

EMPLOYMENT STANDARDS TRIBUNAL

An appeal

- by -

Seyed-Sepehr Seyed-Ali
("Mr. Seyed-Ali")

- 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: David B. Stevenson

FILE No.: 2020/139

DATE OF DECISION: January 15, 2021

DECISION

SUBMISSIONS

Seyed-Sepehr Seyed-Ali on his own behalf

OVERVIEW

1. Seyed-Sepehr Seyed-Ali (“Mr. Seyed-Ali”) has filed an appeal under section 112 of the *Employment Standards Act* (the “ESA”) of a determination issued by Dawn Rowan, a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on August 20, 2020 (the “Determination”).
2. The Determination found Mr. Seyed-Ali’s former employer, Central City Brewers & Distillers Ltd. (“CCBD”), had contravened Part 4, section 42 of the *ESA*, but otherwise had made voluntary payments that had fully satisfied any wage claims Mr. Seyed-Ali had under the *ESA*. In result, the Director found no wages were outstanding and that no further action would be taken.
3. This appeal is grounded in an allegation the Director failed to observe principles of natural justice in making the Determination and new evidence becoming available. There is also reference in the appeal documents to a possible error of law, but that ground is not specifically raised.
4. In correspondence dated October 5, 2020, the Tribunal acknowledged having received an appeal and, among other things, requested the section 112(5) record (the “record”) from the Director.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Seyed-Ali and to CCBD. An opportunity has been provided to both to object to its completeness.
6. In correspondence dated November 26, 2020, Mr. Seyed-Ali has objected to the completeness of the record, identifying the absence of an e-mail thread in July 2020 between him and the Director. The Director does not object to the inclusion of that thread in the record and I have added that thread to the record. The Director has noted, in respect of other aspects of the submission – and I agree, that the submissions made by Mr. Seyed-Ali are not relevant to the completeness of the record but restate arguments made in the appeal submission. Those arguments need not be addressed in the context of the completeness of the record.
7. There has been no objection by CCBD to the completeness of the record.
8. I accept the record is complete.
9. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal, my review of the material that was before the Director when the Determination was being made and any additional evidence that might be accepted and included in the appeal. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 114 (1) *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 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.*

10. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and CCBD will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

11. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE FACTS

12. CCBD operates a brewing and distilling company in Surrey, BC. Mr. Seyed-Ali was employed by CCBD as a Quality Control Technician from February 19 to August 31, 2018. His rate of pay was \$37,500.00 a year.

13. Mr. Seyed-Ali filed a complaint with the Director alleging CCBD had contravened the *ESA* and claimed he was owed regular wages, overtime wages, annual vacation pay, compensation for length of service, and reimbursement for unauthorized deductions.

14. The complaint process was somewhat disjointed. There was a complaint hearing on May 17, 2019, which was attended by Mr. Seyed-Ali and two representatives of CCBD. Both parties presented their respective cases.

15. The delegate of the Director who conducted the hearing was unable to write the decision and the matter was assigned to the Delegate identified in this appeal, who had access to all of the hearing notes, spoke with both parties, and received and cross-disclosed additional information and submissions from the parties.

16. Neither Mr. Seyed-Ali nor CCBD objected to the complaint process or alleged the process denied either of them the opportunity to fully present their case or to respond to the evidence and arguments presented by the other party.
17. The Determination contains an extensive summary of facts that were not in dispute, comprising more than five pages. Mr. Seyed-Ali does not take issue with the facts in this appeal, but asserts in the appeal the Director “mischaracterized” the events.
18. There are a few salient facts that bear noting.
19. First, Mr. Seyed-Ali was employed under a six-month contract that had, as its term, February 19 to September 18, 2018. His contract specifically excluded benefit entitlement and the Director found he was not entitled to the three days sick leave he claimed.
20. Second, on July 23, 2018, Mr. Seyed-Ali, supported by a doctor’s note, commenced medical leave. He was to be re-assessed on July 27, 2018. On July 30, 2018, Mr. Seyed-Ali presented another doctor’s note indicating he would remain on medical leave for an additional month commencing July 27, 2018. The medical leave was unpaid.
21. Third, on August 27, 2018, in response to an e-mail from the Quality Control Manager of CCBD at the time, advising Mr. Seyed-Ali he was to return to work August 28, 2018, and was scheduled for the day shift, Mr. Seyed-Ali listed several concerns with returning to work, including walking back into to a work place “where hazing is supported and drinking on the job especially while driving a forklift is not even acknowledged”, with not having his contract extended, with not being provided with updates in his department during his absence, and with not being invited to a production meeting that had taken place that morning. Mr. Seyed-Ali summarized his position as follows: “there are plenty of other things wrong with CCBD that need to be fixed before I ever come near that place.” Despite efforts by the Human Resources Manager to have Mr. Seyed-Ali meet to discuss a return to work, he neither attended any meeting nor returned to work. On August 28, 2018, CCBD conveyed their position to Mr. Seyed-Ali that his continued absence from work would be viewed as a resignation from his employment. Their position was reiterated and clarified in an e-mail to him on August 29, 2018. Mr. Seyed-Ali’s continued absence in the face of the position taken by CCBD resulted in CCBD sending an e-mail terminating his employment on August 31, 2018.
22. Fourth, during his period of absence, from July 23 to August 31, 2018, Mr. Seyed-Ali received several payments deposited to his bank account. The Director found these payments had been made in error and were unrelated to work performed by Mr. Seyed-Ali during the pay periods to which they related.
23. The Determination also contains a summary of the information and argument presented by Mr. Seyed-Ali and CCBD.
24. The Director found Mr. Seyed-Ali was entitled to overtime wages that had not been paid, ordered their payment, and levied an administrative penalty on CCBD relating to their non payment.
25. The Director found Mr. Seyed-Ali had terminated his own employment and was not entitled to compensation for length of service. The Director added that even if Mr. Seyed-Ali had been entitled to

compensation for length of service, the amounts paid in error to him by CCBD while he was on unpaid medical leave more than offset any amount owed for length of service.

26. The Director found Mr. Seyed-Ali was entitled to annual vacation pay and that the amount to which he was entitled had been paid.

ARGUMENT

27. In the appeal, Mr. Seyed-Ali alleges the Director failed to observe principles of natural justice in making the Determination. His argument on this ground of appeal is a bit difficult to follow, as there is nothing in the argument that identifies a question of natural justice, which as I shall indicate later in these reasons, involves an examination of whether in all the circumstances the process was procedurally fair.
28. Mr. Seyed-Ali's argument is developed under the heading: "Mischaracterization of events", which, in form and substance, revisits Mr. Seyed-Ali's view of the events leading to the decision of CCBD to end his employment; the central point of his argument is that the Director failed to properly consider all these events and incorrectly decided CCBD did not terminate Mr. Seyed-Ali's employment but, by failing to attend work after August 28, 2018 – the end of his scheduled unpaid medical leave – he had terminated his own employment.
29. He says in his submission: "I did not abandon my job and am entitled to CLOS."
30. Mr. Seyed-Ali's argument lists all of the facts and restates all of the arguments which he says ought to have led the Director to find he was terminated without cause.
31. The appeal submission contains reference to several provisions of the *ESA*, including sections 21, 28, 32, 49.1 and 83, which Mr. Seyed-Ali says were contravened by CCBD and were either ignored, glossed over, or simply missed by the Director in making the Determination.

ANALYSIS

32. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, which says:
- 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of 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.*
33. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

34. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.
35. Mr. Seyed-Ali has grounded this appeal in an alleged failure by the Director to observe principles of natural justice and in evidence becoming available that was not available when the Determination was made.
36. I shall first deal with the new evidence ground of appeal. The “evidence” sought to be included with the appeal is a decision made by the British Columbia Human Rights Tribunal on September 17, 2020. The stated purpose for seeking to include this decision in the appeal appears to be to show his human rights complaint against CCBD is still active and that it “covers details of the harassment I received at CCBD and my reluctance return [sic] to work at that time.” I will note in respect of the last point that the “details” of harassment are only Mr. Seyed-Ali’s allegations; the Human Rights Tribunal was clear in stating no findings of fact were being made in its decision: see para. 32.
37. The Tribunal has discretion to accept or refuse new evidence. When considering an appeal based on this ground, the Tribunal has taken a relatively strict approach to the exercise of this discretion and tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. New evidence which does not satisfy any of these conditions will rarely be accepted. 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. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *ESA*.
38. I note first that the decision is a matter of public record and in that respect is not really “evidence” at all. However, to the extent it can be considered “new evidence” in this appeal, I find Mr. Seyed-Ali has not made out this ground of appeal and it is dismissed. I make this finding for the following reasons.
39. The decision is not relevant to the merits of the complaint filed by Mr. Seyed-Ali under the *ESA*; it does not establish any “facts” that might support the claims and arguments made by him to the Director during the complaint process or to the Tribunal in this appeal. Nor is anything contained in the decision “probative” to Mr. Seyed-Ali’s complaint, in the sense that nothing contained in it is capable of resulting in a different conclusion than what is found in the Determination.
40. I shall next deal with the natural justice ground.
41. A party alleging a failure to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99. There is some suggestion of bias in the investigations done by the Director and that sort of allegation commands a high evidentiary bar and require clear and objective evidence.

42. I am able to address Mr. Seyed-Ali's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

43. Provided the process exhibits the elements of the above statement, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination.

44. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Mr. Seyed-Ali was provided with the opportunity required by principles of natural justice to present his position to the Director and to respond to the evidence and argument presented by CCBD.

45. It is not a breach of principles of natural justice for the Director to make a finding on the evidence with which one of the parties disagrees.

46. As noted above, there is a burden on Mr. Seyed-Ali on this ground to provide some objective evidence in support of this allegation.

47. Mr. Seyed-Ali has provided no objectively acceptable evidence showing he was denied the procedural protections reflected in the *ESA* and in the natural justice concerns that typically operate in the context of the complaint process. It is absolutely clear from the file that he was afforded the procedural rights reflected in the *ESA* and captured by natural justice principles.

48. There is simply no basis for this ground of appeal, and it is dismissed.

49. In any event, as I have stated above, at its core this appeal is not really about whether the process was procedurally fair. Simply, it was. This appeal is about nothing more than Mr. Seyed-Ali's disagreement with the conclusion of the Director that he was not entitled to compensation for length of service because he was not terminated by CCBD without cause or notice.

50. There are some peripheral arguments questioning whether the Director erred in law by ignoring, glossing over missing contraventions of the *ESA* by CCBD, but those matters are just window dressing that Mr. Seyed-Ali appears to have compiled for effect and shall be addressed following my analysis of what I perceive to be the central point of this appeal.

51. The question which the Director had to confront in deciding if Mr. Seyed-Ali was entitled to compensation for length of service was one of mixed law and fact, requiring applying the facts as found to the relevant legal principles developed under sections 63 and 66 of the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco, supra*, citing paragraph 35 of

the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: “questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests”. A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

52. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director’s findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. 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.

53. To reiterate, the arguments made here do no more than express Mr. Seyed-Ali’s disagreement with the conclusion of the Director that he was not entitled to compensation for length of service because the circumstances did not raise a question under section 66 of the *ESA* and he terminated his own employment.

54. The Director considered whether the circumstances in which Mr. Seyed-Ali’s employment was terminated disentitled him to length of service compensation. The Director found it was. Based on *all the facts* provided, and accepted, by the Director, it is difficult to find fault with the conclusion of the Director that Mr. Seyed-Ali’s words and conduct clearly expressed an intention to terminate his employment and it was not an inappropriate response by CCBD to accept his decision and to formally confirm the termination of the relationship.

55. The burden in this appeal is on Mr. Seyed-Ali, as the appellant, to persuade the Tribunal that the Determination was wrong, in law, in fact or in some manner of mixed law and fact that raises an error of law.

56. I am not persuaded that burden has been met. As indicated above, this appeal does no more than seek to have the Tribunal accept a very specific view of the events leading to his termination, limit the factual context to those events, accept the conclusions advanced by him based on those events and reach a different result based on that very different factual perspective. The *ESA* does not allow the Tribunal to do this.

57. There is no error of law shown in the decision to deny Mr. Seyed-Ali length of service compensation.

58. Finally, I shall briefly respond to the collection of arguments made by Mr. Seyed-Ali that have referred to other provisions of the *ESA*.
59. The Director addressed section 21 in the Determination, finding there was no unauthorized deduction and that section 21 did not preclude a finding that the amounts deposited to Mr. Seyed-Ali's account on August 17 and 31, 2018, paid all wages he was owed under the *ESA*. There is no error in those conclusions.
60. There was no evidence indicating a breach of section 28(1) (d), (g) or (h). Any contravention of section 28(1) (j) – and there was no evidence or argument specific to this provision – would have been caught by the Director finding CCBD had contravened section 42 and imposing an administrative penalty.
61. Mr. Seyed-Ali did not raise any question relating to section 32 in his complaint and there is no evidence in the record that might support the allegations made in the appeal submission. The delay and the absence of a factual basis for this argument demands that it be rejected.
62. Section 49.1 of the *ESA* was not contained in the legislation at the time relevant to this complaint and can have no possible application to this matter.
63. The argument relating to section 83 of the *ESA* presupposes Mr. Seyed-Ali was terminated without cause. That was not the finding made by the Director, which was that Mr. Seyed-Ali terminated his own employment by failing, or refusing, to return to work following his unpaid medical leave. There is simply no evidentiary basis upon which Mr. Seyed-Ali can assert the Director committed a reviewable error by not examining and making a finding on section 83. I also note that Mr. Seyed-Ali made no allegation in his complaint or during the complaint process that CCBD had contravened the provision.
64. For all of the above reasons, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1) (f) of the *ESA*.

ORDER

65. Pursuant to section 115(1) of the *ESA*, I order the Determination dated August 20, 2020, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal