

Citation: Savoury City Foods Ltd. (Re)  
2020 BCEST 86

An appeal

- by -

Savoury City Foods Ltd.  
("Savoury City Foods")

- 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.:** 2020/075

**DATE OF DECISION:** July 13, 2020

## DECISION

### SUBMISSIONS

Donna Wadsworth

on behalf of Savoury City Foods Ltd.

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Savoury City Foods Ltd. carrying on business as Savoury City Catering (“Savoury City Foods”) has filed an appeal of a determination issued by Ramona Muljar, a delegate of the Director of Employment Standards (the “Director”), on April 15, 2020 (the “Determination”).
2. The Determination found Savoury City Foods had contravened Part 8, section 63 of the *ESA* in respect of the employment and termination of employment of Mathew Beresditsch (“Beresditsch”) and ordered Savoury City Foods to pay Beresditsch wages in the amount of \$1,578.93, an amount that also included interest under section 88 of the *ESA* and concomitant vacation pay, and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$2,078.93.
3. This appeal is grounded in failure by the Director to observe principles of natural justice in making the Determination. Savoury City Foods seeks to have the Tribunal allow the appeal, find Beresditsch was terminated for cause and, it would logically follow, cancel the Determination.
4. In correspondence dated May 12, 2020, the Tribunal acknowledged having received an appeal, requested the section 112(5) record (the “record”) from the Director, notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal, and advised that following such review all or part of the appeal might be dismissed.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Savoury City Foods and to Beresditsch. 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 Beresditsch 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. Savoury City Foods operates a catering service.
10. Beresditsch was employed by Savoury City Foods as a cook from June 15, 2018, to August 12, 2019, when he was terminated at a meeting with Donna Wadsworth (“Ms. Wadsworth”), a director of Savoury City Foods, that was also attended by Matthew Koyanagi, the executive chef for Savoury City Foods, at which Beresditsch conducted himself in a way that was characterized by Ms. Wadsworth as insubordinate – conduct that included a refusal by him to sign a warning letter that had been issued to the four cooks of the leadership team, exhibiting angry behaviour, and swearing at Ms. Wadsworth at the meeting.
11. Beresditsch filed a complaint alleging Savoury City Foods had contravened the *ESA* and claiming compensation for length of service.
12. The Director conducted a complaint hearing. Beresditsch did not attend.
13. Savoury City Foods contended Beresditsch was terminated for just cause.
14. At the complaint hearing, Savoury City Foods supported its case with evidence of a number of concerns held by Ms. Wadsworth about Beresditsch’s conduct and interaction with other employees, many of which had been discussed with her by the other employees. Savoury City Foods presented two witnesses in addition to Ms. Wadsworth to support their position.
15. The evidence presented by Savoury City Foods at the hearing addressed the August 12, 2019 meeting, which was characterized by Ms. Wadsworth as insubordination, and identified the following additional matters relating to Beresditsch as contributing to the basis for the decision to terminate him:

- i. two incidents in December 2018, in which Beresditsch exhibited emotional and erratic behaviour, swearing, and disrupting other staff;
  - ii. engaging in conduct – drinking and smoking – prohibited in the employee manual at an event he worked on August 11, 2019
  - iii. driving the company vehicle while drunk on August 11, 2019; and
  - iv. anger management issues and his failure to seek counselling for them.
16. The Director found Savoury City Foods had failed to show there was cause to terminate Beresditsch and awarded him compensation for length of service in the amount set out in the Determination.
17. Savoury City Foods takes issue with the finding and award under section 63 of the *ESA*.

## ARGUMENT

18. The sum and substance of the appeal is an expression of strong disagreement with the finding by the Director that the conduct by Beresditsch at the meeting of August 12, 2019, when viewed in conjunction with other conduct reflecting on his suitability as an employee, or even when taken in isolation, was not just cause for terminating his employment. It is fair to say the appeal submission emanates a degree of frustration, stating the view they had not been “heard or understood as we had intended”, and at having been found not to have established cause for terminating Beresditsch.
19. It is unnecessary to attempt to summarize all elements of the argument made by Savoury City Foods in the context of the selected ground of appeal as much of it restates the view Savoury City Foods has held through the process and are matters that were identified and addressed in the Determination.

## ANALYSIS

20. 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.*
21. 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.
22. 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.

23. Savoury City Foods has raised the natural justice ground of appeal.
24. A party alleging a failure by the Director 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.
25. I am able to address Savoury City Foods' natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:
- 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).
26. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Savoury City Foods was provided with the opportunity required by principles of natural justice to present their position to the Director. Savoury City Foods has provided no objectively acceptable evidence showing otherwise.
27. It is not a breach of principles of natural justice to make a finding on the evidence that does not accord with the position of one of the parties in the complaint process, which in the circumstances of this case, was that Savoury City Foods had not met the burden imposed on it in section 63 of the *ESA* to show cause for terminating Beresditsch.
28. There is simply no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.
29. While Savoury City Foods has not raised error of law as a ground of appeal, there are elements in the appeal submission that allude to that ground, and for the sake of completeness, I shall address whether there might be some merit in those matters.
30. 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.

31. The question of whether an employee has been dismissed for cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of 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*, BC EST # D260/03, 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.
32. The principles for examining cases raising the question of whether there is cause for dismissal that have been developed under the *ESA* are well-established, 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.
33. I will note here that while the Tribunal has been guided by the common law on the question of just cause, the principles of cause for dismissal used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment.
34. The Tribunal has also been consistent in stating that the objective of any analysis of 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.

35. While the above principles are not fully elaborated in the Determination, when the decision is read contextually, I am entirely satisfied the Director was aware of, and applied, the correct principles to the question of cause.
36. The Director considered whether the nature of the circumstances for which Beresditsch was terminated was, when viewed against previous employee conduct, or viewed on its own, was sufficient or sufficiently serious to warrant dismissal and found that it was not.
37. The Director considered the principle expressed in point 2, above: whether Savoury City Foods had established cause for dismissal based on the cumulative effect of Beresditsch’s “disciplinary” history. The Director found the two incidents in December 2018 were not directly linked to the reasons for dismissal in August 2019, which was insubordination, and Beresditsch had never been disciplined for, or warned of the consequences of, any episodes of insubordination. Whether I agree with the finding of the Director or not, it was supported in the evidence.
38. The Director considered whether the conduct of Beresditsch on August 12, 2019, was, on its own, sufficiently serious to warrant immediate termination and found it was not.
39. The Director also considered the evidence of the events of August 11, 2019, noting: first, some of the conduct alleged to warrant discipline was authorized and condoned by Beresditsch’s immediate supervisor; second, was not investigated; third, was not raised with Beresditsch and he was given no opportunity to respond to the allegations; and, fourth, was not relied upon by Savoury City Foods when terminating him.
40. There is nothing in the Determination that deviates from the legal principles developed under the *ESA* on the question of cause or the analysis the Director was required to undertake.
41. Provided the established principles have been applied, and I find they were, a conclusion on cause is essentially a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is, as noted above, a question over which the Tribunal has no jurisdiction. The application of the law, correctly found, to the facts as found by the Director does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.
42. Had this ground of appeal been clearly raised, I would find no reasonable likelihood it would succeed.

43. 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**

44. Pursuant to section 115 of the *ESA*, I order the Determination dated April 15, 2020, be confirmed in the amount of \$2,078.93, together with any interest that has accrued under section 88 of the *ESA*.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**