

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Colin Thomas

- of a Determination issued by -

The Director of Employment Standards

PANEL: Richard Grounds

FILE NO.: 2022/102

DATE OF DECISION: September 26, 2022

DECISION

SUBMISSIONS

Colin Thomas	on his own behalf
Carrie H. Manarin	delegate of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Colin Thomas (the “Appellant”) of a determination issued by Carrie Manarin, a delegate (the “Adjudicating Delegate”) of the Director of Employment Standards (the “Director”), dated March 31, 2022 (the “Determination”). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* (“ESA”).
2. In the Determination, the Adjudicating Delegate concluded that the Appellant had resigned his employment with Modern Stretch Form Inc. (the “Employer”) and, therefore, compensation for length of service was not owed to the Appellant.
3. The Appellant submits that the Director erred in law and failed to observe the principles of natural justice in making the Determination.
4. I have before me the Determination, the reasons for the Determination, the Appellant’s appeal submission, the *ESA* section 115 record, as well as a submission from the Director.
5. For the reasons provided below, I order the Determination dated March 31, 2022 be confirmed.

ISSUES

6. The issues to be decided in this appeal are whether the Director erred in law and failed to observe the principles of natural justice in making the Determination.

THE INVESTIGATION AND DETERMINATION

7. The Appellant worked as a machine operator for the Employer which operates a custom metal fabrication business in Surrey, BC. The Appellant took time off work in March 2020 because he reported having Covid-19 symptoms. The Appellant exchanged text messages with the Employer on March 30, 2020 and did not return to work. The Appellant alleged that his employment was terminated but the Employer considered that the Appellant had resigned. The Appellant complained to the Employment Standards Branch for compensation for length of service.
8. The Appellant’s complaint proceeded to an investigation conducted by Catherine Stark, a delegate (the “Investigating Delegate”) of the Director. During the investigation, the Employer submitted a transcript of text messages that occurred between the parties during the period of March 16, 2022 at 8:58 AM and April 1, 2022 at 11:57 AM. The record before me shows the Appellant disputed the completeness of the

transcript and he alleged there was a screen shot sent to him by Mr. Mario Maggio, the Employer's representative, that was missing. The Appellant was provided an opportunity to provide further information prior to the issuance of the Investigation Report but he did not.

9. The record before me shows that on February 8, 2022, the Investigating Delegate issued the Investigation Report (dated February 14, 2022), and provided both the Appellant and the Employer an opportunity to respond to the report within a deadline.
10. Both the Appellant and the Employer responded to the Investigation Report. Following receipt of the responses to the Investigation Report, the Adjudicating Delegate was assigned to decide the complaint and she issued the Determination dated March 31, 2022.
11. In the Determination, the Adjudicating Delegate addressed the preliminary matter related to the Appellant's claim that the transcript of the text message string the Employer had submitted had been altered. The Adjudicating Delegate noted some oddities about the screen shots of the text message exchange the Appellant had submitted including that it had no time stamp, it had poor print quality, the background was uneven and the colouring was inconsistent. The Adjudicating Delegate concluded that it was the Appellant's screen shots that had been altered.
12. The Adjudicating Delegate reviewed the information provided by the Employer and the Appellant which primarily related to the Appellant's absence from work due to being sick. The Appellant stated that he left work to self isolate because of COVID related symptoms. The Employer stated that the Appellant left work after one of the owners' sons was hired to work at the company. The Appellant and the Employer had previously had discussions about the Appellant buying the company.
13. The Adjudicating Delegate focused on the issue of whether the Appellant had voluntarily resigned or had been terminated and concluded that the Appellant demonstrated an intention to resign when he advised the Employer that he would quit if one of the owners' sons was hired. The Adjudicating Delegate concluded that the Appellant abandoned his employment contract and, therefore, the Employer was relieved from its obligation to pay compensation for length of service.
14. In reaching the conclusion that the Appellant abandoned his employment, the Adjudicating Delegate relied on Tribunal decision *Burnaby Select Taxi Ltd. and Zoltan Kiss* [BC EST #091/96] and a British Columbia Court of Appeal decision, *Pereira v. Business Depot Ltd*, 2011 BCCA 361.

ARGUMENTS

15. The Appellant appealed the Determination on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Appellant submitted that the Adjudicating Delegate falsely accused him of fabricating evidence when she concluded that he had altered the text message conversation with the Employer. The Appellant explained that the reasons relied upon by the Adjudicating Delegate were flawed because the text message in question was a cropped screenshot (of an earlier part of the text message conversation) so did not have a timestamp, the image was of lower quality because it had been zoomed in, it was not manually blacked out, and the colour coding was consistent with the earlier text messages.

16. The Appellant's "main reason" for his appeal was because the Adjudicating Delegate used a legal test that, he submitted, had nothing to do with his case. The Appellant highlighted that the cases relied on by the Adjudicating Delegate were different because he was in the process of also purchasing the company. The Appellant submitted that the text messages back and forth with the Employer were business discussions and that he was not concerned about one of the owners' sons being hired.
17. The Appellant submitted that the text messages confirmed that the Employer was not providing a way forward to continue with the previous business plan and only wanted him to return as an employee with no purchase agreement, "under new uncertain and undefined terms", diminishing his "role, pay and future with the company".
18. Submissions on the merits of the appeal were requested from the Adjudicating Delegate and from the Employer specifically relating to the issue of the text messages raised in the Appellant's appeal.
19. The Employer did not provide any submissions. The Adjudicating Delegate submitted that even if it was the Employer who altered the text message correspondence, this would have no bearing on the outcome because the remainder of the text messages and other evidence supported that the Appellant had no interest in returning as an employee without an interest in the company. The Adjudicating Delegate submitted that the Appellant did "not dispute the accuracy of any other portion of the parties' text message strings between March 25 and March 30, 2022", the Appellant was given an opportunity to respond to the Investigation Report, and that the evidence supported that the tests for abandonment of employment in the cases cited were met.
20. The Appellant did not make a reply to the Adjudicating Delegate's submissions.

ANALYSIS

Error of Law

21. The Appellant disputes the legal test that the Adjudicating Delegate relied on in concluding that he had abandoned his employment. The Appellant submitted that his situation was different because he was in the process of purchasing the company from the Employer.
22. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.
23. The Adjudicating Delegate was aware of the business discussions between the Appellant and the Employer but still framed the issue as to whether or not the Appellant quit or was fired. Given the Appellant claimed

that he was entitled to compensation for length of service and the Employer responded that the Appellant had resigned, the Adjudicating Delegate correctly identified the issue to be decided. The business acquisition discussions that had occurred did not change the employment relationship that existed at the time.

24. I find the Adjudicating Delegate applied the correct legal principle to decide whether or not the Appellant was entitled to compensation for length of service or whether he had voluntarily resigned. The determining factors relate to the Appellant's demonstrated intent and actions, not whether he was in discussions to purchase the company. The Adjudicating Delegate's conclusion that the Appellant abandoned his employment is reasonably supported by the evidence including:
- a) The Employer never told the Appellant he was fired and it was the Appellant who suggested he be fired.
 - b) The Employer requested the Appellant provide a medical note if the leave was for medical reasons but the Appellant did not do so.
 - c) The Employer attempted to clarify if the Appellant was returning to work but the Appellant stated that it was contingent on "working thing[s] out", referring to the employment of one of the owners' sons and to him buying the company.
25. On appeal, the Appellant submitted that the Adjudicating Delegate falsely accused him of fabricating evidence when she concluded that he had altered a text message conversation he had with the Employer.
26. It is apparent in the record before me that the Adjudicating Delegate failed to correctly understand the screen shot of the text message exchange which the Appellant provided including that it was the Employer who replied to the Appellant's text message asking "How do we move forward[?]" by sending the Appellant a screenshot from an earlier text message exchange. The Appellant and the Employer both used iPhones which utilize particular colour coding for the messages. The inconsistency in the colour coding noted by the Adjudicating Delegate is explained by the fact that it was the Employer who sent the screenshot to the Appellant. In addition, the lack of a timestamp, the lower picture quality and the background shading are all explained by the fact that it was the Employer who sent the screenshot to the Appellant.
27. However, this failure to correctly understand the text message exchange does not materially affect the outcome of the Determination. The Adjudicating Delegate's conclusion that the Appellant abandoned his employment is well supported by the abundance of other evidence confirming that the Appellant was upset about the Employer hiring one of the owners' sons and that they needed to "work thing[s] out" before he would return to work.
28. I am satisfied that the Adjudicating Delegate did not commit an error of law when she concluded that the Appellant abandoned his employment and, therefore, was not entitled to compensation for length of service.

Failure to Observe the Principles of Natural Justice

29. The Appellant submits that the Director failed to observe the principles of natural justice in making the Determination. The Appellant's appeal submissions do not specifically articulate how the Director failed to observe the principles of natural justice but, as noted above, he disputes the Adjudicating Delegate's conclusion about the text message exchange and the legal test she followed.
30. The principles of natural justice relate to the fairness of the process and to 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.
31. The Appellant was informed of the issues and was provided with an opportunity to provide information supporting his complaint. The Adjudicating Delegate provided detailed reasons in the Determination where she considered all of the evidence from both parties. Although I have found that the Adjudicating Delegate misunderstood the text message exchange involving a specific screenshot the Appellant says was sent by the Employer to the Appellant, this did not materially affect the outcome and the Adjudicating Delegate's conclusion on the decisive issue (about whether the Appellant resigned or was fired) was well supported by the evidence.
32. An objective review of the Adjudicating Delegate's reasons does not support that she was not impartial or that she was biased against the Appellant. In addition, the circumstances do not support that there was a reasonable apprehension of bias on the part of either the Investigating Delegate or the Adjudicating Delegate against the Appellant. While it is unfortunate that the Adjudicating Delegate misunderstood the evidence about the text message exchange, this misunderstanding does not itself support a conclusion that the Adjudicating Delegate failed to observe the principles of natural justice in making the Determination.
33. As discussed above, the Adjudicating Delegate applied the correct legal principle to decide whether or not the Appellant was entitled to compensation for length of service or whether he had voluntarily resigned. The legal test used by the Adjudicating Delegate does not raise a natural justice issue.
34. I am satisfied that the Adjudicating Delegate did not fail to observe the principles of natural justice in making the Determination.

ORDER

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

Richard Grounds
Member
Employment Standards Tribunal