Employment Standards **TRIBUNAL**

Citation: Michael L. Hook (Re)
2019 BCEST 120

An appeal

\- by -

Michael L. Hook
("Mr. Hook")

\- 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: David B. Stevenson

FILE NO.: 2019/147

DATE OF DECISION: November 14, 2019

Employment Standards Tribunal
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DECISION

SUBMISSIONS

Michael L. Hook — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Michael L. Hook ("Mr. Hook") has filed an appeal of a Determination (the "Determination") issued by John Dafoe, a delegate of the Director of Employment Standards (the "Director"), on July 18, 2019.

2. The Determination found the British Columbia Corps of Commissionaires ("BCCC") had contravened Part 3, section 18 of the *ESA* in respect of the employment of Mr. Hook and ordered BCCC to pay Mr. Hook wages in the amount of $675.48, an amount that also included annual vacation pay and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of $500.00.

3. The Director denied a claim by Mr. Hook for compensation for length of service finding BCCC had shown there was just cause for his termination. The Director also rejected a claim by Mr. Hook for wages based on eight hours a day, rather than six hours a day.

4. Mr. Hook challenges the conclusion of the Director on both of those matters.

5. This appeal is grounded in error of law and failure by the Director to observe principles of natural justice in making the Determination. Mr. Hook seeks to have the Determination varied by the Tribunal to find he was entitled to length of service compensation and wages based on eight hours a day.

6. In correspondence dated August 20, 2019, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the "record") from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal, and advised that following such review all or part of the appeal might be dismissed.

7. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Hook and to legal counsel for BCCC. An opportunity was provided to both to object to its completeness which has resulted in some adjustment to the record. With those adjustments, the Tribunal accepts the record as being complete.

8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> *114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 or 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and BCCC will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

10. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

11. Mr. Hook was employed by BCCC, which operates, among other things, an airport screening service in Kelowna, BC.

12. Mr. Hook was employed by BCCC as a commissionaire from January 16, 2013, to September 28, 2018, when he was terminated. At the time of his termination, Mr. Hook's rate of pay was $21.00 an hour.

13. The reasons for his termination were provided to Mr. Hook in a letter dated September 28, 2018, and provided to him in a meeting of the same date. The substance of the letter stated:

> . . . your employment with [BCCC] has been terminated for cause effective immediately [for the reasons noted below]:
>
> 1. *Commissionaires BC Policy "HR-34 – Abuse of Authority" …*
> 2. *Commissionaires BC Policy "OPS-06 – Performance Expectations" …*
> 3. *Commissionaires BC Code of Conduct …*

14. The conduct alleged under each of the above reasons had been identified to Mr. Hook in earlier meetings and were reviewed in the September 28 meeting, which was the culmination of several discussions and communications between representatives of BCCC and Mr. Hook.

15. Prior to his termination, Mr. Hook had been placed on paid administrative leave pending investigation of the allegations concerning his conduct. BCCC did not pay him for the second week of the administrative leave, although they had promised to.

16. Mr. Hook filed a complaint alleging BCCC had contravened the *ESA* and claiming he was owed regular wages, annual vacation pay, and compensation for length of service.

17. During the complaint process, BCCC argued the Director had no jurisdiction over the claim for compensation during the administrative leave as that claim was not "wages" under the *ESA*.

18. BCCC contended Mr. Hook was terminated for just cause. A second, more detailed letter of termination was provided by them during the process – a matter which the Director found "troubling" – that contained additional reasons for Mr. Hook's termination. In his analysis, the Director declined to allow the conduct alleged in those additional matters to be used to support the termination, although the Director did reflect on the response of Mr. Hook during the compliant hearing to the additional matters raised in the expanded termination letter.

19. Mr. Hook provided a comprehensive submission to the Director, comprising 68 pages, outlining his positions on the claims made by him. He also provided evidence to the Director in a complaint hearing.

20. The Director found BCCC had established there was just cause to terminate Mr. Hook and was consequently not liable for compensation for length of service to him.

21. The Director also found the claim for compensation during the administrative leave was wages and awarded Mr. Hook an amount representing 30 hours of work and concomitant vacation pay – five days based on six hours a day. He rejected Mr. Hook's argument that he should be paid for 60 hours of work.

ARGUMENT

22. In the appeal, Mr. Hook contends the Director erred in law and failed to observe principles of natural justice in finding BCCC had established there was just cause for terminating his employment and that he was not entitled to 40 hours wages for the unpaid portion of the administrative leave imposed on him.

23. It is unnecessary to outline all elements of the argument made by Mr. Hook on the issue of compensation for length of service and the wage claim.

24. The sum and substance of the argument is that the Director committed a reviewable error by failing to address:

> . . . "three fundamental pillars of my whole testimony and evidence supporting my case: i) that I had not been both formally promoted, and correspondingly properly trained and prepared to act in the capacity of a BCCC Site Supervisor; ii) that I did not throughout the term of my employment receive the support, coaching, and mentoring necessary to make informed and proper judgments and decisions in relation to the work I was performing; and iii) that I was justified in billing the company for 8-hour shifts rather than 6-hours shifts in the final weeks of my employment."

25. The first two points go to the issue of compensation for length of service while the last goes to the wage claim.

ANALYSIS

26. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*

27. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

28. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

29. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

30. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal has 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.

31. The question of whether an employee has been dismissed for just cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of just cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco*, *supra*, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are

questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests". A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

32. The principles of just cause that have been developed under the *ESA* are well-established, have been consistently applied, and are expressed as follows:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    i. A reasonable standard of performance was established and communicated to the employee;
    ii. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
    iv. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

33. I will note here that while the Tribunal has been guided by the common law on the question of just cause, the principles of just cause used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment.

34. The Tribunal has also been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment

contract" (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

35. I am entirely satisfied the decision of the Director incorporated the correct principles to the question of just cause.

36. Provided the established principles have been applied, and I find they were, a conclusion on just cause is essentially a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

37. The Director considered the principles of just cause expressed above: finding BCCC had established just cause based on Mr. Hook's failure to report the 9/11 remark and concluding this failure was a fundamental breach of his duties as a supervisor and a clear breach of the Code of Conduct he signed when he became an employee of BCCC. Whether I agree with that finding or not, it was adequately supported by the evidence.

38. On this issue, the argument by Mr. Hook that the Director failed to address "fundamental pillars" of his argument ignores the statement in the Determination that Mr. Hook, "provided a lengthy list of reasons [for failing to report the 9/11 comment to the employer], none of which are particularly persuasive". The two "pillars" identified by Mr. Hook in this appeal were consistently and repeatedly advanced by him to the Director to excuse his failing to report the 9/11 comment; the Determination makes specific mention of those reasons in its summary of the information and evidence provided by Mr. Hook at the complaint hearing: see pages R7 – R8. To suggest they were "ignored" defies logic.

39. The record indicates both parties were comprehensive in presenting factual support for their respective positions. There was ample evidence before the Director on the question of just cause. The Director was obliged to, and did, consider, evaluate, and weigh the evidence provided. The Director's assessment was based on the evidence and he did not err by finding that was unsupported by evidence. I find that the Director did not err in reaching a conclusion on the just cause issue.

40. It is not necessarily a reviewable error in the Determination that each of Mr. Hook's arguments were not specifically addressed. It is established and accepted that the Director need not explain every finding and conclusion and there is no need to expound on each piece of evidence or controverted fact; it is sufficient that the findings linking the evidence to the result can logically be discerned. In this case, the Director has reached a result that is logically grounded in the evidence and in the material and submissions provided by the parties.

41. The Director was provided with all of Mr. Hook's reasons and, collectively, found them not particularly compelling in the overall context of the evidence.

42. My view might be different if Mr. Hook was able to show that his "fundamental pillars" relating to the just cause issue compelled, as a matter of law, a finding that BCCC did not have just cause to terminate his employment. I am, however, aware of no such principle and Mr. Hook has provided no sound argument

that such a principle should operate in his case. Absent such characterization of his argument, the Director was entitled to view these elements of Mr. Hook's position as no more than part of the total factual fabric upon which this issue was required to be decided.

43. I also find Mr. Hook has not met the burden of showing a failure by the Director to observe principles of natural justice in making the Determination, which Mr. Hook says arises from the Director ignoring and failing to consider or address the "fundamental pillars" of his argument. A fair reading of the Determination indicates the Director was aware of Mr. Hook's position but was not persuaded by it. As indicated above, the Director need not explain how every finding and conclusion is reached if it is apparent that findings made and the conclusion reached can be logically linked to the evidence.

44. At its core, this appeal does no more than challenge the Director's conclusion on the question of just cause, arguing the evidence should have resulted in a different conclusion. The appeal seeks to have the Tribunal reassess the factual context and reach a different result. Absent demonstrable error, the Tribunal may not do that.

45. The circumstances are the same for the other point raised in this appeal.

46. It is clear from the Determination and the material in the record there was substantial material provided by the parties on the scope of the wage claim by Mr. Hook. The Director found there was evidence, acknowledged by Mr. Hook as having been received, that, "explicitly stated . . . his daily hours would be reduced to six along with the other interviewers". The Director accepted this evidence. Mr. Hook's challenge on this point is simply an attack on findings of fact without establishing that finding is based on a reviewable error. His appeal argues all around the aforementioned finding of fact, attempting to show *why* he should be able to claim wages for eight hours a day, rather than show he was entitled to claim wages on that basis. His allegations concerning the relative truthfulness of persons giving evidence for BCCC and his own evidence are inappropriate and have no place in this appeal.

47. To reiterate what I have stated above, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Mr. Hook. The Tribunal is reluctant to venture into a re-examination of the conclusions of the Director absent demonstrated reviewable error. He has not met the burden on him.

48. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (f) of the *ESA*.

49. The appeal is dismissed.

ORDER

50. Pursuant to section 115 of the *ESA*, I order the Determination dated July 18, 2019, be confirmed in the amount of $1,175.48, together with any interest that has accrued under section 88 of the *ESA*.

David Stevenson
Member
Employment Standards Tribunal