 2017, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and advised that following such review all or part of the appeal might be dismissed.

6. The record has been provided to the Tribunal by the Delegate. A copy has been delivered to Ocean Trailer and Mr. Wilson and an opportunity has been provided to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:*
>
> *(a) the appeal is not within the jurisdiction of the tribunal;*
>
> *(b) the appeal was not filed within the applicable time limit;*

> *(c) the appeal is frivolous, vexatious or trivial or gives rise to an abuse of process;*
>
> *(d) the appeal was made in bad faith or filed for an improper purpose or motive;*
>
> *(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;*
>
> *(f) there is no reasonable prospect that the appeal will succeed;*
>
> *(g) the substance of the appeal has been appropriately dealt with in another proceeding;*
>
> *(h) one or more of the requirements of section 112(2) have not been met.*

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Wilson will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether the statutory appeal period should be extended and, coincidently, whether there is any reasonable prospect the appeal will succeed.

ISSUE

9. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

10. Ocean Trailer is in the business of renting, leasing, selling and repairing commercial trailers.

11. Mr. Wilson was employed by Ocean Trailer from July 5, 2005, to February 10, 2017, when he was terminated. At the time of his termination, and from April 2010, Mr. Wilson held the position of Service Writer/Coordinator at a rate of pay of $76,250.00 a year.

12. On February 9, 2017, Mr. Wilson was engaged in an incident in which he yelled and swore at an employee in the presence of other employees and some customers. He was terminated the following day.

13. The termination letter, which is found in the record and is dated February 10, 2017, states in part:

> On numerous occasions you have been spoken to and warned about your temper and abusive language towards fellow co-workers. Harassing and bullying the staff will not be tolerated. Therefore effective immediately we no longer require your services.

14. Mr. Wilson filed a complaint alleging Ocean Trailer had contravened the *ESA* by failing to pay overtime wages and compensation for length of service. The claim for overtime wages was settled. The claim for compensation for length of service was investigated and, not being resolved, was the subject of a complaint hearing conducted by the Delegate.

15. Ocean Trailer contended Mr. Wilson was terminated for just cause. At the complaint hearing, Ocean Trailer supported its case with evidence of a series of disciplinary reports concerning Mr. Wilson and evidence of the incident giving rise to his termination. Ocean Trailer presented four witnesses and five written, but unsworn,

statements, to which the Delegate gave minimal weight generally and disregarded where the statement was presented for the truth of its contents.

16. Mr. Wilson contended Ocean Trailer did not have just cause to terminate him and, in support of that contention, provided several documents and gave evidence on his own behalf.

17. The Director found Ocean Trailer had failed to show there was just cause to terminate Mr. Wilson and awarded him compensation for length of service in the amount set out in the Determination.

18. The statutory appeal period expired at the end of the working day November 13, 2017. This appeal was not delivered to the Tribunal until November 22, 2017. Written reasons and argument supporting the appeal were delivered with the appeal; an additional submission, supplementing that delivered to the Tribunal on November 22, 2017, was submitted to the Tribunal on December 15, 2017.

ARGUMENT

19. The submissions of Ocean Trailer address two matters: the request for an extension of the appeal period and the merits of their appeal.

20. On the request for an extension, Ocean Trailer submits the appeal was e-mailed to the Tribunal within the appeal period but was not delivered to the Tribunal because it was too large. Ocean Trailer has indicated it was their intention to appeal the Determination and that a copy of the appeal was delivered to the Employment Standards Branch within the time limit.

21. On the merits of the appeal, Ocean Trailer submits the Director erred in law in finding it had not established just cause for terminating the employment of Mr. Wilson.

22. It is unnecessary to outline all elements of the argument made by Ocean Trailer. The sum and substance of the argument is that the Director erred in law in applying the just cause standard and deciding Ocean Trailer had not established there was just cause to terminate Mr. Wilson.

23. More specifically, Ocean Trailer says the Director made three errors of law:

1. Failing to apply the proper legal test/analysis for just cause;
2. Failing to apply the proper contextual analysis to Mr. Wilson's conduct; and
3. Failing to consider the nature of the employer's business and its workplace requirements.

ANALYSIS

24. The *ESA* imposes an appeal deadline on appeals to ensure they are dealt promptly: see section 2(d). The *ESA* allows an appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend the time limit for filing an appeal:

> Section 109(1)(b) of the *Act* provides the Tribunal with discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

25. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria must be satisfied to grant an extension:

i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;

iii) the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

v) there is a strong *prima facie* case in favour of the appellant.

26. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can be considered. The burden of demonstrating the existence of such criteria is on the party requesting an extension of time. No additional criteria have been advanced in this appeal. The Tribunal has required "compelling reasons" for granting of an extension of time: *Re Wright*, BC EST # D132/97.

27. In this case, I find the length of the delay is not inordinate.

28. The explanation for the delay is credible.

29. I find there was a genuine and ongoing intention to appeal the Determination and the Director, at least, was aware of this intention.

30. Notwithstanding the *ESA* contemplates expeditious resolution of wage complaints and an employee who has been denied wages should not be compelled to wait an unreasonable period of time to receive what has been earned and is payable under the *ESA*, I find Mr. Wilson will not be further prejudiced by granting Ocean Trailer an extension.

31. When considering the *prima facie* strength of the case presented by Ocean Trailer in this appeal, the Tribunal is not required to reach a conclusion that the appeal will fail or succeed, but to make an assessment of the relative merits of the grounds of appeal chosen against established principles that operate in the context of those grounds. The analysis under section 114(1) (f) is similar. If I find there is merit in the appeal, I would grant an extension of the appeal sufficient to make the appeal timely.

32. The request for an extension of the appeal period, as well as whether the Tribunal will dismiss the appeal at this stage, depends on a consideration of whether there is merit to the appeal and it has a reasonable prospect of succeeding.

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (a) the director erred in law;
>
> (b) the director failed to observe the principles of natural justice in making the determination;
>
> (c) evidence has become available that was not available at the time the determination was being made.

34. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

35. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

36. The grounds of appeal listed above 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 findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

37. The question of whether an employee has been dismissed for just cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of just cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact counsels deference. As succinctly expressed in *Britco*, *supra*, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

38. The principles of just cause that have been developed under the *ESA* are well-established, have been consistently applied and are expressed as follows:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;

2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

   i. A reasonable standard of performance was established and communicated to the employee;

   ii. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

   iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

   iv. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

39. I will note here that while the Tribunal has been guided by the common law on the question of just cause, the principles of just cause used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment.

40. The Tribunal has also been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract" (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

41. I am entirely satisfied the Delegate applied the correct principles to the question of just cause.

42. The Delegate considered the principle expressed in point 2, above: whether Ocean Trailer had established just cause based on the cumulative effect of Mr. Wilson's disciplinary history and found they had not. That finding, which was supported by the evidence, is summarized in the Determination at page R16:

> … I accept that the Complainant was warned that a further verbal confrontation with Mr. Penner or another staff would result in a suspension without pay; any confrontation after that would result in a termination. In other words, the Complainant would not have known that a further occurrence would result in his dismissal – there was no clear and unequivocal warning from the Employer to that effect.

43. The Delegate also considered whether the misconduct exhibited by Mr. Wilson on February 9, 2017, was sufficient in the circumstances to justify summary dismissal and found it was not.

44. In analyzing that question, the Delegate considered whether Mr. Wilson's conduct, assessed on an objective standard, evidenced a wilful repudiation by Mr. Wilson of the employment relationship. In doing so, the Delegate sought to balance the seriousness of the impugned conduct with the sanction imposed in the particular circumstances relevant to the dismissal. This sort of analysis is exactly what is required by the principles established under the *ESA* on a question of just cause. In *The Piping Industry Apprenticeship Board*, BC EST # D029/13, at para. 74, the following observation by the Tribunal, one echoed in many other Tribunal decisions, confirms the correctness of the approach applied by the Delegate in this case:

> By way of general comment, the onus on the employer to prove that it was justified in summarily dismissing an employee for just cause is a high one. Proportionality underlies the contextual approach which must be undertaken when determining this issue. In *Nardulli*, *supra*, the court referred to a previous decision of its own, where the learned judge made the following comments:
>
> > The approach to assessing whether the employee's conduct provides cause for dismissal is objective – that is, the employer's view that the conduct is sufficient to establish cause (or the employee's view that it is not) – is not determinative. However, the approach is also contextual: the court must consider "the particular circumstances surrounding the employee's behaviour … factors such as the nature and degree of the misconduct, and whether it violates the 'essential conditions' of the employment contract or breaches an employer's faith in an employee" (*McKinley v. B.C. Tel*, 2001 SCC 38, [2001] 2 SCR 161, at para.39). This approach balances the employer's right to dismiss an employee for cause with the importance of both the work and the manner of the dismissal to an employee's self-worth.

45. For my part, I am doubtful whether any decision maker would find the momentary outburst by Mr. Wilson, that comprised angrily yelling a particular expletive toward another employee several times, unaccompanied by any verbal or physical threat or assault, was sufficiently severe to justify summary dismissal. It bears noting the evidence provided to the Delegate from the employee who was the target of the outburst was that he "did not find this incident to be atypical as compared to others" and while he "did not feel good about being yelled at", did not feel physically threatened or afraid.

46. As well, the fact Ocean Trailer's responses to the several previous incidents involving Mr. Wilson's combative nature had evoked no more than verbal and written warnings and, as of February 2017, had only escalated to the point of a threatened one-week suspension obviates the assertion that his conduct on February 9, 2017, could be characterized as a violation of an "essential condition" of his employment. This point is noted at page R16 of the Determination: "the employment relationship was able to be successfully carried on after other such incidents – there is no indication as to why it couldn't be in this case".

47. There is nothing in the Determination that deviates from the legal principles developed under the *ESA* on the question of just cause or the analysis the Director was required to undertake.

48. Since Ocean Trailer has not shown the Director erred in determining what legal principles are applicable, it cannot allege that the Director erred by applying the incorrect legal test to the facts. Nor can it allege the Director erred in applying the correct test to the facts Ocean Trailer does not contest.

49. Provided the established principles have been applied, and I find they were, a conclusion on just cause is essentially a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to alleged errors of fact does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

50. I do not perceive Ocean Trailer argues the Director committed an error of law by acting without evidence, but if my perception is incorrect, and Ocean Trailer does assert the Director made findings of fact without evidence, I would not accept this assertion. The record indicates both parties were comprehensive in presenting factual support for their respective positions. There was ample evidence before the Delegate on the question of just cause. The Delegate was obliged to and did consider, evaluate and weigh the evidence provided. Although she did not assess the evidence in the manner advocated by Ocean Trailer, her assessment was based on the evidence and she did not err in law by making any finding that was unsupported by evidence. I find that the Director did not err in law by reaching conclusions without any evidence.

51. Based on the above, it only remains to consider whether the Director erred in law under the fourth part of the definition of error of law.

52. This question, framed in the words used in the definition is whether the Director acted on a view of the facts that could reasonably be entertained. That test for establishing such an error of law has been stated to be as follows:

> … that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" … (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in British Columbia (*Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272)

53. I am unable to find that the conclusions of the Delegate which are challenged by the Employer are based on a view of the facts which could not reasonably be entertained. Applying the above test, I am satisfied the conclusion reached by the Delegate was one that was entirely justified on the evidence presented. Ocean Trailer has not shown there was an error of law in how the Director assessed the evidence to reach the finding on the question of just cause.

54. At its core, this appeal does no more than challenge the Director's conclusion on the question of just cause resulting from an application of the facts to legal principles developed under the *ESA* on that question, submitting the evidence does not support the conclusion reached, the Director erred in assessing the facts and the factual context and seeks to have the Tribunal reassess the factual context and reach a different result.

55. To reiterate, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Ocean Trailer. The Tribunal is reluctant to venture into a re-examination of the conclusions of the Director absent demonstrated reviewable error. Ocean Trailer has not established the Director committed an error of law in finding Ocean Trailer had failed to establish just cause to terminate Mr. Wilson.

56. I will make one final comment. In its appeal, Ocean Trailer submits the Director erred in law by failing "to consider the nature of the Employer's business and its workplace requirements". This submission alludes to the "safety sensitive" nature of Ocean Trailer's business and the requirements under health and safety legislation to maintain a harassment and bullying free workplace.

57. There are three points to be made about this submission.

58. First, I do not accept the contention that the Director "failed to consider the nature of the Employers' business and its workplace requirements". The Determination contains several references to what can be described as the "culture" of the workplace. The effect of that evidence is substantially captured in the comment found at page R16 of the Determination, stating, "[t]his is conduct that occurred from time to time, both on the Complainant's part and as well as by other employees and even managers".

59. Second, based on my review of the Determination and the record, this submission was not made to the Director and should not be considered in this appeal. In any event, it adds nothing to the context, as "harassing and bullying the staff" was included in the February 10, 2017, termination letter and was a component of the assessment of just cause made by the Director.

60. Third, this submission is made "in the air", unsupported by any objective evidence that the operations of Ocean Trailer are "safety sensitive", that Mr. Wilson was in a "safety sensitive" position, that Ocean Trailer was responding to some overriding statutory mandate in terminating Mr. Wilson, that Ocean Trailer had fully conformed to the "reasonable steps" recommended by WorkplaceBC for developing and implementing procedures to address workplace harassment and bullying or that Ocean Trailer had ever treated any previous recorded misconduct of Mr. Wilson as conduct that severely undermined the safety of the workplace.

61. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (f) of the *ESA*.

62. On the same basis, I find Ocean Trailer has not shown a strong *prima facie* case that would warrant an extension of the appeal period.

63. The appeal is dismissed.

ORDER

64. Pursuant to section 115 of the *ESA*, I order the Determination dated October 4, 2017, be confirmed in the amount of $13,152.94, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal