Citation: Richard Penner (Re)
2020 BCEST 62

An appeal

- by -

Richard Penner

- 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: Maia Tsurumi

FILE NO.: 2020/041

DATE OF DECISION: June 3, 2020

DECISION

SUBMISSIONS

Richard Penner — on his own behalf carrying on business as Charmaine Trucking

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Richard Penner carrying on business as Charmaine Trucking ("Charmaine Trucking") has filed an appeal of a determination (the "Determination") issued by Rachel Smith, a delegate (the "Delegate") of the Director of Employment Standards, on January 24, 2020. In the Determination, the Delegate found that Charmaine Trucking contravened sections 28 and 63 of the *ESA*. In the result, Charmaine Trucking was ordered to cease contravening the *ESA* and to pay $379.75 to Steven Naswell (the "Complainant") and to pay $1,000.00 in administrative penalties.

2. Charmaine Trucking appeals the Determination on the grounds that: (1) the Delegate erred in law; and (2) evidence has become available that was not available at the time the Determination was being made.

3. I have decided that this appeal is appropriate for consideration under sub-section 114(1) of the *ESA*. Under sub-section 114(1), the Tribunal has the discretion to dismiss all or part of an appeal, without a hearing, for any of the following reasons:

   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 that 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.

4. This decision is based on the submissions made by Charmaine Trucking in its Appeal Form, the sub-section 112(5) record (the "Record"), the Determination and the Reasons for the Determination (the "Reasons").

ISSUE

5. The issue before the Employment Standards Tribunal is whether all or part of this appeal should be allowed to proceed or be dismissed under sub-section 114(1) of the *ESA*.

THE DETERMINATION

Background

6. Charmaine Trucking is a sole proprietorship registered in British Columbia and operates a courier and delivery service. Mr. Penner is its sole proprietor.

7. The Complainant was employed as a "*swamper*" and his rate of pay was $16.00 per hour. The parties did not agree on a termination date, but the complaint was filed on March 28, 2019, which was within the time period of the *ESA* based on both of the alleged termination dates.

Issues Before the Delegate

8. The issue before the Delegate was whether the Complainant was entitled to compensation for length of service.

Evidence and Submissions

9. The Complainant said he was hired by Charmaine Trucking to work as a swamper, which meant he helped with deliveries by carrying items but was generally not the driver.

10. The Complainant stated he started work on August 15, 2018, and for about the first two weeks he worked full-time hours while filling in for other employees who were taking vacation. After the first two weeks, he said he was usually scheduled for two shifts per week, but his schedule varied and he would occasionally be called in to work as needed.

11. According to the Complainant, he was initially paid in cash, but was added to the payroll in October 2018. He kept records of the dates and hours he worked and handed these in to Charmaine Trucking in order to get paid and did not keep copies of them. Whether he was paid in cash or by cheque, the Complainant said he was always paid every two weeks.

12. The Complainant's ROE shows his last day of work as January 5, 2019, but he said he worked for Charmaine Trucking after this date on a cash basis, which is why he did have pay stubs for after this date. The Complainant said he was laid off on February 15, 2019, which was a permanent layoff.

13. Mr. Moore gave evidence on behalf of the Complainant. The Delegate found he was hired by Mr. Penner as a driver and a swamper and worked for a similar time period as the Complainant. Mr. Moore said that the Complainant covered his shifts when he went on vacation starting on August 15, 2018, to visit family in Ontario. (I note that the Record indicates that it was in fact another employee who went on vacation to Ontario in August and not Mr. Moore and that the Complainant covered one day of work in August for Mr. Moore. However, this discrepancy between the Record and the Reasons has no bearing on the appeal: see below.) Mr. Moore recollected that after August, he would generally work with the Complainant on a weekly basis. He said the Complainant would work with him on Saturdays or Mondays and when Charmaine Trucking's full-time, regular employees were not available to work, the Complainant would cover their shifts. Mr. Moore was terminated sometime in early 2019 and the Complainant was still working for Charmaine Trucking at that time.

14. Melissa Kung ("Ms. Kung") also provided evidence. She was the Complainant's girlfriend. She recalled the Complainant working for Charmaine Trucking by at least August 23, 2018. The date had some significance for her because she started a new job on that day and remembered that the Complainant was staying with her for the first two days of her new employment and she and the Complainant both went to work on those two days. Ms. Kung said she saw the Complainant and Mr. Moore once in September in a Charmaine Trucking truck when they were on a delivery. Ms. Kung recalled that the Complainant worked consistently for Charmaine Trucking from August 23, 2018, to February 12, 2019, which was the day he was laid off. She said she remembered the date of termination because she was at work early that day doing inventory, which was an unusual event, because the Complainant called her around 11:00 a.m. that day to tell her he was laid off and he was quite upset about it and because she went to see the Complainant that day after she was done work so she could support him.

15. Charmaine Trucking initially said that the Complainant did not start working for it until October 2018. However, after listening to Mr. Moore's evidence at the hearing, Charmaine Trucking accepted that the Complainant was working for it in August 2018 and was paid in cash for that work. At the hearing, Charmaine Trucking said it would have records for the Complainant's August work and the Delegate gave him the opportunity to take a break from the hearing to retrieve further documents. However, he declined to do so.

16. Charmaine Trucking said the Complainant filled in for employees on vacation in August 2018, but after that time did not work again for Charmaine Trucking until October 22, 2018, when he was put on the payroll. In October, Charmaine Trucking had a "*burnt-out*" employee and so it needed another employee to fill in and it had the Complainant come back to work.

17. The Complainant's pay stubs show he worked varying hours between October 14, 2018, and January 5, 2019, with an average of 22 hours per week. Charmaine Trucking did not provide an exact record of dates and hours worked by the Complainant.

18. At the hearing, Mr. Penner was not certain about the Complainant's exact lay-off date, but said that after December 2018, Charmaine Trucking had to cut back employee hours because of a decrease in its delivery volume. Hours of operation went from six days a week to five days a week. Charmaine Trucking submitted a January 7, 2019 e-mail from its Operations Manager, which indicated that the company was looking into reducing its days of operation because of a decrease in deliveries. Charmaine Trucking said it would have been the Complainant's shifts that were cut and that was why he was laid off.

19. Charmaine Trucking pointed out that the Complainant's ROE shows the Complainant's last day of work as January 5, 2019, and said that if the company's bookkeeper used this date, it must be correct and so the Complainant must not have worked any shifts after this date. However, Mr. Penner agreed that the Complainant could have been told about his lay-off after January 5, 2019.

20. Mr. Penner was certain about his timeline and the dates the Complainant worked for him, but he also said it was difficult to remember exactly when various employees were working, and this was made even more difficult by the fact that it was very common for employees to get called in to cover shifts for other, scheduled employees.

Delegate's Findings and Analysis

Compensation for length of service

21. The Delegate explained that the only issue in dispute was whether the Complainant worked long enough to entitle him to compensation for length of service under section 63 of the *ESA*. Section 63 makes an employer liable for compensation for length of service when terminating an employee of greater than three months employment. The liability is discharged when an employer provides written working notice of termination or a combination of written working notice and compensation for length of service, equal to the employee's entitlement: *ESA*, sub-sections 63(3)(a) and (b). Thus, the Delegate had to determine whether the Complainant worked for Charmaine Trucking for more than three months.

22. The Delegate said that the calculation of the period of continuous employment is based on the date of termination, and not the date an employee last worked. Therefore, the Delegate had to determine the termination date.

23. The Delegate noted that the Complainant's pay stubs showed he worked for Charmaine Trucking between October 22, 2018, and January 5, 2019. The Complainant said he started working on August 15, 2018 and continued to work for Charmaine Trucking until February 15, 2019. Charmaine Trucking agreed that the Complainant worked for it in August 2018 but said he did not work again for it until October 2018, when he was added to the payroll.

24. The Delegate noted there was no evidence of written termination.

25. The Delegate considered Charmaine Trucking's submission that the ROE correctly indicated the Complainant's last day of work. Charmaine Trucking said the ROE was reliable because it was prepared by Charmaine Trucking's bookkeeper and because this was when the volume of deliveries had decreased, leading Charmaine Trucking to eliminate the Complainant's shifts. The Delegate found that Charmaine Trucking's position on the Complainant's last day of work was contradicted by its January 7, 2019 e-mail that showed the decrease in shifts was still being contemplated on that date and had not yet been implemented. Also, Charmaine Trucking's evidence at the hearing was that the Complainant may have been told about his termination after January 5, 2019, on a date that Mr. Penner could not recall.

26. The Delegate next considered Charmaine Trucking's submission that it would not have paid the Complainant in cash after January 5, 2019, and that the Complainant had no records to show he worked after this date. The Delegate said Mr. Penner conceded at the hearing that it was difficult to keep track of when employees worked because scheduled shifts were frequently covered and worked by an employee other than the one originally scheduled to work. The Delegate stated that Charmaine Trucking did not provide a record of dates and hours worked by the Complainant or an exact date of termination.

27. The Delegate found Ms. Kung's evidence at the hearing was persuasive and the best evidence available: it was straightforward and without embellishment and she provided a date of termination based on events in her own life as well as on her recollection of being told by the Complainant about his termination and travelling to see him to support him that same day. Based on Ms. Kung's evidence, the Delegate found that February 12, 2019, was the date of termination.

28. The Delegate said she did not have to make a finding about whether the Complainant began his employment with Charmaine Trucking on August 15 or October 22, 2018, because both start dates provided a period of consecutive employment of more than 3 months and less than 12 months.

29. Based on his employment of more than 3 months and less than 12 months, the Delegate concluded the Complainant was entitled to 1 week's wages as compensation for length of service. Because the Complainant's pay stubs indicated his average week of work was 22 hours, the Delegate found Charmaine Trucking was liable to pay the Complainant for 22 hours at $16.00 per hour for a total of $352.00. Under section 58 of the *ESA*, the Complainant was entitled to annual vacation pay on this amount at a rate of 4%: $14.08.

Penalties

30. Charmaine Trucking's contravention of section 63 of the *ESA* for failing to pay compensation for length of service was subject to a mandatory $500.00 administrative penalty.

31. The Delegate also imposed an administrative penalty of $500.00 for a violation of section 28 of the *ESA*. She found that Charmaine Trucking failed to provide payroll records as required by the Demand for Employer Records. Charmaine Trucking provided the October 2018 to January 2019 pay stubs but did not provide any other payroll records.

Accrued interest

32. The Complainant was entitled to interest of $13.67, pursuant to section 88 of the *ESA*.

ARGUMENT

33. Charmaine Trucking submits that the Complainant did not work for a six-month period before his employment ended and therefore, he was not entitled to compensation for length of service. Charmaine Trucking specifically says that:

a. Garrett Moore ("Mr. Moore")'s evidence was wrong because:

   i. He said that the Complainant filled in for Mr. Moore while Mr. Moore was on vacation for two weeks in August 2018, but Mr. Moore's timesheets and pay stubs show he was working for all of August 2018;

   ii. He said he worked every Saturday and Monday with the Complainant, but there were only two driver shifts available on Mondays and these were filled by people other than the Complainant (one of whom was Mr. Moore);

b. The Complainant was a casual / on-call employee until September 28, 2018, after which he worked two days a week and remained a part-time employee until his last shift. Charmaine Trucking relies on texts between the Complainant and Mr. Richard Penner of Charmaine Trucking ("Mr. Penner") and a timesheet for a "*Steve*";

c. The Complainant's lay-off was effective January 5, 2019, but Mr. Penner could not reach him until January 14, 2019. On that date, Mr. Penner asked the Complainant to meet with him on January 15, 2019. Mr. Penner and the Complainant met on January 15, 2019, and Mr.

Penner told him why he was laid off and gave him his Record of Employment (the "ROE"). As of this date, the Complainant knew he was laid off and that he might still get the odd shift.

d. After the Complainant was laid off, during his lay-off period, Charmaine Trucking called the Complainant to offer him Saturday shifts from time-to-time, which he declined. Charmaine Trucking relies on texts between the Complainant and Mr. Penner; and

e. On January 30, 2019, the Complainant texted Mr. Penner to say he was no longer available for Saturday shifts.

34. In support of its submission, Charmaine Trucking submitted the following evidence with its Appeal Form:

a. Pay stubs and timesheets for Mr. Moore for:

i. August 19 – September 1, 2018;

ii. August 5 – 18, 2018; and

iii. July 22 – August 4, 2018;

b. Printouts of texts between Mr. Penner and the Complainant; and

c. A timesheet for "*Steve*" indicating eight hours worked on Christmas Eve and Boxing Day; six hours worked on December 29; and an eight-hour statutory holiday for New Year's.

35. Charmaine Trucking states that most of the testimony in the investigation was inaccurate and it was unreasonable for the Delegate to expect it to know the hours worked each day by each employee given the dynamic nature of the delivery / trucking business, which has a fluctuating demand for services. Charmaine Trucking also said it was very hard to disprove testimony at the hearing when it was not informed of who was going to be there and it did not have time to prepare or provide evidence contradicting that testimony.

36. Charmaine Trucking also says that the Complainant's ROE and his full set of pay stubs was sent to the Branch as requested.

ANALYSIS

37. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

38. Below, I first consider Charmaine Trucking's new evidence. Then, I address whether there was a breach of natural justice or an error of law.

New evidence

39. In support of its argument that the Complainant began his employment after September 28, 2018, Charmaine Trucking submitted paystubs and timesheets for Mr. Moore, printouts of texts between Mr. Penner and the Complainant, as well as a timesheet for another individual along with its Appeal Form

40. Charmaine Trucking submitted on appeal that it did not know who would be giving evidence at the hearing and did not have time to prepare or provide records to contradict that evidence.

41. An appeal is decided on the record before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being decided: *ESA*, sub-section 112(1)(c).

42. The Tribunal in *Bruce Davies et al.* provided guidance on how the Tribunal applies sub-section 112(1)(c):

> This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence… [The evidence] must meet four conditions:
>
> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue:
>
> *Bruce Davies et al.*, BC EST # D171/03 at p. 3.

43. Charmaine Trucking's evidence submitted in this appeal does not meet the Tribunal's test for admitting fresh evidence. I find that even if Charmaine Trucking did not know before the hearing that it would want to rely on the evidence it now submits on appeal, once at the hearing, it was provided an opportunity to take a break and produce further documents to supports its position. It did not take advantage of this opportunity. With an exercise of due diligence, it could have provided this evidence to the Delegate before she made her Determination.

44. Therefore, this ground of appeal has no reasonable prospect of success.

Breach of natural justice

45. Charmaine Trucking also submits that most of the testimony in the investigation was inaccurate and it was unreasonable for the Delegate to expect it to know the hours worked each day by each employee given the dynamic nature of the delivery / trucking business, which has a fluctuating demand for services.

Charmaine Trucking said it was very hard to disprove testimony at the hearing when it was not informed of who was going to be there and it did not have time to prepare or provide evidence contradicting that testimony.

46. Although Charmaine Trucking did not expressly rely on a breach of natural justice as a ground of appeal, I find this argument to be primarily a submission that there was a breach of natural justice.

47. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them and have its case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27.

48. There is nothing in the Appeal Form, Record, Determination or Reasons that indicates there was a breach of natural justice. Charmaine Trucking knew the complaint against it, had an opportunity to reply to this complaint and had its case heard by an impartial decision-maker. Two witness statements submitted by the Complainant, one from Mr. Moore and one from an Allan Moon, were disclosed to Charmaine Trucking prior to the hearing. Mr. Moore gave evidence at the hearing. Although Charmaine Trucking may not have known that Ms. Kung was going to give evidence at the hearing, during the hearing, the Delegate gave Mr. Penner an opportunity to take a break so that Charmaine Trucking could get more documents to make its case. Charmaine Trucking did not take advantage of this opportunity. Further, after the hearing, Charmaine Trucking could have submitted evidence to respond to what was said at the hearing.

49. Regarding the Delegate "*expecting*" Charmaine Trucking to know the hours worked each day by each employee, I do not find this to have been the Delegate's finding. The Delegate found that while Mr. Penner was certain about his timeline and the dates the Complainant worked for him, he also said it was difficult to remember exactly when various employees had worked and this was made even more difficult by the fact that it was very common for employees to get called in to cover shifts for other, scheduled employees. The Delegate's point was that this evidence contradicted his other evidence that the date on the ROE was the date of termination.

50. I find there was no breach of natural justice. Therefore, this ground of appeal has no reasonable prospect of success.

Error of law

51. There are two issues relating to a possible error of law: (1) was the Complainant entitled to compensation for length of service; and (2) did Charmaine Trucking keep payroll records required by section 28 of the *ESA*?

52. For the reasons that follow, I find this ground of appeal has no reasonable prospect of success.

53. In *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined a question of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

a. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

b. a misapplication by the decision-maker of an applicable principle of general law;

c. where a decision-maker acts without any evidence;

d. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

e. where the decision-maker is wrong in principle.

54. The Tribunal has adopted this definition: see e.g. *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

55. The *ESA* does not allow appeals based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors of factual findings unless such findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03. The test for establishing an error of law because of factual error is stringent, requiring the appellant to show that the findings are perverse and inexplicable in the sense that they were made without any evidence, that they were inconsistent with, and contradictory to, the evidence or they were without any rational foundation: *Britco Structures Ltd.*, *supra*, at p. 17.

56. Turning first to the question about compensation for length of service, Charmaine Trucking submits that the Complainant did not work for a six-month period before his employment ended and therefore, he was not entitled to compensation for length of service. Its argument on appeal is that the Complainant was a casual worker prior to September 28, 2018, when he was offered part-time employment and that his employment was terminated on January 5, 2019.

57. Sub-section 63(1) of the *ESA* states that after 3 consecutive months of employment and less than 12 consecutive months, an employer is liable to pay an amount equal to one week's wages as compensation for length of service. Thus, the question for the Delegate, and for the Tribunal on appeal, is not whether the Complainant had six months of consecutive employment, but whether he had three months of consecutive employment.

58. Termination occurs when an employee is informed of his or her termination. The Delegate applied this requirement to the evidence before her. There was no evidence of written termination. The evidence during the investigation, including evidence from the hearing, was that Mr. Penner did not recall when the Complainant was orally told about his termination and Mr. Penner acknowledged it could have been some time after January 5, 2019. Charmaine Trucking produced an e-mail that could reasonably be interpreted as indicating that the decrease in shifts was still being contemplated on January 7, 2019, and had not yet been implemented, which was contrary to Mr. Penner's submission that the ROE correctly reflected the termination date. The evidence from Charmaine Trucking was that it was difficult to keep track of when employees worked. Charmaine Trucking did not provide a record of dates and hours worked by the Complainant or of the exact date of termination.

59. The Delegate found Ms. Kung's evidence at the hearing about the Complainant's date of termination persuasive and that it was the best evidence available to her. I conclude the Delegate's reliance on Ms. Kung's evidence was reasonable.

60. The Delegate found the termination date of the Complainant's employment was February 12, 2019, and concluded that she did not have to determine whether the Complainant began his employment with Charmaine Trucking in August or October 2018, as either date meant he had at least three months of consecutive employment before termination. Thus, even if I had accepted Charmaine Trucking's evidence consisting of Mr. Moore's pay stubs and wage statements, it would have made no difference to its prospect of success on this ground of appeal.

61. I note that had I accepted the texts submitted on appeal by Charmaine Trucking, it would have led me to the same conclusion as the Delegate: that the Complainant had worked for at least three consecutive months for Charmaine Trucking. This is because Charmaine Trucking submits that the Complainant began his employment after September 28, 2018, and was told about his termination on January 15, 2019. Based on this evidence, the Complainant would have been employed for at least three consecutive months. Also, Charmaine Trucking's new evidence was that on January 30, 2019, the Complainant texted Mr. Penner to say he was no longer available for Saturday shifts. If it had been admitted on appeal, this evidence could have further supported the conclusion that January 5, 2019, was not the termination date. Further, even if the ROE date of January 5, 2019, was taken as the date of termination, employment from September 29, 2018, through January 5, 2019, would have met the three consecutive months requirement.

62. Turning now to the question about whether Charmaine Trucking submitted all payroll records as required, Charmaine Trucking says that the Complainant's ROE and his full set of pay stubs was sent to the Branch as requested. I conclude the Delegate did not make an error in law in finding that Charmaine Trucking violated section 28 of the *ESA*.

63. Charmaine Trucking says it submitted all of its payroll records relating to the Complainant. There are pay stubs for October 2018 through to January 2019 in the Record. However, at the hearing, Charmaine Trucking acknowledged that the Complainant worked for it in August 2018, but it did not produce payroll records for this period.

64. In summary, the Delegate's Determination was reasonable: she applied the appropriate legal tests to her findings of fact and these facts were grounded on the evidence before her. Thus, I find this ground of appeal has no reasonable prospect of success.

65. In summary, I find that Charmaine Trucking's appeal has no reasonable prospect of succeeding and therefore I dismiss it under sub-section 114(1)(f) of the *ESA*.

ORDER

66. Pursuant to sub-section 114(1)(f) of the *ESA*, I dismiss the appeal as having no reasonable prospect of success and pursuant to sub-section 115(1) of the *ESA*, I order the Determination, dated January 24, 2020, confirmed in the amount of $1,379.75, together with any interest that has accrued under section 88 of the *ESA*.

Maia Tsurumi
Member
Employment Standards Tribunal