Employment Standards TRIBUNAL

Citation: Anthony MacInnis (Re)
2020 BCEST 9

An appeal

- by -

Anthony MacInnis
("Mr. MacInnis")

- 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: Shafik Bhalloo

FILE NO.: 2019/192

DATE OF DECISION: February 3, 2020

DECISION

SUBMISSIONS

Anthony MacInnis — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Anthony MacInnis ("Mr. MacInnis") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on October 10, 2019 (the "Determination").

2. The Determination found that the *ESA* does not apply to Mr. MacInnis' Complaint and no further action would be taken in respect of the Complaint. Accordingly, the Complaint was dismissed.

3. Mr. MacInnis appeals the Determination on the sole ground that new evidence has become available that was not available at the time the Determination was being made.

4. The deadline to file the appeal of the Determination was 4:30 p.m. on November 18, 2019. On November 18, 2019, the Tribunal received Mr. MacInnis' incomplete appeal submission. More particularly, Mr. MacInnis failed to include a completed Appeal Form. By an email of same date, at 11:59 a.m., the Tribunal's Administrator requested Mr. MacInnis to provide a completed Appeal Form by 4:30 p.m. and included in the email a copy of the Appeal Form and an information sheet on "How to Prepare and File an Appeal". Mr. MacInnis failed to comply with the request.

5. On November 21, 2019, the Tribunal sent correspondence to all parties, Mr. MacInnis, the Director, and to Mr. MacInnis' former employer (593402 B.C. Ltd. carrying on business as W & M Enterprises ("W.E.M.")), informing them that it had received Mr. MacInnis' incomplete appeal. In the same correspondence, the Tribunal requested Mr. MacInnis to provide his completed Appeal Form and a written request for an extension to the statutory appeal period by no later than 4:30 p.m. on November 29, 2019.

6. On November 25, 2019, the Tribunal received the requested documents from Mr. MacInnis.

7. On November 26, 2019, the Tribunal corresponded with the parties advising them that it had received Mr. MacInnis' appeal including his application to extend the appeal period. The Director and W.E.M. were both informed that no submissions were requested from them at this time. In the same correspondence, the Tribunal informed the Director to provide the section 112(5) "record" (the "Record").

8. On December 5, 2019, the Director provided the Tribunal with the Record. A copy of the Record was sent by the Tribunal to Mr. MacInnis and W.E.M. on December 12, 2019, and both parties were provided an opportunity to object to its completeness. Neither Mr. MacInnis nor W.E.M. objected to the completeness of the Record and the Tribunal accepts it as complete.

9. On December 30, 2019, Mr. MacInnis sent an email to the Tribunal containing further submissions on the merits of his appeal which I will refer to under the heading Submissions of Mr. MacInnis below.

10. On January 6, 2019, the Tribunal informed the parties that the appeal had been assigned, that it would be reviewed and that following the review, all or part of the appeal may be dismissed. If all or part of the appeal is not dismissed, the Tribunal would seek submissions from W.E.M. and the Director on the merits of the appeal. Mr. MacInnis would then be given an opportunity to make a final reply to those submissions, if any.

11. I will make my decision whether there is any reasonable prospect that the appeal will succeed based on my review of Mr. MacInnis' submissions, the Record, and the Reasons for the Determination (the "Reasons").

ISSUE

12. The issue to be considered at this stage of the proceeding is whether the appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS AND REASONS FOR THE DETERMINATION

13. W.E.M. operates a logging business in Fort Saint John, British Columbia.

14. Mr. MacInnis was employed as a Grapple Skidder Operator with W.E.M. from January 23, 2018, to March 18, 2019, at the rate of pay of $24.00 per hour.

15. On July 15, 2019, within the time period allowed under the *ESA*, Mr. MacInnis filed a complaint against W.E.M. claiming that "W.E.M. "should be made to reimburse [him] for at least [his] airfare and motel costs for going out to a job that didn't exist" (the "Complaint").

16. The delegate investigated the Complaint by speaking with both Mr. MacInnis and W.E.M.'s owner, Wayne Harder ("Mr. Harder"), before making the Determination. In the Determination, the delegate describes the sole issue before her was whether Mr. MacInnis is owed wages under the *ESA*, and if so, in what amount. She also summarizes the evidence of both parties.

17. Mr. MacInnis' evidence was that his mother was required to have a hip surgery in New Brunswick in the latter part of December 2018 and, therefore, he needed to take a leave of absence from work to take care of her. He had an agreement with W.E.M. permitting him to be away from work for a few months. There was no date set for when he would return to work, but he kept in contact with W.E.M. during his absence.

18. He stated that on March 4, 2019, he contacted W.E.M.'s owner, Mr. Harder, and started the conversation to return to work. After communicating back and forth, by text, with Mr. Harder, he was informed that logging work would continue to be available for him until the end of April and he could return to work by March 14, 2019. As a result, he took the next available flight from New Brunswick to Fort St. John on March 14, 2019. When he arrived in Fort St. John, he stayed at a motel and waited a few days to hear from W.E.M. but did not receive any contact from Mr. Harder. On March 18, 2019, he contacted Mr. Harder who informed him that spring break up season had come earlier than expected this year and logging work was finished for the season.

19. After receiving this news, Mr. MacInnis confronted Mr. Harder. Thereafter, he decided to terminate his employment relationship with W.E.M. The gist of Mr. MacInnis' argument is that W.E.M. should reimburse him for travelling expenses for his airfare and motel stay in Fort St. John because it failed to inform him of the spring break up season before he incurred those expenses.

20. W.E.M.'s evidence from its owner, Mr. harder, was that W.E.M. agreed to give Mr. MacInnis a leave of absence for an unspecified amount of time to take care of his mother. However, after few months' absence from work, Mr. Harder said he was unsure whether Mr. MacInnis had quit or would return to work but kept in touch with Mr. MacInnis during his absence.

21. Starting on March 4, 2019, Mr. Harder communicated back and forth with Mr. MacInnis. He informed Mr. MacInnis, when asked by the latter, that there would be work available for him prior to the spring break up season because the spring break up season usually came near the end of April. On this basis, Mr. Harder told Mr. MacInnis that he could return to work by March 14, 2019. However, at this point Mr. Harder was under the impression that Mr. MacInnis had not left New Brunswick.

22. Mr. Harder stated that he received a call from Mr. MacInnis on March 18, 2019, asking about when to come to work. Mr. Harder said he informed Mr. MacInnis that the spring break up season had arrived earlier than expected and he was not aware that Mr. MacInnis had already arrived in Fort St. John. Mr. Harder said that he empathised with Mr. MacInnis and offered him some money and an alternative job, but Mr. MacInnis rejected his offer and stated he would find work elsewhere.

23. The delegate considered the evidence of both parties and while she found that W.E.M. and Mr. MacInnis mutually agreed on the leave of absence and the latter's employment was continuous throughout his leave, Mr. MacInnis' Complaint was lacking basis under the *ESA* and dismissed the Complaint for the following reasons:

> The Act states that wages do not include gratuities, allowances or expenses and money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency.
>
> The text messages indicate that the Employer advised the Complainant that there was work available and that he could come back by March 14, 2019. At the time the Complainant contacted the Employer on March 18, 2019, there was no longer work available. While these communications may have caused the Complainant to travel to Fort St. John for work, as set out above, the definition of wages does not include any allowances or expenses. The Complainant was in New Brunswick for a family matter and chose to return to Fort St. John. It is not the Employer's responsibility to pay for travel costs as it cannot control where the employees travel from. The Complainant would have incurred the cost of flying back to his work location even if the spring break up season had not arrived early.
>
> In addition, the Complainant arrived in Fort St. John on March 14, 2019 but did not report to the Employer for work until March 18, 2019. The Complainant did not report to work for four days and is claiming hotel costs. The Employer is not responsible for the Complainant's living costs and in this case the Employer did not even know that the Complainant was back and available for work.
>
> I find the travel expenses, including flights and hotel, incurred by the Complainant are not wages under the Act and therefore cannot be recovered under the Act.

SUBMISSIONS OF MR. MACINNIS

24. In his Appeal Form, Mr. MacInnis has checked off the "new evidence" ground of appeal stating that new evidence has become available that was not available at the time the Determination was made.

25. In his written submissions which are laced with gratuitous profanity, Mr. MacInnis states that Mr. Harder offered him "a contract for six weeks work" (sic). As a result, he is now claiming wages of $15,000 and lost E.I of $10,000, in addition to $5,000 of expenses. He relies on Mr. Harder's text to him at 2:13 p.m. on March 4 stating "Hi Tony we plan on working till the end of april so it would be great if you are able to make it back" (sic), as a contract promising him work "till the end of April". He also adds that he texted Mr. Harder on the same date, at 6:01 p.m., and told the latter when he would be in Fort St. John. He states that it cost him $5,000 to go to Fort St. John and back. He only found out there was no work for him ten minutes after he had checked into the hotel at Fort St. John. He submits that "if [Mr. Harder] wanted to offer [him] some money, he can put it in [his] account now, and [he] will take that off what [he is] owed."

26. He also alleges that W.E.M. has falsified the Record of Employment by indicating that he quit when he went to take care of his mother. In support of his assertion he points to the Determination and states that it also points out that he was on a leave of absence. He submits that he could not have quit when it was the employer who breached the contract of employment.

27. In his further written submissions on the merits of the appeal received by the Tribunal on December 30, 2019, Mr. MacInnis delineates the specific expenses he is claiming - airfare, hotel, meals, baggage fees, taxi fares - as well as wages for the period March 18, 2019, to April 30, 2019, as he expected to be employed with W.E.M. during this period, and Employment Insurance. His claim for Employment Insurance appears to relate to his claim that the Record of Employment inaccurately shows that he "quit", and this prejudiced his claim for Employment Insurance. The grand total of his claims is $30,589.48. I do not find it necessary to set out the specific amounts for each item in his claims here for the reasons set out in the next section.

ANALYSIS

28. The Tribunal has consistently stated that an appeal is not a re-investigation or rehearing of the complaint nor is it intended to be simply an opportunity to argue positions previously taken. An appeal is an error correction process, with the burden on the appellant, in this case Mr. MacInnis, to persuade the Tribunal that there is an error in the Determination under one of the following limited statutory grounds of review in section 112(1) of the *ESA* to justify the Tribunal's intervention:

> **Appeal of director's determination**
>
> 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.

29. It is also noteworthy that section 112(1) does 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. In *Britco Structures Ltd.* the Tribunal stated that the test for establishing an error of law on this basis is stringent and requires the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director.

30. Having delineated some broad principles applicable to appeals, in this case, Mr. MacInnis appeals on the sole ground that new evidence has become available that was not available before the Determination was made.

31. The Tribunal has held that admission of "new evidence" is discretionary the following four-part-test for admitting new evidence on appeal (see *Re Merilus Technologies*, BC EST # D171/03):

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- 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.

32. It is important to note that the requirements above are conjunctive and not alternative. That is, a party adducing new evidence on appeal must meet all four criteria set out in *Merilus Technologies*, *supra*, before the Tribunal will admit new evidence (See *Corinex Communications Corp.,* BC EST # D043/09; *Khela Excavating Ltd.,* BC EST # D141/15; *Grand Construction Ltd*., BC EST # D018/13).

33. In this case, I do not find there is any "new evidence" within the meaning of the four-part test in *Re Merilus Technologies* decision above. More particularly, as concerns the issue of expenses claimed in his Complaint, Mr. MacInnis is simply reiterating his argument that but for the texts between Mr. Harder and him (the content of which were before the delegate when she made the Determination) advising that there would be work available for him prior to the end of the spring break up season near the end of April, he would not have incurred the expenses he did to travel to Fort St. John and therefore, he should be compensated for these expenses. The only thing I see as additional new information relating to his expense claims is a detailed breakdown of expenses which now includes expenses for meals, taxis, and baggage fees. This information is something that would have existed before the Complaint was filed and could have been submitted by Mr. MacInnis to the delegate before the Determination was made. This evidence would fail under the first of the criteria in *Re Merilus Technologies, supra,* for admitting new evidence on appeal. Further, the evidence in question lacks 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. This is because I find persuasive the delegate's analysis that the definition of "Wages" in the *ESA* does not include travel expenses, including flights and hotel (and I would

include taxis, baggage fees and meals), that Mr. MacInnis incurred and therefore, not recoverable by Mr. MacInnis under the *ESA.*

34. I also note that Mr. MacInnis, in his appeal submissions, has added two new claims that were not included in his Complaint, namely, claims for wages for the period he anticipated working for W.E.M. from March 18 to April 30, 2019, and Employment Insurance for a total period of 19 weeks. The addition of two new claims is not "new evidence" and would fail under the criteria in *Re Merilus Technologies* for admitting new evidence. Furthermore, it is inappropriate to introduce new claims at this stage of the proceedings. He should have advanced these claims in the first instance when he filed his Complaint. These new claims are, therefore, not properly before me. Accordingly, I am dismissing the new claims.

35. With respect to the appeal relating to the claim for expenses, I find Mr. MacInnis is attempting to take the proverbial "second kick at the can" and have this Tribunal take a different view of the facts and arrive at a different conclusion than the Director. I find there is no basis for the Tribunal to interfere with the Determination.

36. Pursuant to section 114(1)(f) of the *ESA,* I dismiss Mr. MacInnis' appeal of the Determination.

ORDER

37. Pursuant to section 115 of the *ESA,* I confirm the Determination made on October 10, 2019.

Shafik Bhalloo
Member
Employment Standards Tribunal