Employment Standards TRIBUNAL

Citation: Sammy's Truck & Trailer Repair Services Ltd. (Re)
2020 BCEST 124

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Sammy's Truck & Trailer Repair Services Ltd.
(the "Appellant")

- 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: James F. Maxwell

FILE NO.: 2020/111

DATE OF DECISION: November 9, 2020

DECISION

OVERVIEW

1. Jesus Manzano (the "Employee") filed a complaint with the Employment Standards Branch (the "Complaint") against his former employer Sammy's Truck & Trailer Repair Services Ltd. (the "Appellant"). In the Complaint, the Employee alleged that the Appellant had failed to pay him wages to which he was entitled, in the form of compensation for length of service.

2. A delegate of the Director of Employment Standards (the "Director") undertook an investigation into the Employee's Complaint, and issued a determination (the "Determination") pursuant to the *Employment Standards Act* (the "*ESA*"), in which the Director held that the Appellant had breached the *ESA* and was liable to pay to the Employee sums for annual vacation pay and compensation for length of service, together with interest thereon. In addition, the Director assessed an administrative penalty in the sum of $500.00. The Director concluded that the total amount payable by the Appellant was $8,789.71.

3. The Appellant has appealed the Determination.

4. Having reviewed the Determination, the Appellant's submissions, and the Record provided by the Director, I dismiss the Appellant's appeal. My reasons follow.

ISSUES

5. The within Appeal raises the following issues:

   a. Did the Director fail to observe the principles of natural justice in making the Determination?

   b. Did the Director err in law in the making of the Determination?

FACTS

6. The Appellant operates a vehicle repair business. The Employee was employed by the Appellant as a mechanic from June 2008 to February 2019.

7. By all accounts, the employment relationship between the Employee and the Appellant began to deteriorate in early 2019. According to the Employee, he was told by the Appellant's principal, in January 2019, that the Appellant was unhappy with the Employee's behaviour. After leaving on a vacation, the Employee received a text message from the Appellant in which the Appellant stated "… have a great holiday, but if you wanna [sic] come back with the same attitude I don't have a job for you."

8. According to the Appellant, the Employee had begun to show a lack of interest in his work. The Appellant began to have discussions with the Employee about this when the Employee returned from vacation in January 2019. According to the Employee, the Appellant told him, upon his return from vacation, that the Appellant no longer wanted the Employee to work for it. The Appellant claims that the Employee told the Appellant that he wanted to "move on with his life". This led to discussions about the Employee leaving the Appellant's employ. The Employee's last day of work was in early February 2019.

9. The Employee told the Appellant that he wanted to be paid two weeks of salary upon leaving his employment. According to the Employee, he believed that he was legally entitled to two weeks salary at the end of his employment.

10. The Appellant claims that it was agreeable to paying the Employee two weeks of salary in order to help the Employee move on with his life. The Appellant prepared a cheque in this sum, together with a document entitled "Severance Agreement". The Employee was instructed to return to pick up this cheque on the next pay day, and to sign the Severance Agreement. The Employee picked up the cheque but was uncomfortable with the language of the Severance Agreement, and declined to sign it.

11. The Severance Agreement was drafted by the Appellant, and contained the following provisions:

> Whereas, the Employer and the Employee have agreed to terminate their employer/employee relationship effective February 01st, 2019; and
>
> …
>
> 1. Effective as of the Severance Date, the Employee's position with the Employer shall be terminated.
>
> 2. The Employer is under no obligation to pay any sum as a result of the termination. Any payment described below will only be made following the execution of this agreement. The Employer agrees to pay the Employee an amount of $2,640.00 in consideration of the promises and covenants made in this agreement.

12. In essence, the Employee believed that he was being fired, while the Appellant asserts that the Employee quit.

13. According to the Employee, he later learned that he was entitled to receive a larger sum upon being dismissed. On June 20, 2019, the Employee filed the Complaint with the Employment Standards Branch. In his Complaint, the Appellant sought Compensation for Length of Service in the sum of $7,920.00.

The Determination

14. The Director undertook an investigation into the Employee's complaint, and interviewed both the Employee and the Appellant's representative, and reviewed the documents supplied by the parties.

15. The Director presented both parties with a detailed summary of the information given by both parties and afforded the parties the opportunity to respond to the evidence and documents provided by the other party.

16. The Director issued the Determination on June 15, 2020.

17. In the Determination, the Director noted that the *ESA* provides that an employer is required to pay compensation for length of service upon the termination of employment, except where the employee voluntarily resigns from that employment.

18. The Director considered the information supplied by the parties, and concluded that the Appellant had not satisfied the burden to demonstrate that the Employee had resigned. The Director concluded that the Employee's employment had been terminated by the Appellant.

19. The Director held that the Appellant had breached the provisions of the *ESA* by failing to pay compensation for length of service at the end of the Employee's employment. The Director determined that the Employee was entitled to receive compensation for length of service of 8 weeks wages. The Director held that the Employee was entitled to receive the sum of $8,289.71 for compensation for length of service (taking into account the two weeks wages already paid to the Employee), together with annual vacation pay and interest accrued thereon.

20. The Director also held that for breaching the provisions of the *ESA* the Appellant was liable to pay an administrative penalty in the sum of $500.00.

The Appeal

21. On July 23, 2020, the Appellant filed the within appeal.

22. In the Appeal Form filed with this appeal, the Appellant indicated that its grounds of appeal are that the Director allegedly failed to observe the principles of natural justice in making the Determination.

23. Included with the Appellant's appeal are its reasons and arguments in support of the appeal. The following is a summary of those reasons and arguments:

a. the Appellant did not intend to fire the Employee;

b. the Employee was a good worker and a valuable employee, though he had started to exhibit a lack of interest in his work;

c. the Appellant had felt that it was necessary to speak to the Employee about his "work ethic and poor attitude";

d. the Employee did not tell the Appellant that he intended to leave the Appellant's employ; and

e. the Employee indicated that he wanted to receive two weeks salary at the end of his employment.

ANALYSIS

24. 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.

25. The burden is on an appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.

26. An appeal under the *ESA* is not an opportunity for an appellant to re-argue the evidence in the hope that this Tribunal will come to a different finding. An appeal is strictly limited to the enumerated grounds, namely error of law, failure to observe the principles of natural justice, or new evidence that was not available at the time that the Director made the determination.

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

27. In the present case, the Appellant contends that the Director failed to observe the principles of natural justice in making the Determination.

28. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal addressed the principles of natural justice that must be addressed by administrative bodies, as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the Act, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST # D050/96)

29. Thus, the principles of natural justice require the Director to provide certain procedural protections to both parties, and to conduct investigations in an unbiased and neutral manner.

30. In its reasons and arguments, tendered with its appeal, the Appellant does not identify any specific failure to observe the principles of natural justice on the part of the Director. On the contrary, the Appellant's reasons and arguments consist chiefly of a repetition of the Appellant's argument before the Director, namely that the Appellant did not intend to dismiss the Employee, and that the Employee voluntarily resigned.

31. I am satisfied that the Director afforded the Appellant the required procedural protections. The Director alerted the Appellant to the filing of the Complaint and provided the Appellant the opportunity to know the case against it. The Director conducted an investigation and afforded both the Employee and the Appellant an opportunity to provide evidence. The Director afforded both parties full opportunity to comment upon the information that each had presented. The Director provided the parties a comprehensive analysis of the information supplied by each. I am satisfied that the Director carefully weighed all of the evidence supplied by both parties in making the Determination.

32. The Director was required to conduct the investigation in a manner that was unbiased and neutral. The Supreme Court of Canada stated, in *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)* [1992], 1 S.C.R. 623 at 636-37, that the test to assess whether an adjudicator has been unbiased is that of the 'reasonably informed bystander':

> The duty to act fairly includes the duty to provide procedural fairness to the parties. That simply cannot exist if an adjudicator is biased. … 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.

33. I am satisfied that a reasonably informed bystander would not perceive any bias on the part of the Director in the conduct of the investigation. Rather, I find that the Director conducted the investigation in a manner that was even-handed and impartial, and afforded the Appellant all of the protections required by natural justice.

34. I am satisfied that the Director observed the principles of natural justice in conducting the investigation, and in evaluating the evidence provided therein. For this reason, I dismiss this ground of appeal.

Did the Director err in law in making the Determination?

35. In *Triple S Transmission Inc. o/a Superior Transmissions*, BC EST # D141/03, this Tribunal stated that a broad view should be taken of an appellant's choice of grounds of appeal, particularly when that choice is made by persons untrained in the law. In the present case, the Appellant has chosen as its only ground of appeal that the Director allegedly failed to observe the principles of natural justice in making the Determination. While the Appellant has provided no specifics in support of this allegation, its argument appears to allege that the Director erred in concluding that the Appellant dismissed the Employee. In keeping with the guidance of *Triple S Transmission*, I will examine whether the Appellant's arguments establish an error of law in the making of the Determination.

36. 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.):

> 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.

37. The Director considered the provisions of section 63 of the *ESA*, which requires an employer to pay compensation for length of service, except in situations where the employee resigns, retires or is dismissed for just cause.

38. In *Burnaby Select Taxi Ltd. & Zoltan T. Kiss*, BC EST # D091/96 ["*Burnaby Select Taxi*"], this Tribunal considered a claim for compensation for length of service, and the argument that the employee had voluntarily resigned. The Tribunal identified the elements that must be proven by an employer, in order to escape the obligation to pay compensation for length of service, as follows:

> 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.

39. The Director applied the provisions of section 63 of the *ESA*, and the holding in *Burnaby Select Taxi*, to the information supplied by both the Employee and the Appellant. The Director considered the allegation of the Employee that he had been fired, and the text message delivered by the Appellant when the Employee was on vacation that stated that "…if you wanna come back with the same attitude I don't have a job for you." The Director considered the Appellant's allegation that the Employee had said that he wanted to "move on with his life". The Director found that the Appellant had not provided compelling evidence that the Employee had formed the intention to quit, and that the Employee's alleged disinterest in his work did not evidence such an intention. The Director was also not satisfied that the Appellant had proven that the Employee had committed an action that was inconsistent with continued employment. The Director thus found that the Appellant had not met its burden to demonstrate either the subjective or objective elements necessary to show that the Employee had resigned.

40. The Director also considered the fact that the Appellant had drafted, without input from the Employee, a "Severance Agreement". The Employee did not sign this agreement, but it nevertheless provides some insight into the state of mind of the parties at the time that the employment relationship ended. The document did not state that the Employee intended to resign from his employment; rather, the document stated that "… the Employer and the Employee have agreed to terminate their employer/employee relationship …". The Director concluded that this document, prepared contemporaneously with the events in question, did not prove that the Employee intended to quit. On the contrary, the fact that the document drafted by the Appellant suggested that the termination was by agreement, and the fact that the Appellant was prepared to provide severance to the Employee without a legal obligation to do so if the Employee had resigned, undermined the Appellant's contention that the Employee had done so.

41. I am satisfied that the Director correctly interpreted and applied the relevant provisions of the *ESA*, and principles of general law regarding termination of employment. I am satisfied that the Director did not act without any evidence. On the contrary, the Director was fulsome in presenting and assessing the information supplied by the parties. I am satisfied that the Director's conclusions, based on that information, were reasonable. I find that the Director's calculation of the amount payable as compensation for length of service was correct.

42. In summary, I find that the Director did not err in law in making the Determination.

SUMMARY

43. In conclusion, I do not find that the Director failed to observe the principles of natural justice in making the Determination. While not specifically alleged, I also do not find that the Director erred in law in making the within Determination.

ORDER

44. I dismiss this appeal, and pursuant to section 115 of the *ESA*, I confirm the Determination.

James F. Maxwell
Member
Employment Standards Tribunal