Citation: Kevin Guness (Re)
2021 BCEST 78

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Kevin Guness
("Appellant")

- 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: Richard Grounds

FILE NO.: 2021/048

DATE OF DECISION: September 13, 2021

DECISION

SUBMISSIONS

Kevin Guness — on his own behalf

OVERVIEW

1. This is an appeal by Kevin Guness (the "Appellant") pursuant to section 112 of the *Employment Standards Act* (the "*ESA*") regarding a Determination issued on April 23, 2021, by Milad Doust, a delegate of the Director of Employment Standards (the "Delegate"). The Appellant brought a complaint against Island Burgers Inc. carrying on business as A&W (the "Employer") for compensation for length of service, misrepresenting the terms of employment, and for charging fees related to his immigration.

2. The Appellant withdrew his complaints related to misrepresentation and for being charged fees related to his immigration because they were filed outside the time limit set out in the *ESA*. The alleged contraventions occurred in the spring of 2018, which is outside the recovery period. The Delegate determined that the Employer sufficiently demonstrated that there was just cause for the Appellant's termination so no compensation for length of service was owed to the Appellant.

3. The Appellant appealed the Determination on the basis that the Delegate failed to observe the principles of natural justice in making the Determination.

4. For the reasons that follow, the Appellant's appeal is dismissed, and I confirm the Determination.

ISSUE

5. The issue to decide is whether or not the Delegate failed to observe the principles of natural justice in making the Determination.

ARGUMENTS

6. The Appellant's submissions focus on how busy the A&W restaurant was and the lack of staff which impacted his ability to use the timers and to keep up with discarding expired food products. The Appellant submits that A&W's standards to discard food 30 minutes after being cooked was "useless" because it was "scientifically proven" that "cooked meat is safe after 30 minutes".

7. Submissions on the merits of the appeal were not requested from the parties.

BACKGROUND

8. The record before me shows that the Employer operates an A&W restaurant in Victoria, BC. The Appellant was employed as a shift manager or food service supervisor from March 16, 2018 to March 14, 2020.

9. The Employer utilizes food timers to indicate the maximum length of time a cooked food product can be kept before being discarded. In January 2019, the restaurant failed an external food audit. Although he was not working on the day of the audit, the Appellant received a warning. In early August 2019, the Appellant did not set the timers while the Employer's Operations Manager, Peter Vik, was present. Mr. Vik instructed the Appellant to discard the food product.

10. On August 21, 2019, Mr. Vik attended the restaurant when the Appellant was working, and the timers were not being used. The Appellant was given a written warning and was asked to complete an action plan. The written warning stated that it was a "final warning" and that if the matters were not corrected, further action will be taken up to and including termination.

11. On March 12, 2020, the Appellant was working alone while another cook was on break. During a food safety audit, it was identified that the Appellant was not able to maintain all the timers correctly. The Employer terminated the Appellant's employment for just cause.

12. On April 19, 2020, the Appellant made a complaint with the Employment Standards Branch for compensation for length of service, misrepresenting the terms of employment, and for charging fees related to his immigration. The Appellant stated in his complaint that the work he performed was primarily cooking which was not in his original job description. The complaint proceeded to an investigation during which the Appellant stated that he paid fees to an immigration consultant to obtain employment as a Temporary Foreign Worker.

13. The Delegate issued a preliminary assessment on January 22, 2021, in which he outlined the reasons why the complaints for misrepresentation and immigration fees were outside the recovery period of 12 months from the date of complaint or termination. The Appellant subsequently withdrew his complaints against the employer for misrepresenting the terms of employment and for charging fees related to his immigration.

The Determination

14. The Delegate dealt with the complaint related to compensation for length of service in the Determination that was issued on April 23, 2021. The Delegate concluded that the Employer used timers "to ensure food safety, quality and to comply with the health board." The Delegate identified the following four factors an employer must prove in order to demonstrate that it has just cause to terminate an employee's employment:

    1. Reasonable standards of performance have been set and communicated to an employee;
    2. The employee is warned clearly that their continued employment is in jeopardy if such standards are not met;
    3. The employee is provided a reasonable opportunity to meet the standard; and
    4. The employee ultimately does not meet those standards.

15. The Delegate extensively summarized the evidence gathered during the investigation from both the Appellant and the Employer. The evidence focused on the food safety policy and the use of timers for food product including the incidents where the Appellant had failed to use the timers.

16. The Delegate concluded that the Employer's expectation of the Appellant that he set the timers was communicated to the Appellant multiple times. The Delegate noted that although the Appellant disputed the extent of the verbal instruction he received from Mr. Vik in August 2019, following an incident when the Appellant did not use the food timers, it was evident that the Appellant understood the Employer's requirement. The written warning following the August 21, 2019, incident communicated the Employer's expectation of the Appellant with respect to setting timers.

17. The Delegate concluded that the Appellant received sufficient warning of termination from the August 22, 2019, written warning which identified that it was the second time that the timers in the kitchen were not in use and that further action, up to termination of the Appellant's employment, would be taken if the problem was not rectified. The Delegate noted that the Appellant submitted that "the second warning triggered him to try his best to not get dismissed."

18. The Delegate concluded that the Employer provided a reasonable opportunity for the Appellant to meet the standard through a follow-up on August 26, 2019, and through further safety audits.

19. The Delegate concluded that the Appellant was not in need of further training and acknowledged his argument that he needed more staff to manage the timers. The Delegate sympathized with the difficulty of the task of using the timers when working alone but found that the standard was not "so extremely demanding to actually be impossible", was not applied unfairly to the Appellant, nor did it deliberately target the Appellant.

20. The Delegate acknowledged the Appellant's submissions of photographs of food left on the ground or on counter tops but noted that these submissions did not relate to the use of timers and did not prove that the Employer did not care about food safety or failed to treat timer violations seriously.

21. The Delegate concluded that the Employer communicated to the Appellant that the timers needed to be set, provided a sufficient opportunity for the Appellant to improve his performance, issued a warning of the consequences for future failure, and showed that the Appellant failed again, which resulted in his termination. The Delegate concluded that the Employer had met the test for just cause and that no compensation for length of service was owed.

ANALYSIS

22. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

23. The Appellant submits that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant disputes the Delegate's findings related to how busy the restaurant was and repeated his submission on appeal that the Employer needed more workers. The Appellant submits that the Delegate should have interviewed more witnesses about the incident in August 2019 where he

was verbally instructed by Mr. Vik to throw away food product and about warnings given to other workers for similar infractions.

24. On appeal, the Appellant has also provided a new piece of evidence to show that not enough staff were working during a week in December 2019. This evidence is discussed below.

Breach of Natural Justice

25. The Appellant's disagreement with some of the facts found by the Delegate or the number of witnesses is not by itself sufficient to find that the delegate failed to observe the principles of natural justice. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

26. The Appellant was provided with notice of the issues before the Delegate and was provided an opportunity to provide evidence in support of his complaint. The Delegate considered the evidence related to the Appellant's termination, including the warnings he received about using food timers. The Appellant does not dispute that he did not use the food timers but submits that he was not able to because the Employer was understaffed. The Appellant also submits that A&W's standards as they relate to food timers were "useless" because the cooked meat is still safe after 30 minutes.

27. The Delegate acknowledged the Appellant's arguments but, ultimately, did not agree with the Appellant. Instead, the Delegate concluded, based on the evidence before him, that the standards were important for food safety and that the standards were achievable. The Delegate considered all of the evidence and concluded that the Employer communicated to the Appellant that the timers needed to be set, provided the Appellant a sufficient opportunity to improve, issued a warning to the Appellant of the consequence for future failure, and showed that the Appellant failed again. Given all of the criteria for just cause were proven, the Delegate concluded that the Employer did not owe the Appellant compensation for length of service.

28. The Delegate was an impartial decision maker and there is no evidence that the Delegate was biased to any degree.

29. The role of the Tribunal is not to make a fresh decision based on the evidence that was before the Delegate. The Tribunal's role is to determine whether the grounds of appeal are sufficient to overturn the Delegate's decision. The Appellant submits that the Delegate failed to observe the principles of natural justice in making the Determination. The Appellant has not identified any failures on the part of the Delegate that would support such a finding.

30. The evidence does not support a finding that the Delegate failed to observe the principles of natural justice in making the Determination.

New Evidence

31. The Appellant has also provided new evidence on appeal in the form of a shift schedule for the restaurant for a week in December 2019. The Appellant submits that this proves that the restaurant was understaffed. Although the Appellant has not checked off the ground of appeal in his appeal form that "evidence has become available that was not available at the time the Determination was made", it is appropriate to address this ground of appeal to address the new evidence.

32. The ground of appeal related to admitting new evidence on appeal was considered by the Tribunal in *Bruce Davies et al.* BC EST # D171/03 where it stated (at page 3):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
>
> (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.

33. The first stage of the test for admitting new evidence on appeal requires that 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. The shift schedule was discoverable by the Appellant with the exercise of due diligence and could have been presented to the Delegate for the investigation but was not. Accordingly, it does not meet the first stage of the test.

34. Although failing one stage of the test it is sufficient to dispose of this ground of appeal, it should also be noted that the shift schedule is of marginal relevance because the Delegate already considered the Appellant's evidence about working alone. It is unlikely that this schedule would have led the Delegate to reach a different conclusion.

35. The shift schedule submitted by the Appellant on appeal does not meet the test for new evidence to be considered by the Tribunal.

ORDER

36. The Appellant's appeal is dismissed, and the Determination is confirmed under section 115(1) of the *ESA*.

Richard Grounds
Member
Employment Standards Tribunal