Employment Standards TRIBUNAL

Citation: Cameron McDonald (Re)
2020 BCEST 19

An appeal

- by -

Cameron McDonald
(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: Carol L. Roberts

FILE NO.: 2019/193

DATE OF DECISION: March 12, 2020

DECISION

SUBMISSIONS

Cameron McDonald — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), this is an appeal by Cameron McDonald (the "Appellant") of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 11, 2019 (the "Determination").

2. The Appellant filed a complaint with the Director on April 15, 2019, alleging that his former employer, Trojan Safety Services Ltd. (the "Employer"), had contravened the *ESA* in failing to pay him compensation for length of service. After investigating the complaint, the Director's delegate found that the complaint had not been made within the time limit established in section 74 of the *ESA* and decided not to exercise her discretion to extend the time limit.

3. The deadline for filing an appeal of the Director's Determination was 4:30 p.m. on November 18, 2019. Although the Employment Standards Tribunal (the "Tribunal") received the notice of appeal and some documents by that deadline, the Appellant sought an extension of time to February 25, 2020, to collect and compile additional information. The Tribunal Registrar wrote the Appellant requesting that he provide reasons for his application to extend the statutory appeal period no later than 4:30 p.m. on December 9, 2019. On December 5, 2019, the Appellant submitted, by email, an April 18, 2019 letter he received from the Employer regarding the issuance of Records of Employment ("ROE"'s) along with a hand-written chart of his dates of employment and references to the *ESA*. The Appellant's email also indicated that the "[h]arddrive recovery is prohibitely (sic) expensive" and that he had "screenshots of before/after vacation text messages with Trojan Dispatch that require's the middle to tell-all." [reproduced as written]

4. The Appellant appeals the Determination contending that the Director failed to observe the principles of natural justice in making the Determination. The Appellant also argues that there is evidence that was not available to the Director at the time the Determination was issued.

5. After receiving the appeal, the Tribunal's Registrar sought the section 112 record from the delegate. On January 13, 2020, the Tribunal's Registrar provided the record to the Appellant and the Employer, asking that they review it and inform the Tribunal no later than February 3, 2020, if they had any objections to the completeness of that record. On February 5, 2020, the Tribunal received an email from the Appellant expressing the view that the record was incomplete. The Tribunal's Administrator contacted the Appellant asking him to identify the records he alleged were missing no later than 4:00 p.m. on February 10, 2020. The Tribunal did not receive any further submissions from the Appellant.

6. The Appellant did not object to the completeness of the record within the time frame provided by the Tribunal's Registrar nor did he identify what, if anything, he believed was missing from that record.

7. 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. I have decided that I need not to seek submissions from the Employer or the Director.

8. This decision is based on the section 112(5) "record" that was before the delegate at the time the determination was made, the submissions of the parties, and the Reasons for the Determination.

FACTS AND ARGUMENT

9. The Appellant worked for the Employer as a first aid/safety officer from June 19, 2017, until March 30, 2018, and again from August 28 to 30, 2018. The Appellant filed his complaint on April 15, 2019, after forwarding a "Self-Help" kit to the Employer on April 11, 2019.

10. The Employer provides safety and first aid services to clients, assigning employees to provide services based on the clients' needs. It operates within a 150 km radius of Fort St. John, B.C. The client to whom the Appellant was providing services concluded its contract with the Employer on March 30, 2018. The Employee returned to his home in the lower mainland during his time off.

11. The Employer said that it made several calls to the Employee in the first part of April to have him return to work. The Employer said that a couple of the calls were not answered and that on a couple of occasions, the Employee refused work. The Employer said that the next time the dispatcher contacted the Appellant, he informed the Employer he was out of the country on vacation. The Employer required all vacation requests to be approved. The Employer said that the Appellant did not request time off and that he simply stopped coming to work despite repeated calls from the dispatcher. The Employer also informed the delegate that while it did experience slower periods of work, the work did not entirely cease and that in fact, there was work for the Appellant in the spring of 2018. The Employer informed the delegate that it hired five additional employees as safety supervisors and an additional five as first aid attendants between April 4 and June 7, 2018. The Employer took the position that the Appellant abandoned his job on March 30, 2018.

12. The Appellant agreed that he went on vacation from April 22, 2018, until May 18, 2018. While on vacation, the Appellant broke his ankle. He did not make the Employer aware of the injury.

13. In August 2018, the Employer experienced an "uptick" in work and contacted former employees, including the Appellant, to determine if they were available for work. The Appellant worked an additional 2.5 days for the Employer but found he was unable to continue due to his ankle injury.

14. The Employer issued three Records of Employment ("ROE") for the Appellant. The first ROE showed his period of employment from June 19, 2017, to August 30, 2018, with 10 pay periods showing zero earnings. Service Canada contacted the Employer, suggesting that because there had apparently been a break in the Appellant's employment, the ROE misrepresented his period of employment. The Employer then issued two separate ROE's for that same period, the first being from June 19, 2017, to March 30, 2018, with the reason for issuing as "E", or quit. The second ROE was for the period August 28 to 30, 2018, with the reason for issuing as "A", or shortage of work/end of contract.

15. The Employer contended that the Appellant's complaint was not filed within the six-month period, but even if it had been, the Appellant was not entitled to compensation for length of service as he had only worked for 2.5 days during the second period of employment.

16. The Appellant contended that he did not quit but was laid off at the end of March 2018 and that a Service Canada representative told him that the ROE was being accepted as a temporary layoff.

17. The Employee provided a record of his incoming calls for May 22, 2018, and asserted the call on May 22, 2018, was the first call he received from the Employer since the end of March 2018. The Appellant said that, because of his ankle injury, he was unable to do the work he was hired to do and that he was laid off on August 31, 2018.

18. The Appellant argued that his termination date should be November 7, 2018, applying the definition of "temporary layoff", and contended that his application had been filed within the statutory six-month limit.

19. The delegate considered the statutory definition of temporary layoff, which provides that if a temporary layoff is permitted, an employer may temporarily lay off employees for up to 13 weeks in a consecutive 20-week period. The layoff is deemed to be a termination of employment once the 13 weeks of layoff are exceeded. Therefore, where an employee whose employment is terminated following a temporary layoff, the period in which to file a complaint was extended by 13 weeks.

20. The delegate applied the definition of temporary layoff, finding that, if the Appellant had been laid off rather than quit, as contended by the Employer, his termination was deemed to have occurred on June 29, 2018 and his complaint should have been filed by December 28, 2018.

21. The delegate then determined that the Appellant's second period of employment ended on August 30, 2018, when the Appellant could no longer perform the work he was hired to do. She found no evidence this period of employment was ended by a temporary layoff. She determined that the complaint was filed approximately 7.5 months after his last day of work.

22. The delegate found that the Appellant's complaint had not been filed within the statutory time period, but even if it had been filed in time, no compensation for length of service was owed given that he had only worked 2.5 days before his employment ended.

23. The delegate noted that the requirements regarding the statutory time limit on filing complaints was publicly available and determined that the Appellant was aware of that time limit because he raised the issue of extending the time limit using the definition of temporary layoff.

24. The delegate concluded that the Appellant had provided no compelling reason to continue the investigation and exercised her discretion to stop investigating the complaint.

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. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission*, (BC EST # D141/03), while

> most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.
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> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

28. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not the Appellant has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that the Appellant has not met that burden.

Error of law

29. 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.

30. Section 74(3) of the *ESA* establishes a six-month limit on the filing of complaints. Section 76(1) requires the Director to accept and review complaints and section 76(3)(a) provides the Director with discretion to refuse to accept or continue investigating a complaint that is not made within the time limit. (see also *Karbalaeiali v. British Columbia (Employment Standards*), 2007 BCCA 533)

31. In *Bridge* (BCEST # RD051/08), I concluded that *Karbalaeiali* required that the Director exercise his discretion to determine whether acceptance of the complaint should be refused. The Tribunal would then be "required to determine whether the complaint should have been accepted and reviewed having regard for the factors it considered properly bore on the exercise of the delegate's discretion" in accordance with the Court of Appeal's decision.

32. In deciding not to accept the Appellant's complaint, the delegate noted that the time limits for filing a complaint were designed, in part, to provide for fair and efficient procedures for resolving disputes as well as promoting the fair treatment of both employers and employees (section 2 of the *ESA*). She weighed the importance of the purposes of the time limit along with the reasons advanced for the lateness of the filing. The delegate concluded that the Appellant was aware of the time limit and the reason he advanced for the late filing of the complaint was his view that he was on a temporary layoff.

33. The delegate found that the Appellant was not on a temporary layoff for the first period of work, but even if she was wrong in that conclusion, the complaint was filed beyond the statutory time period.

34. Although the Appellant also argued that he was laid off in August, rather than June, thereby extending the termination date by 13 weeks, or November 7, 2018, he also stated that he quit his job because he was unable to do the work as a result of his ankle injury.

35. There is no evidence the Appellant was laid off in August, even though the ROE issued by the Employer suggested it was issued due to shortage of work. Both the Appellant and the Employer stated that he was unable to perform his job duties. The Appellant did not ask for time off and he did not provide the Employer with any medical evidence regarding his injury or his ability to return to work.

36. The Appellant filed his complaint on April 15, 2019, 7.5 months after he left his employment.

37. Even if the Appellant had been laid off in August and his complaint could be considered timely, he was not eligible for compensation for length of service in any event, as he had not been employed for three months as required by section 63 of the *ESA*.

38. There is no evidence that the Appellant provided any reason to the delegate for filing the complaint beyond the six-month period. As such, there was nothing before the delegate to consider in exercising her discretion other than the fact that he filed late and his belief that he had been temporarily laid off.

39. The Appellant attached material to his appeal that was before the delegate when she made her decision including the Employer's April 2019 letter and a voice recording of a conversation with Service Canada regarding the ROEs. There is nothing in the Appellant's submission that constitutes new evidence.

40. I also find no basis to interfere with the delegate's exercise of discretion.

41. In *Jody L. Goudreau et.al.* (BC EST # D066/98), the Tribunal set out the circumstances under which it would interfere with the Director's exercise of discretion:

> The Tribunal will not interfere with the exercise of discretion unless it can be shown the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:
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> > … a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and is often said, to be acting unreasonably". *Associated Provincial Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229
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> Absent any of these considerations, the Director even has the right to be wrong.

42. In *Joda M. Takarabe et. al.* (BC EST # D160/98), the Tribunal relied on *Boulis v. Minister of Manpower and Immigration* [(1972), 26 D.L.R. (3d) 216 (S.C.C.)] in which the Supreme Court held that statutory discretion must be exercised within "well established legal principles"; in other words, the discretion must be exercised for *bona fide* reasons, must not be arbitrary, and must not be based on irrelevant considerations.

43. In *Maple Lodge Farms v. Government of Canada,* [1982] 2 S.C.R.2, the Supreme Court underscored these comments:

> Where the statutory discretion has been exercised in good faith and, where required, in accordance with the principles of natural justice, and where reliance has not been placed upon considerations irrelevant or extraneous to the statutory purpose, the courts should not interfere.

44. There is no evidence the delegate improperly exercised her discretion in deciding to cease investigating the Appellant's complaint. There is no suggestion, or evidence, that she exercised her discretion arbitrarily, that she based her decision on irrelevant considerations, or that she acted in bad faith. In fact, the delegate carefully assessed all information provided by both parties, informed them of her preliminary

assessment in the complaint and invited additional submissions, and considered all additional material in arriving at her conclusion.

45. I find no basis to conclude that the delegate erred in law and dismiss the appeal.

ORDER

46. Pursuant to section 115 of the *ESA*, I order that the delegate's October 11, 2019, Determination to stop investigating the complaint be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal