Citation: All-West Crane & Rigging Ltd. (Re)
2021 BCEST 29

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

All-West Crane & Rigging Ltd.
(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.: 2021/008

DATE OF DECISION: March 30, 2021

DECISION

SUBMISSIONS

Barb van Halderen — on behalf of All-West Crane & Rigging Ltd.

OVERVIEW

1. This is an appeal by All-West Crane & Rigging Ltd. (the "Employer") of a December 24, 2020 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director determined that the Employer had contravened sections 63 and 58 of the *Employment Standards Act* (the "*ESA*") in failing to pay Gerardus Robert Paul van Halderen (the "Employee") annual vacation pay, compensation for length of service, and interest in the total amount of $11,372.74. The Director also imposed two administrative penalties in the total amount of $1,000 for a total amount owing of $12,372.74.

3. The ground for the appeal is that evidence has become available that was not available at the time the Determination was being made.

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 Employer, and the Reasons for the Determination.

FACTS

6. The Employer is a company incorporated in British Columbia that operates a crane operation and rental business. The Employee's father, Gerardus John W. van Halderen, is the sole director of the company.

7. The Employee was employed as a crane operator and rigging supervisor until May 24, 2019. On September 13, 2019, he filed a complaint alleging that he was entitled to compensation for length of service.

8. The Director investigated the complaint and both parties presented their material by way of email messages and written submissions. The delegate also spoke to the Employee by telephone.

9. The Employer informed the delegate that it terminated the Employee for cause, specifically, poor performance. The reasons for that were, briefly, as follows.

10. In order to maintain a designation known as a Certificate of Recognition ("COR"), the Employer was required to conduct an internal safety audit on a regular basis. The designation recognizes companies that develop and implement health and safety systems which meet provincial industry standards.

Companies that meet the standards are able to receive financial incentives from WorkSafe BC. Internal audits are conducted by trained company employees or external auditors hired by the company.

11. In April 2019, the Employer and the Employee agreed that the Employee would take the training course so he could conduct the company's audit. The Employer registered the Employee and paid his course fees, wages and accommodations during his training. The Employee obtained his certification on May 3, 2019. The COR representative, the Employee and the Employer agreed that the Employee would conduct an internal safety audit between May 3 and 17, 2019. The Employer said that Employee was to interview employees between May 6 and 10, attend a post-audit meeting on May 17, and submit the final audit on May 22, 2019. The Employee was given reduced job duties so he could meet the Employer's obligations. The parties had a number of discussions about the progress of the audit.

12. The Employer said that the Employee did not return to work on May 24, 2019 as expected, and had not completed a request for time off or received approval to be absent that day. The Employer's director and the Employee had what the delegate characterized as a "heated discussion" regarding the Employee's absence. According to the Employee, he reminded his father that they had agreed he would not be at work that day because he had contractors at his house and when he offered to come to work at noon, his father stated that was not good enough.

13. The Employee said that he told his father that it was impossible to complete the audit by the deadline but his father refused to listen, telling him that he would hire an external auditor and get someone else to run the company's truck. Later that day, the Employer terminated the Employee's employment.

14. The Employer told the delegate that the Employee's failure to complete the audit resulted in the company losing its COR safety status for that year, and the company had suffered a financial loss.

15. The Employee contended that he was under severe stress due to the workload the company had asked him to perform. He said he was dealing with a medical condition and receiving treatment at the time, and that even though the Employer was aware of his medical condition, it insisted the audit had to be completed. The Employee said that he was not aware that the company had agreed to have the audit completed by May 22, 2019, and that, if he had been asked, he would have told the Employer that it would not be possible to complete the audit in the time the Employer had agreed to. In his view, an audit took several weeks to complete, and he had other work to perform in addition to conducting the audit.

16. The Employee said that he often argued with his father and was not certain why he had been fired. He said that he had never been told at any time that his failure to complete the audit by May 22, 2019 would result in his termination.

17. After terminating the Employee's employment, the Employer offered him an opportunity to return to work because he is a member of the family. The Employee declined the offer.

18. Although the Director issued a Demand for Employer Records, the Employer failed to provide those records.

19. On October 20, 2020, the delegate issued a preliminary assessment of the complaint finding that, based on the information he had received, the Employee was entitled to compensation for length of service.

The Employer provided additional information to the delegate regarding the audit process and the circumstances regarding the termination of the Employee.

Determination

20. The delegate found that under section 63 of the *ESA*, the burden was on the Employer to demonstrate that it had just cause to terminate the Employee's employment. The delegate concluded that the Employer had not met this burden.

21. The delegate found that to establish just cause for poor performance, an employer had to demonstrate that a reasonable expectation was communicated to the employee, that the employee was warned that failure to meet the standard would result in termination, that a reasonable period of time was provided for the employee to meet the standard, and that the employee failed to meet the standard. The delegate also found that the employee should be clearly aware of the reason for their dismissal.

22. The delegate noted that the Employer's position was that it terminated the Employee on May 24, 2019, because he did not complete the audit by May 22, 2019. The delegate considered an April 3, 2019 email from COR to the Employer noting that the audit was to be completed by May 22, 2019. The delegate found that the Employee did not receive that email and did not participate in discussions between COR and the Employer concerning the audit's due date. The delegate also noted the Employee's evidence that he would not have agreed to this date because it would have been impossible. The delegate concluded that the Employer had not established that it communicated this deadline to the Employee.

23. The delegate also found that the Employer had not informed the Employee that a failure to complete the audit by May 22, 2019, would result in his termination.

24. The delegate noted that there was no dispute that the Employer did not offer the Employee an opportunity to finish the audit or seek an extension to the completion due date before terminating his employment. The delegate further noted that the Employer invited the Employee to return to work after terminating him, which suggested that the Employee's actions did not irreparably damage the employment relationship.

25. The delegate concluded that the Employer had not met the burden of showing cause for terminating the Employee and that the Employee was entitled to compensation for length of service in an amount equivalent to eight weeks' wages. The Employee informed the delegate that the Employer had paid him an amount equivalent to two weeks wages at the time of his termination, and the Employer failed to submit any information to confirm or challenge the Employee's information. The delegate determined that the Employee was entitled to additional wages in an amount equivalent to six weeks' wages, plus vacation pay.

ARGUMENT AND ANALYSIS

26. Section 114 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.

27. Section 112(1) 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.

28. 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. It is not an opportunity to have the case "re-visited" by the Tribunal. I am not persuaded that the Employer has met the burden in this case.

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

New Evidence

30. The Employer says that it has discovered that "some claims made are false" and that there were some "document errors" in the material provided to the delegate. The Employer also says that payroll records, which it had prepared in response to the Demand for Employer Records, were mistakenly not submitted to the delegate. The Employer submitted this "new evidence" with the appeal submissions.

31. In *Re Merilus Technologies* (BC EST # D171/03) the Tribunal established the following four-part test for admitting new evidence on appeal:

(a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;

(b) the evidence must be relevant to a material issue arising from the complaint;

(c) the evidence must be credible in the sense that it is reasonably capable of belief; and

(d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

32. It appears the "new evidence" submitted on appeal was only recently discovered by the Employer, or was discovered by the Employer not to have been submitted during the investigation through inadvertence.

33. I find that the "new evidence" does not meet the Tribunal's test for admitting new evidence on appeal.

34. All the material upon which the Employer seeks to rely on in the appeal were available during the investigation, had the Employer exercised due diligence. The record confirms that the Employer sought a number of extensions of time in which to submit evidence due to the workload it was facing. Those extensions, which extended the time period by several months, were granted. An appeal is not an opportunity for the Employer to present material it overlooked, or mistakenly never sent to the delegate at first instance because of a lack of due diligence.

35. Although I find that the evidence, including the email correspondence, is credible, I am not persuaded that it would, either on its own or when considered with other evidence, would have led the Director to a different conclusion on the issue of whether or not the Employer had just cause. I will address this issue further below.

36. Finally, the Employer contends that the Record of Employment ("ROE") it issued to the Employee inaccurately records the Employee's start date, and argues that if the Employee is entitled to compensation, it should be for seven years of employment, not eight. While this is not "new evidence," the Employer submits that the evidence it submitted during the investigation was erroneous.

37. I find no basis to conclude that the delegate's determination that the Employee was entitled to an additional six weeks of wages as compensation for length of service to be in error. The ROE was prepared by the Employer, and the Employee's recorded start date coincided with the Employee's recollection of the commencement of his employment. Furthermore, the delegate offered the Employer several opportunities to respond to the Employee's allegations as well as his preliminary findings, in which the Employee's start date was identified as October 27, 2008. An appeal is not an opportunity for the Employer to submit what it contends is accurate information for the first time after having had many earlier opportunities to provide reliable information.

Failure to comply with the principles of natural justice

38. 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.

39. The Employer believes that the delegate did not properly get its "side of the story" and did not investigate the accuracy of the "rebuttal" statements.

40. There is no evidence, or suggestion in the appeal submissions, that the Employer was denied natural justice. It had full opportunity to know what was being alleged, and to make submissions to the delegate.

As noted above, the Employer sought, and was granted, a number of extensions of time in which to respond to the Employee's allegations as well as to respond to the delegate's preliminary assessment.

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

Errors of law

42. 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.

43. Section 63 of the *ESA* provides that an employer must pay compensation for length of service to an employee upon termination of employment. This liability can be discharged if the employer can successfully demonstrate that the employee is terminated for just cause.

44. The Employer argued that the Employee was terminated for cause; specifically, his failure to complete the safety audit by May 22, 2019.

45. The Tribunal has relied on common law principles to assess whether conduct constitutes just cause (see, for example, *Kenneth Kruger*, BC EST # D003/97, *Super Save Gas*, BC EST # D374/97). Those principles are as follows:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    1. A reasonable standard of performance was established and communicated to the employee;
    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
    4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered

other options, such as transferring the employee to another available position within the capabilities of the employee.

46. I find no error in the delegate's finding that the Employer bore the burden of demonstrating just cause. I also find no error in the delegate's analysis of whether or not the Employer had met that burden. There was no evidence before the delegate that the Employer established and communicated a reasonable standard of performance to the Employee. There was no evidence the Employee was clearly and unequivocally told that his job would be in jeopardy if he did not complete the audit by a particular date.

47. Although the COR Auditor Training course manual sets out time frames within which an audit should be completed and the Employee was copied on emails in which deadlines were discussed, neither of these documents constitute a clear direction to the Employee that his job was in jeopardy if the audit was not completed by May 22, 2019.

48. The Employer submits that to "constantly warn an employee" that they were not meeting a standard could be "construed as the employer harassing and causing undue duress amongst employees" and suggests that employees have a duty to report to an employer if they cannot complete a task as required. The Employer also argues that to warn the Employee that his job was in jeopardy if he did not complete the audit by May 22, 2019 "would be considered confrontational and deflating of employee moral (sic)…". I infer from these statements that the Employer concedes it did not warn the Employee that his failure to complete the audit by May 22, 2019 would result in his termination. Consequently, I find no error in the delegate's conclusion that the Employer had not discharged its burden of establishing just cause. While the Employer has the ability to manage its workforce as it sees fit, its actions must meet legal standards and criteria. Its failure to adequately notify the Employee of his potential jeopardy because it believed that doing so would be confrontational does not meet the legal principles required to discharge its burden of establishing just cause.

49. Furthermore, the fact that the Employer offered the Employee the opportunity to return to the company after terminating his employment supports the delegate's conclusion that the employment relationship was not fundamentally and irreparably damaged.

50. 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

51. Pursuant to section 115 of the *ESA*, I confirm the Director's December 24, 2020 Determination in the amount of $12,372.74, plus any interest that has accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal