Employment Standards TRIBUNAL

Citation: Michael Coughlin (Re)
2019 BCEST 64

An appeal

- by -

Michael Coughlin
("Mr. Coughlin")

- 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.: 2019/37

DATE OF DECISION: July 9, 2019

DECISION

SUBMISSIONS

Michael Coughlin — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Michael Coughlin ("Mr. Coughlin") has filed an appeal of a Determination (the "Determination") issued by Rodney J. Strandberg, a delegate of the Director of Employment Standards (the "Director"), on February 28, 2019.

2. The Determination found Mr. Coughlin and his former employer, John David Lefebvre, carrying on business as Stonehouse Bed and Breakfast ("Mr. Lefebvre"), had resolved the dispute that caused the complaint and that no further action would be taken on the complaint.

3. This appeal alleges the Director erred in law, failed to observe principles of natural justice in making the Determination and that new evidence has come available that was not available when the Determination was being made. Mr. Coughlin seeks to have the Determination varied and referred back to the Director of Employment Standards.

4. In correspondence dated April 10, 2019, the Tribunal, among other things, 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, 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 Mr. Coughlin, Mr. Lefebvre, and to legal counsel for Mr. Lefebvre. An opportunity has been provided to object to its completeness.

6. Counsel for Mr. Lefebvre has submitted material to the Tribunal which she says was not, but should have been, included in the record.

7. The Director has responded by indicating the material, which comprised a video attached to an e-mail sent to the Employment Standards Branch late in the complaint process, was not before him when the Determination was being made; that he was not aware of the video; and that he did not view or consider it when making the Determination.

8. Mr. Coughlin has indicated the record, to the best of his recollection, contains all of the documents that were disclosed by him and Mr. Lefebvre during the complaint hearing process but complains about the "glaring" absence of any transcript, recording, or other record of the complaint hearing.

9. I am satisfied the Tribunal has been provided with the record required to be disclosed under section 112(5) of the *ESA*. The video is not part of the record, and there is no request from counsel for Mr. Lefebvre that

the video should be added to the record. Any discussion of, or reference to, the video is irrelevant and inapplicable to what I must decide in this appeal and will not be considered in making this decision.

10. 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 submission filed with 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.*

11. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Lefebvre 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

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

THE FACTS

13. Mr. Lefebvre operates a bed and breakfast on Salt Spring Island. Mr. Coughlin was employed by Mr. Lefebvre as the manager of the bed and breakfast from October 15, 2014, to October 24, 2017, which was the date on which Mr. Coughlin was notified, in a letter from Mr. Lefebvre dated October 13, 2017, his employment at the bed and breakfast would be terminated. Mr. Lefebvre alleged just cause for the termination.

14. Mr. Coughlin disagreed there was just cause for his termination and in communications to Mr. Lefebvre shortly following the October 13, 2017 letter, identified he had claims to regular and overtime wages, statutory holiday pay, and annual vacation pay.

15. Mr. Coughlin and Mr. Lefebvre retained legal counsel. Between October 23, 2017, and November 7, 2017, there were discussions and negotiations between legal counsel for those parties aimed at settling claims arising from Mr. Coughlin's employment and his termination. Those discussions and negotiations resulted in an agreement on terms of settlement of Mr. Coughlin's claims.

16. On November 9, 2017, Mr. Coughlin and Mr. Lefebvre signed documents (the "Settlement Documents") providing, among other things, for the payment of amounts of money to Mr. Coughlin to resolve his claims against Mr. Lefebvre. By May 1, 2018, all monetary amounts agreed to be paid under the settlement had been paid to Mr. Coughlin.

17. Mr. Coughlin filed his complaint to the Director of Employment Standards on March 20, 2018.

18. The Director conducted a complaint hearing over two days in September and October 2018 and found Mr. Coughlin and Mr. Lefebvre had entered into a valid, binding agreement settling Mr. Coughlin's claims under the *ESA* and that both had complied with the terms of the settlement agreement.

19. In reaching this finding, the Director considered the evidence of the parties relating to whether Mr. Coughlin and Mr. Lefebvre had settled Mr. Coughlin's employment related claims and considered four questions:

    1. Did the parties have a mutual intent to create a legally binding relationship addressing any claims that the Complainant may have had under the Act?
    2. Did the Complainant have the capacity to sign the Settlement Documents?
    3. Is there any reason not to enforce the Settlement Agreement?
    4. Have the parties complied with the terms of the Settlement Documents?

20. The first, second, and fourth questions were answered in the affirmative; the third was answered in the negative.

ARGUMENT

21. In his appeal, Mr. Coughlin has raised all of the statutory grounds of appeal found in section 112(1) of the *ESA*. I shall summarize the arguments made under each of the statutory grounds, avoiding unnecessary duplication. For instance, the allegation that the Director failed to observe principles of natural justice is a species of error law but needs only to be analyzed on the former ground. If an error on the natural justice ground is not established, there can be no error of law based on a failure to observe principles of natural justice.

22. The appeal also contains a request for disclosure of documents.

Error of Law

23. Mr. Coughlin submits the Director erroneously concluded he and Mr. Lefebvre "resolved the dispute that caused the complaint" asserting the Director "either ignored or misunderstood numerous facts that were provided to him in testimony and in disclosed documents".

24. This ground of appeal raises the following points:

- the Director wrongly found Mr. Coughlin "did not work at the B and B after" October 13, 2017;
- the Director ignored the evidence of Mr. Lefebvre referring to the trailer "as a bonus";
- the Director erred in stating that following Mr. Coughlin's termination, Mr. Lefebvre "allowed Mr. Cameron to try and sell the [t]railer, without success";
- the Director misunderstood Mr. Coughlin's position by indicating Mr. Coughlin argued he did not have the mental capacity to execute the Settlement Documents;
- the Director erred in placing the onus on Mr. Coughlin to show the Settlement Documents were "unconscionable";
- the Director ignored evidence of alleged contraventions of the *ESA* asserted by Mr. Coughlin;
- comments of the Director directly contravene the B.C. *Human Rights Code*; and
- the Director erred by failing to recognize, and find, that the entirety of the circumstances demonstrated Mr. Lefebvre took advantage of a superior bargaining position to coerce Mr. Coughlin into an unconscionable settlement;

Natural Justice

25. Mr. Coughlin argues the Director failed to provide a fair hearing and, more particularly, demonstrated a bias against him in how the complaint hearing was conducted.

New Evidence

26. Mr. Coughlin has submitted two documents which he seeks to have accepted as additional evidence in the appeal. The first is information showing there were efforts made by Mr. Cameron, Mr. Coughlin's partner, to sell the trailer before Mr. Coughlin's termination. The second is an e-mail communication from February 2014, which Mr. Coughlin says shows Mr. Lefebvre was not operating the Bed and Breakfast in accordance with local land use by-laws or provincial land use regulations.

27. Mr. Coughlin has also requested the Tribunal require Mr. Lefebvre to produce an e-mail from Mr. Coughlin generated on or about February 7, 2016, purporting to contain Mr. Coughlin's resignation from his employment with Mr. Lefebvre. Mr. Coughlin says the document is important because it demonstrates the unacceptable working conditions he endured for much of his employment.

28. He has also requested the consignment contract for the trailer. He says this document is important for two reasons: first, it confirms there were efforts to sell the trailer before Mr. Coughlin's termination; and

second, "because it demonstrates that the 'back pay' represented by the value of the trailer was due to [him] at the time [his] employment was terminated and should have been paid to [him] in full within 48 hours of [his] dismissal".

ANALYSIS

29. 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.*

30. This appeal challenges a discretionary decision of the Director, made under section 76(3) (i) of the *ESA* to refuse to adjudicate Mr. Coughlin's complaint because "the dispute that caused the complaint is resolved".

31. The test for the review of an exercise of discretion is set out in *Jody L. Goudreau and another*, BC EST # D066/98:

> … The Tribunal will not interfere with that exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
>
> > ... a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably". **Associated Provincial Picture Houses v. Wednesbury Corp.** [1948] 1 K.B. 223 at 229.
>
> Absent any of these considerations, the director even has the right to be wrong.

32. In *Takarabe and others*, BC EST # D160/98, the Tribunal added the following comment:

> In *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] the Supreme Court of Canada decided that statutory discretion must be exercised within "well established legal principles". In other words, the Director must exercise her discretion for *bona fide* reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

33. The Tribunal has also reflected on an excerpt from the Supreme Court of Canada decision in *Maple Lodge Farms Limited v. Government of Canada*, [1992] 2 SCR, where the Court made the following comments about the exercise of a statutory discretion:

> It is, as well, a clearly-established rule that the courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility. Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

34. This matter considered by the Director fell squarely within those matters upon which the Director is statutorily authorized to exercise discretion.

35. The discretion in this case was exercised within well-established legal principles. In *Larry Bellman*, BC EST # D203/03, the Tribunal reviewed all of the cases in which settlement agreements were made and found that, provided the settlement agreement was entered into without duress, undue influence, misrepresentation or fraud or there was non-compliance with the agreement, it would not be overturned. The Tribunal has adopted and endorsed a principle that timely and voluntary settlement of unpaid wage disputes ought to be encouraged.

36. The Tribunal referred particularly to circumstances where the settlement was reached after the complainant received legal advice and where the effect of the settlement is to pay the complainant something more than the minimum entitlements provided for in the *ESA* – see e.g., *Ellerton Rudy Small (a.k.a. Rudy Small) operating as R.S. Group Home* BC EST # D032/98; *Alnor Services Ltd.* BC EST # D199/99; and *Charlotte Bowie*, BC EST # D286/99. See also *John Clancy*, BC EST # D059/01.

37. In this case, Mr. Coughlin was represented by legal counsel and the Director found the amount paid under the settlement was greater than Mr. Coughlin could have received had the entitlements of the *ESA* been applied.

Error of Law

38. The appeal asserts error of law. 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.

39. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Mr. Coughlin is required to show

the findings of fact and the conclusions reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

40. Of all the points raised under this ground only three have any relevance to the issue raised by this appeal, which is whether the Director committed a reviewable error by finding Mr. Coughlin and Mr. Lefebvre had entered into a valid and binding settlement of Mr. Coughlin's claims under the *ESA*. Those points are expressed by Mr. Coughlin as being: the comment relating to his "mental state"; placing the onus on him to show the Settlement Documents were "unconscionable"; and the alleged failure to find, in all the circumstances, that he was coerced into a settlement that was "unconscionable".

41. All of the other alleged "errors" relate to matters that are irrelevant if there was a valid and binding settlement of Mr. Coughlin's claims under the *ESA*.

42. On the first matter, Mr. Coughlin says he did not take the position he lacked the mental capacity to execute the documents.

43. Based on submissions to the Director, however, I find no fault – and certainly no reviewable error – on the part of the Director for believing Mr. Coughlin was asserting he lacked the necessary mental capacity to make a valid agreement. In several places in his written submission to the Director, Mr. Coughlin refers to being under "extreme duress". At para 21. of his written argument to the Director, he states:

> Continuing to be in a suicidal state because of the trauma inflicted on me by John Lefebvre and Hillary Watson, and being medicated accordingly, and with my family being homeless because of the inhumane demand that we vacate our home on short notice, and the dire financial position we were thrust into, the Settlement Agreement documents of November 9, 2017 were signed by me under *extreme* mental and financial duress. [emphasis included]

44. There are other references suggesting his mental capacity to reach an agreement on his claims was adversely affected by the circumstances, all of which would reasonably and logically indicate to the reader that he was advancing a lack of mental capacity to make a settlement agreement:

> …I was not in a sufficient state of mind to be able to negotiate a fair settlement, para. 21.3;
>
> …I signed under extreme duress, para. 21.4.

45. In any event, if Mr. Coughlin says he *did* have the mental capacity to execute the Settlement Documents, that does nothing more than eliminate one of the considerations that might have borne upon the question of whether he lacked the legal capacity to reach a binding agreement. It does nothing to bolster his contention that the settlement agreement should be overturned.

46. The Director did not err in law in placing the onus on Mr. Coughlin to show the settlement agreement was "unconscionable". The placement on him of that onus is consistent with the principle that such agreements are to be encouraged and not overturned provided it is not tainted by duress, undue influence, misrepresentation or fraud or noncompliance. Simply put, because Mr. Coughlin was seeking to overturn the settlement, it was on him to show there was a factual basis for doing so. On their face, the Settlement Documents have all the hallmarks of a valid and binding agreement. They contain a clear

statement of the parties' intention to reach a full and final settlement of "all issues in dispute between" them. All the Settlement Documents are signed by Mr. Coughlin and Mr. Lefebvre. The agreement has the added weight of Mr. Coughlin having made the agreement with substantial involvement of legal counsel retained by him.

47. The third point alleging error of law does no more than take issue with the Director's finding on the facts that Mr. Coughlin was not "coerced" into a settlement agreement that was "unconscionable". A fair reading of the Determination shows the Director was alert to all of the facts that had bearing on that question and to the arguments being made by Mr. Coughlin. The view taken by the Director was one reasonably grounded on the evidence; they are neither unreasonable nor perverse or inexplicable. There is nothing in this appeal that has elevated the findings of fact made by the Director to error of law as that term has been interpreted and applied by the Tribunal.

48. Mr. Coughlin has not demonstrated there is any error of law in the Determination.

Natural Justice

49. 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. d.b.a. Honda North*, BC EST # D043/99. I find nothing in the appeal that would support a finding the Director failed to comply with principles of natural justice.

50. I can see no basis for this ground of appeal. Mr. Coughlin has provided no objectively acceptable evidence showing he was denied the procedural protections reflected in section 77 of the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. It is clear from the file that he was afforded the procedural rights reflected in section 77 and captured by natural justice principles.

51. He has complained the Director did not record the complaint hearing. There is, however, nothing in the *ESA* requiring hearings to be recorded or transcribed and it is not the Director's usual practice to do so.

52. Natural justice does not require the Director to accept the evidence and assertions that each party advances in support of their position. Nor does it prohibit the Director from reaching a conclusion on all of the evidence that might be inconsistent with the position of one of the parties, so long as reasons are provided for that conclusion and it is based on relevant considerations, which I find to be the case here.

53. This ground of appeal does little more provide a springboard for Mr. Coughlin to assert, or in some respects, to reassert, facts that challenge or contradict findings made in the Determination without showing there was any reviewable error made in respect of the challenged findings.

54. Under this ground of appeal, Mr. Coughlin also alleges bias. In respect of this allegation, the Tribunal has indicated the test against which a bias allegation is considered is an objective one; the evidentiary bar for finding bias is high and requires clear and objective evidence. Nothing in this appeal comes near satisfying the test for establishing bias: see *Dusty Investments Inc. d.b.a. Honda North*, *supra*, at pages 7 – 9.

55. The burden on Mr. Coughlin to show a breach of the principles of natural justice has not been met.

New Evidence

56. This appeal is also grounded in evidence coming available that was not available when the Determination was being made. This ground is commonly referred to as the "new, or additional, evidence" ground of appeal and is intended to address evidence that may bear on the merits of an appeal but which was not presented to the Director during the complaint process, was not considered by the Director, and is not included in the record.

57. The Tribunal has discretion to accept or refuse new, or additional, evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted.

58. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.

59. The proposed "evidence" included with the appeal does not meet the necessary considerations for admission under section 112(1) (c) in three significant respects. First, none of the material on which the appeal is grounded is "new". All of the material which Mr. Coughlin seeks to include in the appeal existed prior to the issuance of the Determination.

60. Second, most of the material included as "support" for the appeal is not relevant to any material issue arising in this appeal. Third, nothing in the material is capable of resulting in a different conclusion than is found in the Determination, which, to reiterate, is that Mr. Coughlin had made a valid and binding agreement with Mr. Lefebvre that settled his claims under the *ESA*.

61. For much the same reason, Mr. Coughlin's request for the production of documents is denied. The documents sought have no bearing on the issue addressed in the Determination and under consideration in this appeal.

62. On June 21, 2019, the Tribunal received an unsolicited submission from Mr. Coughlin, attaching an eleven-page document. While the submission is not framed as a request to include the document as new evidence, it is clear from his assertion in the submission that, "This document MUST be considered" [emphasis included], his intention in submitting the document is to have it included for consideration in the appeal.

63. I will not include the document for consideration in the appeal. It is another piece of material that is completely irrelevant to the issue being addressed in this appeal. The document does nothing more than

reiterate allegations against Mr. Lefebvre that have no relation to whether Mr. Coughlin and Mr. Lefebvre had entered into a valid, binding agreement settling Mr. Coughlin's claims under the *ESA*.

64. Based on 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

65. Pursuant to section 115 of the *ESA*, I order the Determination dated February 28, 2019, be confirmed.

David Stevenson
Member
Employment Standards Tribunal