Employment Standards TRIBUNAL

Citation: Calvin Hirvonen (Re)
2019 BCEST 103

An appeal

- by -

Calvin Hirvonen

- 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.: 2019/146

DATE OF DECISION: September 24, 2019

DECISION

SUBMISSIONS

Eric Hirvonen on behalf of Calvin Hirvonen

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), this is an appeal filed by Calvin Hirvonen (the "Employee") of a determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director") on June 24, 2019.

2. The Employee filed a complaint alleging that Worldpac Canada Inc. ("Worldpac" or the "Employer") contravened the *ESA* in failing to pay him compensation for length of service. Following a hearing on April 29, 2019, the delegate concluded that the Employer had just cause to terminate the Employee's employment and that he was therefore not entitled to compensation for length of service.

3. The Employee appeals the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employee also contends that evidence has become available that was not available at the time the Determination was made.

4. This decision is based on the Employee's written submissions and the section 112(5) "record" that was before the Director at the time the decision was made (the "Record").

FACTS AND ARGUMENT

Evidence

5. The Employer distributes wholesale automotive parts and equipment. The Employee was employed as a delivery driver from January 9, 2017, until July 24, 2018.

6. The Employee did not appear at the hearing of the complaint. He was represented by his father, Mr. Eric Hirvonen ("Mr. Hirvonen"), who is also his representative in this appeal. At the outset of the hearing, Mr. Hirvonen contended that he had not been provided access to the Employer's records prior to the hearing. He disputed that the records had been made available or disclosed to him prior to the hearing. The delegate informed Mr. Hirvonen that the Employer's records had been provided to the Employee by email on April 9, 2019, and adjourned the hearing for one half hour to enable Mr. Hirvonen to review those records.

7. During the presentation of the Employer's evidence, Mr. Hirvonen left the hearing room. The delegate adjourned the hearing to inquire into his reasons for doing so. The delegate recorded that Mr. Hirvonen left because he could not "listen to Worldpac tell lies." Mr. Hirvonen nevertheless immediately returned to the hearing without further issues.

Background

8. On July 24, 2018, the Employer issued a letter to the Employee terminating his employment for violating company policy, specifically, the Code of Conduct and "failing to act with integrity and poor performance."

9. The Employer also issued warnings to the Employee for driving infractions, tardiness and misuse of equipment, copies of which were provided to the delegate during the hearing.

10. The Employee was involved in two work-related motor vehicle accidents; the first on September 6, 2017, the second on June 18, 2018.

11. In the September 6, 2017 incident, the Employee was rear-ended by an individual who was driving their personal vehicle. The Employee reported no injuries and took no time off work.

12. The Employer reported the motor vehicle accident ("MVA") to the Insurance Corporation of British Columbia ("ICBC"). Because the Employee did not sustain any injuries or incur any loss of wages, the Employer understood that the Employee would not receive reimbursement from ICBC related to the accident.

13. On June 18, 2018, the Employee was involved in a second MVA with another commercial vehicle while returning to the warehouse. The Employee initially reported no injuries and completed the remainder of his shift.

14. According to the Employer's computerized Timecard system and Log Sheet, the Employee worked until 5:52 p.m. on June 18, 2019. On the Log Sheet, the Employee wrote a note indicating that he "elected to do [his] last run for free, any activities [he] used 530 MJN [the licence plate number of the company vehicle] were for personal purposes, do not pay me past 4:00 pm". The Employer discovered this note on June 21, 2018, and informed the Employee that it would not adjust employees' hours of work to reflect inaccurate information and that the Employee would be paid based on the hours he worked.

15. On June 19, 2018, the Employee reported to work complaining of neck and back pain and requested time off work.

16. The insurance regime in British Columbia requires an MVA involving two commercial vehicles to be reported to WorkSafe BC rather than ICBC. The Employer explained to the Employee that this was government and company policy and that any insurance claim had to be made through WorkSafe BC. His return to work would have to be accompanied by a doctor's completed "functional abilities" form according to WorkSafe BC requirements. The Employee refused to do so and continued to work.

17. On June 20, the Employee requested to leave work early, reporting that he felt lightheaded and wanted to visit a doctor. Although the Employee was told to submit an insurance claim through WorkSafe BC, the Employee insisted that he would submit his claim through ICBC. Two of the Employer's managers again explained the WorkSafe BC process, including the requirement for a Functional Ability assessment to the Employee, at which time he agreed to undergo an assessment. The Employee was medically cleared to return to work on June 27, 2018.

18. On June 28, the Employee informed the Employer that he could only work modified duties due to ongoing shoulder and back pain. The Employer informed him that he would have to undergo a second functional assessment.

19. According to the Employer, the Employee did not respond to this information well, and informed the Employer that he would submit a claim with ICBC rather than WorkSafe BC because ICBC did not require a functional assessment. He also informed the Employer that when he submitted a claim to ICBC related to his September 6, 2017 MVA, he had received a cheque without question. The Employer instructed the Employee to leave work and undergo an updated functional assessment.

20. The Employee reported to work late on June 29, 2018, explaining that he had been busy dealing with WorkSafe BC. The Employee expressed frustration with the process and asked why his time records did not reflect his request to "clock out" at 4:00 p.m. on June 18, 2018.

21. The Employee did not have an updated functional assessment conducted as directed by the Employer.

22. The Employer met with the Employee on July 6, 2018, to discuss his conduct. The Employer told the Employee that he had been uncooperative in complying with instructions, refusing to have a functional assessment completed, and insisting that his claim proceed through ICBC rather than WorkSafe BC. The Employee was again instructed to leave work and have the functional assessment completed. Later that day, the Employee returned to work with a doctor's note that he was cleared to return to work immediately.

23. The Employer decided to investigate the Employee's claim with ICBC regarding his September 6, 2017 MVA. The Employer testified that it was concerned that the Employee was attempting to falsify his work hours to inaccurately reflect that he was not working at the time of the MVA so he could submit an insurance claim to ICBC rather than WorkSafe BC.

24. ICBC confirmed to the Employer that on December 6, 2017, the Employee had reported an injury related to his September 6, 2017 MVA, and had received payments for non-pecuniary and general damages.

25. The Employer decided to terminate the Employee's employment when they discovered he had submitted, and received, compensation for an injury when, to their knowledge, he wasn't injured and had not lost any wages.

26. The Employer took the position that the Employee's conduct reflected a lack of integrity and was dishonest, and that it violated the Employer's Code of Conduct. The Employee's employment was terminated for reporting a fraudulent insurance claim and for attempting to falsify his work hours.

27. Mr. Hirvonen contended that the Employee had been terminated without cause and that the reasons set out in the termination letter were not an accurate reflection of why he was fired. Mr. Hirvonen contended there was no evidence the Employee failed to act with integrity, but even if he had, it was the Employer's responsibility to discipline, rather than terminate, him. Mr. Hirvonen noted that the Employer had sufficient time for the Employer to deal with any performance-related issues and that there was no evidence the Employee had ever been disciplined. Mr. Hirvonen contended that the Employee had been terminated without cause, arguing that if an individual was employed as a delivery driver, they could not

be dismissed if they are involved in an MVA. Mr. Hirvonen also argued that the payroll records had no bearing on the reasons for termination and the language used in the July 24, 2018 termination letter was unrelated to the termination.

28. Mr. Hirvonen was unable to provide any evidence with respect to the Employee's September 6, 2017 MVA, and stated that he was unaware of the June 18, 2018 MVA. Mr. Hirvonen also conceded he had no knowledge of the rules regarding the submission of insurance claims.

Delegate's findings

29. The delegate noted that the burden was on the employer to demonstrate just cause for termination. She also noted that where just cause was alleged, in certain cases, an employer could rely on a single incident of misconduct to establish just cause. The delegate identified those cases were where the employee's actions were:

a) Willful and deliberate

b) Inconsistent with the continuation of the contract of employment;

c) Inconsistent with the proper discharge of the employee's duties; and

d) Prejudicial to the employer's interests or in breach of trust.

30. The delegate determined that the Employer's counselling forms and written warnings were irrelevant to the Employee's termination and, for that reason, did not consider them in her findings of fact.

31. The delegate found that in late June 2018, the Employer discovered that the Employee had submitted an injury claim to ICBC related to his September 6, 2017 workplace MVA even though, to its knowledge, the Employee was uninjured and therefore ought not to have received compensation. The delegate noted that as the Employee did not attend the hearing and thus provided no evidence regarding the MVA and the respective claims, she had to make her findings based on the best evidence before her.

32. The delegate determined that the Employer's evidence was generally consistent, reliable, and corroborated by email documentation and accepted its description of the events.

33. The delegate accepted the Employer's assertion that the Employee attempted to falsify his work hours on June 18, 2019, following which he insisted that he submit his claim to ICBC even though he was instructed otherwise. The delegate found that the Employee attempted to falsify his work hours in order to reflect that he was not at work at the time of the accident so he could submit his claim to ICBC.

34. The delegate also determined that once the Employer discovered that the Employee received payment from ICBC for his September 6, 2017 accident, it took steps to confirm that. It was only after the Employer confirmed those facts on July 12, 2018, that it made the decision to terminate his employment.

35. The delegate found that the Employer did not terminate the Employee's employment because he was involved in an MVA, as argued by Mr. Hirvonen. She noted that the termination letter stated the reasons for termination were a violation of company policy, poor performance, and failing to act with integrity.

36. The delegate found that the Employee did not act with integrity when he submitted an injury claim to ICBC when he was uninjured. She also found that the Employee's actions violated the Employer's Code of Conduct and was inconsistent with the contract of employment.

37. The delegate concluded that the Employee's actions were intentional, constituted a breach of trust causing irreparable damage to his employment relationship, and that they warranted immediate dismissal.

ARGUMENT

38. Mr. Hirvonen advanced a number of arguments on appeal, arguing that the delegate:

- erred in law in accepting submissions from the Employer that the Employee filed a fraudulent claim of personal injury to ICBC;
- failed to comply with principles of natural justice in finding that the Employee was terminated for violating an "obscure company policy" without any evidence that the Employee signed the policy;
- failed to comply with the principles of natural justice in finding that the Employee was not injured as a result of the September 2017 MVA;
- failed to comply with the principles of natural justice in accepting that the Employee attempted to falsify a timecard, when the Employee merely requested that the timecard reflect the fact that, at the time of the MVA, he was not in "active delivery";
- failed to comply with the principles of natural justice in accepting that the Employer had just cause to terminate the Employee's employment for accepting compensation for personal injury as a result of a no-fault MVA;
- failed to comply with the principles of natural justice in admitting evidence at the hearing that had not been previously disclosed; and
- failing to comply with the principles of natural justice in determining that filing a claim for personal injury was an act lacking in integrity and in determining that the Employee was not injured.

39. Mr. Hirvonen also says that evidence has become available that was not available at the time the Determination was made. In support of this ground of appeal, Mr. Hirvonen submitted evidence regarding injuries allegedly sustained by the Employee as a result of the September 2017 MVA.

40. Also submitted in support of the appeal is a document written by the Employee, in which he explains his conduct following the September 2017 MVA. In that document, the Employee states that he filed an ICBC claim three months after the MVA because he was injured, it wasn't his fault, he deserved to be compensated, and as far as he was concerned, it was "strictly [his] own business."

41. The Employee also argues that he was never disciplined for making the request to change his hours on his timesheet. He further argues that the decision to terminate him was made July 12, 2018, 12 days before the Employer actually did so. He contends that this shows a lack of integrity on the Employer's part.

ANALYSIS

42. 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, 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.

43. 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.

44. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision of the Director. After considering the appeal submissions, I conclude that the Appellant has not met that burden and dismiss the appeal.

New Evidence

45. In *Re Merilus Technologies*, BC EST # D171/03, the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high probative value, in the sense that, if believed, it could, on its own, or when considered with other evidence, have led the Director to a different conclusion on the material issue.

46. All of the material submitted on appeal was available at the time of the hearing and thus does not constitute new evidence.

47. The Employee submitted a screen shot of a CD which is labelled "Image of the disk containing x-ray [indecipherable] Calvin Hirvonen taken on December 7 2017 by requisition of Doctor Sonia Arcadi." The following page appears to be an image of that x-ray. The following several pages are printouts from an online health site called "very well health" relating to "flat neck syndrome." I infer that in submitting this information, the Employee suggests he suffered an injury as a result of the September 2017 MVA.

48. As the x-ray was available by April 29, 2019, the date of the hearing, it ought to have been provided to the delegate had the Employee considered it relevant to this matter. The new information does not meet the test for new evidence.

49. Furthermore, on review of this information, I am not persuaded that it would have led the delegate to a different conclusion on the issue in dispute. While the material seems to suggest that the Employee has "flat neck syndrome," the material contains no medical diagnosis, nor is there any evidence to suggest that what the Employee has constitutes an injury or that the injury or syndrome was a result of the September 2017 MVA.

50. I have not considered the arguments written by the Employee himself. He did not appear at the hearing to present these arguments even though he had every opportunity to do so.

51. I find no basis for this ground of appeal.

Failure to observe the principles of natural justice

52. 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 delegate must decide the complaint in a manner that is favorable to the Appellant. (see, for example, *Imperial Limousine Service Ltd.,* BC EST # D014/05).

53. There is nothing in the appeal submission that establishes that the Employee was denied natural justice.

54. The Employee was represented by his father at an oral hearing regarding his complaint. Mr. Hirvonen had every opportunity to present evidence and ask the Employer questions on its evidence.

55. The record shows that the Employee was provided with the Employer's evidence on April 9, 2019, 20 days in advance of the April 29, 2019 hearing. It appears Mr. Hirvonen appeared at the hearing without his son having provided him with that material or a full factual background. There is no evidence the delegate considered evidence that had not previously been disclosed. While Mr. Hirvonen may not have seen the Employer's evidence before the hearing, that was through no fault of the Director.

56. Many of the arguments made under this heading are more correctly considered errors of law and will be dealt with below. Most of them relate to the admissibility or weight that ought to have been given to the Employer's evidence. There is no suggestion that Mr. Hirvonen objected to any of this information being presented during the hearing, and having reviewed the record, I find no basis for the argument that the delegate erred in considering it. The delegate has wide latitude in accepting evidence and she appropriately set out her reasons for relying on it.

57. I conclude that the delegate did not deny the Employee the opportunity to be heard.

Error of Law

58. The Tribunal as 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.

59. There is nothing in the appeal submissions that persuade me that the delegate erred in her analysis of the evidence.

60. The delegate appropriately considered the provisions of the *ESA* requiring that the employer pay compensation for length of service unless the employer could establish that it had just cause for termination.

61. The delegate also appropriately noted that the Employer had the burden to substantiate just cause and considered the Employer's evidence in this regard.

62. The delegate noted that the only evidence regarding the MVA and the Employee's insurance claims came from the Employer. As previously noted, Mr. Hirvonen, the Employee's agent, was unaware of these MVAs and was unable to provide any evidence in this regard.

63. The delegate found the Employer's evidence to be reliable and consistent with the documentary evidence. I find no error of law in the delegate's approach to the evidence.

64. The delegate then considered whether the Employer had discharged its burden of demonstrating that the Employee's actions were such to justify termination and concluded that it had.

65. In arriving at this conclusion, the delegate set out some principles for establishing just cause. In my view, it would have been helpful for the delegate to refer to case authority or Tribunal decisions on just cause, of which there are many, in her analysis. However, I find that the delegate considered appropriate factors and that her conclusion was well supported on the evidence before her.

66. The Tribunal has often referred to the test outlined in *McKinley v. BC Tel* ([2001] 2. S.C.R. 161), in finding that dishonest conduct that is serious, wilful and deliberate, constitutes just cause. Such conduct amounts to a violation of an essential condition of their employment which is impossible to reconcile with a continuation of the employment relationship. (see *Provident Security Corp.*, BC EST # RD149/16).

67. In my view, the Employee's conduct combined elements of dishonesty (attempting to have the Employer alter his work timesheet and filing and receiving compensation as a result of an MVA which occurred while he was carrying out duties for the Employer without informing the Employer) and insubordination (refusing/resisting the Employer's direction to undergo a functional assessment after the second MVA). In my view, the delegate's conclusion that the Employee's conduct was deliberate, serious, and incompatible with the continuation of the employment relationship was amply supported by the facts.

68. The insurance regime in British Columbia sets out a process for filing insurance claims while at work and in non work-related situations. Although this process was explained to the Employee on several occasions, he did not want to comply. Although he informed his Employer that he was uninjured, he subsequently filed an insurance claim for injuries sustained while at work and did not report the fact of the filing, or the subsequent compensation received, to the Employer.

69. When the Employee was involved in a second MVA, he attempted to circumvent the insurance regime by seeking to have the Employer falsify time records. The Employer did not immediately discipline the Employee for his attempt to have the time records "adjusted" because it was not aware of the reasons he had attempted to do so. Those reasons became apparent to the Employer on June 21, 2018, after which the Employer decided to terminate his employment for cause.

70. There is nothing in the appeal submission to persuade me the delegate erred in law in her conclusion and I dismiss the appeal.

ORDER

71. Pursuant to section 115 of the *ESA*, I order that the June 24, 2019, Determination that the Employer did not breach the *ESA* and that no compensation for length of service is owed, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal