

An appeal

- by -

Gordon Bath

- 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: David B. Stevenson

FILE NO.: 2020/036

DATE OF DECISION: May 28, 2020

DECISION

SUBMISSIONS

Gordon Bath on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Gordon Bath (“Mr. Bath”) has filed an appeal of a determination issued by Ramona Muljar, a delegate of the Director of Employment Standards (the “Director”), on February 7, 2020 (the “Determination”).
2. The Determination found no contravention of the *ESA* had been committed by Mr. Bath’s former employer, Current Taxi Ltd. (“Current Taxi”), that no wages were owing to Mr. Bath, and that no further action would be taken on his complaint.
3. This appeal is grounded in error of law by the Director and an allegation the Director failed to observe principles of natural justice in making the Determination.
4. In correspondence dated February 27, 2020, the Tribunal acknowledged having received an appeal and requested the section 112(5) record (the “record”) from the Director.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Bath and to Current Taxi. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:
 - 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 or 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.

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Current Taxi will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

8. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

9. Current Taxi operates a transportation business in Kelowna, BC. Mr. Bath was employed by Current Taxi as a taxi driver from March 28, 2017, to January 22, 2019, and was paid based on commission sales. Mr. Bath was terminated by Current Taxi on January 22, 2019.
10. The circumstances leading to Mr. Bath's termination are related to a driving ticket issued to Mr. Bath by the RCMP on January 20, 2019, which cited Mr. Bath for three violations: use of an electronic device while driving, driving without a licence and failing to provide a chauffer's permit. In respect of the second violation, Mr. Bath had been driving a taxi without a licence from December 12, 2018, when it was suspended because he had failed to complete a routinely required medical examination.
11. Mr. Bath was terminated at a meeting on January 22, 2019, at which he was provided with a letter identifying the basis for his termination as "Excess Points on Licence". The letter identified two of the violations on the traffic ticket: use of an electronic device and driving without a licence, referred to the potential for 7 penalty points to be placed on his drivers' licence and set out provisions in his employment contract for termination for exceeding 4 penalty points on his drivers licence over a set period.
12. Mr. Bath filed a complaint with the Employment Standards Branch alleging Current Taxi had contravened the *ESA* by failing to pay compensation for length of service.
13. The Director conducted a complaint hearing on December 17, 2019. As of that date the traffic violations did not show on Mr. Bath's driving record.
14. The Director found Current Taxi had met the burden of showing just cause for terminating Mr. Bath and denied the claim, finding that having and maintaining a valid drivers licence was a central term of his employment and that driving without a valid licence – and the implications to Current Taxi's business for doing so – was sufficiently serious to justify his termination.

ARGUMENT

15. In the appeal, Mr. Bath contends the Director erred in law by considering and giving effect to the position of Current Taxi that Mr. Bath was terminated for two reasons: driving without a valid licence; and for having received a traffic violation ticket that would have resulted in 7 penalty points being placed on Mr. Bath's driving record, which was over the 4 points allowable under his employment contract.
16. He submits the matter of driving without a licence was never included in the reasons for his termination until the complaint hearing and the Director should have confined Current Taxi to the reasons in the termination letter.

ANALYSIS

17. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 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:
- (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.
18. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
19. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.
20. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. Allegations of bias command a high evidentiary bar and require clear and objective evidence.
21. The grounds of appeal listed above do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The 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.
22. The question of whether an employee has been dismissed for just cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of just cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco, supra*, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: “questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests”. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.
23. The principles of just cause, that have been developed under the *ESA*, are well-established. They have been consistently applied and are expressed as follows:
1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
 2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
 - i. A reasonable standard of performance was established and communicated to the employee;
 - ii. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
 - iii. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
 - iv. The employee continued to be unwilling to meet the standard.
 3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
 4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.
24. The Tribunal has been consistent in stating that the objective of any analysis of just cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, “that the misconduct is impossible to reconcile with the employee’s obligations under the employment contract” (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a “repudiatory” breach.

25. While the above principles are not fully elaborated in the Determination, when the decision is read contextually, I am entirely satisfied the Director applied the correct principles to the question of just cause.
26. The Director considered whether the nature of the circumstances for which Mr. Bath was terminated was sufficiently serious to warrant dismissal and found that it was. Based on *all the facts* provided, and accepted, by the Director, it is difficult to find fault with the conclusion of the Director that dismissal was an appropriate response to Mr. Bath’s conduct and that through such conduct he had violated a central condition of his employment which was impossible to reconcile with a continuation of that employment.
27. The burden in this appeal is on Mr. Bath, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact.
28. I am not persuaded that burden has been met. In my view, this appeal does no more than seek to have the Tribunal accept a very myopic view of the basis for Mr. Bath’s termination, limit the factual context for it and reach a different result based on a different factual perspective. The *ESA* does not allow the Tribunal to do this.
29. This ground of appeal is not shown to have any merit.
30. Mr. Bath has also grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination.
31. As noted above, there is a burden on Mr. Bath on this ground to provide some objective evidence in support of this allegation.
32. Mr. Bath has provided no objectively acceptable evidence showing he was denied the procedural protections reflected in the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. It is clear from the file that he was afforded the procedural rights reflected in the *ESA* and captured by natural justice principles.
33. There is simply no basis for this ground of appeal.
34. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

35. Pursuant to section 115(1) of the *ESA*, I order the Determination dated February 7, 2020, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal