Employment Standards TRIBUNAL

Citation: Majy Burns (Re)
2018 BCEST 86

An appeal

- by -

Majy Burns
(the "appellant")

- 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: Kenneth Wm. Thornicroft

FILE NO.: 2018A/71

DATE OF DECISION: August 27, 2018

DECISION

SUBMISSIONS

Majy Burns — on her own behalf

INTRODUCTION

1. On May 18, 2018, Tiara Stiglich, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination under section 79 of the *Employment Standards Act* (the "*ESA*") along with her accompanying "Reasons for the Determination" (the "delegate's reasons"). The Determination and the delegate's reasons were issued following an oral complaint hearing held on December 19, 2017, concerning a complaint filed by Majy Burns (the "appellant").

2. The appellant sought section 63 compensation for length of service following what she alleged was a wrongful dismissal. Her employer took the position that the underlying employment contract had been "frustrated" and, as such, no compensation for length of service was payable by reason of subsection 65(1)(d) of the *ESA*: "Sections 63 and 64 do not apply to an employee…(d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance…".

3. As of the date of the complaint hearing, the appellant had been away from work due to medical reasons for about 3 years and 3 months. Further, as noted by the delegate at page D14 of her reasons: "The hearing was held five months after her termination and she was still not able to return to work".

4. The delegate ultimately concluded (at page D16):

> Medical illness on its own will not meet the criteria of "unforeseeable" as it is completely foreseeable that employees may become ill and may miss work due to this illness. However there is a distinction between an absence which makes performance of an employment contract impossible to perform and the situation where the employee is merely unavailable for work for a period of time due to a medical reason. The Complainant becoming ill and missing work is foreseeable, but I find the Complainant becoming indefinitely ill and not being able to attend work to the point where she cannot fulfil the employment contract is not foreseeable.

THE APPEAL

5. The appellant does not challenge any of the delegate's findings regarding the legal principles governing subsection 65(1)(d) or the delegate's treatment of the evidence before her. Rather, the appellant's sole ground of appeal is that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b) of the *ESA*).

6. In particular, the appellant says that the Determination should be cancelled based on the following assertions:

- "I was not treated fairly during the hearing by the adjudicator…who did not patient to me when I asked her to repeat the question." [*sic*]

- "As an EASL speaker, I was intimidated at the hearing and worse, I felt discriminated…I was treated unfairly at the hearing because my EASL speaking background." [*sic*]
- [The delegate] took notes while each of her questions was asked. However, a copy of my answers was not available to me. There is no way I can check whether my responses to her then are the same after received determination statement five month later." [*sic*]
- "[The delegate] puts misleading information on the determination whether intentional or by mistake, such decision has no creditability ground and integrity value." [*sic*]

FINDINGS AND ANALYSIS

7. In my view, this appeal has no reasonable prospect of succeeding and must be dismissed under subsection 114(1)(f) of the *ESA*. I propose to briefly address each of the appellant's assertions.

8. First, with respect to the appellant's general assertions regarding the delegate's conduct at the hearing, these allegations essentially constitute an allegation of bias on the delegate's part. Even if I accept the appellant's assertion that the delegate may have expressed some frustration with the appellant in terms of her responses to certain questions (and I am making no finding whatsoever that this, in fact, occurred), this allegation falls far short of demonstrating bias on the delegate's part. There is simply no credible evidence before me that the delegate was predisposed against the appellant by reason of some sort of animus or was otherwise in a conflict of interest.

9. Second, the appellant says that because English is not her first language she felt "intimidated", and believed she was the victim of "discrimination". Again, there is no credible evidence to show that the delegate was biased against the appellant because of her supposed difficulties with the English language. I might also add that the appellant worked in an English-speaking environment, prepared her submissions to the delegate – and on appeal – in English, and seemingly competently testified in English at the hearing. I am not satisfied, based on the record before me, that the appellant's alleged lack of English fluency in any way compromised her ability to present her case. I also note that the complaint hearing notice clearly stated that the hearing would be conducted in English, but that any party was free to bring an independent party to the hearing to serve as an interpreter.

10. I am not satisfied that the appellant has, even on a *prima facie* basis, provided any cogent evidence that the delegate discriminated against her because English is not her first language.

11. The appellant's allegations regarding bias on the part of the delegate and unfair treatment at the complaint hearing only appear to have been raised after the delegate issued her reasons for decision. The Determination was issued about five months after the hearing. In the time frame between the date of the hearing and the issuance of the Determination, the appellant never once, so far as I can tell, communicated with the Employment Standards Branch regarding her concerns about bias and unfair treatment. These allegations appear to have been raised, for the very first time, only after the appellant received an adverse decision which she then appealed.

12. Third, regarding the delegate's notes taken at the hearing, there is nothing in the record indicating that the appellant ever requested a copy of the delegate's hearing notes. Even if she had, such notes are not

required to be produced to the parties, absent extraordinary circumstances (see, for example, *Director of Employment Standards*, BC EST # RD100/15, and *McClure*, 2018 BCEST 37).

13. Fourth, the appellant asserts that the delegate's reasons contain "misleading information". The only item particularized was in regard to the delegate's observation (at page D9) that the appellant provided three different figures regarding her rate of pay – the appellant says that she did not do so. However, this relatively trivial matter, even if the appellant's version is accurate, had no bearing on the ultimate outcome. The appellant conceded all the key facts in relation to subsection 65(1)(d) and, on the evidence, I am satisfied that the delegate correctly held that the appellant was not entitled to any compensation for length of service.

14. Finally, and as detailed at page D14 of the delegate's reasons, the employer, in an effort to accommodate the appellant's health issues, made several *bona fide* offers of alternative employment, all of which the appellant summarily rejected. Although the delegate did not turn her mind to subsection 65(1)(f), the appellant's claim for compensation for length of service might have equally been rejected under this provision of the *ESA*.

ORDER

15. Pursuant to subsection 114(1)(f) of the *ESA*, this appeal is dismissed and, in accordance with subsection 115(1)(a), the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal