Employment Standards TRIBUNAL

Citation: Leon Milando (Re)
2018 BCEST 40

An appeal

- by -

Leon Milando
("Milando")

- 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: Rajiv K. Gandhi

FILE NO.: 2018A/19

DATE OF DECISION: April 24, 2018

DECISION

SUBMISSIONS

Leon Milando	on his own behalf
Janko Predovic	on behalf of the Director of Employment Standards

OVERVIEW

1. Leon Milando (the "Appellant") lodged a complaint with the Employment Standards Branch on October 20, 2017, alleging liability on the part of Villa Roofing & Sheet Metal Ltd. (the "Employer") to pay compensation for length of service in the amount of $9,653 according to sections 63(1) and 63(2) of the *Employment Standards Act* (the "*ESA*").

2. The complaint was investigated by a delegate (the "Delegate") of the Director of Employment Standards under authority of section 76 of the *ESA*, and dismissed by way of a written determination issued on January 5, 2018 (the "Determination").

3. In this appeal, the Appellant asserts that the Delegate failed to observe the principles of natural justice when making the Determination – a basis for appeal permitted under section 112(1)(b) of the *ESA*. It is fair to say, I think, that the Appellant wants this Tribunal to make an order requiring the Employer to pay the amount that the Appellant believes he is due.

4. I have considered the Determination, the Director's record of proceedings received on February 20, 2018, and the Appellant's written submissions to the Tribunal received on February 7, 2018, February 21, 2018, and March 20, 2018.

5. For the reasons that follow, I dismiss this appeal according to section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

FACTS AND ANALYSIS

6. The Appellant was employed as a foreman with the Employer, a roofing company, between February 1, 2010, and September 22, 2017. The Appellant's dismissal resulted from a poor driving record that persisted, the Employer says, even though standards were set, warnings were given, and opportunities for improvement provided.

7. The Appellant appears to acknowledge his sub-par driving record, but minimizes its severity, and denies that he was ever warned about the potential loss of employment or, in fact, that he had to comply with the Employer's policies relating to the operation of a motor vehicle. He argues that the termination caught him by surprise.

8. Presented with evidence, corroborated both in documents and statements from five different witnesses, that:

(a) the Employer had, and the Appellant was aware of, the Employer's "Safety Program for Company Vehicles";

(b) the Appellant received warnings, both written and verbal, for reckless driving incidents occurring on March 30, 2017, and April 11, 2017;

(c) the Appellant was warned after each infraction that termination would ensue in the event of a further or continued violation of the Employer's "Safety Program for Company Vehicles";

(d) three separate complaints were received concerning an incident of reckless driving on September 20, 2017,

the Delegate engaged in an analysis following the one adopted by the Tribunal in *Silverline Security Locksmith Ltd.*, BC EST # D207/96, and concluded that the Appellant was dismissed with just cause.

9. Sections 76 and 77 of the *ESA* confers upon the Director and, by extension, the Delegate, a duty to receive, review, and investigate complaints alleging contraventions of the *ESA*. Natural justice requires the Delegate to exercise that duty fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

10. Fairness means that in an investigation, both employer and employee should have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

11. I am unable to discern in the Appellant's submission any substantive argument that, in investigating this matter, receiving evidence, or passing judgment, the Delegate acted unfairly.

12. To succeed in this appeal, the Appellant must demonstrate *the Delegate's* failure to observe the principles of natural justice. I emphasize that, in an appeal under section 112(1)(b) of the *ESA*, the breach must "belong" to the Delegate because, in all of his submissions, the Appellant seems intent on re-arguing facts with a particular focus on what he says is a concerted effort on the part of the Employer's staff to orchestrate his dismissal.

13. An appeal is not a *trial de novo*. It is not my function to make findings of fact or assess the credibility of witnesses in place of, or in addition to, findings made by the Delegate. My ability to interfere with the Delegate's findings of fact is limited to circumstances where the Appellant has established, on a balance of the probabilities, that "a reasonable person, acting judicially and properly instructed as to the relevant law…" would not have reached the same conclusion (see *3 Sees Holdings Ltd.* BC EST # D041/13, at paragraph 27).

14. Given the evidence presented, I am satisfied that the Delegate's findings of fact are reasonable.

15. In my opinion, the Appellant has failed to offer a plausible basis upon which I could properly say that the Delegate's factual conclusions were patently unreasonable, that the Delegate acted unfairly, or that there was a breach of some other principle of natural justice.

16. Accordingly, I decline to vary the Determination.

ORDER

17. This appeal is dismissed under section 114(1)(f) of the *ESA*, and the Determination confirmed under section 115(1)(a).

Rajiv K. Gandhi
Member
Employment Standards Tribunal