Employment Standards TRIBUNAL

Citation: YVR Appliance Installations Ltd. (Re)
2019 BCEST 1

An appeal

- by -

YVR Appliance Installations Ltd.
(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/104

DATE OF DECISION: January 2, 2019

DECISION

SUBMISSIONS

Jonas McKay — counsel for YVR Appliance Installations Ltd.

OVERVIEW

1. On October 11, 2018, YVR Appliance Installations Ltd. (the "Appellant") filed an appeal under subsection 112(1)(c) of the *Employment Standards Act* (the "*ESA*"). This latter provision states that an appeal of a determination issued under section 79 of the *ESA* may be appealed based on "evidence [that] has become available that was not available at the time the determination was made".

2. However, this appeal is most unusual in that the Appellant has not provided its "new evidence" along with its appeal documents. Rather, the Appellant asks the Tribunal to "consider its request for participation and disclosure" and that its appeal be adjudicated "based on new evidence obtained subsequent to any order made pursuant to [the Appellant's] application for participation and disclosure." As matters now stand, this appeal has not been perfected. That being the case, the Appellant seeks an extension of the appeal period under subsection 109(1)(b) of the *ESA* so that, possibly, it might be able to provide the requisite new evidence that will form the basis for its appeal.

3. In my view, this appeal is misconceived and wholly without merit. Essentially, the Appellant wishes to undertake a fishing expedition and, so far as I can determine, plans to drop its line in a lake that may well be devoid of fish. In my view, this appeal must be summarily dismissed. My reasons for reaching that conclusion now follow.

THE DELEGATE'S FINDINGS AND DETERMINATION

4. Timothy Kinstlers (the "Complainant") filed a complaint against the Appellant that, in essence, raised a claim under section 8 of the *ESA*: "An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following: (a) the availability of a position; (b) the type of work; (c) the wages; (d) the conditions of employment."

5. The complaint was the subject of an oral hearing before Alana DeGrave, a delegate of the Director of Employment Standards (the "delegate") on July 18, 2018, attended by the complainant and his two witnesses as well as by the Appellant. The Appellant, who was represented by the same legal counsel who continues to act on its behalf in this appeal, called one of the company's two corporate directors as its sole witness.

The Evidence at the Complaint Hearing

6. The Complainant, who has a young family, testified that although he was employed with a moving company prior to being hired with the Appellant, his hours were "erratic and he often worked on the weekend" with his hours varying from 25 to 60 per week (delegate's "Reasons for the Determination" –

the "delegate's reasons" – at page R3). He was seeking "more stable hours and better pay" and applied for a job with the Appellant through a job portal website (delegate's reasons, page R3).

7. The Complainant applied through this website for a job as an appliance installer (although he had no formal training or very much practical experience in that field). The job offered full-time weekday hours with the possibility of weekend overtime. The Complainant subsequently met with one of the Appellant's directors, Alexander Milne ("Milne" – he was one of two corporate directors and the Appellant's sole witness at the complaint hearing). At the end of the job interview, the Complainant was advised that a job offer would be forthcoming. He later accepted the employment offer and was to commence his duties on January 3, 2018. The Complainant testified – and this evidence is now the central dispute in this appeal – that he resigned his former position (with a moving company) and that his last day of work was on or around December 30, 2017. His contracted hourly wage was $25 and he was to be paid semi-monthly.

8. The Complainant testified that he worked for a few days and was then informed that the Appellant would not likely have any work for him for the week of January 15, 2018. In the latter part of January 2018, the Complainant was informed by Wendell Currie ("Currie" – the Appellant's other corporate director) that the firm was being reorganized and "there was not enough work to continue to employ him" (delegate's reasons, page R4). On January 23, 2018, the Complainant sent the following e-mail to Mr. Currie:

> Hi Wendell, per our phone conversation you indicated that there is not enough work forecast to retain me full time, and that there is some internal restructuring taking place…If there isn't any gainful employment option then I'll require an ROE please." [presumably, "ROE" means a "record of employment", a document required to file an employment insurance claim; the Appellant issued the Complainant a Record of Employment on March 1, 2018]

9. The Complainant's last day of work for the Appellant was January 14, 2018, but he was not formally terminated until January 23, 2018 (delegate's reasons, page R4). On February 4, 2018, Mr. Currie sent the following text message to the Complainant:

> Tim you worked for [the Appellant] for 2 weeks. You were still on probabtion. [*sic*] We can terminate anybody in a 3 month period for any reason. We did not need you anymore and you are frankly not qualified for the job. You are not entitled to any vacation pay or anything besides the hours that you worked. I don't wish to receive any of your documents. You are not an employee of [the Appellant] thefore [*sic*] have no reason to contact me. Do not contact me or Summer again for any reason…

10. The Complainant unsuccessfully sought work with his former employer and on April 3, 2018, found new employment as a radio frequency technician at a $27 hourly rate.

11. Mr. Milne, for the Appellant, testified that the Appellant hired the Complainant as of January 3, 2018, and that he informed the Complainant "it would be full-time, but that there could be slower periods" and he denied promising regular Monday to Friday shifts (delegate's reasons, page R6). "Mr. Milne said that [the Complainant's] employment came to an end because during his probationary period they decided he was unsuitable for the position" and "he denied [the Appellant] ended [the Complainant'] employment because there was a lack of work" (delegate's reasons, page R6). Mr. Milne was not privy

to the Complainant's telephone conversation with Mr. Currie and thus was not in a position to deny that Mr. Currie may have told the Complainant that he was being terminated due to a shortage of work. Mr. Milnes testified that if Mr. Currie did say such a thing, it may have been said "to spare [the Complainant's] feelings" (delegate's reasons, page R6).

12. Mr. Milne also testified that the Appellant commenced operations in October 2017 and ceased operations because "they could not find enough skilled workers" and there was too much demand for the company to service but he also testified that the lack of quality employees caused the firm to lose work (delegate's reasons, page R6). It appears from my review of the section 112(5) record, that the Appellant ceased business operations sometime around March 2018.

13. Two other witnesses testified on the Complainant's behalf at the complaint hearing – a former employee of the Appellant and the Complainant's current supervisor in his new job (the latter, essentially, testifying that the Complainant was a good employee but, of course, this witness was not able to provide cogent evidence regarding the matters in dispute as between the Complainant and the Appellant). The former employee testified that although he responded to an advertisement for, was subsequently offered, and then accepted full-time employment with the Appellant, "he was not called in to work for the first month after being hired [and]…was only called to work for [the Appellant] for three days from the end of December 2017 until April 2018" (delegate's reasons, page R5).

The Delegate's Findings

14. The delegate determined that the Appellant contravened section 8 of the *ESA* in several respects.

15. First, although the Complainant's written employment contact executed December 30, 2017, indicated that the Complainant would start work on January 3, 2018, he did not actually commence working for the Appellant until January 8, 2018. As such, the delegate determined that the communicated "start date" was "untruthful". The delegate further held (page R8): "The [Complainant] relied on that start date in giving notice to his previous employer that he was resigning from that job. I find the untruthful statement influenced [the Complainant] to accept employment with [the Appellant] starting on January 3, 2018, and that he lost wages when he could have been working for his previous employer if only he had been told a later start date."

16. Second, while the delegate rejected the Complainant's position regarding whether he was promised a particular Monday to Friday work schedule (page R8), the delegate determined that the Complainant was not terminated because he was an "unsuitable" employee (as alleged by the Appellant) but, rather, because the Appellant did not have sufficient work to keep him gainfully employed (page R10). The delegate's reasons continue:

> I am not satisfied [the Appellant] exercised reasonable care under the circumstances to provide [the Complainant] with accurate and truthful information upon which he could evaluate the risk of accepting the position. [The Complainant] was looking for more stable work than his previous employer as he has two young sons to support. I find [the Complainant] relied on Mr. Milne's representations during the interview that [the Appellant's] employees had a lot of work and that he would have indefinite, full-time work. I find that [the Complainant] lost wages because he was induced to quit a job of a year and a half to work for an employer who could not give him more than a week's work. I find that [the Appellant] contravened section 8 of the Act in

> inducing, influencing and persuading [the Complainant] to become an employee by misrepresenting the availability of the position and the conditions of employment and accordingly, wages are owing.

17. Noting that section 8 contraventions are remedied on a "make whole" basis (see subsections 79(2)(c) and (d) of the *ESA*), the delegate allowed an unpaid wage claim for the period from January 3 to April 3, 2018 (when the Complainant found new employment) in the amount $11,600.00 plus 4% vacation pay for a total award of $12,064.00 or $12,325.21 including section 88 interest. The delegate also levied a single $500 monetary penalty (see section 98) against the Appellant based on its contravention of section 8 of the *ESA*.

THE APPELLANT'S POSITION

18. The Appellant seeks an order referring this matter back to the Director of Employment Standards on the basis that "evidence has become available that was not available at the time the determination was being made" (subsection 112(1)(c) of the *ESA*). However, as noted above, the Appellant has not provided any "new evidence" but rather has filed an application directed toward the party that employed the Complainant immediately prior to the latter's employment with the Appellant. More specifically, the Appellant seeks "an order that a representative from [the Complainant's former employer, a moving company – the "former employer"] participate in a conference call to give evidence in relation to the Complainant's dates of employment with [the former employer], and how and when the Complainant's employment with [the former employer] ended". Additionally, the Appellant seeks an order for the production of all documents in the former employer's possession relating to the Complainant's termination of employment.

19. The Appellant relies on Rule 11 of the Tribunal's *Rules of Practice and Procedure* – which addresses pre-hearing document disclosure and *viva voce* testimony – in making its application. Rule 11 permits such pre-appeal document disclosure and testimony provided the evidence in question is "admissible and relevant" to the appeal or an issue raised by the appeal. The Appellant's justification for these orders is as follows:

> The reason why [the former employer] should participate and produce information and evidence is because such evidence relates directly to the Complainant's allegation that he quit his job with [his former employer] based on misrepresentations made by the [Appellant]. Such evidence is contradictory to the assertion by the [Appellant] that the Complainant advised he was unemployed at the time of interviewing with the [Appellant], and the evidence relates directly to the award made by the Director in this regard. The requested information is required in order to ensure fair treatment of the employer.

20. The Appellant also seeks an order under Rule 11 directing the Complainant to "produce all documentation relating to income earned during the period of time from January 14 to April 3, 2018" including such things as wage statements, bank records, and documents relating to any Employment Insurance benefit application or EI payments. The Appellant justifies such an order on the following basis:

> The Director ordered payment of wages for an alleged period of unemployment, and this order is not fair if the Complainant was in fact employed or earned income during such a period. The

> Tribunal should obtain information from the Complainant relating to wages earned during the alleged unemployment period, in order to provide a fair result in relation to damages awarded on this point.

21. It is important to note that there is nothing in the material before me to suggest that any material or cogent evidence will be produced as a result of any Rule 11 disclosure orders – the Appellant simply hopes that relevant evidence will be uncovered.

FINDINGS AND ANALYSIS

22. Although this appeal is predicated on the "new evidence" ground of appeal, as noted above, no evidence has been submitted to the Tribunal so that it can be assessed in light of the *Davies et al.* criteria (see BC EST # D171/03). As delineated in *Davies*, "new evidence" is admissible on appeal only if the proffered evidence: i) could not have been obtained, exercising all due diligence, and presented to the delegate for his or her consideration prior to the issuance of the determination; ii) is relevant; iii) is credible; and iv) is material and has significant probative value.

23. The Appellant acknowledges that, at present, it does not have *any* evidence that would be admissible under subsection 112(1)(c) of the *ESA*. Accordingly, it seeks a document production order, and an order to have a representative from the Complainant's former employer provide *viva voce* evidence at a teleconference hearing. The Appellant obviously hopes that this evidence will assist it in pursuing this appeal but, at this juncture, such a hope is pure speculation.

24. With respect to the Rule 11 application directed to the Complainant's former employer, the Appellant's foundational assertion is that the Complainant told Mr. Milne, the Appellant's director who originally interviewed and hired the Complainant, "that he was currently unemployed" whereas the Complainant's testimony at the complaint hearing was "that he quit his job with [the former employer] to work for the [Appellant]" and that further evidence should be obtained as part of the appeal process because "there is an inconsistency to [*sic*] the parties' positions on this point". The Appellant further says that it requires documents and other information relating to any income the Complainant earned during the period between January 14 and April 3, 2018, "in order to provide a fair and accurate assessment of damages" because "[i]f the Complainant worked and earned income during the alleged unemployment period, damages awarded would provide double recovery to the Complainant and would be unfair to the [Appellant]."

25. Proceedings before the Tribunal do not take the form of a *de novo* hearing – as repeatedly stressed in many Tribunal decisions, an appeal to the Tribunal is an "error correction" process. And there is absolutely no evidence in the record presently before me that would lead me to conclude that the delegate erred in finding certain facts or that she erred in law.

26. The evidence that the Appellant now seeks would not, even if it were obtained and proved to be somewhat helpful, be admissible under subsection 112(1)(c) as "new evidence". An appeal hearing is not intended to be a process whereby a party can shore up the evidentiary deficiencies in the case it presented to the delegate. All of the evidence the Appellant wishes to obtain via a Rule 11 production order was available and could have been provide to the delegate either at the complaint hearing or in a post-hearing submission.

27. The Appellant maintains that during the initial job interview, the Complainant advised Mr. Milne that he was presently unemployed. However, that assertion is not consistent with the original unpaid wage complaint in which the Complainant stated: "At the time of my interview, I was employed full-time…". The Complainant's testimony at the complaint hearing was entirely consistent with this latter assertion (see delegate's reasons, page R3). Further, the Record of Employment issued by the former employer on March 13, 2018 (and contained in the record before the delegate) is similarly consistent with the Complainant's position – it shows the Complainant's last paid working day was January 4, 2018.

28. If the Appellant seriously contested the Complainant's evidence regarding his employment status as of the date of his job interview, it should have provided evidence on this score at the complaint hearing. There is absolutely nothing in the delegate's summary of Mr. Milne's testimony at the complaint hearing to the effect that the Complainant told Mr. Milne that he was unemployed as of the date of his job interview with the Appellant. There is nothing in the delegate's reasons indicating that legal counsel cross-examined the Complainant on this issue. The same legal counsel who represented the Appellant both at the complaint hearing and in this appeal does *not* assert in his written submissions that: a) Mr. Milne *testified at the complaint hearing* that the Complainant stated he was unemployed as of the date of his job interview; or b) that counsel cross-examined the Complainant about this matter. This present factual dispute does not appear to have been raised at any time during the proceedings before the delegate.

29. The Appellant also applies to have the Complainant "produce all documentation relating to income earned…from January 14 to April 3, 2018" and "[a]ny documentation relating to application for or receipt of Employment Insurance benefits". The Appellant's legal counsel was certainly entitled to cross-examine the Complainant about his job search efforts following his termination by the Appellant. Counsel could have applied at the hearing for the production order he now seeks – he apparently did not do so. Further, employment insurance benefits are generally not deductible from a severance pay award (see *Jack Cewe Ltd. v. Jorgenson*, [1980] 1 S.C.R. 812) and although a subsection 79(2) make-whole remedy is conceptually distinct from an award of damages for wrongful dismissal, it may be that collateral benefits, such as insurance proceeds, should not be taken into account when fixing compensation under subsection 79(2)(c).

30. This appeal is predicated on the "new evidence" ground of appeal but the Appellant has not provided any evidence in support of its appeal. Rather, the Appellant has applied for a production order under Rule 11 in an effort to hopefully secure the evidence that will support its asserted ground of appeal. As matters now stand, the appeal is deficient – given the absence of any evidence to support the subsection 112(1)(c) ground of appeal – and, accordingly, the Appellant seeks an extension of the appeal period under subsection 109(1)(b) of the *ESA* "for an amount of time to coincide with obtaining evidence and information in accordance with the attached participation and disclosure application".

31. I am not persuaded that I should issue the Rule 11 orders sought by the Appellant. The instant Rule 11 application essentially constitutes a *post hoc* attempt to shore up the evidentiary case that the Appellant could have presented at the complaint hearing. In my view, the Tribunal should not exercise its discretion to issue a Rule 11 order, especially in circumstances where the underlying appeal has not been perfected, unless there is a reasonable likelihood that such an order will produce cogent and probative evidence that is highly relevant to the asserted ground(s) of appeal.

32. The evidence the Appellant seeks would not, in my view, be admissible as "new evidence" under subsection 112(1)(c) because, with proper diligence, it could have been obtained and submitted to the delegate. Further, the factual assertion made by the Appellant's witness, Mr. Milne, regarding the Complainant's employment status as of the date of his job interview with the Complainant stands in marked contrast to the evidence in the record. It also appears that the Appellant never flagged this matter as a point of contention between the parties at the complaint hearing. Finally, in my view, this is not a proper case to extend the appeal period so as to allow the Appellant to attempt to obtain further evidence.

ORDERS

33. The Appellant's applications under Rule 11 are all refused, as is the Appellant's subsection 109(1)(b) application to extend the appeal period. Pursuant to subsections 114(1)(b)(f) and (h) of the *ESA*, this appeal is dismissed. Pursuant to subsection 115(1)(a) of the *ESA*, the Determination is confirmed as issued in the amount of $12,825.21 together with whatever further interest that has accrued under section 88 since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal