Citation: Charles M. Fellnermayr (Re)
2020 BCEST 106

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Charles M. Fellnermayr carrying on business as
Mezmer Eyes and Grapevine Optical

(the "Employer")

- 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: Carol L. Roberts

FILE NO.: 2020/089

DATE OF DECISION: August 17, 2020

DECISION

SUBMISSIONS

Bruce Bergez — on behalf of Charles M. Fellnermayr

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Charles M. Fellnermayr carrying on business as Mezmer Eyes and Grapevine Optical (the "Employer") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on May 11, 2020 (the "Determination").

2. The Director found that the Employer had contravened section 63 of the *ESA* in failing to pay a former Employee compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $4,984.29. The Director imposed a $500 administrative penalty for the section 63 contravention, for a total amount payable of $5,484.29.

3. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

4. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employee or the Director.

5. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the Employer's submissions, and the Reasons for the Determination.

FACTS

6. Natasha Martin was employed as a manager at the Employer's eyewear sales business in Oliver, B.C., from January 8, 2011, until July 10, 2019. On July 15, 2019, the Employee filed a complaint alleging that the Employer had contravened the *ESA* in failing to pay her compensation for length of service.

7. At issue before the delegate was whether Ms. Martin's employment had been terminated without notice, or whether she quit.

Preliminary matters

8. Mr. Bergez, the Employer's agent at the hearing, made a number of objections about the hearing process.

9. Firstly, Mr. Bergez sought to have the hearing conducted face-to-face rather than by teleconference, so that the delegate could better assess Ms. Martin's credibility. The delegate denied the request, finding that it was not necessary for him to view the witness to assess credibility. The delegate also noted that

one of the purposes of the *ESA* was to provide fair and efficient procedures for resolving disputes, including permitting hearings to be conducted by teleconference.

10. Mr. Bergez objected to the delegate's decision to allow Ms. Martin to submit additional evidence two days after the records deadline and 21 days prior to the hearing, arguing that the Employer had been denied natural justice.

11. Mr. Bergez objected to the delegate's ruling that the Employer had the burden of establishing just cause and would provide his evidence first, and refused to allow the Employer to testify. When the delegate explained that his decision would be based on the evidence before him, Mr. Bergez then questioned Ms. Martin for approximately three hours. Ms. Martin became frustrated and ultimately declined to respond to additional questions. Mr. Bergez brought a "no evidence motion" after Ms. Martin decided she would not answer any more questions. The delegate explained that Ms. Martin's entitlement to compensation for length of service would be based on the duration of her employment, and that the length of her employment was not in dispute.

12. Mr. Bergez subsequently informed the delegate that the Employer had decided to call witnesses. The delegate allowed the Employer to call witnesses after hearing from Ms. Martin, but cautioned the Employer that it might not be appropriate for him to be present for the evidence of witnesses if he subsequently decided to give evidence. After hearing from the witnesses, the Employer changed his mind about testifying. He did so after hearing Ms. Martin's evidence as well as the evidence of all other witnesses.

Evidence

13. Ms. Martin managed the Employer's wholesale business (Mezmer Eyes) as well as all operations of the retail business (Grapevine Optical). Her duties included bookkeeping, payroll, managing staff, and assisting with the selection and ordering of product. There was no dispute that in her eight years of employment she received no verbal or written warnings.

14. The delegate heard different versions of what was said regarding the end of Ms. Martin's employment on July 10, 2019.

15. The parties agreed that on that day, the Employer informed Ms. Martin that she no longer had signing authority on the Employer's bank account and that the Employer had cancelled her credit card.

16. According to Ms. Martin, the Employer told her that he no longer needed a manager. Ms. Martin said that when she asked the Employer whether she was fired or laid off, he told her that he 'could lay her off.' He then asked for her keys and told her when she could pick up her final pay cheque and record of employment. Ms. Martin denied telling the Employer that she was quitting or that she gave him a letter of resignation.

17. The Employer denied telling Ms. Martin he no longer needed a manager, and did not tell her that he was laying her off. He said that he still required her services. The Employer agreed that he cancelled Ms. Martin's credit card because, he said, he was going to give her a different card. However, he agreed that he did not tell her of his intention to replace the card. The Employer said that he asked Ms. Martin to

come in on Thursday and Friday and that she replied that she would rather not. According to the Employer, when he asked her directly whether she was quitting, she said yes, and that July 10 was her last day. The Employer said that it made no sense for him to have fired her because he had work for her and no one to replace her.

18. The Employer said that he had to rescind Ms. Martin's signing authority because she had repeatedly cashed her bonus cheques after being instructed to delay doing so in order to take financial pressure off the business around the first of the month.

19. Ms. Martin sent several emails to the Employer after July 10, 2019, requesting her "severance pay" and her Record of Employment (ROE), receiving no response. The Employer said that he did not respond because Ms. Martin was no longer an employee.

20. A number of witnesses gave evidence on behalf of the Employer. One employee who started work the day Ms. Martin's employment ended had no evidence relevant to the complaint. A second witness, an Optometric assistant, overhead the conversation between Ms. Martin and the Employer. She testified that the Employer told Ms. Martin that he had to take signing authority away from her as things were not running the way they were supposed to be. In response, Ms. Martin replied that this arrangement was not fair. The witness did not hear Ms. Martin say that she had quit, nor did she hear the Employer tell Ms. Martin that she was laid off or fired.

21. Applying the Tribunal's test in *Burnaby Select Taxi*, BC EST # D091/96, the delegate found no "clear and unequivocal" evidence that Ms. Martin had voluntarily quit her employment. He noted that while there may have been a misunderstanding between the parties following their conversation on July 10, 2019, the Employer made no attempt to clarify that Ms. Martin had not been laid off. Rather, he asked her for her keys and informed her when she could pick up her final pay cheque and ROE.

22. The delegate concluded that Ms. Martin did not form a subjective intent to quit. He accepted her evidence that she was not in a financial position to do so. The delegate found that the Employer had not discharged his burden of demonstrating that Ms. Martin had quit.

23. The delegate then found, in the alternative, that the Employer had substantially altered the conditions of Ms. Martin's employment by rescinding her signing authority and cancelling her credit card. He found the Employer's explanation that he intended to replace her credit card "dubious" and determined that the reduction to the scope of her duties constituted a substantial alteration to the conditions of her employment. The delegate deemed Ms. Martin's employment to be terminated pursuant to section 66 of the *ESA*.

24. The delegate determined that Ms. Martin was entitled to compensation for length of service in the amount of $4,560.84, plus vacation pay in the amount of $273.65.

ARGUMENT AND ANALYSIS

25. Section 114 of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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, 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.

26. Section 112(1) of the *ESA* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

27. The Employer contends that the delegate made two errors of law and failed to comply with natural justice and "due process."

28. As the Tribunal has often said, an appeal is not an opportunity to re-argue a case already considered by the Director, hoping to have the Tribunal review and re-weigh the issues and reach a different conclusion (see *Metasoft*, BC EST # D022/12). An appeal is intended to be an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is a basis for interfering with the determination on one of the statutory grounds of appeal.

29. I conclude that the Employer has not discharged that burden.

Error of Law

30. The Tribunal as 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.

31. The Employer says that at the hearing, it took the position that Ms. Martin had quit her employment, thereby discharging his liability for compensation for length of service under section 63 of the *ESA*. He argues that it was an error for the delegate to find that the Employer substantially altered the conditions of Ms. Martin's employment under section 66 of the *ESA*.

32. The Employer contends that he did not alter Ms. Martin's compensation, wages, bonuses, hours, or place of work. He says that, at best, he made changes to Ms. Martin's duties by lessening her workload, which were to her benefit.

33. I do not find it necessary to address this ground of appeal. The delegate's conclusion on this point was an alternative finding after he had concluded that the Employer had not discharged his burden of demonstrating that Ms. Martin had quit. Although I do not understand why the delegate found it necessary to make this finding (and which he did in the absence of any submissions), it was clearly not the primary basis for his conclusion that Ms. Martin was entitled to compensation for length of service.

34. Similarly, I do not find it necessary to address the Employer's argument that the delegate erred in failing to conclude that Ms. Martin abandoned her employment when she did not return to work on July 11, 2019. It does not appear from the record that the Employer advanced an abandonment argument before the delegate at first instance. As such, it cannot be said that the Director erred in law in not making a finding on this issue.

35. The Employer argues that the delegate erred in "ignoring" the Employer's evidence on the question of whether Ms. Martin quit or was "laid off." I find no basis for this argument. The delegate set out the Employer's evidence, including his testimony that Ms. Martin said that she quit, in the Determination. After considering all of the evidence, including that of the witnesses, the delegate rejected the Employer's argument that Ms. Martin quit.

36. In doing so, the delegate correctly identified the test for assessing whether or not an employee has quit their employment (see *Burnaby Select Taxi v. Zoltan Kiss* (BC EST # D091/96, Reconsideration denied BC EST # D122/96):

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit employment; objectively, the employee must carry out an act inconsistent with his or her further employment.

37. The delegate found that the Employer had not discharged the burden of establishing clear and unequivocal facts to support a conclusion that Ms. Martin voluntarily quit:

> I find to be reasonable and credible, Ms. Martin's testimony that she asked him if she was being fired or laid off. (sic) Though the statement Mr. Fellnermayr is alleged to have made "I could lay you off" is ambiguous, I accept from this response Ms. Martin assumed she had been laid off. Mr. Fellnermayr agreed, saying that "She took this mental leap that I was laying her off."
>
> Rather than clarifying Ms. Martin's misunderstanding, Mr. Fellnermayr asked her for her keys, then advised when she could pick up her final paycheque and record of employment "ROE"). Whereas Mr. Fellnermayr said that he hoped that she was going to come in Thursday and Friday

> and that any misunderstanding could have been resolved at that time, [a witness] testified that Mr. Fellnermayr told Ms. Martin that she could come back tomorrow or the next day as he needed to know how to do things and she could show him. [The witness] said that Ms. Martin's response was that she would rather not. I accept as accurate [the witness's] characterization of the invitation to return on Thursday or Friday as pertaining to the provision of limited training to Mr. Fellnermayr on the tasks he was assuming from her.
>
> In light of the foregoing, I find that Ms. Martin did not form a subjective intent to quit employment. In reaching this conclusion, I have also accepted as credible Ms. Martin's statement that she was not in financial position to quit her job…

38. Findings of fact are within the purview of the delegate. There is nothing in the Employer's submission to persuade me that the delegate acted without any evidence, or acted on a view of the facts which could not reasonably be entertained.

39. The Employer further argues that the delegate had no jurisdiction to interpret the *ESA*. He argues that statutory interpretation is "generally reserved for . . . members of the *Legal Profession Act*" and that because the delegate is not a lawyer, that the Determination is "*ultra vires*" and an "error of law in its entirety."

40. I find this argument entirely without merit.

41. The *ESA* defines the Director to mean "the Director of Employment Standards appointed under the *Public Service Act* and, in relation to a function, duty or power that the director has under section 117 of this Act delegated to another person, "director" includes that other person".

42. Section 117 permits the director to delegate any of the director's functions, duties or powers under the *ESA*. That includes the power to investigate and adjudicate complaints (section 76).

43. The Employer did not challenge the delegate's authority to conduct the hearing at first instance and has provided no evidence that he was not properly designated by the Director to conduct the hearing and issue a Determination. I find the Determination to be within the Director's jurisdiction and power to make, and is a valid order.

Failure to observe the principles of natural justice

44. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

45. The Employer argues that "[t]here is no statutory restraint nor are there rules of procedure on the length of the cross-examination nor the questions that can be asked." He submits that the delegate failed to observe the principles of natural justice when he accepted Ms. Martin's "abdication" of responsibility to respond to questions.

46. The delegate's decision was explained as follows:

> In his post-hearing submission Mr. Bergez [argued] that a procedural unfairness had occurred as a result of Ms. Martin refusing to permit further questioning by him. I do not agree … Mr. Bergez

> insisted however that Mr. Fellnermayr had a right to cross-examine Ms. Martin prior to the conclusion of the hearing. In response to Ms. Martin's question of whether she too could decline to give evidence I said she could, that it was her decision to make. In light of the arrangements she had already made to be present, Ms. Martin chose to provide her evidence and allow cross-examination. What followed was approximately three hours of overly tedious, and in some cases, irrelevant questioning of her by Mr. Bergez. Ms. Martin gradually became frustrated with the process and decided that she would decline to answer further questions.

47. I find no basis for the Employer's argument that he was denied natural justice. The Employer was well aware that the issue in the hearing was whether or not Ms. Martin was entitled to compensation for length of service under section 63 of the *ESA*. The Director has the power to decide a complaint in a number of different ways, including through an investigation and by way of an adjudicative hearing. If the complaint proceeds by way of a hearing, that hearing must comply with the principles of natural justice as set out above. Provided the parties are given a "meaningful opportunity" to be heard, that obligation is discharged.

48. As the Tribunal stated in *Hall* (BC EST # D266/00, a reconsideration of BC EST # D503/99)

> Several factors inform the content of the duty of fairness at common law. These include the nature of the decision being made, the terms of the statute, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency's own choice of procedures made in light of its institutional constraints. The common law's concern is not for perfect or idealized justice, but for a hearing in which each side has been given a meaningful opportunity to be heard: *Baker v. Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.).

49. The Employer has no "right" to cross-examine a party for any particular length of time, and certainly not for over three hours on what was a very narrow issue. The case authority relied upon by the Employer (which was referred to by the Employer in post-hearing submissions) is a criminal case to which very different evidentiary burdens and standards apply. The delegate, quite properly, found the criminal case inapplicable to the content of the duty of fairness in the complaint hearing.

50. I find that the Employer had ample opportunity to present his case and respond to Ms. Martin's evidence. I am not persuaded that the delegate failed to comply with the principles of natural justice.

51. I find, pursuant to section 114(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

52. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115 of the *ESA*, the Determination, dated May 11, 2020, is confirmed in the amount of $5,484.29, together with whatever interest has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal