



Citation: Hussein Thawer (Re)
2019 BCEST 87

An appeal

- by -

Hussein Thawer
("Mr. Thawer")

- 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: David B. Stevenson

FILE NO.: 2019/61

DATE OF DECISION: August 21, 2019

DECISION

SUBMISSIONS

Hussein Thawer on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Hussein Thawer (“Mr. Thawer”) has filed an appeal of a determination (the “Determination”) issued by Jordan Hogeweide, a delegate of the Director of Employment Standards (the “Director”), on May 2, 2019.
2. The Determination found Mr. Thawer’s former employer, Destination Auto Ventures Inc. carrying on business as Destination Chrysler Jeep Dodge Northshore (“Destination Inc.”), had not contravened the *ESA* and there were no wages outstanding to Mr. Thawer. The Director decided no further action would be taken.
3. In addressing Mr. Thawer’s complaint, the Director considered whether Destination Inc. had contravened section 8 and section 83 of the *ESA*.
4. This appeal is grounded in error of law by the Director and an allegation the Director failed to observe principles of natural justice in making the Determination.
5. In correspondence dated June 17, 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.
6. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Thawer and to counsel for Destination Inc. 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.
7. 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.

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Destination Inc. 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

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

THE FACTS

10. Mr. Thawer was employed by Destination Inc. as a financial services manager from March 22, 2018 to March 31, 2018.

11. He filed a complaint with the Employment Standards Branch, alleging Destination Inc. had contravened the *ESA* and owed him regular wages and other amounts totaling \$133,400.00. Mr. Thawer contended he was lured by Destination Inc. to accept employment with them on the promise of guaranteed employment for one year at a wage of \$10,000.00 a month plus benefits and perks. He also submitted Destination Inc. had retaliated against him for filing a complaint under the *ESA*.

12. The Director found the evidence did not establish Destination Inc. had contravened section 8 or section 83 of the *ESA*. More particularly, the Director found Destination Inc. had not misrepresented the availability of the position, the wages or the conditions of employment and that there was insufficient evidence to show a contravention of section 83.

ARGUMENT

13. In the appeal, Mr. Thawer contends the Director erred in not finding Destination Inc. had contravened sections 8 and 83 of the *ESA*.

14. It is unnecessary to outline all elements of the arguments made by Mr. Thawer or to attempt to relate them to the chosen grounds of appeal. The sum and substance of the argument is that the Director erred by misinterpreting or ignoring the facts in making the Determination.

15. The most significant area of disagreement with the findings of the Director, and one to which Mr. Thawer devotes a large part of his written submission supporting the appeal, is the finding that Destination Inc.

had not assured him of a guaranteed 12-month period of employment at a guaranteed wage of \$10,000 a month.

16. Mr. Thawer also argues there was enough evidence for the Director to find Destination Inc. had slandered his name and sought to blacklist him because of his filing a complaint under the *ESA* and the Director's failure to make those findings, and make a corresponding finding of a contravention of section 83, was an error.

ANALYSIS

17. 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.
18. 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.
19. 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.
20. 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.
21. 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.

22. Questions about whether an employer has contravened sections 8 and 83 of the *ESA* are questions of mixed law and fact, requiring applying the facts as found to the relevant legal principles relating to those provisions.
23. 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. In respect of a complaint alleging contravention of section 8, the applicable principles that have been developed under the *ESA* are expressed in the following excerpt from *Jeff Parsons*, BC EST # D110/00 (Reconsideration denied BC EST # D513/00):
- Section 8 is a pre-hiring provision and covers only pre-hiring practices. The prohibition in Section 8 against misrepresenting is not a general prohibition, but is specific to the four matters identified: the availability of a position, the type of work, the wages and the conditions of employment. The tribunal has adopted and applied a basic legal definition of misrepresentation when considering whether an employer has misrepresented any of those four matters.
25. Provided the established principles have been applied, a conclusion on whether section 8 has been contravened is 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.
26. I am entirely satisfied the Director correctly applied the legal principles to the questions arising under section 8 of the *ESA*.
27. This question of whether the Director committed an error of law on the facts, framed in the words used in the definition of error of law, is whether the Director acted without evidence or acted on a view of the facts that could reasonably be entertained.
28. This is not a case where the Director acted without evidence.
29. That test for assessing whether the Director acted on a view of the facts that could not reasonably be entertained 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

30. I am unable to find that the conclusions of the Director which are challenged by Mr. Thawer are based on a view of the facts which could not reasonably be entertained. The reasoning of the Director on the section 8 issue is coherent, consistent with the evidence, and logically supports the resulting finding. Applying the above test, I am satisfied the conclusion on that matters reached by the Director was one that was entirely justified on the evidence presented. While I appreciate that Mr. Thawer disagrees with the resulting decision, it is not shown in this appeal that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable.
31. Section 83 of the *ESA* reads:
- 83 (1) An employer must not
- (a) refuse to employ or refuse to continue to employ a person,
 - (b) threaten to dismiss or otherwise threaten a person,
 - (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
 - (d) intimidate or coerce or impose a monetary or other penalty on a person, because a complaint or investigation may be or has been made under this Act or because an appeal or other action may be or has been taken or information may be or has been supplied under this Act.
32. Section 83 prohibits an employer from taking any of the listed actions against an employee only if those prohibited actions are motivated in whole or in part by the employee's direct or potential involvement under the *ESA*. That is not to say the described conduct may not run afoul of other provisions of the *ESA*, but section 83 requires proof of both prohibited conduct and improper motivation. The employee has the burden of demonstrating improper motive. This requirement is grounded in considerations of fairness and efficiency: see *Gordon Cameron*, BC EST # RD100/06.
33. The conclusion reached by the Director on this issue is based on an assessment of the evidence applied to the obligation on a person raising a contravention of section 83 of the *ESA* to show that the employer committed any of the prohibited actions found in that provision and that those actions were motivated at least in part, "because a complaint . . . may be or has been made under this Act". In other words, there must be "some evidence" that the actions were motivated by the employee's direct or potential involvement under the *ESA*: *Burnaby Select Taxi Ltd. and Zolton Kiss*, BC EST # D091/96.
34. I substantially agree with the Director that, while one might speculate about some of the conduct of Destination Inc. – as Mr. Thawer has done throughout his appeal submission – the weight of the totality of the evidence was insufficient to tip the balance in favour of finding Destination Inc. contravened section 83 of the *ESA*.
35. Mr. Thawer has failed to show an error of law in respect of the decision of the Director on the section 83 allegation.

36. At its core, this appeal does no more than challenge the Director's conclusion on the section 8 and 83 allegations, which conclusions have resulted from an application of the facts to legal principles developed under the *ESA* to such allegations, 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. The *ESA* does not allow the Tribunal to do this.
37. To reiterate, an appeal is an error correction process. The burden of demonstrating an error in this case lies with Mr. Thawer. The Tribunal is reluctant to venture into a re-examination of the conclusions of the Director absent demonstrated reviewable error. Mr. Thawer has not established the Director committed an error of law in finding a contravention of either section 8 or section 83 of the *ESA*.
38. Mr. Thawer has also grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination.
39. As noted above, there is a burden on Mr. Thawer on this ground to provide some evidence in support of this allegation.
40. Mr. Thawer 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.
41. There is simply no basis for this ground of appeal.
42. 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

43. Pursuant to section 115 of the *ESA*, I order the Determination dated May 2, 2019, be confirmed.

David Stevenson
Member
Employment Standards Tribunal