Employment Standards TRIBUNAL

Citation: Howard Kornblum (Re)
2019 BCEST 67

An appeal

- by -

Howard Kornblum
(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: James F. Maxwell

FILE NO.: 2019/7

DATE OF DECISION: July 10, 2019

DECISION

SUBMISSIONS

Howard Kornblum	on his own behalf
Paul M. Pulver	counsel for Ansan Industries Ltd.
Aleksandra Zivkovic	delegate of the Director of Employment Standards

OVERVIEW

1. On July 9, 2018, Howard Kornblum (the "Appellant") filed a complaint with the Employment Standards Branch as against Ansan Industries Ltd. ("Ansan"). The Appellant alleged that he had been dismissed after two weeks of employment with Ansan. The complaint sought payment from Ansan of the sum of $328.00 in regular wages, $122.00 in overtime, and $103.00 for union initiation fees and dues, for a total of $553.00.

2. On December 24, 2018, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") pursuant to the *Employment Standards Act* (the "*ESA*"), in which the Director declined to further investigate the Appellant's complaint. The Director concluded that the Appellant's employment with Ansan was covered by a collective agreement, and for that reason, the *ESA* did not apply to the Appellant's complaint.

3. On January 29, 2019, the Appellant filed a timely appeal of the Determination. On June 5, 2019, the Appellant tendered further submissions in support of his appeal.

4. In his appeal, the Appellant requests that the Tribunal vary the Determination pursuant to section 112(1)(a), (b), and (c) of the *ESA*, on the bases that the Director erred in law in making the Determination, that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

5. The sole issue considered by the Director in dismissing the Appellant's complaint was the question of whether the *ESA* applied to the facts of the Appellant's complaint.

6. Having reviewed the Determination, the Appellant's submissions, the submissions of the Director's delegate, the submissions of counsel for Ansan, and the record of proceedings received from the Director's delegate on February 6, 2019, I conclude that this appeal must be granted in part pursuant to section 115 of the *ESA*. For reasons set out herein, I order that the Determination be cancelled and that the within matter be referred back to the Director.

ISSUES

7. The following issues fall to be determined in this Appeal:

- Did the Director err in law in making the Determination?

- Did the Director fail to observe the principles of natural justice in making the Determination?
- Has evidence become available that was not available at the time the Determination was being made?

FACTS

8. The Appellant commenced work for Ansan on January 15, 2018, and his employment ended January 25, 2018.

9. When he began his employment with Ansan, the Appellant was advised that he would be a probationary employee until he completed 600 hours of work. During his brief employment with Ansan, the Appellant did not complete 600 hours of work.

10. The Appellant filed a complaint against Ansan on July 9, 2018, within the time period contemplated by the *ESA* for doing so.

11. In his complaint, the Appellant contended that he was dismissed when he refused to work with another Ansan employee. The Appellant alleged that Ansan owed him the sum of approximately $450.00 for wages and overtime and $103.00 for union and initiation dues that had been deducted for payment to the union.

12. The Director initiated a review of the Appellant's complaint. The Director requested that the Appellant provide copies of records detailing the specifics of his employment and termination therefrom. The Director also requested that Ansan provide copies of relevant records relating to the Appellant's employment.

13. On October 24, 2018, the Director received communication from legal counsel for the Construction and Specialized Workers' Union, Local 1611 (the "Union") advising that it was the Union's position that "… any employee employed in the bargaining unit of a signatory employer would be covered by the collective agreement regardless of whether they were a member or not." On October 25, 2018, the Director received further communication from legal counsel for the Union stating that "[o]n the basis of the facts that you have provide [*sic*] to me it is my opinion that Mr. Kornblum is an employee covered by a collective agreement between the Construction and Specialized Workers' Union, Local 1611 and Ansan even though he may not have been a fully initiated member."

14. The Director then moved to a formal investigation of the Appellant's complaint. Based upon that investigation, the Director issued a Determination, dated December 24, 2018. The sole matter addressed in the Determination was the preliminary question of whether or not, in light of the fact that Ansan was party to a collective agreement, the *ESA* applied to the Appellant's complaint.

15. The Director examined the terms of a collective agreement between Ansan and the Union, dated January 1, 2014 (the "Collective Agreement"). The Director also conducted interviews with representatives of Ansan and the Union, and legal counsel for the Union.

16. The Director referenced section 3 of the *ESA*, which defines the scope of the *ESA*, and concluded that the Appellant was covered by the terms of the Collective Agreement. With specific reference to section 3(7)

of the *ESA*, the Director held that the Appellant was obligated to utilize the grievance procedures set out in the Collective Agreement to address the matters raised in his complaint. The Director held that the *ESA* does not apply to the facts of the Appellant's complaint, and for this reason declined to further investigate the complaint.

17. On January 29, 2019, the Appellant filed the within Appeal with the Tribunal.

ANALYSIS

18. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.

19. In the present case, the Appellant cites all three of these grounds as bases upon which the Determination should be varied.

(i) Did the Director err in law in making the Determination?

20. The Appellant alleges that the Director erred in law in making the Determination and discontinuing the investigation of his complaint. The specifics of the Appellant's allegations are broad and sweeping but, given that the only issue decided by the Determination is whether or not the Appellant's complaint is governed by the provisions of the *ESA*, I will limit my examination to that question.

21. This 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.):

- a misinterpretation or misapplication of a section of the applicable legislation;
- a misapplication of an applicable principle of general law;
- acting without any evidence;
- acting on a view of the facts which could not reasonably be entertained; and
- adopting a method of assessment which is wrong in principle.

22. In the Determination, the Director referred to section 3 of the *ESA*, which sets out the scope of the *ESA*. I will set out the provisions of section 3(1)-(7)[1] in its entirety:

3 (1) Subject to this section, this Act applies to all employees other than those excluded by regulation.

[1] Section 3 of the *Employment Standards Act* was amended on May 29, 2019 by the enactment of Bill 8 – 2019 *Employment Standards Amendment Act*, 2019

(2) If a collective agreement contains any provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 does not apply in respect of employees covered by the collective agreement:

Column 1 Matter	Column 2 Part or Provision
Hours of work or overtime	Part 4
Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	section 63

(3) If a collective agreement contains no provision respecting a matter set out in Column 1 of the following table, the Part or provision of this Act specified opposite that matter in Column 2 is deemed to be incorporated in the collective agreement as part of its terms:

Column 1 Matter	Column 2 Part or Provision
Hours of work or overtime	Part 4 except section 37
Statutory holidays	Part 5
Annual vacation or vacation pay	Part 7
Seniority retention, recall, termination of employment or layoff	section 63

(4) If a collective agreement contains any provision respecting a matter set out in one of the following specified provisions of this Act, that specified provision of this Act does not apply in respect of employees covered by the collective agreement:

section 17 *[paydays]*;

section 18 (1) *[payment of wages when employer terminates]*;

section 18 (2) *[payment of wages when employee terminates]*;

section 20 *[how wages are paid]*;

section 22 *[assignment of wages]*;

section 23 *[employer's duty to make assigned payments]*;

section 24 *[how an assignment is cancelled]*;

section 25 (1) or (2) *[special clothing]*;

section 26 *[payments by employer to funds, insurers or others]*;

section 27 *[wage statements]*;

section 28 (1) *[content of payroll records]*;

section 28 (2) *[payroll record requirements]*.

(5) If a collective agreement contains no provision respecting a matter set out in a provision specified in subsection (4), the specified provision of this Act is deemed to be incorporated in the collective agreement as part of its terms.

(6) Parts 10, 11 and 13 of this Act do not apply in relation to the enforcement of the following provisions of this Act in respect of an employee covered by a collective agreement:

section 9 *[hiring children]*;

section 10 *[no charge for hiring or providing information]*;

section 16 *[employers required to pay minimum wage]*;

section 21 *[deductions]*;

Part 6 *[leaves and jury duty]*;

section 64 *[group terminations]*;

section 65 *[exceptions to section 64]*;

section 67 *[rules about notice of termination]*;

section 68 *[rules about payments on termination]*.

(7) If a dispute arises respecting the application, interpretation or operation of

(a) a Part or provision of this Act deemed by subsection (3) or (5) to be incorporated in a collective agreement, or

(b) a provision specified in subsection (6),

the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

23. Sub-section 3(1) provided that the *ESA* applies to all employees, except as provided by the further provisions of section 3, and excepting those employees excluded by regulation.

24. Sub-section 3(2) of the *ESA* provided that where a collective agreement expressly deals with hours of work, overtime, statutory holidays, annual vacation or vacation pay, seniority retention, recall, or termination of employment or layoff, certain specific provisions of the *ESA* do not apply "in respect of employees covered by the collective agreement".

25. Sub-section 3(3) of the *ESA* provided that where a collective agreement does not expressly deal with the matters referenced in section 3(2), the provisions of the *ESA* that deal with those matters are deemed to be incorporated into the collective agreement. Logically, where those provisions are deemed to form part of a collective agreement, the relevant provisions of the *ESA* do not apply "in respect of employees covered by the collective agreement".

26. Section 3(4) of the *ESA* provided that where a collective agreement expressly deals with paydays, payment of wages upon termination, how wages are paid, assignment of wages (and related matters), special

clothing, wage statements, and payroll records, certain specific provisions of the ESA do not apply "in respect of employees covered by the collective agreement".

27. Section 3(5) of the *ESA* provided that where a collective agreement does not expressly deal with the matters referenced in section 3(4), the provisions of the *ESA* that deal with those matters are deemed to be incorporated into the collective agreement. Logically, where those provisions are deemed to form part of a collective agreement, the relevant provisions of the *ESA* do not apply "in respect of employees covered by the collective agreement".

28. Section 3(6) of the *ESA* states that Parts 10, 11, and 13 of the *ESA* do not apply in respect of the matters enumerated therein "in respect of [employees] covered by [the] collective agreement".

29. The *ESA* did not specify in section 3(2) or 3(4) what recourse an employee has in the event of a dispute related to the matters enumerated therein. The *ESA* provided only that where those matters are part of a collective agreement, the *ESA* does not apply. Presumably, an affected employee is left to address a dispute related to these matters by recourse to the grievance procedures of the collective agreement.

30. On the other hand, section 3(7) of the *ESA* provided that where there is a dispute regarding either the application, interpretation, or operation of a provision that is deemed, by section 3(3) or (5), to be incorporated into a collective agreement, or one of those matters specified in section 3(6), then the dispute must be resolved through recourse to the grievance procedures of the collective agreement.

31. In the Determination, the Director did not identify which provisions of the *ESA* related to the merits of the Appellant's complaint. The Director did not identify whether the substance of the Appellant's complaint was dealt with in the Collective Agreement (and thus caught by either section 3(2) or section 3(4)) or was deemed to form part of the Collective Agreement (and thus caught by either section 3(3) or section 3(5)). The Director did not indicate whether the substance of the Appellant's complaint fell within the provisions encompassed by section 3(6).

32. Because the Director did not specify what provisions of the *ESA*, outlined in section 3(2) – section 3(6), related to the Appellant's complaint, I am unable to determine whether or not the Director correctly interpreted or applied these provisions of the *ESA*.

33. In reaching the Determination, the Director referred only to section 3(7) of the *ESA* and concluded that the Appellant was required to rely upon the grievance provisions of the Collective Agreement. To reach this conclusion, the Director undertook an examination of whether the Appellant was an employee "covered by the collective agreement".

34. The Director examined portions of the Collective Agreement and concluded that the Appellant was covered by that Collective Agreement. The Director ruled that the "*Employment Standards Act* and *Regulation* do not apply to his complaint" [emphasis added]. The Director did not identify which provisions of the *ESA* do not apply, but simply ruled that the provisions of the *ESA* and *Regulation* do not apply, in their entirety.

35. I turn now to an examination of whether the Director correctly interpreted or applied the *ESA* in reaching that conclusion.

36. The Collective Agreement contains no provision that specifies that all Ansan employees are members of the Union bargaining unit or are covered by the Collective Agreement. If Ansan and the Union had included such a provision, there would be no denying that the Appellant was covered by the Collective Agreement.

37. Clause 7 of the Collective Agreement deals with Union Security. Paragraph 7.01 of the Collective Agreement provides as follows:

> 7.01 All employees covered by this Agreement must, as a condition of employment, become and remain members of the Union. [emphasis added]

38. Thus, any Ansan employee "covered by this Agreement" is required to be a member of the Union.

39. Paragraph 7.02 of the Collective Agreement provides that probationary employees are not entitled to be members of the Union until they have completed 600 hours of work:

> 7.02 Upon completion of six hundred (600) hours of work, employees shall gain Union membership … .

40. Paragraph 7.08 of the Collective Agreement also provides that an employee does not qualify for Union membership until completing the probationary period:

> 7.08 … The applicant only qualifies for Union membership upon successful completion of the probationary period.

41. On the basis of the foregoing, I conclude that Ansan and the Union did not intend that probationary employees were to be covered by the Collective Agreement. Ansan and the Union agreed that all Ansan employees "covered by this Agreement" are required, as a condition of employment, to be members of the Union. Ansan and the Union also agreed that probationary employees are expressly barred, by the terms of the Collective Agreement, from membership in the Union. It follows, therefore, that probationary employees were not intended to be covered by the Collective Agreement. I find that the Appellant is not covered by the Collective Agreement.

42. On the basis of the foregoing, I find that the Director erred in concluding that the Appellant was covered by the Collective Agreement. I find that the Director erred in interpreting and applying section 3 of the *ESA*. An error in the interpretation of application of relevant legislation is an error of law.

43. In light of my finding that the Director committed an error of law in reaching the Determination, I grant the Appellant's appeal on this ground.

(ii) Did the Director fail to observe the principles of natural justice in making the Determination?

44. The Appellant has tendered, in his original Appeal and his subsequent submissions, lengthy arguments in support of his contention that the Director failed to observe the principles of natural justice in making the Determination. The Appellant's allegations of breaches of natural justice include:

- Bias on the part of the Director;
- The Director was not independent and impartial;

- Lack of due process;
- Lack of transparency.

45. It must be remembered that the Director did not address the merits of the Appellant's complaint in reaching the Determination. Rather, the Director only considered the narrow, preliminary legal question of whether the Appellant was covered by a collective agreement and, if so, whether the provisions of the *ESA* applied to the complaint. The only issue before me in the present appeal is the question of the manner in which the Director answered that narrow, preliminary question. Many of the Appellant's further arguments relate to the merits of his complaint. As the merits of his complaint do not form part of the Determination, I need not address those arguments here.

46. In reaching the Determination, the Director undertook the following steps:

- Accepted the complaint and commenced a review of the matters set out therein;
- Conducted interviews of the Appellant;
- Requested that the Appellant provide documents relevant to the complaint;
- Conducted interviews of representatives of Ansan;
- Requested that Ansan provide documents relevant to the complaint;
- Received information from and conducted an interview with legal counsel for the Union;
- Upon learning that the Union was asserting that it had jurisdiction over the matters in dispute, reverted to a formal Investigation;
- Issued the Determination, addressing only the narrow, preliminary question of the application of the *ESA* to the facts of the Appellant's complaint; and
- Discontinued the Investigation.

47. This Tribunal, in *Re: Milan Holdings* BC EST # D559/97, addressed the question of natural justice and bias in the decisions of adjudicators. The Tribunal recognized the elements of the adjudicative process that must be satisfied to demonstrate procedural fairness:

> Under the current *Act*, the investigative process commences with the filing of a complaint with the Director of Employment Standards under section 74. … At the investigative stage, the Director must, subject to section 76(2), enquire into the complaint, receive submissions from the parties, and ultimately may issue a determination that affects the rights and interests of both the employer and the complainant employee(s). In my view, and consistent with the authorities previously discussed, a determination can only be properly issued following an unbiased investigation.

48. The Tribunal in *Re: Milan Holdings* went on to consider the question of bias in administrative decisions and cited from the decision of the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 636-37:

> . . . The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. It is, of course, impossible to determine the precise

> state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness. To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

49. In reaching the Determination in the present case, the Director accepted and reviewed the complaint, conducted interviews with relevant parties, and requested the production of relevant documentary materials. Upon discovering that the Union was asserting jurisdiction over the dispute, the Director switched to a formal Investigation. As part of that Investigation, the Director recognized the need to address the narrow, preliminary legal question of whether or not the *ESA* applied to the circumstances of the Appellant's complaint. Without addressing the actual merits of the Appellant's complaint, the Director issued the Determination on the narrow question of the application of the *ESA*. The Director then terminated the Investigation.

50. The Appellant has presented no compelling evidence in support of his allegations of breach of natural justice. The Director followed appropriate procedures in initiating a review of the complaint. The Director properly conducted interviews of all relevant parties and requested and reviewed copies of relevant materials. The Director afforded all parties the opportunity to present their positions. The Appellant has presented no compelling evidence that the Director lacked impartiality. The Appellant has presented no compelling evidence that there was a lack of due process or transparency.

51. I am satisfied that the Director observed the principles of natural justice in undertaking initially a review and, subsequently, a more formal investigation. I am satisfied that a reasonably informed bystander would not reasonably perceive bias on the part of the Director in reaching the Determination.

52. While I have found that the Director erred in law in reaching the conclusion of the Determination, I do not find that the Director failed to observe the principles of natural justice in issuing the Determination. I dismiss this ground of appeal.

(iii) Has evidence become available that was not available at the time the Determination was being made?

53. The Appellant has cited as one of the grounds for his appeal that evidence has become available that was not available at the time the Determination was made.

54. In the submissions accompanying his appeal, the Appellant stated that:

> … I would anticipate new evidence on a prospective basis, whether via The Tribunal or FOIPPA Frredom [sic] of Information & Protection of Privacy Act.

55. The Appellant has tendered no new evidence that was unavailable at the time the Determination was made. Rather, the Appellant has simply suggested that he anticipates that new evidence may come to light.

56. This Tribunal, in *Re: Bruce Davies et al.*, BC EST # D171/03, prescribed the circumstances in which new evidence can be permitted that was not available at the time of a Determination:

> . . . 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.

57. The Appellant has tendered no new evidence that was unavailable at the time of the Determination. It is not enough for an appellant to simply hope to discover new evidence that would support his appeal. I dismiss this ground of appeal.

ORDER

58. I allow this appeal, in part, under section 115 of the *ESA*, cancel the Determination, and refer the matter back to the Director to examine the merits of the Appellant's complaint.

James F. Maxwell
Member
Employment Standards Tribunal