Citation: Christopher Adam Taggart (Re)
2022 BCEST 66

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Christopher Adam Taggart

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2022/176

DATE OF DECISION: October 27, 2022

DECISION

SUBMISSIONS

Christopher Adam Taggart — on his own behalf

OVERVIEW

1. This is an appeal by Christopher Adam Taggart (the "Employee") of a decision of a delegate of the Director of Employment Standards (the "Director") made on July 22, 2022 (the "Determination").

2. On August 12, 2021, the Employee filed a complaint with the Director alleging that M.E. Buds Cannabis Dispensary Inc. carrying on business as Buds Cannabis ("Buds" or "Employer") had contravened the *Employment Standards Act* (the *"ESA"*). The Employee alleged that Buds was withholding his employment contract, and misrepresented the availability of work and his compensation. Specifically, the Employee alleged that he had been hired to work 32 hours per week at $15.50 per hour but that he was only paid $15 per hour for 20 hours per week.

3. The Director followed a two-step process in making the Determination. One delegate of the Director (the "investigative delegate") corresponded with the parties and gathered information and evidence. Once that process was complete, the investigative delegate prepared a report (the "Investigative Report") which was sent to the parties for review and comment. Upon receiving the responses to the Investigative Report and the replies to those responses, the matter was sent to a second delegate (the "adjudicative delegate") who assumed responsibility for reviewing the responses and replies and issuing the Determination.

4. During the investigation process, Buds issued a number of cheques to the Director to resolve the Employee's dispute. The funds were sent to the Employee on July 19, 2022.

5. In the July 22, 2022 Determination, the adjudicative delegate determined that the dispute that had caused the complaint had been resolved, and that, pursuant to section 76(3)(i) of the *ESA,* no further action would be taken.

6. The Employee appeals the Determination, identifying all statutory grounds of appeal; that is, that the Director erred in law, that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

7. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal 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 found it unnecessary to seek submissions from the Employer or the Director.

8. This decision is based on the section 112(5) record that was before the Director at the time the Determination was made, the appeal submissions, and the Determination.

ISSUE

9. Whether the Employee has established grounds for interfering with the Director's decision.

BACKGROUND AND ARGUMENT

10. Buds operates two store front locations on Vancouver Island and provides cannabis products and supplies to the public through online and store front sales. Buds is owned and managed by Megan Turpin ("Ms. Turpin") and Dustin Ereiser ("Mr. Ereiser").

11. The Employee, who worked in both locations as a customer service representative/Budtender, started work on April 21, 2021.

12. On August 12, 2021, the Employee had a heated text message exchange with Ms. Turpin regarding his starting wage and employment contract. She told him to cease communicating with her and to deal with Mr. Ereiser. August 12, 2021 was the Employee's last day of work.

13. On August 16, 2021, the Employee had a conversation with Mr. Ereiser regarding the text exchange and requested a medical leave. Mr. Ereiser said that although the Employee did not provide him with a medical note, he agreed that the Employee could take a one-week medical leave.

14. According to the Investigative Report, the Employee and Mr. Ereiser had an exchange of texts between August 23 and 25, 2021 regarding the Employee's return to work. Mr. Ereiser told the Employee that he had not been dismissed, and although he had included the Employee in the new schedule, there was less time available to him.

15. The Employee's reply was as follows:

> No Dustin, threatening to fire me last Tuesday and ignoring me for the past eight days is a constructive dismissal.

16. Mr. Ereiser said that he received additional inappropriate texts from the Employee later that night, and that the Employee later posted his resignation on Google reviews. The review read, in part, as follows:

> [T]he owner, Dustin, constructively dismissed me during leave for mental illness after I filed a claim due to bullying from the other owner, Megan. Megan lied to me about wages and hours, and had refused to provide a copy of my contract. …. Consider this my resignation.

17. The Employee alleged that when he was hired, his starting hourly wage was to be $15.50 for 32 hours per week. However, he was paid $15 hour until June 1, 2021, when his hourly wage increased to $15.20, and on August 1, 2021 to $16.

18. The Employee said that he did not receive an employment contract setting out his hourly wage or the hours he was to work. When he requested his employment contract, he was told that it had been lost when the new store was opened.

19. The Employee provided the investigative delegate with a schedule of his shifts and wage statements in support of his complaint.

20. Ms. Turpin's evidence was that the Employee was hired at minimum wage, and as the minimum wage was about to increase, she agreed to pay him $15 per hour. However, in an effort to resolve the complaint, Ms. Turpin agreed to pay the Employee $15.50 from the beginning of his employment until August 1, 2021, when he received a wage increase to $16 per hour, and sent a cheque to the Director representing the difference.

21. Ms. Turpin also contended that the Employee had been overpaid or underpaid on several pay periods. The investigative delegate informed the Employer that overpayments could not be deducted from wages owing. Buds then issued a cheque for the amounts underpaid plus vacation pay, which the Director held in trust, as well as an amount representing outstanding statutory holiday pay.

22. Buds contended that the Employee resigned his position based on the contents of a review the Employee posted on Google. Although Buds offered the Employee two weeks wages, the Employee turned it down. During the investigation, Buds offered to pay the Employee one week's wages as compensation for length of service, and issued a cheque in that amount to the Director in trust.

23. The investigative delegate conveyed the offer of settlement encompassing wages, compensation for length of service, and statutory holiday pay to the Employee, along with accumulated interest.

24. The Employee declined the compensation because he wanted a) a finding of constructive dismissal, b) interest to be paid on all wages owing, and c) "[p]unitive monies paid to him for pain and suffering and loss of dignity." The investigative delegate informed the Employee that his claim for wages, including statutory holiday pay would be investigated, but that she had no jurisdiction under the *ESA* to award damages for pain and suffering or loss of dignity. She informed him that if he wished to pursue that claim, he would have to consult a lawyer.

25. All three cheques were sent to the Employee's address on July 19, 2022.

26. The adjudicative delegate determined that the Employer had resolved all outstanding pay issues identified in the Employee's complaint form, as well as underpayments in two pay periods that had been identified by the investigative delegate. The adjudicative delegate noted that Buds submitted three cheques to the Director representing wages and interest, and that the wages had been sent to the Employee.

27. The adjudicative delegate also noted that Buds paid the Employee compensation for length of service in an amount equivalent to one week's wages, and in addition, resolved the issue of the hourly wage discrepancy by paying the Employee the difference between the rate he was paid (either $15 or $15.20 per hour) and $15.50 per hour for the period April 21 to July 30, 2021.

28. Finally, the adjudicative delegate noted that Buds had also resolved the issue of statutory holiday pay by paying the Employee $165.87 plus 4% vacation pay on that amount. The total amount paid to the Employee was $898.74 in wages, plus interest.

29. In light of the resolution, the adjudicative delegate determined that no further action would be taken.

ANALYSIS

30. 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 the 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, 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.

31. 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.

32. The burden is on an appellant to demonstrate a basis for the Tribunal to interfere with the determination.

33. An appeal is an error correction process, not an opportunity to re-argue a case that has been presented to the Director. Having reviewed the appeal submissions, I am not persuaded that the Employee has met the burden in this case. His appeal is, in essence, simply a disagreement with the Director's findings and conclusions.

34. I have addressed the Employee's arguments under each ground of appeal.

Error of Law

35. 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.):

a) a misinterpretation or misapplication of a section of the 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.

36. Section 76(3)(i) of the *ESA* provides that the Director may stop reviewing or investigating a complaint if the dispute that caused the complaint is resolved.

37. The Employee alleges that the adjudicative delegate failed to address the causes of his complaint. He contends that he and Buds agreed to an hourly wage that was to increase after a three-month probationary period, and that the Determination failed to account for the wage increase, depriving him of his wages.

38. The Investigative Report noted that the parties disagreed about what the Employee's wage rate was to be. The Employee alleged he was to be paid $15.50 per hour for a three month probationary period while the Employer contended the Employee was offered a starting wage of $15 per hour until August 1, 2021 when his wages increased to $16 per hour. However, in an effort to resolve the complaint, the Employer issued the Employee a cheque covering the difference between what the Employee alleged he was to be paid and what he was actually paid, between April 21, 2021, and August 1, 2021, the day his wage increased to $16, plus interest. I find no error in the adjudicative delegate's conclusion that the Employee's complaint about unpaid wages had been resolved.

39. While it appears that the Employee is also suggesting he was contractually guaranteed 32 hours of work per week and that he was entitled to be paid $15.50 per hour for a three month probationary period, there is no evidence that was the case. I accept that the parties entered into a written contract which was subsequently misplaced, however, there is nothing in the text messages between the parties (which were provided by the Employee) to suggest the Employee was promised a minimum number of hours per week or that he had a three month probationary period. The record indicates that the Employee worked irregular hours from the date his employment started, ranging from between 36 and 65.45 hours per pay period. The record also contains text messages indicating that the Employee was told that work was slow and that his shift schedule was being altered to reflect that. The Employee's response appeared to be "[n]o worries dude, I'm nothing if not flexible." In short, there was no evidence before the adjudicative delegate on which she could arrive at a conclusion that the Employee was entitled to be paid for 32 hours per week at $15.50 per hour until July 21, 2021.

40. Although the Employee raises issues about the Employer's honesty regarding the missing employment contract, whether or not the Employer received a copy of his medical note and whether or not he worked on April 11 and 12, none of those issues are relevant to the question of whether his complaint was resolved though the payments made to him. The adjudicative delegate must make factual findings on the evidence before her, and I am not persuaded that she acted on a view of the facts which could not be reasonably entertained.

41. The Employee also raises questions about the accuracy of the Employer's records. However, he presented no evidence or reason to believe that they were unreliable. The record indicates that the Employer's payroll records were maintained by a third-party professional accounting firm and there is no basis for me to conclude that it was wrong for the adjudicative delegate to rely on them.

42. The Employer also paid the Employee statutory holiday and vacation pay, as well as one week compensation for length of service. The amounts were based on the duration of the Employee's

employment and the employment records. I find no error in the adjudicative delegate's conclusion that these aspects of the Employee's complaint had been resolved.

43. Consequently, I am unable to find that the Director erred in law in deciding to take no further action under section 76(3)(i) of the *ESA*.

Natural Justice

44. Natural justice is a procedural right which includes the right to know the case being made, the right to respond and the right to be heard by an unbiased decision maker. It does not mean that the Director's delegate must arrive at a conclusion the appellant considers just and fair.

45. Although the Employee does not clearly articulate how he was denied natural justice, it appears that his argument in this respect rests on the fact that the adjudicative delegate did not specifically address any of the points he made in response to the Investigation Report. I have reviewed the Employee's comments, which include the allegations set out above – that the Employer lied about losing the employment contract, the reliability of the Employer's records – as well as the Employee's view of his entitlement for compensation for length of service and whether or not he provided a medical note to the Employer. I find that many of the Employee's responses are not relevant to the issue of whether or not the Employee's complaints were resolved and that it was not necessary for the adjudicative delegate to specifically address them in her July 22, 2022 Determination.

46. I find that the investigative delegate afforded the Employee with many opportunities to present his case and to respond to the evidence of the Employer. I also find no error in the adjudicative delegate's finding that the Employer's payment of one week's compensation for length of service to have resolved the Employee's complaint.

47. I deny the appeal on this ground.

New Evidence

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

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 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.

49. It appears that the Employee's "new evidence" is a decision of WorkSafe BC which he contends is relevant to the Employer's "dishonesty".

50. I appreciate Mr. Taggart honestly believes that his former Employer was dishonest. However, I am persuaded that even if the Employer had, in fact, misled the Director about his hourly wage rate, the Employer agreed to pay Mr. Taggart the claimed rate for the hours he actually worked. Mr. Taggart was also paid for hours the Director determined he had not been paid for. As a result, I find that the Worksafe BC decision, even if it was presented to the Director, would not have led the Director to a different conclusion on a material issue.

51. I find no basis for this ground of appeal.

CONCLUSION

52. I find, pursuant to section 114(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

ORDER

53. Pursuant to section 115 of the *ESA*, I confirm the Determination dated July 22, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal