

Citation: Happy Jack's Public House Ltd. (Re)
2020 BCEST 94

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Happy Jack's Public House Ltd.
(the "Appellant")

- 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: James F. Maxwell

FILE No.: 2020/068

DATE OF DECISION: July 27, 2020

DECISION

OVERVIEW

1. Kelsi Fraser-Easton (the “Employee”) filed a complaint with the Employment Standards Branch against her former employer Happy Jack’s Public House Ltd., carrying on business as Happy Jack’s Restaurant + Bar (the “Appellant”). The Employee alleged that the Appellant dismissed her after she had given notice of resignation from her employment. The Employee did not specify what sums she felt that she had not been paid by the Appellant.
2. A delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) pursuant to the *Employment Standards Act* (the “ESA”) in which the Director held that the Appellant had breached the ESA and was liable to pay to the Employee sums as compensation for length of service, and for annual vacation pay, together with interest accrued thereon. In addition, the Director assessed an administrative penalty in the sum of \$500.00. The Director concluded that the total amount payable by the Appellant was \$1,436.37.
3. The Appellant has appealed the Determination.
4. Having reviewed the Determination, the Appellant’s submissions, and the Record provided by the Director, I dismiss the Appellant’s appeal. My reasons follow.

ISSUE

5. Did the Director err in law in the making of the Determination?

FACTS

6. The Appellant is a corporation engaged in the operation of a restaurant in the town of Houston, British Columbia.
7. The Employee began work for the Appellant on or about November 20, 2017. The employment relationship came to an end on July 31, 2019.
8. On August 13, 2019, the Employee filed a complaint with the Employment Standards Branch (the “Complaint”). The Complaint was non-specific as to the Employee’s concerns; rather, the Employee simply stated that she “had given my notice and my employers decided to terminate my employment (without consulting me first of apparent offense) only two days into my notice, before the 2 weeks was over.” The Employee did not specify what sums the Appellant had failed to pay.
9. The Director undertook a formal Investigation into the Employee’s complaint. Pursuant to that Investigation, the Director requested that the Appellant submit all records related to the Employee’s employment and termination. The Director examined all of the records supplied by the Appellant. The Director interviewed both the Employee and the representatives for the Appellant, and exchanged numerous e-mails with the Appellant.

10. On February 4, 2020, the Director issued a Written Report detailing the Director’s findings following the Investigation. The Director provided a copy of the Written Report to the parties, and afforded the parties the opportunity to reply, with the assurance that any responses would be considered by the Director as part of the Determination.
11. The Director thereafter examined all of the information supplied by both the Employee and the Appellant, and on March 27, 2020, the Director issued the Determination that gives rise to this Appeal.
12. The Director considered the history of the employment relationship between the Employee and the Appellant, with particular attention to recent events. The Director found that the Employee had intended to go on a one-month vacation, and discussed this with the Appellant. There were some discussions between the Employee and the Appellant about replacement coverage for the Employee during this vacation. While there may have been some misunderstanding as to what was agreed, the Employee booked flights for her vacation. There ensued an argument between the Employee and the Appellant, which resulted in the Appellant issuing two written warnings to the Employee for her behaviour. Upon receiving these warnings, the Employee gave two weeks notice of her intention to resign from her employment.
13. Soon after the Employee gave notice of her resignation, the Appellant came to believe that there had been some inappropriate discussions between the Employee and another employee. As a result of these alleged discussions, the Appellant terminated the Employee’s employment for “unethical conduct”. The Appellant treated the termination as being based upon just cause, and did not pay the Employee compensation for length of service.
14. The Director examined the issue of whether the Appellant could avoid the obligation to pay compensation for length of service on the basis that the dismissal was for just cause. The Director concluded that the Employee’s behaviour in advance of the termination did not constitute just cause for dismissal. In reaching that conclusion, the Director found that the evidence of the Employee was more credible than that of the Appellant.
15. The Director concluded that the Appellant did not have just cause to dismiss the Employee, and was therefore obligated to pay compensation for length of service. The Director calculated the amount of compensation payable, including vacation pay payable thereon. The Director concluded that the Employee was owed a total of \$912.76, plus accrued interest.
16. The Director found that by failing to pay compensation for length of service the Appellant had breached section 63 of the *ESA*. For this breach of the *ESA*, the Director assessed an administrative penalty in the sum of \$500.00.
17. The Appellant filed with this Tribunal a timely appeal of the Determination. Included with the Appellant’s appeal was a document entitled “Reasons for Appeal”. This document contends that the Director erred in law in making the Determination, by “acting without evidence”. More specifically, the Appellant argues that the Director:
 - a. erred in law in assessing an administrative penalty for failure to pay compensation for length of service, since the Appellant paid all monies owing to the Employee within the time for

doing so. The Appellant alleges that the Director failed to request evidence that such payment was made in a timely manner; and

- b. erred in law by failing to advise the Appellant that it bore the burden of proving that dismissal was for just cause, and by finding the Employee's evidence to be more credible than that of the Appellant.

ANALYSIS

18. Section 112(1) of the *ESA* provides that a person may appeal a determination 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.

19. The burden is on an appellant to persuade this Tribunal that there is justification to interfere with a determination on any one of these statutory grounds.

20. In the present case, the Appellant contends that the Director erred in law in making the Determination.

Did the Director err in law in making the Determination?

21. This 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 Appellant expressly contends that the Director erred in law by acting without evidence. More specifically, the Appellant argues that the Director acted without evidence in concluding that compensation for length of service was payable by the Appellant, and was not paid within the statutory period for doing so, thereby triggering an administrative penalty. The Appellant also argues that the Director acted without evidence by failing to tell the Appellant that it bore the burden of proving that it had just cause to dismiss the Employee, and by finding that the Employee's evidence was more credible than that of the Appellant.

23. I am satisfied that the Director correctly considered and applied the provisions of the *ESA* in assessing whether the Employee was entitled to receive compensation for length of service. The Director examined the question of whether the Appellant could avoid the statutory obligation to pay compensation for length

of service because the Appellant had just cause to dismiss the Employee for events occurring after the Employee had given notice of her resignation. The Director examined the evidence provided by both parties, and concluded that the conduct of the Employee did not amount to just cause for termination, and did not relieve the Appellant of the obligation to pay compensation for length of service.

24. Having concluded that the Appellant did not establish just cause for the termination, and did not escape the obligation to pay compensation for length of service, the Director noted that such compensation had not been paid within 48 hours of the dismissal, as required by the *ESA*. The Director correctly concluded that this failure amounted to a breach of section 63 of the *ESA*. For having breached a provision of the *ESA*, the Director correctly applied section 29(1)(a) of the *Employment Standards Regulation*, which mandates that an administrative penalty of \$500.00 is payable where a person contravenes a requirement of the *ESA*. The assessment of this administrative penalty required no more evidence than that compensation for length of service had not been paid within the statutory period specified by the *ESA*. I find that the Director did not act without evidence in assessing this penalty, and I dismiss this ground of appeal.
25. The Appellant also argues that the Director erred in law by acting without evidence when the Director found that the Appellant bore the burden of proving that it had just cause to dismiss the Employee, and when the Director found the evidence of the Employee to be more credible than that of the Appellant.
26. Whether an employer has just cause to dismiss an employee is a question of law. This Tribunal, and the Courts, have held that an employer bears the burden of proving the existence of just cause, based upon the evidence. The Director was not compelled to tell the Appellant in advance that it bore this burden of proof. I find that the Director thoroughly examined the evidence of the parties, and concluded that the Appellant had not met its burden, and did not prove that it had just cause to dismiss the Employee. I also find that it was precisely by considering the evidence of the parties that the Director concluded that the evidence of the Employee was more credible than that of the Appellant. I find that the Director acted on the evidence, and I dismiss this ground of appeal.

CONCLUSION

27. I find that the Director did not err in law in making the Determination. For this reason, I dismiss this appeal.

ORDER

28. Having reviewed the Determination, the Appellant's submissions filed with the appeal, and the Record supplied by the Director, I dismiss this appeal, and confirm the Determination pursuant to section 115 of the *ESA*.

James F. Maxwell
Member
Employment Standards Tribunal