Citation: Sonia Bailey (Re)
2021 BCEST 3

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Sonia Bailey
(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.: 2020/127

DATE OF DECISION: January 8, 2021

DECISION

SUBMISSIONS

Butch Bailey on behalf of Sonia Bailey

OVERVIEW

1. This is an appeal by Sonia Bailey (the "Employee") of a July 28, 2020 Determination issued by a delegate of the Director of Employment Standards (the "Director").

2. The Director determined that the *Employment Standards Act* (the "*ESA*") had not been contravened and that no wages were owed to the Employee.

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. The Employee also contends 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 Employee, and the Reasons for the Determination.

FACTS

6. Northern Gold Foods Ltd. (the "Employer") operates a breakfast cereal manufacturing business. The Employee was employed as a wrapper operator from June 16, 2008, until March 18, 2019, following which she was on medical leave as a result of a workplace injury.

7. On October 23, 2019, WorkSafe BC ("WorkSafe") issued a decision in which the Employee's injury was considered to be a permanent injury. On October 25, 2019, the Employer informed the Employee that, as a result of the WorkSafe decision, it had concluded that she would not be returning to work. The Employer terminated the Employee's benefits, issued a Record of Employment, and paid her vacation pay.

8. On November 6, 2019, the Employee filed a complaint with the Employment Standards Branch (the "Branch") alleging that the Employer contravened the *ESA* in failing to pay compensation for length of service. The Employee alleged that the Employer terminated her employment on October 25, 2019, when it failed to accommodate her disability. In the alternative, the Employee argued that the WorkSafe BC decision was premature because it was not clear her injury was permanent. In the further alternative, the Employee alleged that it was a term of her employment contract that during extended absences from work, she would continue to receive group benefits for up to one year.

9. The Director's delegate conducted an oral hearing on July 9, 2020.

10. The delegate addressed a number of preliminary issues, including admissibility and relevance of documents relating to a duty to accommodate. She asked the parties if the Employee had appealed the October 23, 2019 WorkSafe decision. The Employer informed the delegate that it appeared the Employee had not. In response to the delegate's inquiry, Butch Bailey ("Mr. Bailey"), the Employee's representative, submitted several medical reports that he asserted were before the WorkSafe decision maker at the time the decision was made and asked the delegate to send the reports "to your experts to evaluate." The delegate informed Mr. Bailey that she would not accept the new evidence. When the delegate again asked Mr. Bailey whether the Employee had appealed the October 23, 2019 WorkSafe decision, Mr. Bailey's response addressed the substance, that is the correctness, of that decision.

11. The delegate informed Mr. Bailey that it was not the role of the Branch to send evidence to experts for their opinion and that she would not accept expert evidence. She also informed Mr. Bailey that she would not accept any further submissions. Mr. Bailey then made a further submission contending that he was not asking the Branch to get an expert opinion, but that "the reports speak for themselves" and demonstrated that the Employer "prematurely" terminated the Employee's employment.

12. The facts before the delegate were that the Employee initiated a WorkSafe claim on March 21, 2019, for a "right shoulder issue." Although WorkSafe initially determined that the Employee was able to participate in a graduated return to work on July 15, 2019, it reported that on June 26, 2019, the Employee informed her WorkSafe case manager that she had no intention of returning to work. The Employee did not return to work on modified duties. On August 13, 2019, the WorkSafe case manager issued a decision finding the Employee ineligible for wage loss benefits. On October 23, 2019, the WorkSafe case manager changed her position and decided that the Employee had a permanent injury and could not return to her pre-injury job.

13. The Employer took the position that, based on the WorkSafe decision as well as the Employee's statement that she was unwilling to return to work, the Employee had quit. The Employer conceded that although the October 23, 2019 WorkSafe decision did not state that the Employee could not return to work, that was its conclusion given that the Employee could not return to her pre-injury job, the Employer had no alternate work available for her, and WorkSafe referred her to permanent wage loss benefits and vocational retraining.

14. The Employer acknowledged that on April 20, 2020, a WorkSafe review officer found that while the Employer had been asked in June 2019 about the availability of temporary light duties, a graduated return to work plan was never proposed to the Employer and the medical evidence showed that the Employee was unable to return to work at that time in any capacity.

15. Mr. Bailey argued that the Employee had been terminated because she was injured as a result of the Employer's "negligence" and because she "exposed" the Employer's violations of human rights. Mr. Bailey also argued that the Employee's first WorkSafe case manager "colluded" with the Employer. The Employee contended that she did not tell the case manager that she was unwilling to return to work; rather, she said that she was unable to do so at that time due to her injury, and the case manager assured her that she was compliant with WorkSafe requirements.

16. Mr. Bailey testified that between June and August 2019, the Employee attended the workplace with an occupational therapist on two occasions to discuss a graduated return to work. Mr. Bailey also stated that he emailed the Employer in September 2019 asking if he would agree to accommodate the Employee. Mr. Bailey argued that this evidence was inconsistent with the Employer's assertion that the Employee quit her employment.

17. Mr. Bailey submitted that the Employer was a large business and could easily have accommodated the Employee, but it refused to do so. He further asserted that, under Human Rights legislation, the Employer had an obligation to give the Employee a job unless it would suffer undue hardship. Mr. Bailey contended that if the Employee could not return to her pre-injury job and the Employer did not accommodate her, the Employee was entitled to compensation for length of service. Mr. Bailey agreed that the Employee had received wage loss benefits through WorkSafe BC from March 2019 to October 21, 2019, and permanent wage loss benefits thereafter.

18. Mr. Bailey stated that the Employee did not appeal the October 23, 2019 WorkSafe decision that her injury was permanent because she was only concerned with having her wage loss benefits reinstated.

Determination

19. The delegate noted that Mr. Bailey had submitted new evidence, consisting of medical reports, following the hearing. When the delegate informed Mr. Bailey that she was not accepting the reports, he responded that she was obligated to because it showed that the Employee had made progress with her injury. Mr. Bailey contended that the delegate ought to send the reports to an expert to evaluate, and then argued that the delegate should assess the documents herself to determine if the WorkSafe case manager's October 23, 2019 decision was premature.

20. The delegate noted that the Employee had the opportunity to dispute the October 23, 2019 decision and chose not to do so. The delegate found that it was not her role under the *ESA* to review the WorkSafe decision, which had been made under the *Workers Compensation Act* and associated policy guidelines, and did not consider the medical reports submitted by the Employee.

21. The delegate considered the provisions of section 63 of the *ESA* as well as the Tribunal's test for determining if an employee had quit their employment, as set out in *Burnaby Select Taxi Ltd. and Zoltan Kiss* (BC EST # D091/96):

> The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent[ion] to quit employment; objectively, the employee must carry out an act inconsistent with her or her further employment.

22. The delegate noted that the Employer relied on the WorkSafe decision as evidence that the Employee quit. The delegate also noted the evidence of the Employee and her spouse that the Employee denied telling the case manager that she did not intend to work, that the Employee went to the workplace in April and June 2019 to discuss what duties she was able to perform, and that on August 23, 2019, the Employee and her husband met with the Employer's human resources officer and told her that she had not quit. The delegate further noted that on September 19, 2019, the Employee emailed the Employer to

ask if the Employer would accommodate her disability. The delegate found these facts inconsistent with a conclusion that the Employee intended to quit.

23. The delegate also considered the Employer's position that the employment contract was frustrated when the WorkSafe case manager determined that the Employee's injury was permanent and that she could not return to her pre-injury job. The delegate noted Mr. Bailey's argument that the Employee's occupational therapist did not decide that the Employee's injury was permanent until December 11, 2019, but found that, because the Employee did not appeal the October 23, 2019 WorkSafe decision, that decision was the best evidence of the Employee's medical condition. The delegate noted that the October 23, 2019 WorkSafe decision found that the Employee would be unable to return to her pre-injury job for the foreseeable future, and that she would be referred to permanent disability benefits and vocational training for another job. The delegate concluded that it was reasonable for the Employer to rely on this decision in concluding that the Employee would not be returning to work.

24. The delegate determined that the Employer had not acted prematurely in cancelling the Employee's benefits and that it had no obligation to continue the Employee's benefits for a further five months under its benefits policy. The delegate found that the Employer's benefits policy "sets out its employees' *maximum* entitlement to benefit while they are on an extended leave from work; it is not a 'guarantee' of employment for a year while an employee is on an extended leave."

25. The delegate also relied on the Tribunal's decision in *Mohammed Khan* (BC EST # D067/01) in which the Tribunal found that an employer was not required to pay compensation for length of service where an employee was incapable of performing the contract of employment as a result of a permanently disabling workplace injury. The delegate found little to differentiate the facts in *Khan* from those before her.

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, 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 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 the appeal 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 done so in this case.

29. Mr. Bailey submitted over 70 emails to the Tribunal between August 27, 2020, and September 4, 2020. One of those emails did not have any content in the body or attachments. The Tribunal combined the remaining 69 emails and attachments into a single 283-page appeal submission for disclosure purposes. Some of the information contained in the appeal submission was already before me since the emails were contained in the section 112 record. In other words, a large portion of the information submitted on appeal has been considered by the delegate. The Employee submitted a further seven emails after December 1, 2020.

30. The essence of the Employee's appeal is that, in declining to consider medical reports which offered opinions regarding the Employee's injury and her ability to return to work, the delegate both erred of law as well as failed to comply with principles of natural justice. The Employee submitted the medical reports not as new evidence, but as evidence the delegate ought to have considered. The Employee advances a number of other arguments, including allegations that the delegate was biased and that she failed to consider issues including human rights obligations, specifically, a duty to accommodate.

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

New Evidence

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

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. the evidence must have high 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.

33. The Employee argues that the medical records submitted to the delegate which she refused to consider ought to be considered by the Tribunal. Although Mr. Bailey concedes that the medical reports are not new evidence, he submits that "the truth was available" and the delegate refused to consider it.

34. As the delegate's refusal to consider these reports constitutes the main reason for the appeal, I will address the delegate's decision below. However, for sake of completeness, I conclude that the reports do not meet the Tribunal's test for new evidence. As the Employee concedes, the information was available at the time the Director was adjudicating the complaint. I also find that, even had the records been before the delegate, they would not have led her to a different conclusion on the question of whether or not the Employee was entitled to compensation for length of service.

Failure to comply with the principles of natural justice

35. 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.

36. There is no evidence, or suggestion in the appeal submissions, that the Employee did not know the case being advanced by the Employer, or that they were denied the opportunity to respond. While I understand the Employee believes the delegate unfairly refused to consider medical reports, that does not constitute a failure to comply with principles of natural justice. The delegate's decision to exclude the evidence was based on her conclusion that she had no jurisdiction to consider the correctness of a decision of WorkSafe. I will address that question further below, under error of law.

37. I also infer from the Employee's appeal submissions that she believes the delegate was biased against her.

38. Mr. Bailey asserts that the delegate and the Employer, along with an Employer's Advisor, asked the Employee a "trick [q]uestion" at the hearing regarding whether or not she appealed the October 23, 2019 decision. She asserts that the delegate "colluded" with the Employer in arriving at her conclusion.

39. Furthermore, in her submission regarding the completeness of the record, the Employee argued that the record was incomplete and that the Tribunal should have a copy of all emails between the delegate and the Employer and the Employer's representative so it "can see the dirty work that went on by [the delegate]."

40. Mr. Bailey states "[w]e have speculated on the behaviour of the above players and it's not inconceivable that we have painted a story that may not be far off the exact truth but I am sure this is not justice."

41. As this Tribunal has consistently noted, the Director must both be, and appear to be, impartial (see, for example, *Milan Holdings* BC EST # D313/98). Allegations of bias against decision makers are serious. 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).

42. There is no evidence that the delegate "colluded" with the Employer, that she misconducted herself, or that she was biased. I deny the appeal on this ground.

Errors of law

43. 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.

44. 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)). Section 65(1)(d) provides that section 63 does not apply to an employee who is employed under an employment contract "that is impossible to perform due to an unforeseeable event or circumstance…"

45. In *Khan, supra,* the Tribunal decision relied upon by the delegate, an employee who was permanently disabled as a result of a workplace injury claimed compensation for length of service as well as payment of disability and medical service plan premiums. The Tribunal found that WorkSafe's determination that the employee was permanently disabled was some evidence that the employee was incapable of performing the employment contract. The Tribunal found that the employee was unable to perform his "pre-injury job."

46. The Tribunal held:

> Mr. Khan was incapable of performing the contract of employment. This was not his fault, and is "no one's fault". There is no evidence before me that this is anything but a genuine permanent disability that will continue in the future. An employee who is employed must "work" for the employer. The exchange of labour or service for pay is a fundamental term or condition of any employment contract. …
>
> In my view, the disability in this case does amount to a contract impossible to perform due to an unforeseeable event, and therefore the employer was not required to give notice of termination of employment. … In this case, given that Mr. Khan was permanently disabled, and unable to return to his pre-injury job, it is not a case of him being unavailable for a medical reason, but a case where it is impossible for him to perform the pre-injury duties.

47. I have carefully reviewed all the documents in the appeal submission, and I find there is nothing that identifies an error of law made by the delegate. Furthermore, there is nothing in the appeal submission that persuades me that the delegate's conclusion that the Employee's contract of employment was frustrated, is in error. The Employee's submission contains no argument that the delegate erred in relying on the Tribunal's decision in *Khan*, or that, for example, *Khan* should be distinguished. Rather, the

submission largely repeats the arguments made before the delegate at first instance as well as suggesting that the delegate misconducted herself.

48. The essence of the Employee's appeal is that the delegate erred in excluding medical reports that the Employee contends demonstrate that the WorkSafe decision was wrong.

49. The Employee does not dispute the delegate's finding that she did not appeal the October 23, 2019 decision that she was permanently disabled. Having not appealed the WorkSafe decision, the Employee cannot now challenge the correctness of that decision by way of a complaint to the Employment Standards Branch. As the delegate correctly noted, WorkSafe decisions are made under the *Workers' Compensation Act* and related policies. If the Employee disagreed with that decision, her remedy was to appeal it.

50. Given that the Employee did not appeal the WorkSafe decision, the Employer was entitled to rely on it. The delegate determined that the Employer fairly understood that the Employee was unable to return to her pre-injury job – in other words, the contract of employment was frustrated.

51. I find that the delegate did not err in excluding the evidence the Employee sought to submit to challenge the WorkSafe decision. The medical records were not relevant to the issue of whether or not the Employee was entitled to compensation for length of service or whether, as of October 23, 2019, the Employer could have considered the employment contract to be frustrated.

52. Furthermore, although the Employee also continues to advance arguments suggesting that the Director ought to apply the provisions of the "Human Rights of Canada," and that the Employer and WorkSafe failed to comply with the *Human Rights Code,* those arguments must be made according to the particular governing legislation. As the delegate correctly noted, the issue before her was whether the Employee was entitled to compensation for length of service under the *ESA*, not whether the Employer failed to accommodate the Employee.

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

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

ORDER

55. Pursuant to section 115 of the *ESA*, I confirm the Director's July 28, 2020 Determination.

Carol L. Roberts
Member
Employment Standards Tribunal