Employment Standards TRIBUNAL

Citation: Gagandeep Kaur (Re)
2021 BCEST 26

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Gagandeep Kaur
(the "Employee")

- 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.: 2021/002

DATE OF DECISION: March 10, 2021

DECISION

SUBMISSIONS

Inderbir Singh Bedi — on behalf of Gagandeep Kaur

OVERVIEW

1. This is an appeal by Gagandeep Kaur, (the "Employee") of a December 2, 2020 Determination (the "Determination") issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director determined that the Employer had not contravened the *Employment Standards Act* (the "*ESA*") and that no wages were owed to the Employee. The Director decided that no further action would be taken.

3. The grounds for the appeal are that the Director erred in law and failed to comply with the principles of natural justice in making the Determination.

4. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions, I found it unnecessary to seek submissions from the Employer or the Director.

5. 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 Employee, and the Reasons for the Determination.

FACTS

6. The Employee was hired as a bookkeeper and income tax preparer for A Plus Accounting Inc. (the "Employer") from January 16, 2019, until August 28, 2019. On August 29, 2019, the Employee filed a complaint with the Director alleging that the Employer terminated her employment because she was pregnant.

7. The Employee was hired by Kirpal Athwal ("Ms. Athwal"), the sole director and officer of the Employer. Ms. Athwal has been in business as a certified bookkeeper for over 20 years. The Employer's office is located in Ms. Athwal's mother's home, and is accessed by a separate entrance.

8. The Employee worked a 7.5 hour day and was a paid on an hourly basis. During tax season, she worked overtime hours, largely on Saturday.

9. Ms. Athwal's evidence was that, shortly after hiring the Employee, she noted a number of errors in her work, which she pointed out to the Employee, and gave her written instructions on how to perform the work. She then asked the Employee to stop performing bookkeeping tasks and to focus on tax preparation. Ms. Athwal testified that she had to redo all the Employee's bookkeeping work. She did not

give the Employee any written warnings because she believed it would be uncomfortable to do so given that the Employee was the only employee.

10. During tax season, the Employee was responsible for answering the telephone and booking tax preparation appointments. Despite instructions from Ms. Athwal to book clients according to their needs, the Employee overbooked her, at times booking three clients in one 15-minute block and booking clients during her lunch hour. She said that she occasionally had to deal with upset and frustrated clients and had to rearrange appointments made by the Employee.

11. The Employer's evidence was that the Employee worked some Saturdays in February, March and April, the busy tax season. She brought her child with her on several occasions, even though she did not seek Ms. Athwal's permission to do so, and Ms. Athwal's mother cared for the Employee's child without compensation.

12. In May 2019, Ms. Athwal was away from the office for two weeks and brought her computer with her because she expected she might be required to respond to clients' questions. Ms. Athwal instructed the Employee to keep the office doors and windows locked, and not to give her telephone number out while she was away. Despite this instruction, Ms. Athwal received multiple telephone calls on her personal phone from clients, and believed the Employee had given out her number. Ms. Athwal also observed, by way of a remotely accessed security camera, the Employee leaving the office doors and windows open. Ms. Athwal spoke to the Employee, who confirmed she would not do that in the future. Despite this caution, Ms. Athwal's mother confirmed that the door had been left unlocked at times.

13. Ms. Athwal's evidence was that she gave the Employee a number of verbal warnings about her performance, but did not document those conversations. The Employer identified other performance issues, including misfiled documents and failing to provide clients with complete documentation.

14. In June 2019, the Employee informed Ms. Athwal that she was pregnant, but did not say what her due date was or when she expected to take a maternity leave. Ms. Athwal said that she was excited to hear the news, and told the Employee not to sit on the ground or lift heavy documents. She said that she accommodated the Employee's request for absences for doctor's appointments and lateness for work. Ms. Athwal also said that her mother also prepared special food for the Employee and her family.

15. According to the Employer, the Employee asked her about her work options during her pregnancy. Ms. Athwal's evidence was that she told the Employee if she was not feeling well, she could request a note from her doctor and go on sick leave, and receive EI benefits.

16. In August 2019, the Employee requested a letter of employment from Ms. Athwal in order to obtain a mortgage. Ms. Athwal provided the Employee with a letter on August 12, 2019, which set out her wage rate, her period of employment and confirmed that the Employee was employed full time.

17. Ms. Athwal was away from work from August 21 to 25. She reminded the Employee not to give out her personal telephone number, and to confirm clients' identities using tax information before providing any documentation to them. While she was away, Ms. Athwal received messages from her clients informing her that that they were not receiving documents they had requested. In particular, she received a message from a mortgage broker seeking documents on an urgent basis. After forwarding the message

to the Employee, Ms. Athwal received several phone calls from the client informing her that the requested documents had not been provided and that they would be holding her personally responsible for any financial losses if the transaction did not close.

18. Ms. Athwal returned to the office on the 26th, frustrated with the Employee's failure to provide the requested documents for the mortgage client, and asked the Employee for an explanation. The Employee denied any knowledge of the issue and told Ms. Athwal that since she was back, she could provide the client with the information. The Employee also asked Ms. Athwal for the letter she requested for her mortgage and Ms. Athwal reminded her that she had already given it to her. Approximately one half hour later, the Employee told Ms. Athwal that she was not feeling well and went home.

19. The Employee texted Ms. Athwal the morning of August 27th to inform her she was not feeling well and would not be coming to work. Ms. Athwal testified that she telephoned the Employee to discuss her health and did not terminate her employment during that call.

20. On August 28, the Employee arrived at work and asked Ms. Athwal to amend the employment letter to reflect a positive view of her work. Ms. Athwal declined to do so, stating that she had already provided the Employee with the letter and that she had already told her she was not doing a good job. According to Ms. Athwal, the Employee became angry and told Ms. Athwal that she would "regret it." Ms. Athwal told the Employee not to say anything more and the Employee left the office to call her husband. Ms. Athwal's evidence was that she then terminated the Employee's employment effective September 11, 2019, for insubordination and poor work performance. The Employee left the office after receiving the letter and Ms. Athwal prepared two cheques for the Employee, one for final wages and one for one weeks wages as notice, based on her understanding of her obligations as a result of information provided by Service Canada. Ms. Athwal's attempt to provide the money to the Employee was unsuccessful, as mail sent by regular and registered mail was returned. Ms. Athwal made payment of final wages to the Branch prior to the delegate's hearing of the complaint.

21. Ms. Athwal denied that the Employee's pregnancy was a factor in terminating her employment; rather, she said that she terminated the Employee due to her poor work performance, her insubordination and because she felt the Employee had threatened her. The Employer did not hire any other employees in August 2019.

22. The Employee's version of events was provided, in part, through her spouse, and the Employee was apparently unwilling or unable to explain to the delegate why she could not answer questions or give evidence on her own account.

23. The Employee disagreed with virtually all of the Employer's evidence. She denied that she had been warned about her performance and contended that her employment was terminated because she was pregnant.

24. The Employee testified that she brought her child to work on one occasion with the Employer's permission, and denied that Ms. Athwal's mother looked after her child or provided her with food. The Employee denied that Ms. Athwal ever spoke to her about any concerns, any errors in bookkeeping, misfiled documents or problems in booking appointments. The Employee denied that she gave Ms. Athwal's personal telephone number to anyone or double-booked appointments. When asked about Ms.

Athwal's recorded schedules, the Employee did not know why multiple appointments had been booked for one time and suggested that the Employer had altered the records.

25. The Employee's evidence was that Ms. Athwal's behaviour towards her changed after she informed Ms. Athwal she was pregnant, with Ms. Athwal sending her home and telling her to go on sick leave even though the Employee told her that she felt fine.

26. The Employee denied that she failed to respond to emails during Ms. Athwal's absence in August and was unable to recall specific emails referred to by Ms. Athwal or recall how or when she responded to them. She denied that she ignored any client emails in August. The Employee also did not recall any telephone calls regarding an urgent mortgage approval for a client.

27. Although the Employee agreed that she left work on August 26 after working for a few hours, she contended that Ms. Athwal's recollection of the conversation regarding the events of that morning was fabricated. The Employee also agreed that she texted Ms. Athwal the following morning as she was not feeling well and that she and Ms. Athwal subsequently spoke by telephone. However, the Employee contended that during that phone call, Ms. Athwal told her she could go on sick leave or Ms. Athwal would terminate her employment. The Employee's evidence was that she could not obtain a medical certificate because she was in good health. However, her evidence was that she became very upset after her discussion with Ms. Athwal and went to the hospital as she was feeling unwell. The Employee's evidence was that she informed the doctor that she was upset because her employer was terminating her. According to the Employee, the doctor gave her a note excusing her from work on August 27 and 28 if her symptoms persisted; and told her to give the note to her employer because she could not be terminated while she was pregnant.

28. The Employee said that she gave the doctor's note to Ms. Athwal on the morning of August 28, 2019, and Ms. Athwal ignored it. The Employee said that she worked for about 20 minutes and then approached Ms. Athwal about an employment letter to obtain a mortgage. According to the Employee, Ms. Athwal prepared the letter while she continued to work, and when Ms. Athwal gave it to her, she noticed that it was dated August 10 rather than August 28. According to the Employee, Ms. Athwal told her that she did not want to have the same date on the termination letter as the mortgage letter. According to the Employee, Ms. Athwal asked her if she wanted to go on sick leave, to which the Employee replied that her doctor would not provide her with a medical certificate because her health was fine.

29. The Employee said that she did not receive her final pay and that she changed her address in November.

Determination

30. The delegate found that under section 126 of the *ESA*, the burden was on the Employer to demonstrate that the employee's pregnancy was not the reason for terminating the employment relationship. The delegate concluded that the Employer had met this burden.

31. The delegate found that, in the absence of any documentary evidence supporting the position of either of the parties, she had to consider the credibility of their evidence. After setting out the test for the assessment of credibility, the delegate wrote that she placed little weight on the evidence of the

Employee's husband, noting that he had no first-hand knowledge of any of the events and that he had an interest in the outcome.

32. The delegate placed greater weight on the Employer's evidence because Ms. Athwal had a better recall of details, identified specific instances of the Employee misfiling documents, explained the details of the mortgage issue and recounted other specific incidents in the employment relationship. The delegate noted that the Employer provided schedules identifying multiple appointments, which the Employee confirmed making, and noted the Employee's denials of any errors while contending that the Employer had altered the calendar for the purposes of the hearing.

33. The delegate considered the Employer's evidence showing the Employee's errors in calculating GST amounts, and noted the Employee's denial she made any errors and inability to recall specific files, even though the Employer had submitted her evidence in advance of the hearing.

34. The delegate also noted the Employee's evidence that she told her Employer that her health was good and that her doctor would not issue her a medical note, and found it to conflict with her evidence at the hearing. That evidence consisted of a doctor's note that she was a high-risk pregnancy and was being followed by two medical specialists in addition to her family doctor.

35. Overall, the delegate found Ms. Athwal's evidence to be specific and consistent with documentary evidence while the Employee's evidence was general and not consistent with any documentary evidence.

36. The delegate noted that Ms. Athwal did not allege that the Employee's work performance was negatively impacted by her pregnancy or that the Employee was absent from work as a result of her pregnancy. She also noted that Ms. Athwal terminated the Employee's employment two months after learning of her pregnancy, which she found reduced the likelihood that the termination was in response to the Employee's disclosure.

37. The delegate concluded that Ms. Athwal's explanation of the events leading to the termination of the Employee's employment was reasonable and the Employee's version to be less believable and determined that the Employer had not contravened the *ESA*.

ANALYSIS

38. Section 114(1) of the *ESA* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the 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.

39. 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; and

(c) evidence has become available that was not available at the time the determination was being made.

40. 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. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the decision. I am not persuaded that the Employee has met the burden in this case.

41. I will address each ground of appeal in turn.

Failure to comply with the principles of natural justice

42. 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.

43. There is no evidence, or suggestion in the appeal submissions, that the Employee was not provided with the Employer's documents in advance of the hearing or that she was denied the opportunity to respond to that evidence.

44. The Employee argued that the delegate was biased against her and showed "favoritism" towards the Employer, who was represented by counsel who attended law school with the delegate. The Employee asserted that she was not able to properly present her case because the delegate was biased toward her "best friend," counsel for the Employer.

45. In the Determination, the delegate noted that, at the outset of the hearing, she advised the parties that she attended law school with Manjot Cheema, the Employer's counsel. However, the delegate wrote that she had not had any contact with Ms. Cheema since that time, which was in excess of five years. She noted in the Determination that, after disclosing this information, neither party objected to the delegate proceeding.

46. On appeal, the Employee agrees that she did not object at the time but that she had no idea what "[the delegate and Ms. Cheema] planned for."

47. The Employee submits that the delegate "wrote 4.5 pages of dictation provided by her best friend" and that the Determination demonstrated that she "was not even allowed to say anything during the case…".

The Employee advances a number of similar arguments, suggesting that the delegate's decision to prefer the evidence of the Employer was influenced by this friendship.

48. Allegations of bias against decision makers are serious, and bare assertions unsupported by any evidence, or mere speculation, are insufficient to make out a claim that natural justice has been denied. The onus of demonstrating bias lies with the person who is alleging. (see *R. v. S.R.D.,* [1997] 3 S.D.R. 141, *Gallagher,* BC EST # D124/03, and *Chengalath*, 2018 BCEST 55)

49. While I understand the Employee believes that the delegate had made up her mind in favor of the Employer, I am unable to find that the delegate was actually biased.

50. The delegate wrote that she had no association with a former law school classmate for five years. There is no evidence before me that this statement is untrue, nor is there any evidence before me that, as the Employee contends, the delegate and counsel for the Employer were "best friends," either at law school or at the time of the hearing. On this basis alone, I would find no evidence of actual bias.

51. The delegate, quite properly, disclosed her previous association with counsel for the Employer. After having done so, the Employee did not object to her continuing to act as the decision maker. The Employee asserts bias for the first time after obtaining a decision which is not in her favour.

52. I am also unable to find that the Employee has satisfied the test for a reasonable apprehension of bias based solely on the undisputed fact that the delegate and counsel for the Employer attended law school at least five years prior.

53. In *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R., the Supreme Court of Canada repeated the test for reasonable apprehension of bias, first established in *Committee for Justice and Liberty v. National Energy Board* [1979] 1 S.C.R. 369:

> Public confidence in our legal system is rooted in the fundamental belief that those who adjudicate in law must always do so without bias or prejudice and must be perceived to do so. A judge's impartiality is presumed and a party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified. The criterion of disqualification is the reasonable apprehension of bias. The question is what would an informed, reasonable and right-minded person, having viewed the matter realistically and practically, and having thought the matter through, concluded. Would he think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly? (at para. 60)

54. In my view, the test for finding a reasonable apprehension of bias has also not been met. In my view an informed person would conclude that it was more likely than not that the delegate would decide the Employee's case fairly, given the presumption that the delegate is impartial, and the absence of any evidence of communication or association with counsel for the Employer for at least five years.

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

Errors of law

56. 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.

57. The Employee says that the delegate erred in preferring the Employer's evidence over hers, and in ignoring and misstating evidence. The Employee also contends that the delegate erred in failing to find contraventions of the *ESA*, specifically when the Employer did not pay her all wages owing within the time period provided in the *ESA,* and in misrepresenting the position contrary to section 8 of the *ESA*.

Credibility Assessment

58. The assessment of the credibility of the witnesses is within the authority of the delegate. Absent any persuasive evidence that the delegate's assessment was, for example, affected by bias, or made findings of fact that were unsupported by any evidence, I have no jurisdiction to interfere (see *Britco Structures Ltd.*, BC EST # D260/03).

59. The delegate wrote that the Employee attended the hearing with her husband, and that "[o]n several occasions she stated her preference that he provide evidence on her behalf. She did not explain why she preferred this and was able to answer questions and give evidence on her own account."

60. I find that the Employee's unwillingness to give some of her own evidence, and her inability to explain why her husband, who had no first-hand knowledge of any of the circumstances, was better placed to respond to some questions, did nothing to assist her credibility.

61. The Employee says that the delegate found the evidence of the Employer to be more credible, in part, because she could not recall all of the emails. The Employee says that she did not have access to any of the Employer's email correspondence and it was unreasonable for the delegate to find that she should be expected to be able to recall them all. She argues that this should not result in a finding that she was less credible.

62. What the delegate found, in fact, was:

> In respect of the mortgage file, Ms. Kaur said that she had responded appropriately to every single email she received but could not recall with detail that incident or any other issue. It is difficult for me to accept both that Ms. Kaur could be certain that she responded to every client email, and that she could not recall the details of particular client emails.

63. Given that the Employee denied that she ever made any mistakes, did not recall any evidence of poor work performance and alleged that the Employer edited the evidence after she left her employment, I am not persuaded that the delegate's credibility assessment was without any evidentiary foundation.

64. I am not able to conclude that the delegate's decision to prefer the evidence of the Employer, based on the fact that the Employer's evidence was specific, consistent with the documentary evidence and detailed, to be in error. I note that the Employee had been provided with the Employer's evidence in advance of the hearing so that she could, as best as she was able, recall as many details as possible. Her inability to respond to the Employer's assertions in any specific way other than a general denial does not support a conclusion that the delegate erred in her assessment of credibility.

Ignored evidence

65. The Employee argues that, although she was hired as a bookkeeper and income tax preparer, she was forced to perform work of a receptionist and Office Assistant. She says that the Employer issued a Record of Employment ("ROE") that indicated she was an Office Assistant, which "ruined her career" when she was interviewed by other employers. The Employee contends that the delegate erred by ignoring this evidence. She also seems to allege, for the first time on appeal, that the delegate failed to find that the Employer contravened section 8 of the *ESA* by misrepresenting the position she was hired for.

66. One of the difficulties with the Employee's argument is that her initial complaint, which the record indicates was confirmed in the mediation, was that her employment was terminated because of her pregnancy. There is no evidence that the Employee ever complained that the Employer misrepresented her position at the hearing before the delegate.

67. However, even if the Employee raised this issue, the ROE, which is completed by the Employer at the end of a period of employment, is used to calculate an Employee's entitlement to employment insurance benefits. It is not meant to be relied upon by a prospective employer, either for job accuracy or as a reference. Although the Employee testified at the hearing that she had to disclose the ROE description of her position with other employers, she was under no obligation to do so. The Employee also asserts that, because the ROE recorded her position as an Office Assistant, she did not get the job she applied for. However, there is nothing in the record that appears to support the Employee's assertion that a potential employer declined to hire her based on that document alone. There is no evidence about what that position was, or any information from the potential employer about the reason she was not hired. There was no evidence before the delegate that the Employee's "career was ruined" by the Employer's failure to accurately complete the ROE. If the delegate in fact communicated to the Employee that the ROE was not relevant to her complaint, I find no error in that decision.

68. The Employee also argues that the delegate did not consider why the Employer left her in charge of the office or terminated her employment sooner if she made so many mistakes during her employment. I find no error in the delegate's analysis of the evidence on the issue before her. That issue was not whether the Employee's employment was terminated for cause. Whether or not the Employer had just cause was not relevant, since the Employer paid the Employee her statutory entitlement as compensation for length of service under section 63 of the *ESA*. The sole issue before the delegate was whether the Employee was terminated because she was pregnant.

69. Section 54(2)(a) of the *ESA* provides that an employer must not, because of an employee's pregnancy, terminate the employee's employment. The delegate properly placed the burden on the Employer to establish, on a balance of probabilities, that the Employee's employment was not terminated because of her pregnancy.

70. Although the Employee originally complained that the Employer had failed to pay her wages and compensation for length of service, this issue was resolved by the parties in mediation prior to the hearing. The evidence was that the Employer had attempted to pay these amounts to the Employee by registered mail within the time period provided in the *ESA*, but the Employee had refused or returned the cheques. The Employer paid these amounts voluntarily, apparently through the mediation process. Given that this issue was resolved prior to the hearing, I find that the delegate did not err in not addressing this issue in the Determination. I note that the Employee was entitled, pursuant to section 63 of the *ESA*, compensation in an amount equivalent to one weeks' wages since she had worked less than one year. The record suggests that the Employer paid her an amount representing two weeks' wages. If the Employee is of the view that she is entitled to an additional amount by virtue of her employment agreement with the Employer, she must pursue that entitlement in another forum.

71. The Employee also argues that the delegate erred in her understanding of the evidence relating to her medical condition. In the Determination, the delegate noted that the Employee's evidence was that "she had no health issues relating to her pregnancy prior to August 2019, but later stated she had issues with her blood pressure while pregnant." The delegate found (at R11) that:

> Ms. Kaur stated that prior to the phone call from Ms. Athwal on August 27, her health was good during her pregnancy, and her doctors would not provide a medical note such that she would qualify for Employment Insurance medical leave. This evidence does not accord with the doctor's note she provided that although her condition was stable, she had a high-risk pregnancy and was being followed by two medical specialists in addition to her family doctor.

72. The Employee contends that her health deteriorated only after she was threatened with wrongful termination and that the delegate erred in law when she ignored or misapprehended the doctor's note.

73. I am unable to agree that the delegate misunderstood or ignored the medical evidence. The August 28 note indicated that the Employee had a high-risk pregnancy and was being followed by two specialists. While it may be that her health suffered due to stress relating to her employment, the evidence was that her health was not "fine" as she asserted at the hearing.

74. However, whether or not the delegate misunderstood the medical evidence, that evidence was only part of the analysis about whether or not the Employee's employment was terminated because of her pregnancy. The delegate also considered the Employer's evidence that she did not terminate the Employee for several months after being told about the pregnancy, that she accommodated many instances of lateness and illness due to the Employee's pregnancy, and that she was happy for the Employee. The Employee did not dispute this evidence. The delegate concluded, on balance, that the Employer had discharged her burden of demonstrating that the reason for terminating the Employee was not related to her pregnancy. I find no basis to interfere with this conclusion.

75. I conclude that there is no reasonable prospect the appeal will succeed, and dismiss the appeal pursuant to section 114 (1)(f) of the *ESA*.

ORDER

76. Pursuant to section 115 of the *ESA*, I confirm the Director's December 2, 2020 Determination.

Carol L. Roberts
Member
Employment Standards Tribunal