Employment Standards TRIBUNAL

Citation: Gaspar, Najera, Phan, Simon and Villahermosa (Re)
2018 BCEST 69

Applications for Reconsideration

- by -

Leonila Gaspar, Daria Najera, Erlinda Phan, Jane Simon and Nida Villahermosa
(the "Applicants")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NOS.: 2018A/57, 2018A/58, 2018A/59, 2018A/60 and 2018A/61

DATE OF DECISION: July 11, 2018

DECISION

SUBMISSIONS

Blake Scott, LSLAP	on behalf of Leonila Gaspar, Daria Najera, Erlinda Phan, Jane Simon and Nida Villahermosa

OVERVIEW

1. This is an application by Leonila Gaspar, Daria Najera, Erlinda Phan, Jane Simon and Nida Villahermosa (collectively, the "Applicants") for a reconsideration of Tribunal Decision 2018 BCEST 48 (the "Original Decision"), issued by the Tribunal on May 1, 2018. Although the Applicants filed separate applications, they are essentially identical, advancing the same arguments in support of their requests for Reconsideration.

2. Ross Saito Enterprises Ltd. carrying on business as Canadian Tire ("Canadian Tire") operates a Canadian Tire store in Vancouver at which the Applicants were employed. Four of the Applicants were employed as cashiers and one was employed as a sales associate. Their employment was terminated in July 2016 following Canadian Tire's discovery of a parking fee reimbursement scheme involving a number of employees, including the Applicants and three janitors.

3. Canadian Tire had a policy of reimbursing customers who purchased at least $15 worth of merchandise $2.25 for one hour of parking. Canadian Tire discovered and investigated a scheme in which it was alleged that discarded parking stubs were collected and brought to cashiers for reimbursement. Following the investigation, Canadian Tire terminated the employment of the employees, including the Applicants and the janitors, for their involvement in the scheme.

4. The Applicants filed complaints alleging that Canadian Tire had contravened the *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("*ESA*") in failing to pay them compensation for length of service.

5. A delegate of the Director of Employment Standards investigated the complaints. The investigation consisted of, among other things, interviews with the Applicants and other Canadian Tire employees, including the manager who conducted the internal investigation and one of the janitors, Albert Moreno. Although counsel for both Canadian Tire and the Applicants requested an oral hearing, the delegate determined that the complaints could be determined through an investigative process.

6. On September 22, 2017, the delegate issued a Determination concluding that the Applicants' employment had been terminated for cause and that Canadian Tire had not contravened the *ESA*. The delegate wrote:

> Considering all of the evidence, based on a balance of probabilities, I accept the Cashiers did knowingly process and facilitate fraudulent parking reimbursement transactions and I find that that conduct caused irreparable damage to the employment relationship.

7. The Applicants appealed the Determination to the Tribunal on the grounds that the Director erred in law, specifically in finding that their employment had been terminated for cause, and in his application

of the law on credibility. The Applicants also argued that the delegate failed to comply with the principles of natural justice in failing to hold an oral hearing as requested rather than conduct an investigation because credibility was central to the delegate's findings. The Applicants also argued that the delegate failed to comply with natural justice in not providing their representative with interview notes of an employee whose employment had also been terminated but who was not represented by LSLAP.

8. The Tribunal Member dismissed the appeal under section 114(1) of the *ESA* after concluding that the appeal had no reasonable prospect of succeeding.

ISSUE

9. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

10. The Applicants seek reconsideration of the Original Decision, arguing that the Member erred in law in applying the wrong test for just cause, repeating the error of the delegate in confirming the Determination. While the Applicants agree that the question of whether an employee has been dismissed for just cause is one of mixed law and fact, they argue that a question of mixed fact and law may give rise to a reviewable error where a question of law can be extricated that has resulted in the error.

11. The Applicants say that the delegate, followed by the Member, applied the fourth part of the test in *Kruger* (BC EST # D003/97), the leading Tribunal decision on principles of just cause dismissal, which states that, in exceptional circumstances, a single act of misconduct may be sufficiently serious to justify summary dismissal. The Applicants contend that, to justify summary dismissal in those circumstances, the misconduct must be "serious, wilful and deliberate" (*Carol F. Anderson*, BC EST # D172/01) which the delegate did not find.

12. The Applicants argue that the delegate did not find actual knowledge of the parking reimbursement scheme; rather, his finding that the cashiers "were aware or ought reasonably to have been aware" fell short of the clear and cogent evidence standard. The Applicants argue that the only way the alleged misconduct of the Applicants could be serious wilful and deliberate was if they knew that the janitors obtained the tickets fraudulently and proceeded to reimburse the janitors nevertheless, but no such finding was made.

13. The Applicants also submit that the Member failed to comply with principles of natural justice by confirming the delegate's decision not to hold an oral hearing and not to provide interview notes of the Cashier not represented by LSLAP.

14. Relying on *Baker v. Canada (Minister of Citizenship and Immigration)* ([1990] 2 S.C.R. 817) and the Tribunal's decision in *Re Pacific Ice Co.*, BC EST # D174/96, the Applicants argue that failure to proceed by way of an oral hearing where credibility is a key issue can constitute a breach of natural justice. Counsel contends that one of the central issues before the delegate was whether the evidence of the complainants or Mr. Moreno, one of the janitors, was more credible. While the Applicants acknowledge the Tribunal's limited authority to review the credibility of the parties, they submit that the delegate's analysis and reasons for preferring the evidence of one party over another must be legally sound and adequate.

15. The Applicants argue that the delegate's failure to disclose relevant evidence can be a breach of natural justice.

16. Finally, the Applicants submit that there is an arguable case of sufficient merit to allow for the substantive issues raised on reconsideration to be addressed.

THE FACTS AND ANALYSIS

17. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides

> (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

1. The Threshold Test

18. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*."

19. In *Milan Holdings*, BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

20. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The Member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;

- Some significant and serious new evidence has become available that would have led the Member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss,* BC EST # D122/96*)*

21. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

22. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

23. In *Valoroso*, BC EST # RD046/01*,* the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> … the *Act* creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

24. There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

Analysis and Decision

25. The Applicants have failed to demonstrate that this is an appropriate case for the exercise of the Tribunal's Reconsideration power.

26. The Applicants have not demonstrated that the Member failed to comply with the principles of natural justice. The Member carefully reviewed the submissions of the Applicants, which were made by LSLAP and determined that the appeal had no reasonable prospect of succeeding. In doing so, he clearly and fully considered all of their arguments.

27. In dismissing the Applicant's argument that the delegate erred in not holding an oral hearing, the Member wrote:

> The Director has discretion over how a complaint will be addressed. There is no entitlement for any party to an oral hearing before the Director. Whether one, or both, parties would prefer to have an oral hearing is not particularly relevant. The question is whether the refusal to conduct

> an oral hearing, in the circumstances of the particular case, amounted to a breach of the principles of natural justice.
>
> Issues of credibility seem to create particular problems when considering if a party was denied fair process by the decision of a delegate to deny an oral hearing. It is fair to say that many, if not most, of Determinations are decided on an assessment of the credibility of the evidence presented by the parties to a complaint. As acknowledged by the Director this was one of those many cases. The Director is the decision-maker in the first instance and is the first to hear what people – witnesses - have to say. It is not for the Tribunal to second guess a finding of credibility that is otherwise grounded in the evidence before the Director and adequately reasoned but the Tribunal will, where called upon, decide whether it was or was not reasonable for the Director to reach conclusions on credibility using the complaint process adopted. In this case, I am satisfied that it was.
>
> The Tribunal will only compel an oral hearing where the case involves a serious question of credibility on one or more key issues, or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly. The concern of the Tribunal is not for perfect or idealized justice, but for ensuring the complaint process adopted by the Director is one where each side has been given a meaningful opportunity to be heard and there has been a full and fair consideration of the evidence and issues. (paragraphs 50 – 52) [My emphasis]

28. The Member found that the Applicants had provided no evidence demonstrating that the process adopted by the delegate "denied them the procedural protections reflected in section 77 of the *ESA*" as outlined in Tribunal decisions including *Imperial Limousine Service Ltd.*, BC EST # D014/05.

29. I agree with the Member's analysis. The argument that the Member failed to comply with the principles of natural justice by finding no error in the delegate's decision to decide the matter through the investigative process is misplaced. In a reconsideration application, the Applicants must establish that the Member, not the delegate, failed to comply with natural justice. There is absolutely no evidence in support of that proposition.

30. Similarly, I find no evidence that the Member misunderstood a significant issue or that the decision is not consistent with other decisions based on similar facts. In my view, the Member both understood the issues and arrived at a conclusion which is consistent with other Tribunal decisions.

31. With respect to the Applicants' submission that the delegate erred in law in applying the principles of just cause, the Member held that the question of whether an employee has been dismissed for cause is one of mixed law and fact, and one which counsels deference to a decision of the Director. After reviewing the Tribunal's jurisprudence on just cause, including *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd*. (BC EST # D643/01, Reconsideration denied BC EST # D092/02) the Member found that he was "entirely satisfied the Director applied the correct principles to the question of just cause."

32. The Member wrote:

> The totality of the evidence strongly suggests each of the Appellant cashiers voluntarily participated in the scheme knowing it was dishonest. That finding is made by the Director at

> page R15 of the Determination on the evidence presented and accepted and I find nothing in the appeal that detracts from this finding or shows it to be unsupportable.
>
> The representative for the Appellants also argues the Director did not find the misconduct of the Appellants to be "serious, wilful and deliberate" which he submits is a prerequisite to summary dismissal. While those words are not specifically used in reference to the dishonest conduct of the Appellants, the finding made by the Director, viewed in context, clearly describes conduct that is in every relevant way "serious, wilful and deliberate."
>
> Consistent with the endorsement of a contextual approach to assessing just cause for dismissal, the Director considered whether the nature of the dishonesty of the Appellants was sufficiently serious to warrant dismissal and found that it was. Based on the evidence provided, and accepted, by the Director, it is difficult to find fault with the conclusion of the Director that dismissal was an appropriate response to the dishonest conduct of the Appellants; that each of the Appellants had violated an essential condition of the employment which was impossible to reconcile with a continuation of that employment. (paragraphs 35 – 37)

33. The Member rejected the Applicants' arguments that a "higher standard of proof" was required when alleging a serious offence, noting that the only standard of proof in the *ESA* was that of a balance of probabilities. The Member also found that the delegate was fully aware of the length of employment of each of the Applicants, and stated that there was "no overriding principle that a long-term employee may not be terminated for dishonesty that strikes at the heart of the employment relationship." In my view, this statement is consistent with Tribunal decisions and the common law.

34. In his assessment of the Applicants' argument on the issue of whether the delegate erred in assessing the credibility of competing evidence, the Member wrote that what the Applicants actually challenged was not "whether the Director applied the correct legal test, but whether in applying the legal test to the facts, the Director reached the correct result" and that the Applicants' disagreement with the delegate's decisions on credibility does not amount to an error of law unless such error arises from the findings of fact. The Member found no such error of fact.

35. In addressing the Applicants' argument that the delegate failed to comply with principles of natural justice in failing to disclose notes of the evidence provided by another complainant who was not represented by LSLAP, the Member noted that a summary of that complainant's statement was disclosed during the complaint process and that the delegate noted that her statement aligned with those of the other Applicants. The Member disagreed with the Applicants' argument that disclosure of the summary was insufficient to satisfy the principles of natural justice outlined in the *ESA*, noting that the summary was in fact consistent with the statements of the Applicant cashiers.

36. The Member identified that the sole factual issue around which the argument revolved was whether the evidence of Mr. Moreno could be believed over the denials the cashiers made to the delegate. The Member noted that the delegate conducted interviews in person and over the phone, provided the results of the interviews to both parties, and offered the Applicants an opportunity to be interviewed with respect to Mr. Moreno's evidence, but none of them accommodated that request.

37. The Member ultimately concluded that the Applicants' argument on credibility was nothing more than "a last attempt by the Appellants to have the Tribunal reassess findings made by the Director without providing a legal basis for doing so."

38. I am not persuaded, in reviewing the Determination, the arguments made on appeal, the Original Decision and the submissions on the application for reconsideration, that the Applicants have raised significant questions of law that should be reviewed because of their importance to the parties or their implications for future cases. The issues raised are not novel and have been addressed by the Tribunal on many occasions. The Original Decision was consistent with those decisions. That the Applicants disagree with the result is not a basis for an exercise of the reconsideration power.

ORDER

39. The request for reconsideration is denied. I order that the Original Decision 2018 BCEST 48, issued May 1, 2018, be confirmed.

Carol L. Roberts
Panel
Employment Standards Tribunal