Employment Standards TRIBUNAL

Citation: Pamela Koontz (Re)
2019 BCEST 96

An appeal

- by -

Pamela Koontz

- 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: Richard Grounds

FILE NO.: 2019/48

DATE OF DECISION: September 4, 2019

DECISION

SUBMISSIONS

Pamela Koontz — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Pamela Koontz (the "Appellant") has filed an appeal of a determination issued on April 10, 2019 (the "Determination"), by Ramona Muljar, a delegate (the "Delegate") of the Director of Employment Standards (the "Director").

2. The Appellant worked as a legal assistant for B-175 Holdings Ltd., operating as Zak & Decker Law (the "Employer"). The Appellant's employment was terminated without cause and her last day worked was May 8, 2018. On November 22, 2018, the Appellant filed a complaint against the Employer under section 74 of the *ESA* for regular wages and overtime. The Delegate concluded that the complaint was not filed within the time limit set out in section 74(3) of the *ESA* and declined to exercise discretion to investigate the complaint.

3. On May 17, 2019, the Appellant appealed the Determination on the basis that evidence has become available that was not available at the time the Determination was being made. In further correspondence, the Appellant submitted that the Delegate had also erred in law and failed to observe the principles of natural justice in making the Determination.

4. For the reasons that follow, the Appeal is dismissed and the Determination is confirmed.

ISSUE

5. The issues are whether the Delegate erred in law, whether the Delegate failed to observe the principles of natural justice in making the Determination and whether there is evidence that has become available that was not available at the time the Determination was being made.

ARGUMENT

6. The Appellant submitted on appeal that that she wished to "challenge the grounds of the Determination for late filing due to cognitive symptoms and vision impairment by submitting new evidence". The Appellant submitted that the four-part test to submit new evidence had been met for the following reasons:

(i)

> Persistent stress is a major factor affecting my cognitive symptoms which to date leaves my scatter brained, overwhelmed, frustrated and unable to think, understand and comprehend matters during a conversation in stressful periods. My hindered vision along with comprehension arguably was the attributing factors in my understanding of timelines. Until I read and reread the written determination by the Delegate who noted that since I

> was not on medical leave came to the conclusion I had no cognitive or physical limitations. I do not have any recall being asked this, nor of my denial of cognitive or physical ability.
>
> (ii, iii, iv)
>
> In 2015 I suffered a concussion and in January of 2016 was seen by [a doctor] specialist in Physical Medicine & Rehabilitation who returned to India over 1 year ago. To present date I have lived with loss of cognitive abilities and vision impairment. I have had surgery recently to shorten the tendons and remove all lid excess and in the healing process. …

7. The Appellant included with her appeal submissions medical reports dated January 11 and 28, 2016, confirming that she had developed post-concussive symptomatology, including cognitive symptoms, following a collision with another player during a slo-pitch baseball game in September 2015. The Appellant also included a Blepharoplasty Surgical Information sheet and appointment confirmation to attend Royal Inland Hospital on May 8, 2019.

8. The Appellant subsequently submitted that the Delegate had also erred in law and failed to observe the principles of natural justice in making the Determination. The basis for this was that the Delegate made no mention in the Employment Standards Branch Workflow Sheet that: she had offered documentation in support of her complaint; she had stated that there was no hire letter, or policy and procedures manual; there was no mention that she had been questioned about her cognitive symptoms, physical ability or vision; and payslips were provided electronically and she did not have access to them after her termination.

9. The Appellant submitted that the Delegate did not obtain all of the information for the Determination and subsequently focused on the time limitation and noted in the Determination that there were no exceptional circumstances. The Appellant made submissions about her wages, benefits and overtime.

10. Submissions on the merits of the appeal were not requested from the parties.

THE FACTS AND ANALYSIS

FACTUAL ANALYSIS

Background Facts

11. The Appellant worked as a legal assistant for the Employer which operates a law firm in Kamloops, British Columbia. The Appellant started working for the Employer on July 4, 2017, and was terminated without cause on May 8, 2018. On November 22, 2018 the Appellant filed a complaint under section 74 of the *ESA* for regular wages, overtime, annual vacation pay, and statutory holiday pay.

12. On February 5, 2019, the Delegate sent the Appellant a letter advising that the complaint was not filed within the six-month time limit. The letter requested the Appellant to provide details in writing about why she had failed to file her complaint within the six-month time limit.

13. On February 15, 2019, the Appellant responded in writing with the following information:

- She had contacted the Employment Standards Branch on May 9, 2018 and was told she could get a self-help kit online and that she had six months to notify her employer.
- She hand-delivered the Information Notice to the Employer and Request for Payment to the Employer on November 7, 2018,
- She proceeded to file her complaint online on November 7, 2018 that same day and was asked if she had a response from the Employer so she waited another 15 days before she filed her complaint online. She thought that she had to wait 15 days after notifying her Employer to file her complaint because the Information Notice to the Employer stated "If you do not respond to the employee within 15 days, a complaint may be filed with the Employment Standards Branch".
- She misunderstood the process she read on her cell phone and relied on the Information Notice.
- She was unable to access her work email to print any payroll information.
- She was focused on finding full-time employment.
- A family matter arose involving the father of her young adult children who was terminally ill.
- She had no computer.

14. The Delegate spoke to the Appellant on April 4, 2019. The Delegate recorded on a Workflow Sheet that the Appellant stated that: she had printed the Self Help Kit at Worksafe BC; she hand delivered it to the Employer on November 7, 2018; she tried to file the complaint online but it kept asking her whether she had received a reply from the Employer yet and she had not because she had just notified them that same day; she waited 15 days before filing her complaint; she waited until November 7, 2018, to notify her Employer because she did not have access to her payslips; it took her time to compile all of her information into spreadsheets; she was going through hard times during the summer because the father of her adult children became terminally ill and she had to drive them around; and she had no access to a computer. The Appellant also made statements to the Delegate about her termination and wages.

The Determination

15. On April 10, 2019, the Delegate completed the Determination and addressed the preliminary matter of whether or not the Complaint had been filed outside the six-month time limit. The Delegate summarized the evidence of the Appellant from the letter provided by the Appellant and based on the information conveyed to the Delegate in the April 4, 2019 telephone call.

16. The Delegate identified two issues including whether or not the Complainant filed within the time limit required by section 74(3) of the *ESA* and, if the complaint was filed outside the time limit, whether discretion should be exercised to refuse to investigate the complaint under section 76(3) of the *ESA*.

17. The Delegate reviewed each of the Appellant's reasons for not filing the complaint within six months and found that the Appellant's misunderstanding about the information in the Self Help Kit aimed at the Employer was not an exceptional circumstance warranting a deviation from the six-month time limit to

filing a complaint. The Delegate also found that not having access to payroll and work calendar information did not amount to an exceptional circumstance because there is no prerequisite to have all such information readily available to make a complaint and no such instruction was passed on to the Appellant by the Employment Standards Branch. The Delegate found that not owning a computer was not an exceptional circumstance because the Appellant was able to use a computer at Worksafe BC to print documentation and eventually used her phone to file her complaint online.

18. In regard to being preoccupied with family matters and finding full-time employment, the Delegate found that these were not exceptional circumstances. In addressing these factors, the Delegate stated "[d]uring this period, the Complainant herself was not on medical leave nor was her cognitive or physical ability to file a complaint affected". As the Delegate found that there were no exceptional circumstances, the Delegate found no compelling reason to continue the investigation and determined that no further action would be taken.

ANALYSIS

19. The Appellant filed her complaint outside the six-month time limit required in section 74(3) of the *ESA*. The Delegate exercised discretion not to investigate the Appellant's complaint based on the provisions in section 76(3)(a) of the *ESA* which provides as follows:

> 76 (3) The director may refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint if
>
> (a) the complaint is not made within the time limit specified in section 74 (3) or (4),

20. The Appellant appealed the Determination on the basis that the Delegate erred in law, failed to observe the principles of natural justice in making the Determination and that new evidence has become available that was not available at the time the Determination was being made.

21. Section 112 of the *ESA* sets out the Tribunal's jurisdiction to consider appeals of the Director's determinations:

> 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:
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> (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.

Error of Law

22. The Appellant appeals the Determination on the ground that the Delegate erred in law. The basis for this was that the Delegate made no mention in the Employment Standards Branch Workflow Sheet that: the Appellant had offered documentation in support of her complaint; the Appellant had stated that there

was no hire letter, or policy and procedures manual; there was no mention that she had been questioned about her cognitive symptoms, physical ability or vision; and payslips were provided electronically to the Appellant and she did not have access to them after her termination. In addition, the original ground of appeal related to new evidence and the fact that the Appellant misunderstood the information in the Self Help Kit is also relevant to consider under this ground of appeal.

23. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.

24. The threshold for overturning the exercise of a Delegate's discretion not to investigate a complaint made outside the six-month time limit is very high. The Tribunal will only interfere where the Delegate made a mistake in construing the limits of his or her authority, if there was a procedural irregularity or if the decision was unreasonable.[1] A decision may be unreasonable if the Delegate does not properly instruct him or herself on the law or considers matters that are not relevant.[2] A Delegate's discretion must be exercised for *bona fide* reasons and must not be arbitrary or based on irrelevant considerations.[3]

25. The issue of the Director's approach to exercising discretion under paragraph 76(3)(a) has been considered by the Tribunal in other cases. The Tribunal has found that misunderstanding the time line in the Self-Help Kit[4], a lack of "time, energy, effort, courage and resources" to file on time[5] and anxiety due to employment termination without medical evidence[6] were not sufficient to interfere with the Delegate's exercise of discretion not to investigate.

26. There is no dispute that the Appellant filed the complaint outside the six-month time limit. The Delegate considered each of the Appellant's reasons for missing the time limit to determine whether or not there were any exceptional circumstances that would warrant an exercise of discretion to proceed with an investigation of the complaint. The Delegate did not misconstrue her authority and there was no procedural irregularity. The Delegate properly instructed herself on the applicable law, including the purpose of the *ESA*, and did not act arbitrarily. In regard to irrelevant considerations, the Delegate considered logical factors related to the Appellant's reasons for missing the time limit.

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[1] *Re: Jody L. Gourdreau et. al.,* BC EST # D066/98.
[2] *Ibid*.
[3] Re: Jody M. Takarabe et. al., BC EST # D160/98.
[4] *Re: Tessa Carter*, BC EST # D124/11 and *Re: Zeljko Dragicevic*, BC EST # D132/15.
[5] *Re: Linda Margaret Pierre*, BC EST # D022/16.
[6] *Re: Anna Maria Gianni*, BC EST # D061/17.

27. The Delegate did make a comment in the Determination that the Complainant was not on medical leave and nor was her cognitive or physical ability to file a complaint affected. It appears that the Delegate made this comment in response to the Appellant's reasons related to going through a difficult personal time which included that the father of her adult children was going through a terminal illness. Given this context, this was not an irrelevant consideration. The Delegate's comment incorporates an obvious inference that the Delegate found that there was no evidence of such mental incapacitation on the part of the Appellant which would have prevented her from filing her complaint within the required time period.

28. The Appellant submits that there could have been a different conclusion if the Delegate had been aware of her cognitive incapability. I am not able to agree with this submission because even if the new medical evidence from 2016 was admitted on appeal, which it is not, there is still no evidence that the Appellant was unable to file a complaint within the time limit due to her prior post-concussive symptoms or eyelid surgery. The Appellant bears the burden to prove this; the Delegate does not have to disprove such an assertion. Although the Appellant has submitted that the Delegate did not consider facts related to the merits of her complaint, it would have only been necessary for the Delegate to do this if the Delegate had exercised discretion to investigate the complaint, which she did not.

29. Given the evidence, I am satisfied on a balance of probabilities that the Delegate's exercise of discretion was not arbitrary, unreasonable or based on irrelevant considerations. Further, I am satisfied that none of the criteria identified in *Gemex, supra*, have been proven such that the Delegate did not commit an error of law. This ground of appeal is dismissed.

Failure to Observe the Principles of Natural Justice in making the Determination

30. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker.

31. The Delegate informed the Appellant of the issue relating to missing the time limit and provided her with an opportunity to provide a response. There is no evidence that the Delegate was not an impartial decision maker. Given these factors, there is no basis to find that the Delegate failed to observe the principles of natural justice in making the Determination. This ground of appeal is dismissed.

New Evidence

32. The Appellant also appealed the Determination on the basis that new evidence has become available that was not available at the time the Determination was being made. The evidence submitted by the Appellant on appeal included medical reports from January 2016 confirming that she had developed post-concussive symptomatology, including cognitive symptoms, following a collision with another player during a slo-pitch baseball game in September 2015. The Appellant also included a Blepharoplasty Surgical Information sheet and appointment confirmation to attend Royal Inland Hospital on May 8, 2019.

33. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.*, BC EST # D171/03, where it stated (at page 3):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). 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. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
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> (b) the evidence must be relevant to a material issue arising from the complaint;
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> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
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> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

34. The first stage of the test for admitting new evidence on appeal requires that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made. The medical records submitted by the Appellant were available prior to the time that the Determination was made. Accordingly, in regards to the medical records, the first stage of the test to admit the new evidence on appeal has not been met.

35. There is no date on the Blepharoplasty Surgical Information sheet and appointment confirmation to attend Royal Inland Hospital on May 8, 2019. While the surgical date came after the date of the Determination, it is not known if this information existed before the date that the Determination was made. Regardless of the exact date that this information was available, there is no obvious relevance, other than speculation, to the events of the previous year when the Appellant missed the time limit. In addition, it is unlikely that considering this evidence would have led to a different conclusion. Accordingly, the second and fourth parts of the test to admit new evidence have not been met in regards to the information regarding the eyelid surgery planned for May 9, 2019.

36. The new evidence submitted by the Appellant will not be admitted as part of the appeal as it does not meet the test for admission.

ORDER

37. I dismiss the appeal and confirm the Determination under section 115(1)(a) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal