

Citation: Dr. Paula Winsor-Lee Inc. (Re)  
2019 BCEST 63

An appeal

- by -

Dr. Paula Winsor-Lee Inc. carrying on business as Monashee Dental Centre  
("Dr. Winsor-Lee Inc.")

- 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.:** 2019/42

**DATE OF DECISION:** July 9, 2019

## DECISION

### SUBMISSIONS

Dr. Paula Winsor-Lee

on behalf of Dr. Paula Winsor-Lee Inc. carrying on  
business as Monashee Dental Centre

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Dr. Paula Winsor-Lee Inc. carrying on business as Monashee Dental Centre (“Dr. Winsor-Lee Inc.”) has filed an appeal of a Determination (the “Determination”) issued by Jennifer R. Redekop, a delegate of the Director of Employment Standards (the “Director”), on March 21, 2019.
2. The Determination found Dr. Winsor-Lee Inc. had contravened Part 3, section 17, Part 4, section 40, Part 7, section 58, and Part 8, section 63 of the *ESA* in respect of the employment and termination of employment of Mieka Mandalari (“Ms. Mandalari”) and ordered Dr. Winsor-Lee Inc. to pay Ms. Mandalari wages in the amount of \$5,163.89, an amount that also included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay administrative penalties in the amount of \$2,000.00. The total amount of the Determination is \$7,163.89.
3. This appeal is grounded in error of law by the Director in making the Determination. Dr. Winsor-Lee Inc. seeks to have the Determination varied by the Tribunal to cancel that part of the Determination finding Dr. Winsor-Lee Inc. had not established just cause for terminating Ms. Mandalari and that she was entitled to length of service compensation.
4. In correspondence dated May 6, 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.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Dr. Winsor-Lee Inc. and to Ms. Mandalari. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Ms. Mandalari 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**

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

### **THE FACTS**

9. Dr. Winsor-Lee Inc. operates a dental clinic in Lumby, BC.
10. Ms. Mandalari was employed by Dr. Winsor-Lee Inc. as a certified dental assistant from December 16, 2011, to July 3, 2018, when she was terminated at a meeting with Dr. Paula Winsor-Lee and provided a letter explaining the reasons for the decision to terminate her employment.
11. The termination letter, which is found in the record and is dated July 3, 2018, cites the following matters relating to Ms. Mandalari as either contributing to or forming the basis for the decision to terminate her:
- i. not advising Dr. Paula Winsor-Lee following a staff meeting on June 20, 2018, that she did not intend to attend an extracurricular event Dr. Paula Winsor-Lee had organized for the staff;
  - ii. texting on her cell phone during the staff meeting, which is described in the letter as “inexcusable”;
  - iii. a past reprimand and warning letter, dated November 4, 2014, for not participating as a team worker and failing to take responsibility for her actions, in which Ms. Mandalari was informed that a failure to correct those concerns could result in the loss of her employment;
  - iv. a lack of respect – to Dr. Paula Winsor-Lee and the other employees – demonstrated by her texting during the June 20 meeting;
  - v. previous discussions about cell phone use; and

- vi. a lack of effort to help other employees.
12. Ms. Mandalari filed a complaint alleging Dr. Winsor-Lee Inc. had contravened the *ESA* and claiming she was owed regular wages, annual vacation pay, statutory holiday pay, and compensation for length of service.
13. During the complaint process, it came to the attention of the Director that there was a potential issue concerning overtime and annual vacation pay. The parties were advised and given an opportunity to make submissions on those matters. Nothing about the determination on those matters is raised in this appeal.
14. Dr. Winsor-Lee Inc. contended Ms. Mandalari was terminated for just cause. At the complaint hearing, Dr. Winsor-Lee Inc. supported its case with evidence of a number of concerns held by Dr. Paula Winsor-Lee, and other employees, about Ms. Mandalari's actions, conduct and interaction with other employees, many of which had been discussed with her. Dr. Winsor-Lee Inc. presented two witnesses in addition to Dr. Paula Winsor-Lee to support their position
15. The Director found Dr. Winsor-Lee Inc. had failed to show there was just cause to terminate Ms. Mandalari and awarded her compensation for length of service in the amount set out in the Determination. The Director also found Ms. Mandalari was owed a small amount in overtime wages and annual vacation pay in the amounts set out in the Determination. There was no finding Ms. Mandalari was owed statutory holiday pay. Dr. Winsor-Lee Inc. takes no real issue with any aspect of the Determination other than the finding and award under section 63 of the *ESA*.

## ARGUMENT

16. In the appeal, Dr. Winsor-Lee Inc. contends the Director erred in law in finding it had not established there was just cause for terminating the employment of Ms. Mandalari.
17. It is unnecessary to outline all elements of the argument made by Dr. Winsor-Lee Inc. The sum and substance of the argument is that the Director erred in law in applying the just cause standard in the circumstances and in deciding Dr. Winsor-Lee Inc. had not established there was just cause to terminate Ms. Mandalari.
18. More specifically, Dr. Winsor-Lee Inc., acknowledging the circumstances of Ms. Mandalari's termination involved a cumulation of "minor misconduct or performance issues", says the Director erred in law by finding Ms. Mandalari's termination was a disproportionate response to the actions and attitude attributed to her at the June 20, 2018, staff meeting, particularly in light of her length of service and the lack of corrective discipline.

## ANALYSIS

19. 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.*

20. 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.
21. 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.
22. 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.
23. 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.
24. 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.

25. 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.

26. 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.

27. I am entirely satisfied the Director applied the correct principles to the question of just cause.

28. The Director considered the principle expressed in point 2, above: whether Dr. Winsor-Lee Inc. had established just cause based on the cumulative effect of Ms. Mandalari’s history, including the one instance, in November 2014, of recorded discipline, and found it had not. Whether I agree with that finding or not, it was amply supported by the evidence.

29. The Director also considered whether the conduct of Ms. Mandalari on June 20, 2018, and her response to Dr. Paula Winsor-Lee when that conduct was raised during the July 3, 2018, meeting was sufficiently “egregious” to justify summary dismissal and found it was not.

30. There is nothing in the Determination that deviates from the legal principles developed under the *ESA* on the question of just cause or the analysis the Director was required to undertake.
31. 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.
32. I do not perceive that Dr. Winsor-Lee Inc. is arguing the Director committed an error of law by acting without evidence, but if my perception is incorrect, and that is part of the argument being made by Dr. Winsor-Lee Inc., I would not accept it.
33. 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. Although she did not assess the evidence in the manner advocated by Dr. Winsor-Lee Inc., her assessment was based on the evidence and she did not err in law by making any finding that was unsupported by evidence. I find that the Director did not err in law by reaching conclusions without any evidence.
34. Based on the above, it only remains to consider whether the Director erred in law under the fourth part of the definition of error of law.
35. This question, framed in the words used in the definition, is whether the Director acted on a view of the facts that could reasonably be entertained. That test for establishing such an error of law has been stated to be as follows:
- ... that there is no evidence before the Board which supports the finding made, in the sense that it is inconsistent with and contradictory to the evidence. In other words, the evidence does not provide any rational basis for the finding. It is perverse or inexplicable. Put still another way, in terms analogous to jury trials, the Appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination, the emphasis being on the word "could" ... (*Delsom Estate Ltd. v. British Columbia (Assessor of Area No. 11 Richmond/Delta*, [2000] B.C.J. No. 331 (B.C.S.C.) at para. 18, cited with approval in *British Columbia (Assessor Area No. 27-Peace River) v. Burlington Resources*, 2003 BCSC 1272
36. I am unable to find that the conclusions of the Director, which are challenged by Dr. Winsor-Lee Inc., are based on a view of the facts which could not reasonably be entertained. The reasoning of the Director on the just cause issue is coherent, consistent with the evidence, and logically support the resulting finding. Applying the above test, I am satisfied the conclusion reached by the Director was one that was entirely justified on the evidence presented.
37. Dr. Winsor-Lee Inc. has not shown there was an error of law in how the Director assessed the evidence to reach the finding on the question of just cause.

38. At its core, this appeal does no more than challenge the Director's conclusion on the question of just cause resulting from an application of the facts to legal principles developed under the *ESA* on that question, arguing the evidence does not support the conclusion reached. The appeal seeks to have the Tribunal reassess the factual context and reach a different result.
39. To reiterate, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Dr. Winsor-Lee Inc. The Tribunal is reluctant to venture into a re-examination of the conclusions of the Director absent demonstrated reviewable error. Dr. Winsor-Lee Inc. has not established the Director committed an error of law in finding Dr. Winsor-Lee Inc. had failed to establish just cause to terminate Ms. Mandalari.
40. 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*.

### **ORDER**

41. Pursuant to section 115 of the *ESA*, I order the Determination dated March 21, 2019, be confirmed in the amount of \$7,163.89, together with any interest that has accrued under section 88 of the *ESA*.

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**David Stevenson**  
**Member**  
**Employment Standards Tribunal**