

An appeal

- by -

Ken Campbell
("Mr. Campbell")

- 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: Marnee Pearce

FILE NO.: 2018A/103

DATE OF DECISION: January 7, 2019

DECISION

SUBMISSIONS

Ken Campbell on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (“*ESA*”), Ken Campbell (“Mr. Campbell”) has filed an appeal of a Determination issued on August 29, 2018, by Carrie H. Manarin, a delegate (the “delegate”) of the Director of Employment Standards (the “Director”).
2. Mr. Campbell filed a complaint with the Director alleging that Nasi-B Investment Ltd. carrying on business as Domino’s (“Domino’s” or “Employer”) contravened the *ESA* in failing to pay him the minimum wage rate, vacation pay, and compensation for length of service.
3. Following an investigation, the delegate concluded that Domino’s had contravened section 16 of the *ESA* by failing to pay Mr. Campbell minimum wage for four pay periods, section 21(2) of the *ESA* by requiring Mr. Campbell to use and pay for his own vehicle expenses, section 27 of the *ESA* by not providing a complete written wage statement on each pay day, section 45 of the *ESA* by failure to pay statutory holiday pay, section 58 of the *ESA* for failing to pay vacation pay, and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) by failing to provide complete and accurate records as required.
4. The Determination awarded \$1,994.84 to Mr. Campbell for wages, statutory holiday pay, annual vacation pay, business expense, and accrued interest.
5. The Determination imposed mandatory penalties against Domino’s for first contraventions of sections 16, 21, 27, 45, and 58 of the *ESA*, and section 46 of the *Regulation* for a total administrative penalty amount of \$3,000.00.
6. Mr. Campbell appealed the Determination to the Tribunal on the grounds that the Director erred in law, specifically by accepting hearsay evidence. Further, Mr. Campbell asserts that Domino’s should have introduced evidence at the hearing from the November 2017 RCMP investigation as this would have established that he did not deliberately cut in front of a cab and caused an accident by slamming on his brakes. He asks that the decision finding that he was terminated with cause be varied.
7. After receiving the appeal, the Tribunal’s Registrar sought the 112(5) record (the “Record”), that is, all the material before the delegate pertaining to the complaint, including but not limited to, Canada Post tracking information, corporate searches, payroll demands, and investigative notes from the Director. The delegate produced the Record on October 19, 2018.
8. A copy of the Record was sent to Mr. Campbell and Domino’s via e-mail on October 23, 2018, allowing an opportunity to object to its completeness. No objection was received, and I am satisfied that the Record is complete.

9. This decision is based on Mr. Campbell's appeal submissions, the Record, and the Reasons for the Determination.

ISSUE

10. Whether or not Mr. Campbell has established any basis to interfere with the Director's Determination.

FACTS

11. Mr. Campbell was employed as a pizza delivery driver from August 27, 2017, to January 21, 2018, for Domino's, a pizza franchise business operating in Richmond, BC.
12. On July 19, 2018, Mr. Campbell participated in a hearing at the Employment Standards Branch and testified that he received no vacation pay and no paid time off, and no documentation from his Employer about his rate of pay; he understood he was to be paid \$8.50 per hour plus \$1.00 per delivery to compensate him for the use of his personal vehicle.
13. On July 19, 2018, Mr. Campbell testified that on his last day of work another employee, Brook, accused him of being a bad driver, and he and Brook were told to leave. He received a text message from a co-owner of Domino's, Jenica Rana ("Ms. Rana"), telling him he was terminated for trying to run over another employee, Brook, in the parking lot that same day and for working at another job.
14. Ms. Rana provided evidence on behalf of Domino's at the July 19, 2018, hearing. Regarding Mr. Campbell's wage rate and payroll records, she admitted that these did not accurately reflect Mr. Campbell's pay rate but did record his hours of work. Concerning vacation pay, Ms. Rana agreed that Mr. Campbell was owed vacation pay on his 2017 earnings.
15. The delegate reviewed the payroll records, finding them unreliable. The payroll summary did not match the number of hours shown on each of the wage statements for the same period. The delegate relied on the wage statements to determine if Mr. Campbell was paid at least minimum wage, as these statements were given to the complainant contemporaneously with the work performed. The delegate divided the gross wages paid by the number of hours shown on the wage statements for each pay period and found that Mr. Campbell was not paid at least minimum wage for 4 pay periods in late 2017 and early 2018.
16. The delegate determined that neither the payroll summary nor the wage statements show the payment of statutory holiday pay, and 4 statutory holidays were identified within the employment period as outstanding.
17. Section 21(2) of the *ESA* says that an employer must not require an employee to pay any of the employee's business costs. The delegate concluded that the \$1.00 payment per delivery intended to cover Mr. Campbell's use of his personal vehicle was treated as wages by Domino's. Evidence of this included the payment of vacation pay for 2018 on this money. The payroll summary established that Mr. Campbell made 1,356 deliveries during his 5 months of employment and was entitled to recover business expenses of \$1,356.00.

18. Ms. Rana testified that Mr. Campbell was terminated due to his increasingly aggressive and volatile behaviour. Incidents of threatening and harassing behaviour were reported to her on a couple of occasions by the store manager. Ms. Rana testified that she spoke to Mr. Campbell about his behaviour and gave him a verbal warning that he would be fired if this behaviour did not stop.
19. Ms. Rana testified that on Mr. Campbell's last day of work she sent Mr. Campbell home early along with his co-worker, Brook; the two workers had been arguing about Mr. Campbell running a 4-way stop sign. Ms. Rana stated that she followed them out to the parking lot where she observed Mr. Campbell swerve his vehicle at Brook. She sent Mr. Campbell a text message and told him he was terminated.
20. Ms. Rana testified about a motor vehicle accident from late-November 2017 reported by Mr. Campbell which he described to her as minor and involving a taxi. She was later told by employees that Mr. Campbell told them he was angry with the taxi driver and had deliberately caused the motor vehicle accident, by driving in front of the taxi, then hitting his brakes causing the taxi driver to rear end him.
21. Co-worker Brian, a delivery driver, testified that he overheard Mr. Campbell talking about causing a collision with a taxi driver by "brake checking" or swinging in front of the taxi and braking, then falsely reporting a minor accident to the Employer.
22. The delegate addressed the issue of just cause for termination of Mr. Campbell, noting that the onus of proof is on an employer to show it had just cause to terminate an employee. The delegate considered the reasons given, namely Mr. Campbell swerving his vehicle towards co-worker Brook in the parking lot after being sent home. This evidence was given little weight as it was not put forward in writing or in person by Brook, and the incident was also denied by Mr. Campbell. No video evidence was presented even though the parking lot was patrolled by video surveillance, and there was no police report of the event. The delegate concluded there was insufficient evidence that this incident occurred as described by Ms. Rana.
23. The delegate then considered the late-November 2017 motor vehicle accident while Mr. Campbell was carrying out his employment duties. Mr. Campbell did not report the true details of the incident to the Employer, characterizing it as a "minor fender-bender" after the incident occurred. However, Ms. Rana testified that she had been told by other employees that he intentionally caused the accident by swerving in front of the taxi and then hitting his brakes. Ms. Rana did not know about the details of the incident until several months after it occurred, which would be just prior to Mr. Campbell's termination or shortly thereafter.
24. The delegate noted that Mr. Campbell did not challenge Ms. Rana's evidence that he intentionally caused the late-November 2017 motor vehicle collision.
25. The delegate concluded that the late-November 2017 motor vehicle incident gave the Employer just cause to terminate Mr. Campbell. Engaging in the conduct of deliberately causing an accident is serious, put the safety of other drivers at risk, and while engaging in this activity during the course of his employment, Mr. Campbell also put the Employer at risk of legal liability for his actions. Mr. Campbell's action of causing a motor vehicle accident was inconsistent with his continued employment as a delivery driver and Domino's had just cause to terminate him.

ARGUMENT

26. Mr. Campbell's appeal submission, filed with the Tribunal on October 15, 2018, provides Mr. Campbell's written arguments; these are limited to the issue of his dismissal from his employment with cause.
27. Mr. Campbell argues that the police report and evidence, including camera footage, from the late-November 2017 motor vehicle incident should have been presented by Domino's at the hearing; he provided an RCMP file number.
28. Mr. Campbell argues that the video evidence not presented by Domino's would show that he did not deliberately cause the late-November 2017 motor vehicle accident.
29. Mr. Campbell argues that the evidence of Brian was hearsay, not first hand, and should not be considered.

ANALYSIS

30. 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, 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 that the appeal will succeed;
 - g. the substance of the appeal has been appropriately dealt with in another proceeding;
 - h. one or more the requirements of section 112(2) have not been met.
31. 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.
32. 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 facts which could not reasonably be entertained; and
 5. adopting a method of assessment which is wrong in principle.
33. The burden is on the appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that Mr. Campbell has met that burden.
34. Mr. Campbell has limited his appeal to the issue of his dismissal from employment with just cause. This decision will address whether there has been an error under section 112(1) of the *ESA* concerning the Director's decision that Mr. Campbell's conduct in late-November 2017, specifically, deliberately causing a motor vehicle accident, was just cause for his termination from his employment as a pizza delivery driver effective January 21, 2018.
35. Just cause exists where there is a fundamental breach of the relationship between employer and employee or where there are repeated infractions of workplace rules or incidents of unsatisfactory conduct.
36. Just cause may be shown in instances where an employee's conduct is:
- a. willful and deliberate;
 - b. inconsistent with the continuation of the contract of employment; or
 - c. inconsistent with the proper discharge of the employee's duties;
 - d. prejudicial to the employer's interests, a breach of trust, or such as to repudiate the employment relationship.
- (J.M. Schneider Inc. and Brian Ruckledge, BC EST # D154/03)*
37. When employee misconduct forms the basis for a "just cause" dismissal, the Supreme Court of Canada has called for an "assessment of the context of the alleged misconduct". In the case of a proceeding under the *ESA*, the Director must:
- a. determine if the evidence proves misconduct, on a balance of probabilities, and
 - b. consider whether the nature and degree of that misconduct warrants dismissal.
- (McKinley v. BC Tel, [2001] 2 S.C.R. 161)*
38. In *McKinley v. BC Tel, supra*, the Supreme Court of Canada stressed that misconduct (in that case, alleged dishonesty) must be assessed globally, with a view to determining if the misconduct gives rise to an irreparable breakdown in the employment relationship. The decision-maker should assess whether the misconduct in question "violates an essential condition of the employment contract", "breaches the faith inherent to the work relationship", or "is fundamentally or directly inconsistent with the employee's obligations to his or her employer" (para. 48).
39. The first question to address is whether the delegate analyzed the evidence as mandated by *McKinley*.

40. The delegate considered the evidence on the issue of whether Mr. Campbell deliberately caused the late-November 2017 motor vehicle collision with the taxi driver while in the performance of his duties. The evidence included testimony from the Ms. Rana, stating that she was told by Mr. Campbell that the late-November 2017 accident was a minor fender-bender, but she was told by other employees that Mr. Campbell intentionally caused the incident by swerving in front of the taxi and hitting his brakes. The true details of this incident were not known to the Employer until just prior to Mr. Campbell's termination or shortly thereafter.
41. The delegate took specific note of Mr. Campbell's decision to not challenge Ms. Rana's evidence that he intentionally caused the late-November 2017 motor vehicle collision, and that he did not challenge the evidence that he was untruthful to the Employer regarding the incident.
42. The evidence also included testimony from co-worker Brian who said that he overheard Mr. Campbell "bragging" about deliberately causing an accident by brake-checking a taxi-driver, although at the time Mr. Campbell only told his Employer that he had been involved in a minor accident.
43. Mr. Campbell argues that the delegate erred in law by accepting evidence from co-worker Brian regarding the late-November 2017 motor vehicle accident as this was hearsay evidence.
44. The co-worker Brian testified that he heard Mr. Campbell state that he deliberately caused the accident with the taxi-driver; this is not hearsay evidence, as it was heard directly by Brian. Mr. Campbell also had the opportunity at the hearing to question Brian on the veracity of his testimony in the presence of the decision-maker. I find Brian's testimony to be evidence properly before the delegate.
45. The delegate accepted that the evidence supported the finding of fact that Mr. Campbell deliberately caused a motor vehicle collision with a taxi in late-November 2017.
46. I find that the delegate completed a reasonable analysis of the evidence and that the evidence supports, on the balance of probabilities, that the proven misconduct resulting in Mr. Campbell's termination took place, and that he deliberately caused a motor vehicle collision while in the employ of Domino's.
47. The next question to be addressed is whether, in keeping with *McKinley*, the delegate considered whether the nature and degree of the misconduct found warrants dismissal.
48. The delegate found that this incident alone gave the Employer just cause to terminate Mr. Campbell without notice once the true details of the misconduct came to her attention. The delegate found that Mr. Campbell's conduct of deliberately causing an accident was serious in that it put the safety of other drivers at risk. In engaging in this activity during the course of his employment, Mr. Campbell potentially put Domino's at risk of legal liability for his actions. The delegate found that Mr. Campbell's action of deliberately causing an accident was inconsistent with the continuation of his employment as a delivery driver and gave the Employer just cause to terminate him.
49. The just cause analysis as mandated by *McKinley* was properly undertaken in the Determination, and in my view, clearly demonstrated misconduct of a nature and degree that the employment relationship was irreparably broken.

50. The true nature of the late-November 2017 motor vehicle accident came to the Employer's attention just prior to Mr. Campbell's termination or shortly thereafter. The delegate correctly referenced Black Press, BC EST # D043/17, supporting that evidence of misconduct discovered after termination can be relied on to prove just cause, especially where a complainant conceals their misconduct.
51. I find there has been no error of law in the Determination. The correct method of assessment was used, there was no misapplication of the *ESA*, and the conclusions reached by the delegate were reasonable and firmly grounded in the evidence.
52. Mr. Campbell argued that the Employer should have obtained and presented the police report and video evidence of the late-November 2017 motor vehicle collision; presumably, Mr. Campbell believes this would have provided exculpatory evidence concerning the nature and cause of the collision.
53. The Employer, in responding to Mr. Campbell's complaint filed on March 14, 2018, and in preparation for the complaint hearing, provided the Branch with a list of people intended to be called as witnesses, and a brief summary of their evidence. A list of documents was also provided.
54. There is no onus on the Employer to provide information other than in response to the allegations of *ESA* contraventions listed by the Complainant. If Mr. Campbell wished to ensure police evidence including video evidence associated with the late-November 2017 collision was presented at the hearing, then the responsibility was his to gather this information and introduce it as evidence at the hearing and providing appropriate notice and disclosure to the Employer.
55. There is no merit in this argument.
56. I am not persuaded that there is a basis to interfere with the Determination, and the appeal is dismissed.

ORDER

57. Pursuant to section 115 of the *ESA*, I order that the August 29, 2018, Determination be confirmed in the amount of \$4,994.84, together with any further interest that has accrued under section 88 of the *ESA*.

Marnee Pearce
Member
Employment Standards Tribunal