Employment Standards TRIBUNAL

Citation: Microb Resources Inc. (Re)
2020 BCEST 93

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Microb Resources Inc.
("Microb Resources")

- 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.: 2020/054

DATE OF DECISION: July 27, 2020

DECISION

SUBMISSIONS

Brandon Hillis — counsel for Microb Resources Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"ESA"*), Microb Resources Inc. carrying on business as Salt Spring Coffee ("Microb Resources") has filed an appeal of a Determination issued by Ayn Lexi, a delegate of the Director of Employment Standards (the "Director"), on February 25, 2020.

2. The Determination found Microb Resources had contravened Part 6, section 54 of the *ESA* in respect of the employment of Vivian Chi ("Ms. Chi") and ordered Microb Resources to pay compensation to Ms. Chi in the amount of $27,670.42, an amount that included interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $28,170.42.

3. In this appeal Microb Resources says the Director erred in law and failed to comply with principles of natural justice in finding Ms. Chi had not quit her employment with Microb Resources.

4. Additionally, and alternatively, Microb Resources submits the Director erred in finding Ms. Chi should have been returned to the position she held prior to her going on maternity leave and in the award of compensation, including finding her entitled to a 2018 employee bonus.

5. Microb Resources seeks to have the Determination cancelled.

6. In correspondence dated April 15, 2020, the Tribunal acknowledged having received an appeal. Among other things, the correspondence 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 notified the parties that, following such review, all or part of the appeal might be dismissed.

7. The record has been provided to the Tribunal by the Director. A copy has been delivered to counsel for Microb Resources and to counsel for Ms. Chi. The parties have been given an opportunity to object to its completeness. Neither party has indicated there are any omissions from the record. I am satisfied the record is complete.

8. 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 submission filed with 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), Ms. Chi and the Director 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

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

THE FACTS

11. Ms. Chi was employed by Microb Resources as a VP Finance commencing July 25, 2016. The Director found she was terminated on May 6, 2019, the date that Microb Resources refused to return her to work.

12. Ms. Chi had taken pregnancy/paternity leaves commencing August 2018. Before leaving on her leaves, she hired a permanent replacement for her position as VP Finance. The Director found Ms. Chi told her replacement she would not be returning to her position.

13. The Director accepted Ms. Chi's evidence that she did not wish to return to work in her VP Finance role, but wanted to move into an operational role at the same level.

14. Microb Resources continued to pay Ms. Chi's benefits while she was on the leaves, did not block her access to her work e-mail until March 29, 2019, and allowed her to keep her laptop and company phone until May 16, 2019.

15. During a meeting with Mickey McLeod, president and CEO of Microb Resources, in November 2018, Ms. Chi had suggested a return to work as VP Operations. Mr. McLeod said she wouldn't be able to do that job.

16. On March 24, 2019, Ms. Chi sent an e-mail to Mr. McLeod advising she would be returning to work on May 6, 2019. In his response to that e-mail, also on March 24, Mr. McLeod stated, in part: "I understand

that you are on maternity leave and entitled to your job back, but you said you didn't want to displace Darren …".

17. The March 24 e-mail communications spurred some activity from Microb Resources that culminated in a letter from Mr. McLeod, dated May 13, 2019, setting out the "terms" of Ms. Chi's "resignation".

18. The Director found Ms. Chi never communicated an intention to quit her employment to Mr. McLeod, who was her direct supervisor.

19. The Director found Ms. Chi was terminated by Microb Resources on May 6, 2019.

20. The Director found the documentary evidence indicated Microb Resources was acting on the belief that Ms. Chi was on pregnancy/paternity leaves from August 2018 until August 2019.

21. During the early part of 2019, there was also some discussion of payment of a 2018 employee performance bonus. The Director found this bonus was discretionary and therefore not wages under the *ESA*, but found that, as the bonus would have been paid had her employment not been terminated, it was appropriate to include the bonus amount as part of the "make whole" remedy.

22. Ms. Chi commenced new employment on July 3, 2019. The Director found Ms. Chi should be paid the wages she lost by being terminated and not being returned to her pre-pregnancy/paternity leaves position for the period from May 6 to July 2, 2019.

THE APPEAL

23. Microb Resources submits the Director erred in law in finding Ms. Chi had not quit her employment, misapplying the applicable test on that question, and acted on an unreasonable view of the facts.

24. Microb Resources says the error arose from the Director focussing on the "mindset" of the employer rather than on the words and conduct of the Ms. Chi.

25. Microb Resources argues that, even if she had not quit, the Director committed an error by finding Ms. Chi should have been returned to the VP Finance position.

26. Microb Resources submits that even if the employer contravened section 54 of the *ESA*, Ms. Chi should not have been awarded wages lost between May 6 and July 2, 2019, as part of the remedy for that breach, as her leaves were scheduled to last until August 23, 2019. The argument contends there is nothing in the *ESA* which allows her to unilaterally alter her expected return date, that she could not have returned to work on May 6 without the employer's agreement and, consequently, she lost no wages when she was not allowed by the employer to return to work.

27. Finally, Microb Resources says the Director, in any event, was without jurisdiction to include the 2018 employee bonus in the remedy.

ANALYSIS

28. 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.*

29. 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.

30. Microb Resources contends the Director made an error of law and failed to comply with principles of natural justice. The natural justice ground is entirely dependent on establishing the error of law ground of appeal.

31. 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.

32. There are two arguments made by Microb Resources under the error of law ground of appeal: first, that the Director misapplied the test for determining whether an employee has quit their employment; and second, that the Director acted on a view of the facts which could not reasonably be entertained.

33. Microb Resources also contends the Director erred in finding Ms. Chi should have been returned to her position as VP Finance and in awarding lost wages from the date the Director found she had been terminated until she found alternate employment. I shall address this argument under the general rubric of whether there is a reviewable error under the *ESA*.

34. The question of whether an employee has quit is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under the *ESA*.

35. 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. As succinctly expressed by the Panel in *Britco*, *supra*: "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. A decision by the Director on a question of mixed law and fact requires deference.

36. The first error of law argument is, *simpliciter*, did the Director apply the correct legal test to deciding whether Ms. Chi had quit.

37. I find the Director applied the correct test and the correct legal principles in coming to the conclusion Ms. Chi did not quit and, in doing so, reject the contention argued by Microb Resources that the Director misapplied the test and legal principles on that question.

38. The test set out in the Determination recognizes there is a subjective element – that the employee communicated to the employer an intention to terminate the employment relationship – and an objective element – that such intention was confirmed by some subsequent conduct. At page R6 of the Determination, the Director has correctly stated the well-established legal principles under the *ESA*, which recognize the question of whether an employee quit their employment is a largely a factual analysis, requiring "clear and unequivocal facts" showing the right of the employee to quit the employment has been voluntarily exercised.

39. The Director did what is expected under the test, which is to search the evidence for whether Ms. Chi had expressed an intention, through words or conduct, to quit her employment.

40. After summarizing this evidence, the Director concluded that Ms. Chi's actions did not demonstrate an intent to quit nor did she perform any act inconsistent with her further employment with Microb Resources. In the context of the issue of whether Ms. Chi's words or actions constituted quitting her employment, the Director made a finding of fact that Ms. Chi never communicated to Microb Resources an intention to quit her employment: see page R8. There are facts that support that conclusion, including her meeting with Mr. McLeod in November 2018, and how the employer reacted to her absence. Also, the Director accepted Ms. Chi's evidence that she did not want to return to her VP Finance role, as she no longer felt challenged by it, but wanted to move into an operational role. That finding, that Ms. Chi wished to continue her employment with Microb Resources in another position, is inconsistent with an intention to quit her employment.

41. Microb Resources contends the "mindset" of the employer is irrelevant. If that contention suggests it is unimportant how the employer responds to words or conduct by the employee that might on some level be construed as a quit, I disagree that such evidence is irrelevant. At the least, evidence of how the employer responds to words or conduct that are alleged to constitute a quit assists in determining whether the facts, ultimately, are a clear and unequivocal expression of an employee's intention to quit. In other words, if the conduct of the employer is not consistent with its understanding that the employee had quit (as the Director found was the case here), it is logically improbable that the proverbial "outside observer" could say there was a freely and voluntarily given expression made to the employer representing the employee's intention to quit.

42. To reiterate, this is not a case where the Director failed to apply the accepted test for determining whether Ms. Chi had quit her employment. Rather it is the more typical type of case where the Director weighed the evidence presented and made a decision based on that evidence and the appellant disagrees with the result.

43. This leads into the second argument under the error of law ground. Microb Resources argues that in weighing the evidence the Director "acted on a view of the facts that could not reasonably be entertained". That argument, of course, challenges findings of fact made by the Director and raises the question of whether such findings are an error of law.

44. In addressing this argument, I reiterate what I have said above: the "mindset" of the employer is not irrelevant to the objective of the analysis.

45. The grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, supra.

46. The test for establishing findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

47. To expand the above point, in order to establish the Director committed an error of law on the facts, Microb Resources is required to show the findings of fact and the conclusions and inferences reached by the Director on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, at paras. 26 – 29.

48. The weight of evidence is a matter for the Director and is a question of fact, not law. It is only where a conclusion reached on the facts is one that could not reasonably be entertained that an error of law is shown. Findings of fact made by the Director require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.

49. The Director was alert to all of the facts that might bear on Ms. Chi's subjective intention. The argument made here does not assert new facts and neither adds to nor detracts from the facts presented to and analyzed by the Director in the Determination; it seeks only to have them weighed differently.

50. I am not persuaded the Director committed an error of law on the facts in deciding whether Ms. Chi quit her employment. The facts as found by the Director allow for the conclusion reached on the quit issue.

51. I find the director did not err in law in concluding Ms. Chi did not quit her employment.

52. Microb Resources argues the Director erred in finding Ms. Chi should have been returned to her VP Finance position. Based on the clear wording of subsection 54(3) of the *ESA*, which requires an employer to place an employee returning from a leave provided under Part 6 to either the position they held before

taking the leave or in a comparable position, this argument cannot succeed. Mr. McLeod acknowledged as much in his March 24 e-mail response to Ms. Chi. Microb Resources successfully argued there was no comparable position into which Ms. Chi could be placed. Under section 54, the only other option was to return her to the VP Finance position. There can be no argument that Ms. Chi had a statutory right that required she be returned to the VP Finance role and section 4 of the *ESA* prohibits statutory rights from being waived.

53. The more perplexing question is whether, in the circumstances, Ms. Chi could, or more accurately should have been able to, require Microb Resources to return her to the VP Finance position before her expected return date and with the period of notice provided in her March 24 e-mail.

54. Microb Resources contends there is nothing in the *ESA* allowing Ms. Chi to unilaterally decide to return from her leaves, which were scheduled to end on August 23, 2019. I agree with that statement, but conversely, there is nothing in the *ESA* that allows an employer to deny an employee's request for an early return to their position.

55. Pregnancy and parental leaves are an employee entitlement under the *ESA*. An employee is entitled to these leaves but under the *ESA* is not *required* to take them. The right to a leave identified in Part 6 belongs to the employee; such leaves are triggered by a request from the employee; the maximum length for leaves are set out in Part 6: 17 weeks for pregnancy leave and 35 weeks parental leave if such leave is commenced immediately following pregnancy leave. While I have accepted there is nothing specifically expressed in the *ESA* about an employee seeking to return to work during the leaves periods allowed by the provisions of Part 6, I am of the view the employee has, at least, a qualified right to do so. Recognizing an employee has this right is consistent with the purposes of the *ESA*, with the judicially accepted view of the importance of employment to an employee and with the common sense notion that personal circumstances of the employee can change and alter the initial planned leaves period.

56. I accept that recognizing an employee's unfettered right to end a period of leave can have unanticipated consequences for the employer and, as such, I subscribe to a view of this right that is highly contextual and requires a balancing of the respective interests of the employee and employer. It is not my intention in this decision to establish any principle or precedent for cases that involve different circumstances. At the least, however, a request by the employee for an early return from a period of leave must be genuine and the response of the employer must be one that is objectively reasonable.

57. I find the facts in this case do not indicate there were any circumstances that would allow Microb Resources to reasonably refuse Ms. Chi's request to return to work and, at the same time, terminate her employment. Ms. Chi's request only required Microb Resources to do what it would have been required to do in August, when the statutory leave period ended. Their response to terminate her employment was inappropriate and without cause.

58. I note, parenthetically, that in all the circumstances, this matter might also have attracted an investigation under section 83 of the *ESA*. There are elements of Ms. Chi's case that strongly suggest the decision to terminate her employment was a prohibited response to her request to return to the VP Finance position.

59. For the above reasons, I do not accept that the Director erred in the circumstances in awarding wage loss from the date on which Ms. Chi sought to return, and was terminated, until she found alternate employment.

60. Lastly, Microb Resources argues the Director had no jurisdiction to include the 2018 bonus amount as part of a "make whole" remedy. An award under s. 79(2)(c) is compensatory. It is intended to make the claimant "whole" in the economic sense. It is not limited to wages lost. The Director found Ms. Chi would have received the 2018 employee bonus except for her claim against the employer. Microb Resources does not say otherwise or challenge the Director's finding in this regard. The Director's finding on this point is supported in the evidence. In every sense, the remedy does nothing more than make Ms. Chi economically "whole".

61. 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

62. Pursuant to section 115 of the *ESA*, I order the Determination dated February 25, 2020, be confirmed in the amount of $28,170.42 together with whatever interest may have accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal