Citation: Joel Cuttiford (Re)
2021 BCEST 84

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Joel Cuttiford
(the "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: Mona Muker

FILE NO.: 2021/058

DATE OF DECISION: October 27, 2021

DECISION

SUBMISSIONS

Joel Cuttiford — on his own behalf

OVERVIEW

1. Joel Norman Cuttiford, carrying on business as Larix Landscaping (the "Appellant"), has filed an appeal under section 112 of *the Employment Standards Act* (the "*ESA*") of a determination issued by a delegate of the Director of the Employment Standards (the "Director") on March 22, 2021 (the "Determination").

2. The Director found that the Appellant contravened sections 58 and 63 of the *ESA*, and accordingly owed its former employee, Kevin Wightman (the "Employee"), annual vacation pay, compensation for length of service, and accrued interest, in the amount of $669.34. Pursuant to section 29(1) of the *Employment Standards Regulation* (the "*ESR*"), the Determination also imposed one administrative penalty of $500.00, for a total amount payable of $1,169.34.

3. The deadline for filing an appeal of the Determination was April 29, 2021.

4. In email correspondence dated June 24, 2021, from the Director to the Appellant, the Appellant was demanded to pay the total outstanding wages and interest owed to date in the amount of $1,171.80.

5. The Appellant appealed the Determination on June 29, 2021, alleging that the Director erred in law, the Director failed to observe the principles of natural justice in making the Determination, and evidence became available that was not available at the time the Determination was made. The Appellant also sought an extension of the statutory appeal period.

6. In correspondence dated July 20, 2021, the Employment Standards Tribunal (the "Tribunal") notified the Employee and the Director that it had received the Appellant's appeal as well as the Appellant's subsequent submission of July 16, 2021, and it was enclosing the same for informational purposes only. They were further notified that no submissions on the merits of the appeal were being sought from them at that time. The Tribunal also requested the Director provide the Tribunal with a copy of the section 112(5) record (the "Record") and requested the Appellant provide the Tribunal with any additional documents in support of their appeal by August 31, 2021. As of September 1, 2021, the Tribunal had not received any further documents from the Appellant.

7. On August 6, 2021, the Tribunal received a submission from the Director containing the Director's Record and Record cover letter. Subsequently, the Tribunal requested the Director resubmit the Record and Record cover letter because of deficiencies within the August 6, 2021 submission. On August 11, 2021, the Tribunal received the Director's amended Record and forwarded a copy to the Appellant and the Employee on September 1, 2021. Both parties were provided an opportunity to object to the completeness of the Record. Neither party objected. Accordingly, the Tribunal accepts the Record as complete.

8. Section 114(1) of the *ESA* permits the Tribunal to dismiss all or part of an appeal without a hearing or 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 find it unnecessary to seek submissions from the Employee or the Director.

9. Accordingly, this decision is based on the Determination, the reasons for the Determination (the "Reasons"), the Appellant's appeal submissions, and the Record that was before the Director when the Determination was made.

ISSUES

10. The issues before the Tribunal are whether the statutory appeal period should be extended pursuant to section 109(1)(b) of the *ESA*, and if extended, whether the appeal should be allowed to proceed or dismissed under section 114(1) of the *ESA.*

DETERMINATION

Background

11. According to a BC Registry search conducted on May 14, 2020, with a currency date of March 27, 2020, the Appellant was incorporated in British Columbia ("BC") on January 16, 2008. Joel Norman Cuttiford ("Mr. Cuttiford") is the sole proprietor. The Appellant operates a landscaping and arboriculture business in Victoria, BC.

12. The Employee was employed as an arborist from September 25, 2019, to April 22, 2020. At the time of the termination, the Employee was paid $30.00 per hour.

13. On May 12, 2020, the Employee filed a complaint (the "Complaint") at the Employment Standards Branch (the "ESB"), claiming the Appellant fired the Employee without cause and failed to pay him compensation for length of service and vacation pay.

14. The Director received evidence from the Employee and the Appellant during the investigation of the Complaint before making the Determination. I will only set out those aspects of the factual background directly relevant to the issues on appeal.

Reasons

15. The Director noted that the Employee provided the following evidence in the investigation of the Complaint: when the Employee was working at an apartment complex, the Appellant asked the Employee to cut down a tree from the base. The Employee declined to do so because he did not have the requisite training and certification, citing WorkSafeBC Regulations. The Employee also asserted that it was unsafe and illegal to do so. An argument ensued as to whether the Employee was correct, to which the Appellant responded by stating "then I don't f*cking need you". The employment relationship was terminated immediately. Prior to this incidence, the Employee was never disciplined, nor did he receive negative performance feedback. The Employee received positive feedback up until this point.

16. The Director noted that the Appellant provided the following evidence in the investigation of the Complaint: the Employee was fired because he refused to do the job he was hired for. The Appellant testified that the Employee had a bad attitude, swore in front of clients, refused to follow instructions, and did not get along with colleagues. The Appellant believed that the Employee was incorrect about the certification requirements, and that it was a justification for refusing to do the work. The Appellant believed anyone could cut down trees. The tree in question was only about ten inches across. The Appellant mainly fired the Employee because of his negative attitude and the previous warnings that were issued regarding termination. The Appellant allegedly had a 'handful of interactions' with the Employee about the Employee's conduct. There were no written warnings or performance reviews, just verbal discussions.

17. The Director noted that the Appellant was provided with multiple opportunities to respond to the Complaint. The Record shows that the investigation began on December 23, 2020. The Appellant had opportunities to submit correspondence between December 30, 2020, and March 21, 2021 – up until the Determination was made. However, the Appellant did not provide any documents pertaining to the termination or demonstrating a history of discipline.

18. Just cause for major misconduct allows an employee to be terminated immediately because of an incident that is serious, deliberate, and intentional. The Director found that the Employee's refusal to cut down the tree because the Employee perceived it to be unsafe and in violation of WorkSafeBC regulations, did not warrant just cause for immediate dismissal – even if it was a mistaken belief. Rather, this indicated that the Employee was taking necessary precautions to ensure a safe work environment.

19. The Director reviewed section 26.21 of the WorkSafeBC Occupational Health and Safety Regulation and determined that the regulation is not restricted to forestry operations and requires workers who buck trees to be qualified. Workers must also maintain insurance for bucking trees over a certain size. The Record shows that the delegate spoke with a Manager from BC Forest Safety about the requirements and consequences of not abiding by the WorkSafe Regulations. The Manager confirmed that the Employee was correct. The delegate also spoke with a person from Hort Education about arborist certification requirements, who confirmed the applicability of the WorkSafeBC Regulations. The Director found that the parties were required to abide by section 26.21 of the WorkSafeBC Regulations.

20. Just cause for minor misconduct would require the Appellant to establish that they took the following steps in addressing the Employee's inappropriate behavior, language, or failure to follow instructions: 1) a reasonable standard of performance was established and communicated; 2) the Employee was provided with sufficient time and a reasonable opportunity to meet the standard; 3) the Employee was warned that failure to meet the standard was serious and could result in termination; and 4) the Employee still failed to meet the standard.

21. The Director found that the Appellant did not meet the test for minor misconduct. The Director found that the Appellant did not provide proof that the Employee received any warnings, oral or written, to satisfy the test for minor misconduct. Nor was there any evidence that the refusal to perform work had been previously addressed; or that there were warnings or training on what was expected from the Employee; or that the Employee had previously been disciplined for the specific issue that led to the termination.

22. As a result, the Director determined that the Appellant did not have just cause for terminating the Employee. The Employee was thus entitled to one week of compensation for length of service under section 63 of the *ESA* and 4% vacation pay under section 58.

23. The Record shows that the delegate spoke with the Appellant on February 19, 2021, before making the Determination and explained how WorkSafeBC requirements are applicable, and how the Appellant did not meet the just cause requirements for major or minor misconduct. The Appellant responded disrespectfully by insulting the delegate and calling her incompetent, wrong, and accusing her of not knowing how to research or do her job. The Appellant stated that they would not pay the Employee, even if a Determination was issued. The delegate ended the call without reacting. I note that the Appellant was also hostile with the delegate and accused her of not being neutral during their very first conversation on December 30, 2020, when the delegate simply called to hear the Appellant's side of the story.

ARGUMENTS

24. The Appellant appeals the Determination on the bases that the Director erred in law, failed to observe the principles of natural justice in making the Determination, and new evidence becoming available that was not available when the Determination was made.

25. In the appeal form, the Appellant submits that they did not receive the "last letter in regards to deadlines". The Appellant relies on this for a breach of the principles of natural justice. The Appellant has not provided any grounds for alleging an error of law.

26. The Appellant also re-argues that the Employee failed to complete orders, behaved inappropriately in front of clients by swearing and complaining, and had a racial prejudice against workers.

27. The Appellant submits correspondence and a timeline of complaints and warnings issued to the Employee for his behavior. The Appellant also submits correspondence from the Director demanding payment of the outstanding wages under the Determination.

ANALYSIS

Request to extend statutory appeal period

28. Section 112(3) of the *ESA* provides that a person served with a determination may appeal the determination by delivering a written request to do so, with reasons for the appeal, to the Tribunal within 30 days of service, if served by registered mail, or 21 days after service, if served personally.

29. Section 122 of the *ESA* provides:

> 122 (1) A determination or demand, a notice under section 30.1(2) or a written report referred to in section 78.1(1)(a) that is required under this Act to be served on a person is deemed to have been served if it is
>
> (a) sent by ordinary mail or registered mail to the person's last known address according to the records of the director,

(b) transmitted by email to the person's last known email address according to the records of the director,

(c) transmitted by fax to the person's last known fax number according to the records of the director, or

(d) sent, transmitted or delivered by any prescribed method of service.

(2) If service is by ordinary mail or registered mail, then the determination or demand, the notice under section 30.1(2) or the written report referred to in section 78.1(1)(a) is deemed to have been served 8 days after it is mailed.

(3) If service is by email or fax, then the determination or demand, the notice under section 30.1(2) or the written report referred to in section 78.1(1)(a) is deemed to have been served 3 days after it is transmitted.

30. The Determination was issued on March 22, 2021, and was sent on the same date by registered mail to the Appellant's address in Victoria, BC. The Determination indicated that the appeal deadline was April 29, 2021. The Appellant filed the appeal two months past the statutory deadline.

31. Section 109(1)(b) of the *ESA* provides that the Tribunal may extend the time for requesting an appeal even if the time period has expired. The Tribunal has consistently held that extensions are not granted as a matter of course and should only be granted for compelling reasons. The burden is on the Appellant to demonstrate that the appeal period should be extended.

32. In *Re: Niemisto* (BC EST # D099/96), the Tribunal set out criteria for the exercise of discretion in extending the time to appeal. The party seeking an extension must satisfy the Tribunal that:

a. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

b. there has been a genuine, ongoing *bona fide* intention to appeal the determination;

c. the respondent party, as well as the director, have been made aware of this intention;

d. the respondent party will not be unduly prejudiced by the granting of an extension; and

e. there is a strong *prima facie* case in favour of the appellant.

33. These criteria are not exhaustive. Other factors may also be considered. The Tribunal will consider and weigh factors identified in *Niemisto* and other factors it considers relevant in exercising its discretion to extend the statutory appeal period, based on the totality of all factors and circumstances (see *Re Patara Holdings Ltd. (c.o.b. Best Western Canadian Lodge),* BC EST # D010/08; reconsideration dismissed BC EST # RD053/08).

34. I do not find it appropriate to grant the extension of the statutory appeal period under section 109(1)(b) of the *ESA.* I therefore dismiss the appeal for the reasons set out below.

35. With respect to *Niemisto's* first criterion, I am not persuaded that there is a reasonable and credible explanation for the Appellant's failure to request an appeal within the statutory time limit. They have not

provided any compelling reasons for extending the time limit to appeal, why the appeal could not have been filed before the deadline, and why it was filed two months after the statutory deadline.

36. The Appellant has not provided any explanation as to why they did not receive the Determination in the mail. The Determination was sent to the Appellant's last known address in Victoria, BC. The Record shows that it was sent to the address listed on the Complaint form, the Employee's pay cheques, and the Employee's Records of Employment. A land title search, conducted on April 13, 2021, also reveals that the Appellant is the registered owner of the property located in Victoria where the Determination was mailed. I note that the BC Registry search has a different address, listed in New Westminster, BC. However, the New Westminster address cannot be found anywhere else in the Record. There is also no evidence that the Appellant's business operates outside of the island, in the lower mainland. Furthermore, the Appellant listed the Victoria address on the Tribunal's appeal submission form when they appealed the Determination. I accept that the Record supports that the Victoria address is the Appellant's last known address.

37. The Record shows that the registered mail envelope was returned to the ESB on April 13, 2021, because the mail was unclaimed.

38. The Appellant's refusal of accepting service of the Determination, served in accordance with section 122 at the Appellant's last known address, does not excuse the Appellant from the deemed service provisions. It is the Appellant's responsibility to set in place processes to respond to their obligations. It is because the Appellant failed to do so that they failed to receive the Determination (*Cross Current Divers Ltd.,* BC EST # D129/03; *Millicent Ruth Forrest (c.o.b. Proficiency Plus Foodservice & Consulting*), BC EST # D216/03). The evidence suggests that the Appellant simply refused to accept the registered mail sent to their address.

39. A person cannot avoid service in accordance with section 122 of the *ESA* by failing to claim or refusing to receive registered mail sent to their last known address. There is also no indication that the Appellant moved from their last known address. Even if they did, they would have to make arrangements to receive their mail.

40. Accordingly, I find that the Appellant has not provided a reasonable or credible explanation for the failure to request an appeal within the statutory time limit.

41. With respect to the second and third criteria in *Niemisto*, I find no basis for a genuine and ongoing *bona fide* intention to appeal the Determination before the appeal period expired on April 29, 2021. Although when the Appellant insulted the delegate and disagreed with her decision, the Appellant stated "[the Employee] can take me to court. I'm not paying him" – the first time there was any indication that the Appellant may be interested in appealing the Determination was on June 25, 2021, after the expiry of the appeal period, when the Appellant replied to the Director's request for payment of the outstanding Determination. The Appellant then contacted the Tribunal via email on June 29, 2021. There is nothing in the materials before me that shows that the Director or the Employee was aware of the Appellant's intention to file the appeal.

42. With respect to the fourth criterion in *Niemisto,* although there is some prejudice in further delaying payment to the Employee, I have not given this factor much weight.

43. With respect to the fifth criterion in *Niemisto*, the appeal would not succeed if the extension is granted because the Appellant does not a strong *prima facie* case for appeal. The absence of a strong *prima facie* case is contrary to the purposes of the *ESA*. It is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail (*0388025 B.C. Ltd. (c.o.b. Edgewater Inn)*, BC EST # D019/12). I have addressed the strength of the Appellant's *prima facie* case below.

Prima facie case

44. Section 112(1) of the *ESA* allows a party to 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.

45. Section 114(1) 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 any 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 that 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.

46. The Tribunal has consistently held that an appeal is not another opportunity to argue the merits of a claim to another decision-maker. An appeal is an error correction process, and the burden is on the Appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds of review in section 112(1).

47. The Appellant seeks to overturn the Determination based on all three statutory grounds for appeal. I will address each ground of appeal separately.

Error of law

48. The Tribunal as 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.):

a. a misinterpretation or misapplication of a section of the *Act* [in *Gemex*, the legislation was the *Assessment Act*];

b. a misapplication of an applicable principle of general law;

c. acting without any evidence;

d. acting on a view of the facts which could not reasonably be entertained; and

e. adopting a method of assessment which is wrong in principle.

49. In rare cases, findings of fact may amount to an error of law where the Director acted without any evidence or arrived at a clearly wrong conclusion of the facts, unsupported by the evidence. In cases where there is some evidence, the Tribunal will generally not reevaluate the evidence or substitute its own view of the evidence (*Hossein Lotfi (Re),* 2021 BCEST 70).

50. As previously stated, an appeal is not an opportunity for the Appellant to reargue the merits of their claim. Yet much of the Appellant's submissions are an attempt to reargue facts that the Director considered and dismissed in their Reasons.

51. I am satisfied that the Director conducted a sufficient analysis of the statutory and common law tests and considered the facts in light of those tests, as set out in paragraphs 18 to 21 above. I find that the Appellant has failed to show that the Director committed a palpable or overriding error in arriving to their conclusion.

52. I find that the Director did not err in law.

Principles of Natural Justice

53. Natural justice is a procedural right that includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (*Re 607730 B.C. Ltd. (c.o.b. English Inn & Resort)*, BC EST # D055/05; *Imperial Limousine Service Ltd.*, BC EST # D014/05). The party alleging failure to comply with natural justice must provide evidence in support of the allegation (*Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

54. The Appellant submits that they did not receive the "last letter in regards to deadlines". As discussed in paragraphs 36 to 39 above, it was the Appellant's responsibility to set in place processes to respond to their obligations of receiving registered mail. The Appellant's refusal to claim or accept registered mail sent to their last known address does not provide a basis for the breach of the principles of natural justice.

55. There is also nothing in the Reasons, Record, appeal form, or submissions showing that the Director failed to comply with the principles of natural justice in making the Determination. The Record shows that the Appellant knew the allegations against them and was given a full opportunity to respond to the allegations before the Determination was made. The delegate spoke with the Appellant on December 30, 2020; January 12, 2021; and February 19, 2021. On December 30, 2020, the Appellant was hostile and stated that they could not speak with the delegate at that time. On February 16, 2021, the delegate phoned and left a message for the Appellant; however, the delegate's call was not returned. I am satisfied that the delegate did her due diligence in providing the Appellant opportunities to respond, considered the

Appellant's testimony, and remained professional when the Appellant verbally abused her on February 19, 2021.

56. Accordingly, I find that the Director did not breach the principles of natural justice.

New Evidence

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

a) whether the evidence could, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or hearing;

b) the evidence must be relevant to a material issue in 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 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 a material issue

58. This ground of appeal is not intended to give a person dissatisfied with the result of a determination the opportunity to submit evidence that, in the circumstances, should have been provided to the Director before the determination was made.

59. None of the evidence the Appellant submits is "new". All of it existed at the time the Determination was being made. There is nothing in the Appellant's submissions that suggest that the correspondence and timeline of complaints and warnings were not available during the investigation of the Complaint. The Record shows that the Appellant had multiple opportunities after their phone calls with the delegate to submit documents and provide information. This was even noted in the Director's Reasons. Having not provided this information during the investigation process, the Appellant cannot submit it on appeal.

60. I find that there is no basis for the new evidence ground of appeal.

61. Accordingly, I decline to extend the statutory appeal period under section 109(1)(b) of the *ESA* and dismiss the appeal. Had I granted the extension for the statutory appeal period, the appeal would have nevertheless been dismissed under section 114(1)(f) for having no reasonable prospects of success.

ORDER

62. The appeal is dismissed under section 114(1)(b) of the *ESA* for having been filed outside of the statutory appeal period. Pursuant to section 115 of the *ESA*, the Determination dated March 22, 2021, is confirmed, together with any interest that has accrued under section 88 of the *ESA* to the amount payable as of June 24, 2021.

Mona Muker
Member
Employment Standards Tribunal