Employment Standards TRIBUNAL

Citation: Dale Kent (Re)
2019 BCEST 119

An appeal

- by -

Dale Kent
("Mr. Kent" or the "Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Maia Tsurumi

FILE NO.: 2019/164

DATE OF DECISION: November 14, 2019

DECISION

SUBMISSIONS

Dale Kent — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Dale Kent ("Mr. Kent" or the "Appellant") has filed an appeal of a determination (the "Determination") issued by Jordan Hogeweide, a delegate (the "Delegate") of the Director of Employment Standards, on January 9, 2019. In the Determination, the Delegate found that the *ESA* was not contravened and there were no outstanding wages.

2. Mr. Kent appeals the Determination on the grounds that the Delegate failed to observe the principles of natural justice. He seeks to have the Determination cancelled.

3. Mr. Kent also requests an extension of time to the statutory appeal period pursuant to section 109(1)(b) of the *ESA*.

4. I decline to extend the time to file the appeal and thus dismiss the appeal pursuant to section 114(1)(b) of the *ESA*.

5. This decision is based on the submissions made by Mr. Kent in his Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, and the Reasons for the Determination (the "Reasons").

ISSUE

6. The issues before the Employment Standards Tribunal (the "Tribunal") are whether:

   a. the time period for filing the appeal should be extended pursuant to sub-section 109(1)(b) of the *ESA*; and

   b. if the answer to a. is yes, whether all or part of this appeal should be allowed or dismissed.

ARGUMENT

7. The Appellant asks me to extend the time period to file his appeal because he says that he did not receive the Determination until a couple of days before September 14, 2019. The Determination was issued on January 9, 2019. The Appellant is more than seven months late with his appeal.

8. On the merits of the appeal, the Appellant submits that the Delegate erred by failing to observe principles of natural justice in making his Determination because:

   a. Mr. Lazaro was not the correct person to provide evidence. There were two other employees whose evidence were required;

   b. The Employer did not fully investigate both sides of the incident;

c. There was other evidence of instances of harassment where employees were not disciplined;

d. Of his mental health;

e. The Delegate did not do a thorough enough job of investigating before coming to his decision;

f. The Delegate should have given the Appellant's use of emoticons more weight;

g. The text he sent did not amount to serious misconduct;

h. The incident could have been solved easily by an instruction that there should be only business texts and with someone having a brief discussion with the Dispatcher; and

i. The Social Security Tribunal found that there was no just cause.

9. The Appellant wants the Tribunal to cancel the Determination.

THE FACTS AND ANALYSIS

Background

10. The Respondent, Coast Environmental Ltd. (the "Employer"), operates an environmental services business within the jurisdiction of the *ESA*.

11. The Appellant was employed as a portable toilet delivery driver and serviceman from May 1, 2009, to January 26, 2018, at the rate of pay of $19.50/hour. He filed his complaint (the "Complaint") on February 16, 2018, alleging that the Employer failed to pay him statutory holiday pay for Family Day 2018 and failed to pay him compensation for length of service.

12. The Delegate conducted a hearing on July 26, 2018, and issued his Determination and Reasons on January 9, 2019.

Issues Before the Delegate

13. The issues before the Delegate were whether the Complainant was owed: (1) compensation for length of service; and (2) statutory holiday pay for Family Day 2018.

Evidence and Submissions at the Hearing

14. The Employer's general manager, Dan Lazaro ("Mr. Lazaro"), gave evidence for the Employer. For the nine or so years before the Appellant was fired, he was never disciplined; he was a good employee and a friendly guy.

15. However, on January 26, 2018, Mr. Lazaro was told that on January 25, 2018, the Appellant sent a sexually inappropriate text message to a female dispatcher of the Employer (the "Dispatcher"). The message was sent on the Appellant's work phone, which he also used for personal use. It was sent to the Dispatcher's work phone, which she left at the office and did not use as a personal phone. The Dispatcher forwarded the message to her manager saying that it was unsolicited, inappropriate, and "creepy". The manager in

turn showed the text message to the Employer's Manager of Human Resources and Environmental Health and Safety, Patti Faulconbridge ("Ms. Faulconbridge").

16. The evidence was that on January 26, 2018, the Employer's Division Manager retrieved the Dispatcher's company cell phone, reviewed the past and present texts, and contacted Human Resources, Mr. Kent's manager, and Mr. Kent himself. There was a face-to-face meeting of these individuals. At the meeting, Mr. Kent did not acknowledge that the text was inappropriate as he felt that the Dispatcher was very friendly with him. The Division Manager said that the use of a company phone for this purpose was not allowed and the Human Resources representative said that the text and its content made the Dispatcher very uncomfortable and met the definition of harassment.

17. Based on the above sequence of events, Ms. Faulconbridge and Mr. Lazaro decided to terminate the Appellant for serious misconduct and he was terminated on January 26, 2018.

18. On January 26, 2018, the Appellant sent e-mails to the Employer explaining his behaviour. He said that he had worked hard for the company for nine years, that he and the Dispatcher were friends, including outside of work, and that he thought the article was a funny story that the Dispatcher would enjoy. He further said that he was shocked by the Dispatcher's reaction as he had always respected female employees and never crossed the line.

19. On January 31, 2018, the Dispatcher e-mailed Mr. Lazaro and said that she received a text from Mr. Kent on January 27, 2018. She did not look at the message before deleting it. She said that she felt that the Appellant's mental health had been questionable lately and that she was "extremely uncomfortable about this entire situation." She was concerned that the Appellant would be coming back to work because it would make for an even more uncomfortable work environment for her. Mr. Lazaro told her that the Appellant would not be returning to work and that he would be asked not to contact her again.

20. On February 23, 2018, the Appellant asked the Employer to provide him with its sexual harassment policy and information about how it was communicated to employees. He said that he had never seen this policy. Ms. Faulconbridge responded on February 26, 2018, that the Company's safety manual that contained the policy was placed in each vehicle and in each office and was referred to in Safety Meetings that the Appellant attended.

21. On April 11, 2018, the Appellant sent the Employer a "Victim Impact Statement" about the negative effects that his termination had had on him.

22. Mr. Lazaro testified about the Employer's Workplace Violence & Harassment Policy (the "Policy") found in its Occupational Health & Safety Manual. He said that the Employer ensured that every employee read and understood the Policy. The Employer submitted a "Safety Orientation Form" signed by Mr. Kent on May 2, 2012, which confirmed that he was oriented on the "Health & Safety Program". The Policy states in part:

> Coast Environmental Ltd. is committed to providing a work environment that is free from…any form of harassment. …
>
> Coast Environmental Ltd. prohibits…any form of harassment in the workplace and will not tolerate such behaviour. … Sexual Harassment is defined as an unwelcome behaviour of a sexual

> nature in the workplace that negatively affects the work environment or leads to adverse job-related consequences for the employee. Violations of this policy may head, in the Companies' sole discretion, to disciplinary action up to and including termination of employment. [emphasis included]

23. With respect to the workplace and rude jokes and the like, Mr. Lazaro said that the Employer took sexual harassment of any kind very seriously and never condoned such behaviour, especially in the #metoo climate. He was unaware about the Appellant and the Dispatcher joking around in such a way in the past; he was unaware of a picture of a hand giving the middle finger on the Dispatcher's desk, as alleged by the Appellant; he was unaware of any of the Appellant's other allegations about inappropriate workplace behaviour; and he reiterated that the Employer always treated behaviour of that sort seriously.

24. The Appellant did not attend the hearing because of medical issues. He said that he would rely on documents submitted in support of his Complaint.

25. In his written submissions, the Appellant said that the Employer had no written standards for behaviour and he provided the following examples of inappropriate behaviour in relation to the workplace:

a. One employee chasing another with a dildo found in a sewage tank;

b. One employee photographed at a known brothel and who got a "DUI" received only a two-week suspension from work;

c. An employee shaking her breast out of a window, taunting someone after a heated exchange;

d. The Dispatcher saying in the office that "the cake tasted so good it made me wet"; and

e. Very graphic pictures e-mailed or texted from other employees to dispatchers, including the Dispatcher, without complaints or any discipline.

26. The Appellant also provided examples of the unpleasant and difficult conditions he experienced as a delivery driver and serviceman of portable toilets.

27. He said that the Employer's dispatchers deal with unpleasant calls about sewage and so forth and that the Dispatcher was not a "fragile lady". He truly felt that she was a friend and that he had been nothing but a gentleman to her. They had about five to seven years of work-related phone calls and texting and he was shocked to find out that she was offended "or something?" by the humorous story he sent to her. On January 26, 2018, after he did not get a response to his text of January 25, 2018, he went to apologize to her in case he had upset her. He found out that she had gone home crying.

28. In his written submissions, the Appellant also criticized some of the Employer's business practices.

29. One e-mail with the Employer that the Appellant submitted but that the Employer did not submit to the Branch was about his return to the workplace after he was terminated. On January 31, 2018, Ms. Faulconbridge e-mailed the Appellant about a report that he was at the Chemainus yard/office on January 30, 2018. Ms. Faulconbridge asked the Appellant to not return to that yard or property and not to have any further contract with the Dispatcher or other workers.

30. The Appellant's response to Ms. Faulconbridge says, "Please calm down". He was merely clearing up loose ends and he had no phone to arrange things. His intention was not to potentially further upset the Dispatcher. He told Ms. Faulconbridge that she was overstepping her authority by telling him who he could talk to.

31. The Appellant submitted 33 pages of text messages between him and the Dispatcher covering the period from July 19, 2016, to February 17, 2017. He submitted that these proved that he and the Dispatcher chatted "as friends and also the occasional disgusting thing our job presented" and that the Dispatcher was not "some fragile young lady that cannot stand a humorous factual Wired magazine article texted to her."

32. The Delegate reviewed the 33 pages of text message and found that most of the content was related to work. While the Appellant and the Dispatcher discussed what needed to be done for the service work, they also gossiped about co-workers, complained about customers, told funny stories about work and home, discussed weekend plans, and generally talked about their private lives. They sometimes used rough language.

33. As part of the Complaint, the Appellant submitted some information from a human resources consultant who summarized her opinion of the Appellant's situation in an e-mail to him. She expressed doubt that the Appellant's conduct amounted to sexual harassment and thought that summary dismissal was an excessive response in the circumstances. The Appellant also submitted an article by the same consultant called "False Allegations of Sexual Harassment: Misunderstandings and Realities". The article discusses sexual harassment allegations, investigations, and other considerations and says that the "law and case law also tell us we need to consider what is known or ought to be known to be unwelcome comment or conduct, and what might constitute sexual harassment. What would a reasonable person, in 1952, conclude? In 2011?"

34. The Appellant also submitted some information about emoticons and argued that the smiley faces he used in the text message on January 25, 2018, showed that his comment was considered merely funny with no intention to harm.

Delegate's Findings and Analysis

Compensation for Length of Service

35. Under the *ESA*, if the Appellant was not fired for just cause, he was entitled to eight weeks wages. The Delegate said that the burden was on the Employer to prove just cause.

36. The Delegate noted that the Employer fired the Appellant because of a single act of misconduct and thus for just cause to be established, the Appellant's misconduct must have been a fundamental and irreparable breach of the employment relationship.

37. First, the Delegate considered whether misconduct occurred. The Appellant's position was that the text did not amount to misconduct: (1) the Employer had no clear polices on the use of company phones or sexual harassment; (2) even if there were policies, he was not made adequately aware of them; (3) he and

the Dispatcher were friends; and (4) he and the Dispatcher had joked around by text in the past about off-colour subjects.

38. The Delegate held that whether or not the Employer had communicated its policies to the Appellant was irrelevant (although he found that it was likely that they did communicate these policies because of the 2012 safety training and the Policy was kept in the Employer's trucks) because an employer does not need an express policy against sexual harassment. Employers may presume that employees know that unwanted communication of a sexual nature is prohibited in every workplace.

39. The Delegate accepted that the Appellant and the Dispatcher were on friendly terms, but there was very little evidence that the two of them interacted outside of work and he was satisfied on the evidence that whatever friendship they had came second to their relationship as co-workers, which was the context in which the sexually graphic text was sent.

40. The Delegate also accepted that the Appellant and the Dispatcher sometimes used off-colour language in their text conversations and that some of that language could even be interpreted as sexual in nature. But the Delegate found nothing in the 33 pages of text messages was unambiguously and graphically sexual the way in which his text message on January 25, 2018 was. He rejected the argument that the history of rough language between the Appellant and the Dispatcher somehow created a situation where it was okay for the Appellant to use sexual language.

41. The Delegate disbelieved the Appellant's bare allegations that the Dispatcher had engaged in lewd behaviour in the past. He also found that even if she had "thick skin" from working in a workplace that deals with unpleasant situations or had cut-outs of the middle figure at her desk, this did not excuse communicating sexually to her. The Delegate did not find any relevance in the use of the emoticons. He accepted that the text was meant as a joke, but jokes can still be unwanted, and when they contain sexually explicit language it can and most often will amount to prohibited sexual communication. It did in this case.

42. The Delegate found it important that the Dispatcher took offence to the text message and reacted negatively. It was more than reasonable and consistent with the rest of the evidence received in the Complaint. There was nothing but a bare allegation by the Appellant to suggest that she was somehow embellishing her reaction for "personal reasons".

43. After having concluded that there was misconduct, the Delegate then went on to consider whether in the entire context of the employment relationship, the nature and severity of the misconduct was irreconcilable with sustaining an employment relationship. The Delegate found the following factors applicable to the circumstances:

    a. Workplace environment: Although the Appellant listed several incidents of misbehaviour in the workplace, including by the Dispatcher, there was no evidence to substantiate these allegations and the Delegate believed Mr. Lazaro that as far as he knew, these incidents had never occurred and that if any misbehaviour of a sexual nature had occurred, the Employer would have taken it very seriously. The Delegate rejected the Appellant's suggestion that the nature of the work itself made sexual language more permissive.

b. Wilful or deliberate misconduct: The Delegate concluded that the Appellant did not intend to offend the Dispatcher. However, he found that a reasonable person viewing the text objectively in the circumstances would find that it contained explicitly sexual language that would be unwelcome to the Dispatcher. The Appellant had not once expressed remorse for offending the Dispatcher or accept that he might have done anything wrong. He continued to profess disbelief that the Dispatcher or anyone else could find the text inappropriate. The Delegate found that his showing up at the Dispatcher's workplace unannounced very soon after being fired for offending her with sexual language showed that the Appellant was either oblivious to, or disregarded, the norms of the modern workplace.

c. Length of service without prior misconduct: The Delegate credited the Appellant for working many years at a very demanding job without any indication of misconduct or poor performance. This meant that that threshold for fundamental breach of the employment relationship should be higher for the Appellant than for an employee with a history of misconduct. However, there are some kinds of misconduct, including sexual harassment, that could not be overcome no matter how long and how good an employee's service record is.

d. Effect of the misconduct on the Employer: The Delegate agreed with the Employer's point that today, more than ever, sexual improprieties in the workplace should be of the utmost concern to all employers. Employers must ensure that their employees work in a safe environment free of all forms of unwelcome sexual communication. Thus, when the Appellant used sexual language that was unwanted by the Dispatcher, he did real damage to the Employer's business. It clearly upset the Dispatcher, but more broadly, it threatened to undermine the Employer's commitment and obligation to keep its workers safe.

44. Based on the above, the Delegate concluded that the nature and severity of the Appellant's misconduct was irreconcilable with sustaining his employment relationship and therefore the Employer had established just cause and by doing so had discharged its liability to pay him compensation for length of service.

Statutory Holiday Pay for Family Day 2018

45. The Delegate found that the Appellant was not entitled to statutory holiday pay on Family Day, February 12, 2018, because he was not an employee of the Employer on that day and he had not worked or earned wages for 15 of the preceding 30 days before the holiday as required by sub-section 44(a) of the *ESA*.

Analysis

Issue 1: Should the Time for Filing the Appeal Be Extended?

46. The Determination was issued on January 9, 2019. The Appellant filed his appeal form on September 16, 2019. His explanation for filing his appeal late is that Canada Post failed to notify him that the Determination was ready for pick-up at his local postal outlet. He says he does not know how this happened and that the last contact he had with the Branch was the Branch telling him to be patient because of its back log in dealing with complaints. He says he only read the Determination and Reasons a couple of days prior to September 14, 2019 (the date of his Appeal submissions).

47. As held by the Tribunal in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, extensions of time should not be granted as a matter of course. While the Legislature has established tight time frames for filing an appeal from a determination, the time periods established in the *ESA* are not that unusual: *Niemisto*, at p. 3.

48. The Tribunal has criteria to determine whether or not time periods for filing appeals should be extended. These criteria are set out in the *Niemisto* decision. Appellants seeking extensions for filing appeals should satisfy the Tribunal that:

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

ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;

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

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

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

Niemisto at p. 3; see also *Gorenshtein v. British Columbia*, 2013 BCSC 1499 at paras. 28 and 57

49. These criteria are not an exhaustive list. There may be other factors that ought to be considered. Further, not all of the above factors may be applicable in determining whether an extension should be granted or not depending on the circumstances of each case.

50. Based on the above criteria, I do not allow the Appellant's request to extend the time limits for filing his appeal under paragraph 109(1)(b). My reasons are as follows.

51. The Appellant has provided a credible explanation as to why he did not know that the Determination had been issued and did not follow-up with the Branch sooner. There is nothing to indicate that he did not have a genuine or ongoing *bona fide* intention to appeal the Determination and I do not think that Coast Environmental, the respondent party, would be unduly prejudiced by the granting of an extension.

52. However, neither the Employer nor the Director was made aware of the Appellant's intention to file an appeal and there is no strong *prima facie* case in favour of the Appellant. In fact, even if I had granted the extension of time, I would have dismissed his appeal under sub-section 114(1)(f) of the *ESA* as having no reasonable prospect of success.

No strong *prima facie* case

53. A "strong *prima facie* case" is an onerous requirement: *Scott v. College of Massage Therapists of British Columbia*, 2016 BCCA 180 at para. 78. It generally requires the Tribunal to undertake a review of the claim on the merits. It means that if the Appellant's appeal is heard, he has a strong likelihood on the law and the evidence presented that he will be successful: *Rezaian v Saraie*, 2018 BCSC 1088, at para. 22.

54. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

a. the director erred in law;

b. the director failed to observe the principles of natural justice in making the determination;

c. evidence has become available that was not available at the time the determination was being made.

55. As I set out above, the Appellant says that he was not accorded procedural fairness because:

a. Mr. Lazaro was not the correct person to provide evidence. There were two other employees whose evidence were required;

b. The Employer did not fully investigate both sides of the incident;

c. There was other evidence of instances of harassment where employees were not disciplined;

d. Of his mental health;

e. The Delegate did not do a thorough enough job of investigating before coming to his decision;

f. The Delegate should have given the Appellant's use of emoticons more weight;

g. The text he sent did not amount to serious misconduct;

h. The incident could have been solved easily by an instruction that there should be only business texts and with someone having a brief discussion with the Dispatcher; and

i. The Social Security Tribunal found that there was no just cause.

56. There is nothing in the Determination, the Reasons for Determination, or the Record that indicates the Delegate failed to observe principles of natural justice in making his Determination. The Appellant was given notice of the proceedings and their potential implications and he had opportunities to provide evidence and submissions in relation to his Complaint. The Delegate made his Determination based on all of the evidence and submissions before him, which included what was provided by the Appellant as well as by the Employer.

57. The Appellant says that others were better placed to provide relevant evidence, but it was his responsibility to get that evidence before the Delegate and he did not do so.

58. With respect to other instances of harassment prior to his termination, the Appellant had an opportunity to put evidence rather than bare allegations before the Delegate and he did not do so.

59. Regardless of the Appellant's opinion about the Employer's investigation, a description of the investigation was before the Delegate and considered by him in making his Determination.

60. Further below in this Decision, I deal with the Delegate's assessment of the Complaint and his conclusion that sending the text amounted to just cause in relation to whether there was an error of law, but in terms of procedural fairness, the Record and Reasons indicate that the Delegate fairly assessed the evidence and submissions before him in coming to his Determination, including the Appellant's use of emoticons.

61. Even though the Appellant only claims there has been a breach of natural justice, I have also considered whether he might have a strong *prima* facie case based on a possible error of law.

62. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

a. A misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

b. A misapplication by the decision-maker of an applicable principle of general law;

c. Where a decision-maker acts without any evidence;

d. Where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

e. Where the decision-maker is wrong in principle.

63. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

64. The Appeal Form, Determination, Reasons, and Record do not indicate that the Delegate may have been wrong in principle, may have misinterpreted or misapplied the *ESA*, or may have misapplied an applicable principle of general law.

65. A single act of misconduct can justify dismissal if the misconduct is of sufficient character to cause the irreparable breakdown of the employment relationship: *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161 at para. 48; *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at paras. 27 – 28. Whether just cause exists is a question that requires an assessment of the context of the alleged misconduct. This test can be expressed in different ways such as just cause for dismissal exists where the misconduct: (1) violates an essential condition of the employment contract; (2) breaches the faith inherent to the work relationship; or (3) is fundamentally or directly inconsistent with the employee's obligations to his or her employer: *McKinley v. BC Tel*, 2001 SCC 38, [2001] 2 S.C.R. 161 at para. 48; *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at para. 30.

66. In *Steel v. Coast Capital Savings Credit Union*, our Court of Appeal held that the governing principle from *McKinley* is that a decision-maker is tasked with determining whether, in the totality of the circumstances, the alleged misconduct was such that the employment relationship could no longer viably subsist: *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at para. 28, citing *McKinley* at paras. 56-57. The decision-maker is not obligated to formally balance the employee's length and quality of service with the nature and severity of the misconduct in determining whether there was just cause to dismiss, though it may be appropriate on the facts of a particular case to engage in such an analysis: *Steel v. Coast Capital Savings Credit Union*, 2015 BCCA 127 at paras. 28 – 29.

67. In a case where the employee admits to having engaged in the misconduct, the sole issue to consider is whether that conduct caused an irreparable breakdown in the employment relationship.

68. In my view, the Delegate did not err in principle in applying the *McKinley* analysis and his conclusion was not unreasonable. He applied a contextual approach and considered whether the nature of the conduct, which the Appellant admitted he had engaged in, was misconduct and was irreconcilable with a continuing employment relationship. The Delegate was aware of the length and quality of the Appellant's service, as well as the seriousness of the transgression, all of which he considered in the circumstances of the employment relationship and the Employer's approach to unwanted and unwarranted sexual misconduct or harassment. The Record established that the Employer's employees had a fundamental obligation to

not send unwanted sexually explicit communication to another employee and that the Appellant did not understand this fact even after he engaged in this conduct. It was open to the Delegate to find that this fundamental obligation was required whether or not the Appellant was familiar with the Employer's Sexual & Harassment Policy and that his refusal to understand that what he did was misconduct was fundamentally incompatible with the employment relationship. In these circumstances, the Appellant's actions resulted in a fundamental breakdown of the employment relationship.

69. There is no basis on which I might conclude that the Delegate did not act without any evidence or on a view of the facts that could not reasonably be entertained. As noted above, in relation to the principles of natural justice, my review of the Record and Reasons indicate that the Delegate's findings were based on the evidence and submissions before him. His conclusions were reasonable.

70. I have reviewed the decision of the Society Security Tribunal (the "SST") which was submitted as part of the Appeal Form. This decision was issued on October 11, 2018, prior to the Delegate's Determination. The Record indicates that the Appellant did not provide the decision to the Delegate.

71. The SST decision does not change my finding that there was no error of law. The decision is based on the Federal Court of Appeal's definition of "misconduct" for the purposes of sub-section 30(1) of the *Employment Insurance Act*, S.C. 1996, c. 23. In this context, misconduct is defined as "wilful misconduct", which means conscious, deliberate, or intentional conduct such that a claimant knew or ought to have known that his or her conduct would result in dismissal. There is no similar requirement under the *ESA*. Wilful misconduct was a factor that the Delegate considered in his contextual approach to whether the nature of the misconduct was such as to justify termination, but it was not the end of the analysis, like it is for determinations about Employment Insurance.

72. I now turn to the final ground on which an appeal can be made to the Tribunal, new evidence. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

73. *Bruce Davies et al.* provides guidance on how the Tribunal applies sub-section 112(1)(c):

> This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence…[The evidence] must meet four conditions:
>
> (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 culpable of belief; and

(d) the evidence must have high potential 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:

Bruce Davies et al., BC EST #D171/03, at p. 3.

74. None of the additional submissions made by the Appellant about other evidence of sexual communications among employees going undisciplined meets the criteria for the admission of new evidence.

75. Based on all of the above, I decline to extend the time to file the appeal.

Issue 2: Should the appeal be allowed or dismissed?

76. Given my decision that there is no strong *prima facie* case and thus the time to file the appeal will not be extended, I do not need to answer this question. However, had I granted the extension, for the reasons I give above as to why there is no strong *prima facie* case, I would also have found that the appeal had no reasonable prospect of success and dismissed it under sub-section 114(1)(f).

ORDER

77. Pursuant to sub-section 115(1)(a) of the *ESA*, I order the Determination, dated January 9, 2019, confirmed.

Maia Tsurumi
Member
Employment Standards Tribunal