Employment Standards TRIBUNAL

Citation: Hussein Thawer (Re)
2019 BCEST 114

An Application for Reconsideration

- by -

Hussein Thawer
(the "Applicant")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2019/169

DATE OF DECISION: October 28, 2019

DECISION

SUBMISSIONS

Hussein Thawer — on his own behalf

INTRODUCTION

1. Hussein Thawer (the "Applicant") applies for reconsideration of 2019 BCEST 87 (the "Appeal Decision") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). Such applications "may not be made more than 30 days after the date of the order or decision" (section 116(2.1). In this case, the Appeal Decision was issued on August 21, 2019, but the reconsideration application was not formally filed until October 1, 2019.

2. However, notwithstanding the seemingly late application, I am satisfied that this application should be accepted as timely. On September 20, 2019, the Applicant filed an Appeal Form (Form 1) with appended reasons seeking to overturn the Appeal Decision. This filing error has now been corrected but, as noted above, the Applicant's Reconsideration Application Form was not filed until October 1, 2019 (i.e., after the reconsideration application period expired). It seems clear that the Applicant simply initially filed the wrong form and I do not think it would be fair to now treat that oversight as a fundamental procedural failing.

3. By way of the Appeal Decision, the Tribunal dismissed the Applicant's appeal of a Determination issued on May 2, 2019, by Jordan Hogeweide, a delegate of the Director of Employment Standards (the "delegate"). Following an investigation, the delegate dismissed the Applicant's section 74 complaint because "the *Employment Standards Act* has not been contravened and no wages are outstanding". The Applicant, in his original complaint, maintained that he had been hired as a "financial services manager" at "$120,000 per year minimum". He claimed he had been wrongfully dismissed and, accordingly, sought $133,400 in unpaid wages and allowances based on a guaranteed one-year contract.

4. The delegate's investigation focussed on two provisions of the *ESA*, namely, section 8 (the pre-hire misrepresentation provision) and section 83 (employee not to be mistreated because of a complaint or investigation).

5. On appeal, the Tribunal held that neither ground of appeal advanced – error of law; breach of the principles of natural justice – had been made out. The Applicant's appeal was thus dismissed under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding.

6. The Applicant now seeks to have the Appeal Decision set aside. In my view, this reconsideration application fails to pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, as such, must be dismissed. My reasons for reaching this conclusion now follow.

PRIOR PROCEEDINGS

The Determination

7. The Applicant was employed for a very brief period (March 22 – 31, 2018) at a North Vancouver car dealership [the "Employer"] as a financial services manager. His employment was governed by terms and conditions set out in a written employment contract he signed on March 22, 2018. The delegate, at page R12 of his Reasons for the Determination issued concurrently with the Determination (the "delegate's reasons"), described this agreement as follows:

> The best evidence I have before me of the terms of employment that [the Employer] promised to [the Applicant] before he was hired is the written employment contract he signed on March 21, 2018 [*sic*, the actual date was March 22, 2018], the day after his interview with [the Employer's general manager]. Before signing it, [the Applicant] had the chance to review the agreement. [The Employer's recruitment officer] had sent it to him the evening before and asked him if he had any questions. [The Applicant] provided no evidence to show that before signing the contract he raised any sort of objection to [the human resources manager; the general manager], or anyone else at [the Employer], despite the written agreement containing no mention of any guaranteed monthly income or one-year term. In fact the agreement stated [the Employer] could fire [the Applicant] "at any time, without cause," as long as it followed the rules in the Act for doing so.

8. The Applicant's comprehensive written employment contract, dated March 21, 2018 and signed on March 22, 2018, clearly stated that there was no guaranteed salary or employment tenure – the Applicant's compensation was based solely on a commission structure with a $1,500 monthly gross draw against earned commissions plus a monthly allowance for the use of his vehicle, allowances for fuel and cellular telephone expenses, and the contract also provided for certain other group benefits. As noted by the delegate, above, there was no security of tenure since the agreement permitted the Employer to terminate the Applicant at any time without cause subject only to the minimum requirements of the *ESA*.

9. The Employer's evidence regarding the March 21 employment agreement, accepted by the delegate, is set out at page R9 of the delegate's reasons:

> [The Employer's recruitment officer] then drafted [the Applicant's] employment agreement (excerpted above) and then called him to ask if he had any questions about it (he did not). She also asked if he had a printer so he could print it off and sign it. [The Applicant] said he did not have a printer, so she said she would have it ready for him to sign at the dealership the following morning. That same afternoon, [the Employer's recruitment officer] emailed [the Applicant] a copy of the agreement, and wrote, "as per your previous discussions with [the Employer's general manager], please find the attached written Employment Offer…Please take the time to review the terms of the attached offer and let me know if you have any questions." She also included several standard documents for new-hires. [The Employer's recruitment officer] received a signed copy of [the Applicant's] employment agreement the next day. He did not ask any questions and or suggest any changes to the agreement.

10. Electronic communications contained in the section 112(5) record (the "record") corroborate the Employer's position. An e-mail, dated March 21, 2018, from the Employer's general manager to the recruitment officer, the Employer's human resources manager and a third individual, states that he has

hired the Applicant on a commission basis more or less identical to two other named individuals. The record also includes the recruitment officer's March 21 e-mail to the Applicant (and copied to various other individuals in the Employer's organization) attaching the employment offer (commission only) and various other documents that were to be signed the next day. Although the Applicant was invited to "let me know if you have any questions", there is nothing in the record to indicate that the Applicant ever took issue with the employment terms embodied in the March 21 employment agreement.

11. One must query why the Applicant would not have raised a question about his employment compensation (strictly commission) and the lack of employment security reflected in the agreement (he was to be placed on a three month probationary period and could be terminated "at any time, without cause" with minimum *ESA*-mandated notice or pay) if he understood he was being hired for a one-year minimum term at a $10,000 monthly salary.

12. At this juncture it is important to note that although the Applicant originally claimed compensation based on a "wrongful dismissal", under the *ESA* he did not have any entitlement to section 63 compensation for length of service because he did not work for at least three consecutive months (the minimum qualifying period before any compensation for length of service is payable). The delegate may have believed that the Applicant was, in fact, dismissed without cause – he characterized the Applicant's dismissal as "thoughtless and cold hearted" and observed that the Employer advanced only "bare (and outright false) allegations" and "provided no substantive evidence of performance problems or misconduct" (page R12). Nevertheless, the delegate did *not* make an affirmative finding that the Applicant was dismissed without just cause and did not (indeed, in light of the Applicant's short tenure, the delegate *could* not) award the Applicant any section 63 compensation.

13. It may be that the Applicant has a legitimate claim for damages for wrongful dismissal, but such a claim must be pursued in the civil courts or perhaps before the Civil Resolution Tribunal if he limited his claim to no more than $5,000. Neither the Director nor the Tribunal has any jurisdiction to issue a civil damages award for severance pay in lieu of reasonable notice. I am not passing any judgment regarding the merits of such a possible civil damages claim.

14. As noted above, the Applicant's complaint was not adjudicated under section 63 but, rather, on the basis of alleged contraventions of sections 8 and 83 of the *ESA*. These two provisions are set out, below:

> 8 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;
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> (b) the type of work;
>
> (c) the wages;
>
> (d) the conditions of employment.
>
> 83 (1) An employer must not
>
> (a) refuse to employ or refuse to continue to employ a person,
>
> (b) threaten to dismiss or otherwise threaten a person,

> (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
>
> (d) intimidate or coerce or impose a monetary or other penalty on a person,
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> because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.

15. The Applicant's position regarding section 8 was (and he continues to assert) that despite the clear and unequivocal provisions of his March 21 written (and signed) employment agreement, he was hired and employed under a fixed-term agreement with a minimum one-year term at a $10,000 monthly salary plus other allowances and benefits. In support of his position, the Applicant submitted a letter dated March 26, 2018, on the Employer's letterhead and signed by the Employer's general manager, addressed "To whom it may concern" referencing "Verification of Employment for [the Applicant]". This brief letter reads as follows:

> I, [Employer's general manager/title], am writing this letter to confirm that [the Applicant] has signed and been offered a minimum one year guaranteed contract. His minimum salary is guaranteed to be no less than $10,000.00 per month as well as a monthly car allowance of $500.00 and cell phone allowance of $100.00.
>
> Should you have any other questions or concerns, please feel free to call me at [telephone number omitted].

16. This March 26 letter was the subject of conflicting evidence before the delegate. The Applicant maintained that he requested this letter so that he could provide proof of employment and income to a prospective landlord. The Employer's position, as communicated to the delegate by the Employer's general manager and his executive assistant, was that the Applicant dictated the contents of the letter to his executive assistant (who knew its contents were untruthful) and that she had previously prepared similar exaggerated letters for other employees (delegate's reasons, page R9): "She had done similar letters in the past and knew they were often exaggerated or outright fabricated as a courtesy to employees who wanted to improve their candidacy as a tenant." The general manager's evidence was that he explained to the Applicant during his job interview that the Applicant, "given his performance background… should be able to make at least $10k in commissions per month… [b]ut they did not discuss any guaranteed income 'top-ups' or any kind of guaranteed term of employment" (page R10). The general manager's evidence regarding the March 26 letter was as follows (page R10):

> …[the Applicant] asked [the general manager] for the verification of employment letter. [The general manager] brought [his executive assistant] into [the Applicant's] office and told her to draft a letter according to [the Applicant's] instructions. [The general manager] read and signed the letter, knowing it to be false, because he wanted to help [the Applicant] get a place. It was not the first time he had signed a letter like that. He was just trying to help [the Applicant] out. The letter was not meant to alter the employment contract at all.

17. The delegate ultimately concluded that the Employer had not contravened section 8 either in regard to the term of employment or the proposed compensation arrangements. The delegate determined that the Employer's March 26 letter "does not reflect the actual terms of employment that [the Applicant] and

[the Employer] discussed before he was hired". The delegate found both the general manager and his executive assistant to be "forthright and credible" and that:

> …the purpose of the letter was to assist [the Applicant] in renting an apartment. The letter was overstated to make [the Applicant] appear to be a more financially secure tenant than perhaps he really was, and I am not persuaded that it describes empty promises that were made to [the Applicant] as inducements for him to accept the position.

18. In my view, the delegate's rejection of the Applicant's position that he was hired for a minimum 1-year term at a monthly $10,000 salary was entirely reasonable given the evidence before him. However, and more importantly, the delegate's finding regarding the terms of the parties' employment contract was based on a proper evidentiary foundation and, as such, it is not open to the Tribunal to substitute its judgment on this matter for that of the delegate.

19. As for the matter of section 83 mistreatment, the delegate found that the evidence before him did not suggest that there had been any such mistreatment.

The Appeal Decision

20. The Applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice.

21. With respect to the error of law ground of appeal, the Applicant's challenge to the Determination was predicated on alleged factfinding errors regarding the fundamental terms of the Applicant's employment offer. He maintained that he was offered, and accepted, a $10,000 monthly salary for a guaranteed minimum one-year term.

22. As noted in the Appeal Decision, the interpretation and application of sections 8 and 83 of the *ESA* involve questions of mixed fact and law. In *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235, the Supreme Court of Canada observed that where a finding involves the application of a legal standard to a set of facts, the finding must not be set aside unless it is tainted by "a legal or palpable and overriding error".

23. There was some evidence before the delegate, namely, the March 26 letter, to support the Applicant's position. But there was also both documentary and witnesses' evidence demonstrating that the Applicant was hired on a commission basis with no employment tenure guarantee. As noted by the Tribunal Member in the Appeal Decision (at para. 30):

> I am unable to find that the conclusions of the Director which are challenged by [the Applicant] are based on a view of the facts which could not reasonably be entertained. The reasoning of the Director on the section 8 issue is coherent, consistent with the evidence, and logically supports the resulting finding. Applying the above test, I am satisfied the conclusion on that matters reached by the Director was one that was entirely justified on the evidence presented. While I appreciate that [the Applicant] disagrees with the resulting decision, it is not shown in this appeal that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable.

24. I entirely agree with the Appeal Decision on this score. Indeed, in my view, the weight of the evidence clearly demonstrated that the parties' employment agreement was as asserted by the Employer rather

than by the Applicant. It may be that the Applicant, in his mind, interpreted the general manager's statement that the Applicant should be able to earn $10,000 in commissions each month as an affirmative contractual undertaking, but even if that were the case, I am still puzzled why the Applicant would sign an employment agreement that clearly did not provide for any guaranteed minimum $10,000 monthly salary if he truly understood that was the bargain struck.

25. With respect to section 83, the Tribunal held as follows (at paras. 32 – 34):

> Section 83 prohibits an employer from taking any of the listed actions against an employee only if those prohibited actions are motivated in whole or in part by the employee's direct or potential involvement under the *ESA*. That is not to say the described conduct may not run afoul of other provisions of the *ESA*, but section 83 requires proof of both prohibited conduct and improper motivation. The employee has the burden of demonstrating improper motive. This requirement is grounded in considerations of fairness and efficiency: see *Gordon Cameron*, BC EST # RD100/06.
>
> The conclusion reached by the Director on this issue is based on an assessment of the evidence applied to the obligation on a person raising a contravention of section 83 of the *ESA* to show that the employer committed any of the prohibited actions found in that provision and that those actions were motivated at least in part, "because a complaint… may be or has been made under this Act". In other words, there must be "some evidence" that the actions were motivated by the employee's direct or potential involvement under the *ESA*: *Burnaby Select Taxi Ltd. and Zolton Kiss*, BC EST # D091/96.
>
> I substantially agree with the Director that, while one might speculate about some of the conduct of [the Employer] – as [the Applicant] has done throughout his appeal submission – the weight of the totality of the evidence was insufficient to tip the balance in favour of finding [the Employer] contravened section 83 of the *ESA*.

26. I also agree with, and adopt, the Tribunal Member's reasons regarding the interpretation and application of section 83 of the *ESA*.

27. The Applicant's position regarding the "natural justice" ground of appeal was not clearly delineated in his appeal submissions but, as best as I can determine, he maintained that the delegate did not fairly consider the totality of the evidence. There is no suggestion that the delegate was biased or in some sort of conflict of interest. The record shows that the delegate sought and considered all of the evidence submitted by the Applicant in support of his complaint. The Tribunal Member on appeal rejected the natural justice ground of appeal and I fully concur with that decision.

THE ASSERTED GROUNDS FOR RECONSIDERATION

28. The Applicant's reasons in support of his reconsideration application are, essentially, that there has been an egregious miscarriage of justice and that his complaint ought not to have been dismissed. He maintains that the Employer's evidence was wholly untruthful and that he has been victimized by a concerted slander campaign on the part of the Employer's senior employees:

> They trashed my name admittedly to former employers, cost me jobs and slandered me again to members of the TD auto finance and in this industry that type of slander carries far and fast…

> IT was also proven that they had zero grounds for dismissal and every single employ that was asked by the Director of Employment Standards what they though my reasons of being let go truly were and they all gave a different answer which the Director himself called them out on and said he seen this as harsh with zero reasons as to why i truly should have been let go other then "because they just felt like they can so they did. [*sic*]

FINDINGS AND ANALYSIS

29. The Applicant may be correct in asserting that there was no just cause for his dismissal. I have already alluded to the fact that the delegate was apparently sympathetic to this view. However, whether or not the Applicant was dismissed without cause is not relevant in this instance because, even assuming he was dismissed without cause, he was not entitled to any section 63 compensation for length of service since his period of continuous service did not meet the minimum statutory 3-month consecutive employment threshold.

30. Similarly, whether or not the Applicant has a valid civil claim for defamation is not relevant since the delegate was not empowered under the *ESA* to award damages for slander.

31. The Applicant's appeal – and this application – is, at its core, a request that the Tribunal review the evidence and come to a different conclusion than that reached by the delegate. The Tribunal could set aside the delegate's findings if there was no evidence before him to support his findings, but this is manifestly not the situation here. Indeed, as I stated above, I consider the delegate's findings to be entirely reasonable and that they logically flow from the evidence that was before him.

32. As the Tribunal observed in *Milan Holdings*, the reconsideration process is not intended to offer an applicant another opportunity to reargue the same case that has been previously advanced. Rather, the applicant must demonstrate that there is a strong presumptive case that the appeal decision is predicated on a serious legal error or is otherwise tainted by a fundamental lack of fairness.

33. This application constitutes nothing more than an attempt to have the Tribunal reweigh the evidence and reach a different conclusion than that set out in the Appeal Decision. At the first stage of the two-stage *Milan Holdings* test, the Tribunal must consider "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" (page 7). In my view, this application falls well short of raising such a question and, accordingly, does not pass the first stage of the test. That being the case, this application must be dismissed.

ORDER

34. This application for reconsideration is refused. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal