Employment Standards TRIBUNAL

Citation: Gagandeep Kaur (Re)
2021 BCEST 41

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Gagandeep Kaur
(the "Applicant")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2021/029

DATE OF DECISION: May 13, 2021

DECISION

SUBMISSIONS

Gagandeep Kaur — on her own behalf

INTRODUCTION

1. Gagandeep Kaur (the "applicant") applies for reconsideration of 2021 BCEST 26, issued on March 10, 2021 (the "Appeal Decision"). This application is made pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). By way of the Appeal Decision, the Tribunal confirmed a Determination issued by Sarah Beth Hutchison, a delegate of the Director of Employment Standards (the "delegate"), on December 2, 2020. The delegate issued her "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

2. The delegate determined that the applicant's former employer did not contravene section 54(2)(a) of the *ESA* and, accordingly, "no wages are outstanding" and "no further action will be taken".

BACKGROUND FACTS

3. Very briefly, the applicant claimed that her employment was terminated "because of" her pregnancy, contrary to section 54(2)(a) of the *ESA*. In this case, there is no dispute that the applicant was terminated – and she was paid two weeks' wages even though her *ESA* entitlement was only one week's wages. But the applicant maintained that the employer's allegation of "just cause" (largely based on poor performance and insubordination) was, essentially, a pretext, and that her pregnancy was the causal factor in her dismissal. As noted at para. 68 of the Appeal Decision: "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."

4. The applicant's complaint was the subject of an oral complaint hearing held on July 14, 2020. The employer testified on her own behalf. The applicant's evidence on many points was provided by her husband, rather than by the applicant herself. I entirely agree with the Tribunal Member's observation at para. 60 of the Appeal Decision: "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."

5. The employer, who operates a bookkeeping and tax preparation service, was represented by legal counsel who was known to the delegate. The delegate's reasons record the following exchange (page R2): "I notified the parties at the outset of the hearing that I previously attended school with counsel for [the employer], but had no contact with her since that time, in excess of five years. [The applicant] agreed to continue the hearing."

6. This latter relationship was the foundation for many of the applicant's arguments on appeal, namely, that the delegate favoured the position of "her best friend" (i.e., the employer's legal counsel) to the applicant's detriment. I note that in the Appeal Decision, the Member observed (at paras. 50 – 52 and 54):

> 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.
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> 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.
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> 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.
>
> . . .
>
> 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.

7. The hearing before the delegate was largely a "she said – she said" affair, with each party providing mutually exclusive versions of the events in question. The delegate was very much alive to the burden of proof placed on the employer by reason of section 126(4)(c) of the *ESA*. However, the delegate was also satisfied that the employer's evidence about the applicant's poor performance was adequately corroborated by other documentary evidence showing that the applicant had made client scheduling errors, failed to send out important documents to clients, and made other accounting errors such as incorrectly calculating GST. The delegate noted that the applicant continued to work for some two months after first informing the employer about her pregnancy, and that the employer had frequently spoken to the applicant about the latter's unsatisfactory work performance. The applicant's evidence was, essentially, a general but vague denial of *any* instances of poor performance. Overall, the delegate accepted "[the employer's] specific evidence, which accords with the documentary evidence, over [the applicant's] general evidence that is not congruent with the evidence" (delegate's reasons, page R11). The delegate determined that the applicant's evidence was not credible in certain key respects.

8. On appeal, the Tribunal saw no reason to disturb the delegate's factual findings, ultimately concluding (at paras. 73 – 74):

> 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.

> 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.

THE APPLICATION FOR RECONSIDERATION

9. The applicant's reasons supporting her reconsideration application are cursory and do not speak to any specific errors in the Appeal Decision. I have reproduced the applicant's reasons, in full, below:

> The reason I [applicant's name] Want's to appeal for the reconsideration of my appeal is because , I feel the justice is not done in my case, I have explained earlier also last time when I asked for the appeal, on the same notes, I am going to repeat that I need a fair chance to be heard, which did not happen last time during my hearing.
>
> I am pretty sure having faith on the BC, Justice system that my request will be Considered for the reconsideration
>
> [*sic*]

10. It appears that the applicant's present challenge principally concerns what transpired at the complaint hearing and, in particular, her concerns about the delegate's "bias" flowing from the employer's counsel having attended law school with the delegate, some five years earlier. This issue was addressed in both the delegate's reasons (i.e., the delegate made full disclosure, and the hearing proceeded with the applicant's consent), and in the Appeal Decision. I agree with the findings set out in the Appeal Decision that there was no cogent evidence of actual or apprehended bias on the delegate's part. Further, all of the applicant's evidence and arguments were considered by the delegate and, once again, by the Tribunal on the appeal.

11. I am unable to conclude that the applicant was denied "a fair chance to be heard". Clearly, the applicant is disappointed with the outcome of her complaint. However, I am not persuaded that this application raises a serious question regarding the correctness of the delegate's findings, or regarding the Tribunal Member's findings on appeal.

12. It follows that this application must be summarily dismissed since it does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98).

ORDER

13. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal