Citation: Dhindsa Law Corporation (Re)
2021 BCEST 20

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Dhindsa Law Corporation
("Dhindsa")

- 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: Maia Tsurumi

FILE NO.: 2020/165

DATE OF DECISION: February 12, 2021

DECISION

SUBMISSIONS

Andrew Rebane — counsel for Dhindsa Law Corporation

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Dhindsa Law Corporation ("Dhindsa") has filed an appeal of a determination (the "Determination") issued by Amanda Curtis, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on October 30, 2020. The Delegate determined that Dhindsa contravened sections 34 (wages) and 63 (compensation for length of service) of the *ESA*.

2. Dhindsa appeals the Determination on the grounds that the Delegate erred in law.

3. For the reasons set out below, I dismiss the appeal pursuant to sub-section 114(1)(f) of the *ESA*, as it has no reasonable prospect of success.

4. My decision is based on the submissions made by Dhindsa in the Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, and the Reasons for the Determination (the "Reasons").

ISSUE

5. The issue before the Employment Standards Tribunal (the "Tribunal") is whether this appeal should be allowed or dismissed pursuant to sub-section 114(1)(f) of the *ESA*.

THE DETERMINATION

Background

6. Dhindsa is a law firm incorporated in British Columbia and located in Abbotsford. Amarjit Singh Dhindsa ("Mr. Dhindsa") is its sole director and officer.

7. The Complainant was a legal administrative assistant hired on October 18, 2019. Their employment ended in the first half of March 2020.

8. The Complaint was filed on March 18, 2020. On July 30, 2020, Dhindsa issued a cheque to the Complainant for annual vacation pay in full satisfaction of the vacation pay claim ($327.00, less statutory deductions). The Delegate issued the Determination on October 30, 2020.

Issues Before the Delegate

9. The issues before the Delegate were whether:

(a) the Complainant was owed wages for compensation for length of service, which required a determination about whether:

i. the Complainant quit or was terminated;

ii. Dhindsa had just cause to terminate the Complainant; and

(b) The Complainant was entitled to minimum daily hours for March 12, 2020?

10. The Delegate determined that: (1) the Complainant was owed $640.63, plus 4% vacation pay, as compensation for length of service; and (2) the Complainant was entitled to a payment for minimum daily hours for March 12, 2020.

Evidence Before the Delegate

11. Both parties agreed that on the afternoon of March 11, 2020, Mr. Dhindsa and the Complainant had a disagreement at the workplace, after which the Complainant immediately left the workplace. That evening, the Complainant texted Mr. Dhindsa to ask if she should attend work the next day so that the Complainant and Mr. Dhindsa could talk. Mr. Dhindsa agreed.

12. There was also no dispute that on March 12, 2020:

(a) the Complainant went to the workplace in the morning;

(b) the Complainant could not login to her computer because the password was changed;

(c) the Complainant and Mr. Dhindsa met in his office and Mr. Dhindsa's legal assistant, Anne Downton ("Ms. Downton") was present;

(d) during the meeting:

i. Mr. Dhindsa raised the issue of the Complainant's recreational internet use at work, including showing them their browsing history;

ii. Mr. Dhindsa asked the Complainant to pack up their desk and return their office keys to him;

iii. the Complainant said they did not have all the office keys with them;

iv. Mr. Dhindsa said the Complainant's Record of Employment (the "ROE") would be available for pick-up when they dropped off their office keys;

(e) aside from March 12, 2020, Dhindsa's records of hours the Complainant worked was accurate and the Complainant was paid appropriately for the hours worked during their final pay period;

(f) the ROE listed the Complainant's reason for leaving employment as "*quit*"; and

(g) the Complainant was not paid for March 12, 2020.

13. The parties disagreed about whether the Complainant quit or was terminated.

14. The Complainant said they were terminated. When hired, Mr. Dhindsa told the Complainant that as long as their work was done, they could leave work early on some days. The Complainant only left work early with Mr. Dhindsa's permission.

15. According to the Complainant, on March 11, 2020, Mr. Dhindsa was verbally and mentally abusive to them over a work mistake and the Complainant started crying and felt degraded. The Complainant said they told Mr. Dhindsa they would not take his abuse and he could not treat people that way. The Complainant then said they were done listening to Mr. Dhindsa and left the office around 2:30 p.m., taking their purse, cell phone, and keys, but leaving their children's photos and makeup in their desk. They did not say they quit.

16. The Complainant said when they arrived at the office on March 12, 2020, they sent Mr. Dhindsa a text asking him what he wanted them to do. Mr. Dhindsa replied 15 minutes later and said he would meet in 12 minutes. The Complainant further said they tried to log on to their computer, but the password had been changed. They then tried a password posted on the wall, but when they were doing this Mr. Dhindsa arrived at their desk and started accusing them of hacking into the computer. The Complainant then went to Mr. Dhindsa's office with Ms. Downton.

17. Regarding the meeting in Mr. Dhindsa's office, the Complainant told the Delegate that Mr. Dhindsa told them they were terminated for being on the internet while at work and that this was the first time the issue of the Complainant's use of the internet for personal use was discussed with them. The Complainant said Mr. Dhindsa had previously asked for help listing items for sale on the internet and that they did play poker.

18. Dhindsa said the Complainant quit their position. Dhindsa submitted witness statements from a number of the Complainant's co-workers.

19. Harjit Dhillon ("Ms. Dhillon") sat in the cubicle next to the Complainant and worked with her for three months. She said that on March 11, 2020, she overheard the Complainant slam their keyboard tray as they pushed it under the desk and say they were "*done*" before walking out of the office.

20. Ms. Downton was not at the office on March 11, 2020, but Mr. Dhindsa told her that the Complainant had quit and he would be changing the passwords on their computer. He asked Ms. Downton to collect the items on the Complainant's desk. On the morning of March 12, 2020, Ms. Downton collected the work-related items off of the Complainant's desk. When the Complainant came in and could not log on to their computer, they asked Ms. Downton if their password had changed. Ms. Downton told the Complainant that Mr. Dhindsa had changed the password and that he would be in to speak with the Complainant soon. However, the Complainant started guessing the new password and was able to access the computer. Ms. Downton said she told the Complainant that Mr. Dhindsa probably changed the password because the Complainant had quit and he did not want them to access client information.

21. During the meeting in Mr. Dhindsa's office, Ms. Downton said Mr. Dhindsa asked the Complainant why they had come into the office when they had quit the day before. The Complainant said they had not quit. Mr. Dhindsa then showed the Complainant a log of their personal internet usage at work and said

based on their browsing history, they had only been working one to two hours each day and personal internet use was the equivalent of stealing time. The Complainant admitted to the personal internet use because Mr. Dhindsa had proof, but the Complainant said the websites were running in the background and did not affect their ability to work.

22. Mr. Dhindsa said the Complainant quit on March 11, 2020, after he discovered a mistake they made on a client matter. He said that type of mistake typically did not happen after someone had worked at the firm for three to four months and he did not understand how similar mistakes were continuously being made by the Complainant. However, once he learned about the Complainant's internet activities it was apparent that they rarely focused on their daily work-related tasks. Mr. Dhindsa said he had a "*stern conversation*" with the Complainant on March 11, 2020, because of their mistake. The Complainant became defensive, slammed their keyboard tray closed, said "*I am done*" and grabbed their personal items, except for some stationary, and walked out of the office. This indicated to Mr. Dhindsa that the Complainant had quit and Mr. Dhindsa changed their computer password. Mr. Dhindsa said he was surprised that at the meeting on March 12, 2020, the Complainant claimed they had not quit. After the Complainant said this, Mr. Dhindsa made it clear to them that their words the previous day constituted quitting employment.

23. Although Dhindsa did not specifically submit the Complainant was terminated for cause for spending a lot of work time on the internet for non-work purposes, it provided evidence that went to this argument. It submitted internet browser activity logs from November 8, 2019, to March 16, 2020. Ms. Dhillon said the Complainant made many mistakes and she gave some examples of these mistakes. When Ms. Dhillon raised these mistakes with Mr. Dhindsa, he told her to give the Complainant time to learn the process. Ms. Dhillon also said the Complainant was consistently on Facebook and playing online poker while at work. Heena Bhathal ("Ms. Bhathal") said she worked with the Complainant for approximately one week full-time and, during this time, she found various problems with the Complainant's work and gave examples of these problems. Ms. Downton said the Complainant spent several hours each day on personal telephone calls and was constantly leaving early and taking days off at the last minute for personal reasons. She also said the Complainant made many mistakes, some discovered while the Complainant was working, but some only found after they left the firm.

The Delegate's Decision

24. The Delegate concluded that:

(a) the Complainant did not quit on March 11, 2020;

(b) the Complainant was terminated on March 12, 2020;

(c) Dhindsa did not have just cause to terminate the Complainant;

(d) the Complainant was owed compensation for length of service in the amount of $640.63, plus 4% vacation pay of $25.62; and

(e) the Complainant was owed minimum daily wages for March 12, 2020 in the amount of $40.00, plus 4% vacation pay of $1.60.

25. The Complainant was also entitled to $11.65 in interest on the amounts owing under section 88 of the *ESA*.

26. The Delegate imposed mandatory administrative penalties of $500 for the violations of sections 34 (minimum daily hours) and 63 (compensation for length of service) of the *ESA*. This amounted to $1,000.

Compensation for length of service

27. The Delegate stated that section 63 of *ESA* makes an employer liable to provide compensation for length of service upon termination. She noted that sub-section 63(3) discharges that liability if the employer can show the employee was given proper written notice of termination, equivalent wages, a combination of both, or if the employee quits, retires, or was terminated for cause.

28. Mr. Dhindsa and the Complainant had different interpretations of what the Complainant said before she left work on March 11, 2020. Mr. Dhindsa said the Complainant said, "*I'm done*" after his stern conversation with them and immediately left the workplace so this shows they quit. The Complainant said their words were, "*I'm done listening to you*." The Delegate found it was unreasonable to conclude that the Complainant quit based only on their saying words to the effect of "*I'm done*" and leaving the workplace on March 11, 2020. It was equally plausible that the Complainant needed a cooling off period away from the workplace, which was what the Complainant asserted. The Complainant's unchallenged evidence was that they left the photos of their children and makeup at their desk, which a person who has formed the intent to quit was unlikely to do. The Delegate concluded the Complainant's behaviour was not the result of a desire to quit.

29. There was no dispute that later on March 11, 2020, the Complainant texted Mr. Dhindsa saying, "*Hi, should I come into work tomorrow so we can talk?*" To which Mr. Dhindsa replied a few minutes later with, "*Ok*." The Delegate found these facts further reinforced her conclusion that the Complainant left work to cool off after the exchange with Mr. Dhindsa and did not leave because they intended to quit. Also, the Complainant used the word "*work*" to describe the office, which indicated they felt they were still employed. An employee who has quit is unlikely to later text the employer and ask if they should come into work the next day to talk.

30. There was also no dispute that when the Complainant arrived at work, Mr. Dhindsa was not there and they texted him, asking what they should do. He said he would be there shortly. While waiting for him, the Complainant tried to log on to their work computer and asked Ms. Downton if their password had changed. The Delegate found it reasonable to conclude that an employee who has actually quit their job is unlikely to ask about duties, wait for instructions, sit at their work computer and try to log on, and then ask why their login is not working. These actions indicated that, more likely than not, the Complainant thought they were employed. The Delegate said the Complainant made it clear at the March 12, 2020 meeting that they had no intention of quitting and had not quit. Mr. Dhindsa's actions at the meeting after the Complainant said they had not quit was to bring up misconduct, instruct them to pack up their desk and return their keys. These actions were reasonably construed as communicating an intent to terminate the Complainant.

31. In summary, the Delegate concluded on the evidence that the Complainant did not quit on March 11, 2020, but was terminated on March 12, 2020.

32. Next, the Delegate considered whether the Complainant was terminated for cause. She noted that a single act of misconduct may constitute just cause, but it must be serious, deliberate and intentional, and fundamentally breach the employment contract. Actions that can result in termination for one occurrence of misconduct include, but are not limited to:

(a) wilful misconduct;

(b) gross incompetence;

(c) theft;

(d) fraud;

(e) conflict of interest;

(f) serious undermining of the corporate culture;

(g) serious breach of employer rules and policies; and

(h) failure to respond appropriately to corrective discipline.

33. Wilful misconduct means the employee knew what they were required to do and deliberately did not do it, or they knew what was not permitted and did it anyway. A mistake, especially if made because of inexperience or lack of training is not generally considered wilful misconduct.

34. Dhindsa provided the Delegate with the Complainant's internet browsing activity logs, which were referenced during the March 12, 2020 meeting. These records showed various websites visited from 1 to 221 minutes per day during the Complainant's employment. However, the Delegate found she could not conclude that the Complainant's internet use amounted to theft of company time in a way that was so egregious as to warrant summary dismissal. This was because the Complainant gave uncontested evidence that Mr. Dhindsa relied on them to use the internet to do things for him unrelated to their job tasks and because Dhindsa did not provide evidence to refute that at least some of the Complainant's internet use was when they had websites open and running in the background while working.

35. The Delegate found that leaving internet sites used for personal browsing open and running in the background while conducting job tasks was minor misconduct that an employer was entitled to address. Thus, the Delegate considered whether this minor misconduct constituted just cause. In order to establish just cause for minor misconduct, an employer must have:

(a) established a reasonable standard of performance and communicated that standard to the employee;

(b) provided the employee with sufficient time and a reasonable opportunity to meeting the standard;

(c) warned the employee that failure to meet the standard was serious and would result in termination; and

(d) shown that the employee still did not meet the standard.

36. The Delegate concluded Dhindsa did not have just cause to terminate the Complainant. There was no evidence that Dhindsa had done any of the required steps. The Delegate also found Dhindsa's conclusion that the Complainant rarely focused on their daily work because of their internet use was a stretch

because: there was no evidence to substantiate that the internet sites were not running in the background; when Ms. Dhillon mentioned mistakes in the Complainant's work, Mr. Dhindsa told her the Complainant needed some time to learn; and neither Ms. Bhathal nor Ms. Downton linked the Complainant's mistakes to any personal internet use.

37. The Complainant was employed for more than three months, but less than one year so they were entitled to one week's compensation for length of service ($640.63, plus 4% vacation pay; of $25.62).

Minimum daily hours

38. Under section 34 of the *ESA*, an employee who reports to work as required by an employer is entitled to wages for a minimum number of hours. An employee scheduled for eight hours or less must be paid a minimum of two hours, even if they have not worked for two hours.

39. The Delegate found the Complainant was entitled to wages for two hours as minimum daily hours for March 12, 2020, which was $40.00, plus $1.60 in vacation pay. The Delegate concluded the Complainant did not quit on March 11, 2020. There was no dispute the Complainant asked if they should come into work on March 12, 2020, and they reported for work that day.

ARGUMENT

40. Dhindsa submits that the Delegate erred in law in her Determination that the Complainant was owed compensation for length of service. Specifically, the Dhindsa says that: (1) the Complainant quit on March 11, 2020; and (2) the Complainant's misconduct constituted just cause for termination.

41. Dhindsa says the Delegate acted on a view of the facts that could not reasonable be entertained in finding the Complainant did not quit because the Complainant:

(a) clearly stated, "*I'm done*", which clearly evidences an intention to quit;

(b) left the workplace without discussing her absence with Mr. Dhindsa;

(c) did not return to the workplace that day; and

(d) only returned to the workplace the following day after asking permission from Mr. Dhindsa to do so.

42. Dhindsa also says the Delegate acted on a view of the facts that could not reasonably be entertained in finding the internet browser activity logs did not show wilful misconduct because there was extensive time when an online casino site and Facebook were open.

43. Finally, Dhindsa submits the Delegate erred in law by imposing a $500 administrative penalty for the failure to pay minimum hours on March 12, 2020. Dhindsa does not expressly appeal the Delegate's finding that it failed to pay minimum daily hours under section 34, but it submits in its Appeal Form, under "History of the Proceedings" at paragraph 13, that the Delegate never advised it by way of her Preliminary Assessment that she was considering a possible violation of section 34 and so Dhindsa did not have the opportunity to make submissions about this issue or have the opportunity to consider whether or not to settle to avoid a penalty for breach of section 34.

ANALYSIS

44. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Sub-section 112(1) of the *ESA* provides that a person may appeal a determination on any 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.

45. I find the Delegate did not err in finding that the Complainant was owed compensation for length of service or in imposing a penalty for a violation of section 34 of the *ESA*.

46. As Dhindsa notes in its Appeal Form, in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, 1998 CanLII 6466 (BC CA), the British Columbia Court of Appeal defined questions of law in the context of an appeal of a tribunal's determination. In this context, an error of law occurs in the following situations:

(a) a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

(b) a misapplication by the decision-maker of an applicable principle of general law;

(c) where a decision-maker acts without any evidence;

(d) where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

(e) where the decision-maker is wrong in principle.

47. The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5 at para. 36.

48. Regarding the question of compensation for length of service, Dhindsa submits a finding that the Complainant quit was the only reasonable conclusion. I reviewed the evidence and the Delegate's findings based on that evidence. I conclude that the Delegate's decision was reasonable.

49. Section 63 of *ESA* imposes liability on the employer for compensation for length of service upon termination. In order to be excused from liability under sub-section 63(3), Dhindsa had to establish that the Complainant was given proper written notice of termination, equivalent wages, a combination of both, or quit, retired, or was terminated for cause. The onus was on Dhindsa, as the employer, to establish that the Complainant quit. There had to be clear and unequivocal facts to support a conclusion that the Complainant voluntarily exercised their right to quit: *Burnaby Select Taxi Ltd. & Zoltan T. Kiss (Re)*, BC EST # D091/96 at p. 10, BC EST # 122/96 (reconsideration refused). The test is both subjective and objective: subjectively, the Complainant had to form an intention to quit; and objectively, the Complainant had to carry out an act inconsistent with continued employment: *Burnaby Select Taxi Ltd. & Zoltan T. Kiss (Re)*, BC EST # D091/96 at p. 10. The employer's assumptions about what happened do not determine whether

or not an employee has resigned. Indeed, even the use of the words "*I quit"* does not necessarily manifest an intent to sever the employment relationship as it may be part of an emotional outburst, stated in anger or frustration or for other reasons: *Burnaby Select Taxi Ltd. & Zoltan T. Kiss (Re)*, BC EST # D091/96 at p. 10.

50. Given the evidence before the Delegate, the Delegate reasonably found that the Complainant did not intend to quit. The evidence I am referring to includes:

(a) the Complainant either said, "*I'm done*" or "*I'm done listening to you*" and then immediately left the workplace on March 11, 2020;

(b) the Complainant said they did not intend to quit;

(c) the Complainant left the photos of their children and makeup at their desk;

(d) the Complainant texted Mr. Dhindsa on March 11, 2020 and said, "*Hi, should I come into work tomorrow so we can talk?*" and Mr. Dhindsa replied a few minutes later with, "*Ok*";

(e) upon arriving at the workplace on March 12, 2020, the Complainant texted Mr. Dhindsa to ask him what they should do and waited for instructions;

(f) while waiting for Mr. Dhindsa, the Complainant tried to log on to their work computer and asked Ms. Downton if their password had changed; and

(g) when Mr. Dhindsa met with the Complainant, they told him they had not quit.

51. I also conclude the Delegate's decision was reasonable with respect to her determination that there was no just cause for termination. The Delegate's conclusion that there was no wilful misconduct was reasonable based on the evidence before her. Importantly, there was no evidence of any deliberate or wilful intent in the Complainant's conduct and certainly no deceitful conduct that warranted summary dismissal: see *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. The internet browsing records showed various websites visited by the Complainant, but there was no evidence that all of the browsing was done for the Complainant's personal use, given that Mr. Dhindsa relied on them to do things on the internet for him, which were unrelated to the Complainant's job tasks, and there was no evidence on which to find that all of the Complainant's internet use was active use and did not occur because they had websites open and running in the background while they were working.

52. Dhindsa also appeals the penalty for contravening section 34 of the *ESA* (minimum daily hours). Given the Delegate's conclusion that Dhindsa violated section 34, there is no basis on which to appeal the penalty. Section 98 provides that once the Director has found a contravention of the *ESA*, the person who contravened the *ESA* is subject to a mandatory penalty.

53. Although Dhindsa did not expressly appeal the Delegate's finding that it violated section 34, its Appeal Form contains submissions (see "History of the Proceedings" at paragraph 13) that are essentially an argument that the Delegate failed to observe principles of natural justice in making the Determination: Dhindsa was not advised via the Preliminary Assessment that the Delegate was considering a possible violation of section 34 and so Dhindsa did not have notice of this issue and was not given an opportunity to respond.

54. Principles of natural justice (also called procedural fairness) are, in essence, procedural rights that ensure that parties know the case made against them, are given an opportunity to reply to the case against them and have their case heard by an impartial decision-maker: see *AZ Plumbing and Gas Inc.*, BC EST # D014/14 at para. 27. Procedural fairness requirements in administrative law are functional, and not technical, in nature. They are also not concerned with the merits or outcome of the decision. The question is whether, in the circumstances of a given case, the party that contends it was denied procedural fairness was given an adequate opportunity to know the case against it and to respond to it: *Petro-Canada v. British Columbia (Workers' Compensation Board)*, 2009 BCCA 396 at para. 65.

55. I find Dhindsa's argument about section 34 has no reasonable prospect of success. First, under section 76(2) of the *ESA*, the Director has broad discretion in investigating compliance with the *ESA* and may even conduct an investigation without receiving a complaint. Second, from the Preliminary Assessment, Dhindsa knew that the Delegate had, on a preliminary basis, concluded that the Complainant did not quit on March 11, 2020. Thus, Dhindsa had notice that by terminating the Complainant on March 12, 2020, any associated issues were in play in the investigation even though not mentioned in the Preliminary Assessment. These issues include not paying the Complainant for coming into work on March 12, 2020, and whether there was just cause to terminate the Complainant, a point Dhindsa raised in its response to the Preliminary Assessment.

ORDER

56. Pursuant to sub-section 114(1)(f) of the *ESA*, this appeal has no reasonable prospect of success and pursuant to sub-section 115(1)(a) of the *ESA*, I confirm the Determination, dated October 30, 2020.

Maia Tsurumi
Member
Employment Standards Tribunal