Employment Standards TRIBUNAL

Citation: New H Dental Lab Inc. (Re)
2018 BCEST 72

An appeal

- by -

New H Dental Lab Inc.
("New H")

- 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)

PANEL: Carol L. Roberts

FILE NO.: 2018A/44

DATE OF DECISION: July 30, 2018

DECISION

SUBMISSIONS

Ryan Hegedus on behalf of New H Dental Lab Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("*ESA"*), New H Dental Lab Inc. ("New H") has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on March 6, 2018. The deadline for filing an appeal of the Determination was April 13, 2018.

2. On September 6, 2017, Alexander Bublitski filed a complaint with the Director alleging that New H contravened the *ESA* in failing to pay him compensation for length of service.

3. Following a hearing, a delegate of the Director concluded that New H had contravened sections 63 and 58 of the *ESA* in failing to pay Mr. Bublitski vacation pay and compensation for length of service. The delegate ordered New H to pay $2,930.79 in respect of those wages and interest.

4. The delegate also imposed two administrative penalties in the total amount of $1,000 for the contraventions, for a total amount payable of $3,930.79.

5. New H's appeal, dated April 16, 2018, and received by the Tribunal on April 20, 2018, contends that the Director failed to observe the principles of natural justice in making the Determination. New H also sought an extension of time in which to file the appeal.

6. These reasons are based on New H's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

ISSUE

7. Whether or not New H has established any basis to interfere with the Director's determination.

FACTS

8. Ryan Hegedus is the sole director of New H, a dental laboratory. Mr. Bublitski was employed as a dental technician at New H from April 2014 until May 26, 2017. On September 6, 2017, Mr. Bublitski filed a complaint alleging that New H had contravened the *ESA* in failing to pay him compensation for length of service.

9. At the December 6, 2017, hearing, Mr. Hegedus appeared on behalf of New H, and Mr. Bublitski appeared on his own behalf. At issue before the delegate was whether or not Mr. Bublitski's employment had been terminated for cause.

10. The New H laboratory is a 900 square foot area in which Mr. Hegedus and Mr. Bublitski, his sole employee, worked. They were close friends, and each had keys and alarm codes to access the

laboratory. Mr. Bublitski also had his own business, performing dental lab work for his own clients. Although Mr. Hegedus verbally agreed that Mr. Bublitski could do some of his own work during his working hours at New H, this agreement was not in writing.

11. The parties agreed that, in the event the delegate found that Mr. Bublitski was entitled to compensation for length of service, his entitlement would amount to $2,870.40.

12. At the hearing, Mr. Hegedus provided the following evidence:

13. On May 19, 2017, Mr. Bublitski was working alone in the laboratory because Mr. Hegedus had taken the day off. Mr. Hegedus made an unexpected visit to the lab and discovered Mr. Bublitski performing work for his own clients, which was not something Mr. Hegedus had agreed to.

14. On May 25, 2017, New H issued Mr. Bublitski a warning letter stating that on May 19, he had used company time, materials, and equipment for his own use without Mr. Hegedus' permission. The letter warned Mr. Bublitski that "further discussions were not required," but that

> …if there [was] a need to again have a discussion arising from a lack of corrective action being taken by you, the company reserves the right to impose further disciplinary actions up to and including suspension without pay and or termination of employment….we continue to believe that you can be a valuable part of our team in the future and look forward to seeing positive actions and results form (sic) our discussion.

15. Mr. Hegedus testified that, after issuing the warning letter, he had second thoughts and decided to terminate Mr. Bublitski's employment. On or about June 6 or 7, 2017, Mr. Hegedus telephoned Mr. Bublitski and told him not to return to work. Mr. Hegedus said that he terminated Mr. Bublitski's employment because Mr. Bublitski was working for another employer, and that he was using New H's time and materials for the benefit of his new employer during his normal working hours without Mr. Hegedus' knowledge or consent.

16. Mr. Bublitski did not dispute that on May 19, 2017, he was performing work for another client. However, his evidence was that in 2015, Mr. Hegedus agreed that he could do some of his own work during New H's working time, using New H's laboratory and materials. Mr. Bublitski also asserted that when he initially asked Mr. Hegedus if he could bring his own work to the laboratory, Mr. Hegedus said that he could. Mr. Bublitski also said that although he offered to pay New H for the use of its facilities, Mr. Hegedus would not take any money so he bought him lunch on several occasions.

17. The delegate referred to section 63 of the *ESA*, noting that New H had the burden of demonstrating, on a balance of probabilities, that there is just cause for dismissal. He considered that a single act of misconduct may constitute just cause, but that misconduct must be serious, deliberate, and constitute a fundamental breach of the employment contract.

18. The delegate considered New H's argument that Mr. Bublitski intentionally used company paid time and facilities to conduct work for another client without Mr. Hegedus' permission, conduct that amounted to just cause. The delegate also considered Mr. Bublitski's argument that, while he did not dispute that he did work for another client, he contended that he was permitted to do the work based on the parties' 2015 agreement.

19. The delegate noted the parties' agreement that Mr. Bublitski could work for another employer during New H work hours and using the New H laboratory. The delegate also noted that Mr. Hegedus also testified that on occasion, he assisted Mr. Bublitski so that Mr. Bublitski could meet his own clients' deadlines.

20. The delegate found that there was insufficient evidence to establish that Mr. Bublitski was deliberately acting outside of the parties' agreement when he was performing work for other clients on May 19, 2017. The delegate determined that Mr. Bublitski's actions were not a fundamental breach of the employment agreement.

21. In arriving at his conclusion, the delegate noted that New H also did not initially view Mr. Bublitski's actions as cause for dismissal. He considered the fact that on May 19, 2017, Mr. Hegedus left the laboratory without indicating Mr. Bublitski's job was in jeopardy and that the May 26, 2017, warning letter clearly stated that the act of misconduct was a first occurrence which could lead to dismissal in the event it was not corrected. It was only after further thought that Mr. Hegedus changed his mind and communicated his decision to Mr. Bublitski by telephone.

22. The delegate found that Mr. Bublitski was entitled to compensation for length of service in the amount of $2,870.40 according to their agreed statement of facts.

23. The delegate imposed administrative penalties for New H's contravention of section 46 of the *Employment Standards Regulation* in failing to produce records to the Director pursuant to a Demand issued October 26, 2017, and for failing to pay Mr. Bublitski wages 48 hours after the date of termination, pursuant to section 63 of the *ESA*.

ARGUMENT

24. In its appeal submission, New H contends that the delegate made an "unjust" decision. Mr. Hegedus repeats arguments made to the delegate, which is that Mr. Bublitski worked on his own cases on "company time" without permission. Mr. Hegedus indicates that he wanted to enter into an agreement with Mr. Bublitski in which Mr. Bublitski would pay him 10% of his gross sales for using the New H lab after hours, but Mr. Bublitski did not agree to that. Mr. Hegedus says that he then restricted Mr. Bublitski to "two processes" which did not affect the workflow. Mr. Hegedus agrees that after initially giving Mr. Bublitski a warning letter, he "retracted" his initial decision and "fired [Mr. Bublitski]". Mr. Hegedus also asserts that the delegate made many factual errors.

25. Upon a review of New H's asserted errors, I find nothing turns on the disputed points. Even if the delegate misconstrued Mr. Hegedus' evidence in several respects (including what, if anything, was said when Mr. Hegedus encountered Mr. Bublitski in the lab on May 19, 2017, and what Mr. Bublitski stated that he earned from his own business) none of this evidence was central or crucial to the delegate's conclusion on the issue before him.

26. Mr. Hegedus contends that he was betrayed by Mr. Bublitski and seeks to have the case "thrown out."

ANALYSIS

27. Section 114 of the *ESA* provides that 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 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.

28. New H's appeal was filed one week past the time frame in which to do so.

29. In *Niemisto*, BC EST # D099/96, the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:

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

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

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

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

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

30. These criteria are not exhaustive.

31. Mr. Hegedus' reasons for filing the appeal past the time period are that he was busy running his business and stressed at work.

32. I accept that Mr. Hegedus was busy running his business, with all the stress that normally entails. However, there is no evidence that the stress of operating a business was extraordinary or unusual.

33. There is no information before me to suggest that New H had a genuine and on-going *bona fide* intention to appeal the Determination, or that the parties were aware of this intention.

34. I find that there will be some prejudice to the respondent as it will delay receipt of compensation the Director has determined he is entitled to.

35. Finally, I do not find that New H has demonstrated a strong *prima facie* case in its favour.

36. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

37. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. In *J.C. Creations* (BC EST # RD317/03) the Tribunal concluded that, given the purposes and provisions of the legislation, it is inappropriate to take an "overly legalistic and technical approach" to the appeal document: "The substance of the appeal should be addressed both by the Tribunal itself and the other parties, including the Director. It is important that the substance, not the form, of the appeal be treated fairly by all concerned." As New H is self-represented, I have given it wide latitude in addressing the stated grounds of appeal.

Failure to comply with the principles of natural justice

38. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. It does not mean that the Director's delegate must arrive at a conclusion the appellant considers just and fair.

39. There is nothing in New H's appeal submission that establishes that it did not know the case it had to meet or that it was denied a fair hearing. Although New H contends that the delegate misconstrued some of the evidence, there is no evidence Mr. Hegedus was not given a full opportunity to respond.

40. Although New H disagrees with the decision, there is no evidence the delegate failed to comply with the principles of natural justice.

Error of law

41. New H says that the delegate made an "unjust" decision. While New H clearly disagrees with the result, I can only interfere with the determination if New H can establish that the delegate erred in law.

42. 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.

43. The delegate correctly applied the law. Section 63 of the *ESA* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

44. I am not persuaded that the delegate erred in law in concluding that New H had not discharged its burden of demonstrating that Mr. Bublitski was dismissed for cause.

45. New H was unable to establish, on a balance of probabilities, the terms of the agreement between the parties regarding the nature of Mr. Bublitski's "outside" work. In the absence of any written agreement, the delegate was obliged to consider what the terms of that agreement were. The delegate also noted Mr. Hegedus' response to finding Mr. Bublitski performing "outside" work at the New H laboratory on May 19, 2017. I find that the delegate fairly considered all of the evidence, and find no basis to interfere with his conclusion.

46. New H's disagreement with the result is not a basis for an appeal on this ground.

47. I dismiss the appeal. The appeal was not filed within the statutory time period and I find there is no reasonable prospect the appeal will succeed.

ORDER

48. Pursuant to section 115 of the *ESA*, I order that the Determination dated March 6, 2018, be confirmed in the amount of $3,930.79, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Carol L. Roberts
Panel
Employment Standards Tribunal