Employment Standards TRIBUNAL

Citation: Mark Yen Yim (Re)
2021 BCEST 83

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Mark Yen Yim
(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.: 2021/055

DATE OF DECISION: October 20, 2021

DECISION

SUBMISSIONS

Mark Yen Yim — on his own behalf

INTRODUCTION

1. This is an application for reconsideration of 2021 BCEST 52 (the "Appeal Decision") filed by Mark Yen Yim (the "applicant") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*").

2. There is an issue regarding the timeliness of this section 116 application. The Appeal Decision was issued on June 4, 2021 and, accordingly, the statutory deadline for filing an application for reconsideration was July 5, 2021 (see section 116(2.1) of the *ESA*).

3. The applicant first filed a wholly illegible reconsideration application form on June 17, 2021. On July 5, 2021, the applicant filed another reconsideration form, but this form was password protected and thus could not be opened. The Tribunal's staff contacted the applicant about this issue on July 8, and again on July 12, 2021.

4. On August 13, 2021, the applicant filed another copy of a reconsideration application form with the Tribunal. On this form, the applicant indicated that he was seeking an extension of the reconsideration application period to July 30, 2021. Of course, even if an extension were granted to July 30, 2021, the application would still have been deficient since it was not perfected by that date.

5. On September 14, 2021, the applicant filed an "Appeal Form" with the Tribunal although it seems clear from the documents appended to the form that the applicant was not seeking to appeal a determination (he had already done so, by way of an Appeal Form filed on December 14, 2020) but, rather, was applying for reconsideration of the Appeal Decision that was issued following his December 14, 2020 appeal.

6. The applicant's reconsideration application was arguably perfected on September 14, 2021, when the applicant submitted some brief reasons and other documents that purported to supporting his section 116 application. However, it must also be noted that these "reasons" were woefully inadequate – being, essentially, various wholly unsupported aspersions and allegations against the delegate and other individuals.

7. In my view, and apart from the timeliness of this application, it is in any event not meritorious, and accordingly must be dismissed.

PRIOR PROCEEDINGS

8. On November 29, 2019, the applicant filed a complaint under section 74 of the *ESA* claiming $680.00 in compensation for length of service under section 63 of the *ESA*. Although the details set out in the complaint are somewhat murky, it appears that the applicant was saying that he had been dismissed without just cause following some sort of altercation involving himself and a co-worker.

The Determination

9. In any event, and following an investigation by Leah Reinheimer, a delegate of the Director of Employment Standards (the "delegate"), the delegate issued a Determination (1 page) – and her accompanying "Reasons for the Determination" (the "delegate's reasons") – on November 18, 2020. The Determination states: "I [the delegate] have determined that the *Employment Standards Act* has not been contravened and no wages are outstanding. Accordingly, no further action will be taken."

10. In her accompanying reasons, the delegate summarized the evidence she gathered during the course of her investigation. I do not propose to exhaustively recount all of this evidence. The upshot of the delegate's 14 pages (single-spaced) reasons was that she found the applicant engaged in a "physically aggressive manner" toward a co-worker. Ultimately, she concluded that the applicant's former employer had just cause to terminate the applicant's employment "as a result of his aggressive, unsafe, and reckless workplace behaviour on October 10, 2019 [and] [h]e is not, therefore, entitled to compensation for length of service".

The Appeal Decision

11. The deadline for appealing the Determination, as set out in a text box at the bottom of the Determination, headed "Appeal Information", was December 28, 2020. The applicant filed an Appeal Form on December 14, 2020 but did not file the other documents that are required in order to perfect an appeal. In particular, the applicant did not provide written reasons supporting the two grounds of appeal identified on the form – namely, that the delegate failed to observe the principles of natural justice in making the Determination and that he had "new evidence". Further, the applicant did not file a complete copy of the Determination and the delegate's reasons. In his Appeal Form, the applicant also requested that the statutory appeal period be extended to March 5, 2021.

12. On December 15, 2020, and following communications between the applicant and a Tribunal staff member, the applicant filed some further particulars regarding his grounds of appeal. He maintained that the delegate's reasons did not "make sense", that the delegate did not properly consider all of the evidence that was before her, that some of the employer's evidence was fraudulent, and that other evidence had been tampered with.

13. As previously noted, the Appeal Decision was issued on June 4, 2021. In the Appeal Decision, the Tribunal Member observed (at para. 13): "The Delegate reviewed all of the video records provided and concluded, consistently with the RCMP and WorkSafeBC, that the Complainant was, in fact, the aggressor in the altercation that occurred on October 10, 2019." With respect to the applicant's "tampering" allegation, the Member observed (at para. 17): "…although the Appellant indicates that an expert had confirmed that the video footage had been tampered with, no such supporting evidence was provided to the Tribunal."

14. With respect to the timeliness of the appeal, the Member held (at paras. 21 – 22):

> …although the Appellant indicated his intention to appeal in a timely fashion, the initial submission requested an extension to March 5, 2021 to provide fulsome reasons and argument, and any related evidence. The submissions received in March and April, however, make no further reference to the extension request, and in fact included further submissions after the March 5th date, also without reference to the extension requested, or its passing.

> On this basis alone I would be prepared to reject the Appellant's request for an extension of time for filing the present appeal. Even if I had been prepared to accept that the Appellant's language barriers, and intention to provide further evidence relating to the video evidence of the incident, constituted a reasonable and credible explanation for the extension of time requested, the fact that no further supporting evidence was provided mitigates against allowing the extension.

15. Apart from finding that the appeal should be dismissed as untimely (and that extending the appeal period was not appropriate in the circumstances), the Member also found that there was no merit to the two asserted grounds of appeal – "natural justice" and "new evidence" (see sections 112(1)(b) and (c) of the *ESA*).

16. With respect to the "natural justice" ground of appeal, the Member held (at paras. 28 – 29).

> With respect to the Appellant's assertion that the Director failed to observe the principles of natural justice, it appears this assertion is based on assertions that the Delegate accepted the Employer's reasons and evidence, which the Appellant characterizes as "lies".
>
> On the face of the material and information contained in the record, the Appellant was provided with the opportunity required by principles of natural justice to present their position to the Director. Although the Appellant expresses dissatisfaction in the result, and alleges a failure to consider the witness statements provided, it is clear from the Determination that all avenues of inquiry raised by the Appellant were explored.

17. The Member also found that there was no merit to the "new evidence" ground of appeal (at paras. 30 – 31):

> The Appellant also asserts as a ground of appeal that evidence has become available that was not available at the time the Determination was made. Although the Appellant continues to assert that the video footage was doctored or tampered with, this is not a new allegation, as he claims to have raised this with the RCMP, and raised this on numerous occasions with the Delegate. In addition, although the Appellant claims to have sought the advice of an expert who confirmed the alleged tampering, neither the Delegate nor this Panel have been provided with any such evidence.
>
> The Appellant's submissions, on their face, instead appear to be an attempt to reargue the case that was already decided by the Delegate, with the addition of further alternate reasons the Appellant believes their employment was terminated without severance.

18. Notwithstanding the foregoing comments, the Member also reviewed the applicant's submissions and concluded that even if the appeal period were to be extended, the appeal would nevertheless be dismissed as having no reasonable prospect of success (see section 114(1)(f) of the *ESA*).

THE APPLICATION FOR RECONSIDERATION

19. The Appeal Decision was issued on June 4, 2021. Section 116(2.1) of the *ESA* states that an application for reconsideration must "not be made more than 30 days after the date of the order or decision". On July 5, 2021, the applicant submitted the following one-paragraph note, appended to the password-protected reconsideration application form, to the Tribunal:

> A reason(s) I need to extension the statutory reconsideration period to July 30, 2021 because I need to prepare video footages, documents, and eyewitness statements from co-worker(s) working there. Thank you. [*sic*]

20. On August 13, 2021, the applicant filed a Reconsideration Application Form. On that same day, he also submitted an e-mail to the Tribunal stating:

> Regarding my severance pay, the deletor agent Leah of the employment standards handling my case was sloppy !She lacks wisdom.Think about it, the video footage in the company of [the employer] cunning deleted all my important evidence parts before telling lies to all that I was applying for my compensations and smearing me that I attacked his worker . That's bullshit, Big Liar ! (I am a victim, wounded ! Was cunningly tricked by the owner of this [employer] ! You were also cunningly tricked by him ! (deceived by him) So, I need more days to carry on this cunning Owner and I need people to help me ! I need an extension day again thank you. [*sic*]

21. The applicant also noted on the Reconsideration Application Form that he was seeking an extension of the reconsideration application period to July 30, 2021.

22. On September 14, 2021, the applicant filed an *Appeal Form* with the Tribunal (obviously, he used the wrong form) to which was appended a document setting out his reasons in support of his application for reconsideration of the Appeal Decision. These reasons are as follows:

> Regarding my severance pay, I should have what I deserve !
> I need to send you these Evidence documents from my Doctor [name omitted],and my coworker witness in his eyes seeing what happened at the workplace,on Oct 10 2019, and he has written letters to the people who handled my case. It was unfair to me.and it was sloppy handling !
> That was my Evidence,Also I had someone video footage expert check for me the video footage that I got from the Employment Standards agent [the delegate].The Expert found out from the video footage that a few parts were tempered Edited ! The footage running was different time and it was encoded.That is my proof ! Please reconsider my case ,and I hope you are fairly handling it .
> I going to hand you these Evidence and show you the footage running time was different ,and I highlight it on the video footage
> You should know that it is illegal as the company Owner cunning the video footage on my evidence working at the workplace injuring and smearing me lied to somewhere I claimed for my compensation and tried to get me a hard time for that. The [employer] Owner cunning Video Footage before that and showed to the place where I claimed for my compensation,So you guys have been deceived by him [the employer] LDT and I am also a Victim ! Please Reconsider it .thank you for your precious time [*sic*]

FINDINGS AND ANALYSIS

23. I do not find the applicant's request for an extension of the reconsideration application period to be meritorious. On that basis alone, this application must be dismissed. The applicant apparently seeks an extension of the reconsideration application period in order to gather additional evidence. However, an application for reconsideration is not a new evidentiary hearing. Rather, the focus of a section 116 application is a review of the appeal decision to determine if it is tainted by a significant legal error. As

noted by the Tribunal in the leading decision, *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98 (*Milan Holdings*), at page 7:

> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law" . . .

24. As for the merits of the application, in essence, the applicant wishes to re-argue the very same case he advanced on appeal, perhaps supplemented by some evidence that was not previously submitted to either the delegate in the original investigation or the Tribunal on appeal. I should also note that any evidence the applicant now wishes to submit seemingly could have been gathered and presented to the delegate during the investigation. That being the case, such evidence is presumptively inadmissible, both on appeal and on reconsideration.

25. The delegate determined that the applicant's former employer had just cause to dismiss him and, accordingly, no compensation for length of service was payable (see section 63(3)(c) of the *ESA*). "Just cause" is not defined in the *ESA*, and thus one must turn to common law principles for guidance. Fundamentally, "just cause" is a repudiatory breach by the employee of the employment contract entitling the employer to summarily dismiss the employee without notice or severance pay in lieu of notice. A finding of "just cause" is one of mixed fact and law (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235) and, as such, can only be overturned if the decision-maker misdirected herself with respect to the governing legal principles or, in terms of her factfinding, made a palpable and overriding error.

26. A review of the delegate's reasons shows that she applied the appropriate legal test for just cause and, based on the evidence before her, I am unable to say that she made a palpable and overriding error in determining that the applicant was dismissed for just cause. With respect to the latter issue, in this case, the just cause allegedly arose from an October 10, 2019 altercation between the applicant and a co-worker. The delegate had before her the following evidence regarding this altercation, and regarding the applicant's work record:

- A WorkSafe BC report that indicated the applicant "baited" his co-worker and then attempted to engage the co-worker in a physical altercation (the applicant having to be restrained by other employees);
- Several months prior to the altercation in question, the applicant was warned about his poor workplace relations with other employees;
- CCTV video footage clearly showed that the applicant was the aggressor in the October 10th altercation;
- The fact that the applicant was the aggressor was independently corroborated by at least three other employees who witnessed the events in question;

- the victim of the applicant's aggression also stated that the applicant made racial slurs toward him;
- the applicant, for his part, stated that while his actions were "aggressive", they were nonetheless justified and, in any event, the CCTV footage had been subjected to tampering and was therefore unreliable (an allegation, I note, that the applicant has consistently advanced, but never proved); and
- this was not the first instance of inappropriate workplace conduct as he had previously been reprimanded for an incident that occurred in July 2019.

27. The delegate reached the following conclusions based on the evidence before her (delegate's reasons, page R15):

> I find that an employee behaving towards a colleague in such a physically aggressive manner that it takes two supervisors to physically restrain that employee's aggressive actions is major conduct inconsistent with the notion of continued employment. I find [the applicant's] behaviour to be particularly egregious as it occurred in a bakery setting around equipment and food Ingredients – raising the risk of bodily injury and food contamination. It is reasonable to conclude that in restraining [the applicant] from attacking [his co-worker], the supervisors also potentially risked slipping, tripping, or falling themselves but they found It necessary to step in to protect [the co-worker]. Indeed, [the applicant] ended up being injured as a result of his behaviour. I find that [the applicant's] actions constituted unsafe and violent workplace behaviour which an employer is not required to tolerate.
>
> While the Employer did initially inform [the applicant] that he was receiving a warning about his behaviour and while the Employer did initially require [the applicant] to report to work the day after the incident, [the applicant] did not actually report for work because he had been injured from the October 10, 2019 incident. Accordingly, I find the Employer terminating [the applicant] on November 8, 2019 after they had fully reviewed and investigated the events of October 10, 2019 was not unreasonable, particularly as [the applicant] had not been attending work anyway due to his injury.
>
> Accordingly, I find that [the employer] had just cause to terminate [the applicant's] employment as a result of his aggressive, unsafe, and reckless workplace behaviour on October 10, 2019. He is not, therefore, entitled to compensation for length of service.

28. The position that the applicant advances on this reconsideration application is, essentially, the same one he advanced before the delegate and subsequently on appeal; namely, the delegate conducted a sloppy investigation, witnesses lied, and the video evidence was tampered with and was thus unreliable. None of these allegations has any merit. As noted in *Milan Holdings*, *supra* (at page 7):

> . . . the following factors have been held to weigh against a reconsideration:
>
> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay . . .
>
> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence) . . .

29. This application is untimely and is not predicated on any compelling and admissible "new evidence"; rather, the applicant simply seeks a different result based on the same evidence and arguments that were before the delegate at first instance and then re-argued on appeal.

30. I entirely agree with the Tribunal Member that the original appeal – apart from it being untimely – had no reasonable prospect of succeeding and thus was properly dismissed under section 114(1)(f).

31. In my view, this application – apart from it being untimely – does not pass the first stage of the *Milan Holdings* test and, accordingly, must be dismissed.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal