Citation: Michael Hook (Re)
2020 BCEST 37

An Application for Reconsideration

- by -

Michael Hook
(the "applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2019/199

DATE OF DECISION: April 27, 2020

DECISION

SUBMISSIONS

Michael Hook	on his own behalf
Gradin D. Tyler	counsel for the British Columbia Corps of Commissionaires
John Dafoe	delegate of the Director of Employment Standards

OVERVIEW

1. Michael Hook (the "applicant") filed an application under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2019 BCEST 120 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal confirmed a Determination issued by John Dafoe, a delegate of the Director of Employment Standards (the "delegate"), on July 18, 2019, pursuant to which the applicant's former employer, the British Columbia Corps of Commissionaires (the "employer"), was ordered to pay the applicant $675.48 on account of unpaid wages and interest. The Determination was issued following an oral appeal hearing.

2. The application raises two issues. First, the applicant says that the delegate erred in finding that the employer had just cause to dismiss him from his employment. Second, he says that the delegate erred in calculating his unpaid wage entitlement. The application for reconsideration is predicated on the applicant's assertion that the Tribunal erred in confirming the delegate's findings regarding these two issues.

DOES THE *ESA* APPLY?

3. As recounted in the delegate's "Reasons for the Determination" (the "delegate's reasons") issued concurrently with the Determination, the applicant's work duties were in relation to security screening services pursuant to a contract the employer had with Horizon Air at the Kelowna airport. The employer's employees working under this contract provide initial screening services to identify security risks. If a passenger was identified as a possible security risk, the screener would refer that person to Canadian Air Transport Security Authority personnel, who then make further inquiries and take, if appropriate, further action.

4. A complaint may be summarily dismissed "if [the *ESA*] does not apply to the complaint" (section 76(3)(b)). Both the Director of Employment Standards and the Tribunal have statutory authority to interpret and apply the "division of powers" provisions in the *Constitution Act, 1867*.

5. In light of the nature of the applicant's employment, I requested the parties to file further submissions regarding whether the *ESA* applied to the applicant's employment. This jurisdictional issue was not raised at the complaint hearing, nor on appeal. However, in light of decisions such as *Securiguard Services Limited*, 2005 CIRB 342; *Syndicat des agents de sécurité Garda, Section CPI-CSN v. Garda Canada Security Corporation,* 2011 FCA 302; *Voss v. Garda Canada Security Corporation*, 2013 HRTO 188; and *Pama v. G4S*

Secure Solutions (Canada) Ltd., 2014 HRTO 190, all of which deal with security guards working at airports, I directed the parties to address the jurisdictional issue.

6. The delegate, while not taking any specific position on this issue, explained that he did not address federal versus provincial jurisdiction in his reasons because this issue was never raised by the parties. Further, and in any event, he did not consider the employer's security screening activities to be sufficiently integral to the Kelowna airport's operations so as to bring its employees within the federal sphere by reason of its constitutional authority over aeronautics.

7. Both the employer and the applicant submit that this employment relationship was governed by the *ESA*. In particular, the employer notes that its services at the Kelowna airport are only "complementary" to the federal security agency's services, and the mere fact that the employer's services are undertaken at an airport is not a sufficient basis for finding federal jurisdiction.

8. Although the applicant was employed by an organization whose operations principally fall under provincial jurisdiction, the nature of the employer's operations and the applicant's duties at the Kelowna airport may be sufficient to bring this particular employment relationship within the federal government's jurisdiction. I am not fully satisfied that the *ESA* applies to this employment relationship. However, in light of the fact that no party has argued in favour of federal jurisdiction, I am content to presume for the purposes of this decision that provincial, rather than federal, employment standards legislation applies here.

9. I shall now turn to the substance of this application.

PRIOR PROCEEDINGS

10. As set out in the delegate's "Reasons for the Determination" issued concurrently with the Determination (the "delegate's reasons"), the applicant filed a complaint against his former employer seeking unpaid regular wages, vacation pay and compensation for length of service. The complaint was the subject of an oral hearing held on May 15, 2019.

11. As noted above, the employer is under contract to provide security screening services at the Kelowna airport for Horizon Air. In October 2017, the applicant was promoted to the position of site supervisor. As a supervisor, the applicant reported to a manager and the applicant, in turn, was responsible for several "interviewers" who reported to him; he was responsible for directing their work and assessing their performance.

12. In August 2018, the applicant's daily work hours were reduced from 8 hours to 6 hours per day. This appears to have been predicated by Horizon Air's decision to reduce the level of service the employer was providing to it.

13. As a result of certain conduct that was brought to the employer's attention, the applicant was first placed on administrative leave while an investigation was undertaken and, about two weeks later, dismissed. I do not propose to outline the conduct in question in these reasons as it is extensively detailed in the delegate's reasons. The applicant did not deny the misconduct in question but, rather, took the position

that in view of his employment tenure (over 5 ½ years) and otherwise clean work record, dismissal was too harsh a sanction in all the circumstances.

14. The delegate found that one incident in particular, a failure to report to senior management a very serious threat made by one of the interviewers who reported to him, constituted a "fundamental breach" of the applicant's employment contract. Accordingly, no compensation for length of service was payable by reason of section 63(3)(c) of the *ESA* (compensation not payable where there is "just cause" for dismissal). I understand that the employee who uttered the threat was also dismissed and, given the nature of threat, rightly so.

15. The applicant was paid for the first week of his administrative suspension but, apparently due to what the employer characterized as a "payroll error", not for the second week of his suspension. The delegate awarded the applicant 30 hours' pay for this second week (five days x 6 hours/day plus concomitant vacation pay).

16. The applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see section 112(1)(a) and (b) of the *ESA*).

17. The Tribunal dismissed the appeal, finding that the delegate turned his mind to the appropriate governing legal principles in assessing whether there was just cause for dismissal (para. 35) and that the delegate's ultimate decision on this issue was adequately supported by the evidentiary record before him.

18. With respect to the applicant's unpaid wage claim, the Tribunal held that the delegate had sufficient evidence before him to conclude that the applicant's unpaid wage claim should be based on a 6-hour, rather than an 8-hour, day. The Tribunal dismissed the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding.

THE APPLICATION FOR RECONSIDERATION

19. Applications for reconsideration are reviewed using the two-stage analytical framework set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. Under this framework, the Tribunal will first consider whether the application raises a sufficiently serious question justifying a more searching review of the application on its merits.

20. In order to pass this first threshold, the applicant must demonstrate that the application, on its face, raises a serious, presumptively meritorious, question of law, fact, principle or procedure that is highly significant because of its importance to the parties and/or because of the implications of the question for future cases. An application will not pass this first stage if it simply constitutes an invitation to re-weigh evidence in order to arrive at a different conclusion on the same facts.

21. In my view, this application does not pass the first stage of the *Milan Holdings* test and, that being the case, must be dismissed.

22. The applicant continues to assert that the employer did not have just cause for dismissal. At para. 37 of the Appeal Decision, the Tribunal Member observed: "Whether I agree with that finding or not [referring to conduct that was held to justify the applicant's dismissal], it was adequately supported by the

evidence". Let me be less equivocal – in light of the evidence before the delegate, I am satisfied that it would have constituted an error of law for the delegate to have determined that there was no just cause.

23. The only basis that I can see for finding that there was no just cause, would be a finding that the misconduct in question did not occur. But, as conceded by the applicant, the misconduct *did occur* – his position before the delegate was that "in the face of an unblemished employment record over five plus years, these events do not constitute cause for termination" (delegate's reasons, page R9). In my view, as noted above, once the facts relating to the alleged misconduct were proven, a finding of just cause for dismissal inevitably followed.

24. The applicant also continues to assert that his unpaid wage entitlement was incorrectly determined. I entirely agree with, and adopt, the Tribunal Member's analysis of this issue as set out in the Appeal Decision.

25. Finally, the applicant raises an argument and provides some uncorroborated evidence in an effort to explain or otherwise justify his conduct. He says that he previously intentionally withheld this evidence – regarding some sort of conspiracy (an "insidious plot") directed towards him by certain of his subordinates who "share a strong ethnic bond with each other". He says these subordinates "had shrewdly calculated…to end my career as schedule-maker" and that he did not raise this matter previously because he feared for his position if he brought it forward to management. This evidence and argument (which I find, on its face, to be rather difficult to accept) should have been placed before the delegate or, at the very least, should have been advanced on appeal under section 112(1)(c) of the *ESA*. These allegations are not properly before me, at this late stage, as part of an application for reconsideration.

ORDER

26. This application to reconsider the Appeal Decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal