Citation: Kevin Cheale Personal Real Estate Corporation (Re)
2021 BCEST 1

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Kevin Cheale Personal Real Estate Corporation
(the "Employer")

- 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: Carol L. Roberts

FILE NO.: 2020/114

DATE OF DECISION: January 7, 2021

DECISION

SUBMISSIONS

Kevin Cheale	on behalf of Kevin Cheale Personal Real Estate Corporation
Ramona Muljar	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Kevin Cheale Personal Real Estate Corporation (the "Employer") of a July 16, 2020 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director found that the Employer had contravened sections 34, 58, and 63 of the *Employment Standards Act* (the "*ESA*") in failing to pay a former Employee wages, vacation pay, and compensation for length of service. The Director determined that the Employer owed wages and interest in the total amount of $1,099.62. The Director also imposed two $500 administrative penalties on the Employer for the contraventions, for a total amount payable of $2,099.62.

3. The grounds for the appeal are that the Director failed to comply with the principles of natural justice in making the Determination. After reviewing the appeal submissions, I decided I would not dismiss the appeal under section 114 and sought submissions from the Director and the Employee. Although the Director made submissions, the Employee did not.

4. This decision is based on the section 112(5) "record" that was before the delegate at the time the Determination was made, the submissions of the Employer and the Director, and the Reasons for the Determination.

FACTS

5. The Employer operates a real estate maintenance business in Kelowna, British Columbia. Bradley McDermott (the "Employee") was employed as a handyman from April 24, 2019, until August 1, 2019.

6. On August 9, 2019, the Employee filed a complaint alleging that the Employer had contravened the *ESA* in failing to pay him compensation for length of service. The Director's delegate conducted an oral hearing on June 23, 2020, into the complaint.

7. At issue before the delegate was whether the Employer had terminated the Employee's employment, and if so, whether the Employee was entitled to compensation for length of service as well as one day's wages.

8. The Employer contended that the Employee had abandoned his employment. The Employer's evidence was that on July 24, 2019, the Employee did not show up for work without consulting the Employer, and the Employer was unable to communicate with him. The Employer met with the Employee on August 1, 2019, to discuss a job that the Employee had "done wrong" as well as his absence from work on July 24. The Employer's evidence was that when he asked the Employee where he had been on the 24th, the

Employee said he did not want to talk about it. The Employer gave the Employee a cheque representing wages less deductions for July 24. The Employer stated that the Employee was apologetic and understood why he had not been paid for that day.

9. The Employer said that he tried telephoning the Employee after August 1, 2019, without success but did not attempt to communicate with the Employee by way of email or text message. The Employer said that the Employee just stopped reporting for work. The Employer did have a conversation with the Employee on an unspecified date after August 1, 2019, regarding the Employee's intention to apply for workers compensation benefits.

10. The Employer contended that it had not terminated the Employee's employment. The Employer issued a Record of Employment (ROE) with the reason for termination of employment being "Shortage of work/End of contract or season."

11. The Employer's witness, J.B., another maintenance worker, testified that he took a day off with the Employee but did not remember the date. J.B. said that he and the Employee agreed not to do a scaffolding job that day but to do it the following day instead. J.B. testified that on an unspecified date during the course of his employment the Employee told him that he had reached his three-month anniversary and could now go on worker's compensation.

12. J.B. said that he and the Employee were working on a job the week of July 31, 2019. At the end of one of the days, J.B. said that he told the Employee that would see him the next day at the Employer's residence. When he went to the Employer's residence, the Employee was not there, and the Employer said that he had not heard from him and that the Employee had not shown up.

13. J.B. testified that he finished the Employee's painting job because the Employee did not show up for work after that.

14. The Employee testified that he injured his shoulder at work in May 2019 and that the injury got worse. He went to a doctor at the end of July. The Employee's evidence was that at the August 1, 2019 meeting, the Employer informed him that he was being let go because he was not trustworthy. The Employee testified that when he gave the Employer the doctor's note, the Employer threw it back at him. The Employee informed the Employer that he was going to file for worker's compensation benefits.

15. The Employee's evidence was that he retrieved his personal belongings from the work site and did not contact the Employer again. The Employee acknowledged that he missed a number of telephone calls from the Employer but testified that he did not respond because the Employer was threatening him and because he had already been fired. The Employee also said he also received a number of text messages from the Employer. The Employee said that he deleted those messages because in them, the Employer was threatening to come after him with a lawyer.

16. The Employee said that he did a few hours work on July 24, 2019, then he went to J.B.'s house to discuss their work for the following day, after which he went home because there was no other work for him that day.

Determination

17. The delegate noted that the evidence of the parties regarding the events on August 1, 2019, conflicted. The Employee's evidence was that he was told he was being let go while the Employer testified that the Employee was not fired, that he simply stopped showing up for work.

18. The delegate noted that the Employer communicated with the Employee by text message daily, instructing him what work had to be done. She noted that on July 31, 2019, the Employee informed the Employer that he required the next two days to complete a job he had been working on that week. She also noted that the Employer did not attempt to verify with the Employee whether he was intending to come to work.

19. The delegate wrote:

> The Employer has not submitted any evidence to show that the Complainant would have indicated to [the Employer] that he desired to leave his employment. Prior to August 1, 2019, the Complainant had not taken any action that would indicate that he no longer wished to be employed by [the Employer]. On the contrary, based on the text message conversation from July 31, submitted by the Employer, the Complainant intended to use the next two days after July 31st to finish a paint job. Based on the Employer's evidence, it had historically communicated extensively with the Complainant via text message about upcoming or unfinished jobs. It does not follow that on this occasion, the Employer made no attempt to contact the Complainant by text message about his whereabouts, especially considering that he had an unfinished painting job at hand that week. Further, the Record of Employment issued by the Employer does not support the Employer's argument that the Complainant quit his employment, as the reason given for termination of employment in this document is "shortage of work/end of season".

20. The delegate concluded that the Employer had "not fulfilled its duty to demonstrate that it has been absolved of its obligation under section 63 of the Employment Standards Act to give written notice or pay compensation…" and that the Employee was entitled to compensation for length of service.

21. The delegate also found that the Employee was entitled to wages for work performed on July 24, 2019. The delegate noted that the Employee's evidence was that he had worked "a few hours" on that day, and that although the Employer stated that there were no work orders for that day, the text messages between the Employer and Employee "implies" that the Employee did complete some work that day, and that the Employer was aware of that fact since Mr. Cheale indicated that the Employer should have completed more tasks that day. The delegate determined that the Employee was entitled to the minimum two hours pay for July 24, 2019, plus vacation pay on that amount.

ARGUMENT

22. The Employer argues that it had been "discriminated against." As support for this argument, the Employer notes that the Employee only participated in the hearing when reminded of it by a Branch employee. The Employer also argues that the delegate selectively recounted the Employee's evidence about being "let go" and failed to give appropriate weight to the Employee's "character."

23. The Employer contends that, during the hearing, the Employee acknowledged that the Employer did not fire him; that he just assumed it. The Employer argues that all of the parties at the hearing heard the Employee acknowledge that the words "you are fired or we are letting you go" were never spoken. The Employer says that, despite that evidence, the delegate nevertheless unfairly found that the Employer was liable to pay compensation for length of service.

24. The Employer says that it cannot know why the Employee decided not to show up for work since the Employee never responded to the Employer's telephone calls.

25. Finally, the Employer says that it attempted to show the Employee's character by pointing out that after the Employee had worked for three months, he told J.B. that he was now eligible to apply for worker's compensation, and in fact did so after not showing up for work after August 1, 2019. The Employer points out that the Employee's worker's compensation claim was denied, and included the Worksafe BC decision on that claim with the appeal.

26. Finally, the Employer relies on an email the delegate sent to her supervisor and which was inadvertently copied to the Employer as evidence that the decision was flawed.

27. The Director submits that it is not a denial of natural justice to remind a participant of a Director's hearing and that it is not a denial of natural justice to award a party wages to which they are entitled even if that party is not entirely truthful in their statements at a hearing.

28. The delegate submits that, after all of the evidence was presented, the Employer "did not argue nor demonstrate that it was exempt from the obligation to pay compensation for length of service due to any of the exceptions found in section 65 of the [*ESA*]." The delegate submits that the Determination identifies the reasons and evidence to support this finding.

29. Finally, the delegate submits that the Employer received the July 21, 2020 email to her supervisor in error. She notes that it was sent after the Determination was issued and is not evidence of a denial of natural justice.

ANALYSIS

Errors of law

30. Section 112 of the *ESA* sets out the grounds for appealing a determination to the Tribunal as follows:

> (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.

31. Although the Employer's ground of appeal is that the delegate failed to observe the principles of natural justice, in substance, the appeal is a disagreement with the result. Because this process is designed for the participation of parties who are not legally represented, the Tribunal takes a large and liberal interpretation of the grounds of appeal.

32. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

33. There is no evidence that the Employer was denied natural justice. The record discloses that the parties appeared at an oral hearing conducted by telephone. The Employer was made aware of the complaint and the evidence it required by way of a Notice of Complaint hearing. The Director also issued a Demand for Employer Records, in which it was obliged to produce warning letters, payroll records, all documents relating to termination and any other documentation it intended to rely upon at the hearing. The Employee was also obliged to disclose records in advance of the hearing.

34. I am satisfied that the Employer was well aware of the details of the complaint and was given full opportunity to respond, including the opportunity to present evidence and question the Employee at a hearing. The fact that the Employee did not call into the hearing at the designated time does not amount to a denial of natural justice.

35. Finally, the fact that the delegate inadvertently included the Employer in an email communication to another Branch employee does not amount to a denial of natural justice. Although the delegate acknowledges in that email that the Determination "was not her best work," the quality of a Determination does not demonstrate any bias on the part of the delegate.

36. I find no basis for this ground of appeal.

37. 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.

38. Section 63 of the *ESA* provides that an Employer is liable to pay an Employee compensation for length of service unless the Employee terminates the employment, retires, or is dismissed for just cause (section 63(3)(c)).

39. I infer from the Employer's submissions that the delegate did not give appropriate weight to all of the circumstances surrounding the Employee's conduct, including his comments to a co-worker that he intended to work only as long as necessary to collect worker's compensation benefits, that he refused to respond to the Employer's telephone calls regarding his intention to return to work, as well as the Employee's purported dishonest evidence about being fired.

40. In my view, the delegate erred in law in failing to fully address the Employer's argument that the Employee had abandoned his employment.

41. The leading Tribunal decision on whether or not an employee terminates their employment, or abandons their position, is *K & R Poultry* (BC EST # D059/15). In that case, the Tribunal reviewed the law on the issue of abandonment and outlined the test to be whether, "… viewed objectively, did [the employee do] or [say] [any]thing to lead [the employer to] reasonably believe that [the employee] had abandoned his contract of employment?" The Tribunal also referred to *Pereira v. The Business Depot Ltd.,* 2011 BCCA 361, in which the test for abandonment was expressed as follows:

> The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (*i.e.*, repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 (CanLII), 47 B.C.L.R. (4th) 56 at para. 8.

42. Although the delegate did not explicitly consider the test of abandonment outlined above, she did consider some of the circumstances surrounding the end of the employment. However, it is my view that she did not fully consider whether a reasonable person, viewing the circumstances objectively, would have understood from the Employee's words and actions, that he had abandoned the contract.

43. I also find that the delegate erred in concluding that the Employer had not submitted any evidence in support of his argument that the Employee had quit. She did not consider, for example, undisputed evidence that the Employer made several telephone calls to the Employee after August 1, 2019, that the Employee refused or declined to answer. She did not consider the Employee's evidence that, although the Employer repeatedly texted the Employee after August 1, 2019, the Employee deleted them because, he asserted, they were threatening in nature. That evidence does not accord with the delegate's finding that the Employer "made no attempt to contact the Complainant by text message…".

44. The delegate appeared to accept that the Employer had terminated the Employee's employment on August 1, 2019, even though the Employer took the position that the Employee simply stopped showing up for work. She did not consider, for example, the evidence that the Employee did not deny that he made no attempt to contact the Employer after August 1, 2019.

45. The delegate also appears to place no weight on the Employer's evidence regarding the Employee's claim for WorkSafe BC benefits. The record discloses that the Employer submitted to the delegate the WorkSafe BC letter to the Employee (copied to the Employer) which indicated that the Employee first reported his injury to Worksafe BC on August 2, 2019. In denying the claim, Worksafe BC noted that the Employee reported that his injury occurred on May 29, 2019, and he first sought medical treatment for that injury on August 1, 2019. The Worksafe Officer noted that the Employee reported a left shoulder injury when reaching upwards with a paint brush in his right hand and that he reported the injury to his Employer a couple days later. The Worksafe Officer noted that this information conflicted with the Employee's

statement on August 2, 2019, that he first reported the injury to his Employer on August 1, 2019. The Worksafe Officer also considered that the Employee did not seek medical attention until August 1, 2019.

46. This evidence, along with the evidence of the Employer's witness that the Employee stated that he was going to work only long enough to be eligible for workers compensation, ought to have been considered by the delegate. While the denial of the Employee's claim for benefits may not have been directly relevant, the information was relevant to the test of "whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract."

47. I find that the delegate erred in law by acting on a view of the facts that could not reasonably be entertained and allow the appeal.

ORDER

48. Pursuant to section 115 of the *ESA*, I cancel the Determination and refer the matter back to the Director for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal