Citation: Patricia Whelpton (Re)
2022 BCEST 78

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Patricia Whelpton

- of a Determination issued by -

The Director of Employment Standards

PANEL: Maia Tsurumi

FILE NO.: 2022/188

DATE OF DECISION: December 20, 2022

DECISION

SUBMISSIONS

Patricia Whelpton — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*ESA*"), Patricia Whelpton (the "Appellant") has filed an appeal of a determination (the "Determination") issued by Tara MacCarron, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on September 20, 2022. The Delegate determined Price's Lock and Safe (2009) Ltd. (the "Employer") did not terminate the Appellant by substantially altering a condition of her employment: *ESA*, s. 66.

2. The Appellant appeals the Determination on the grounds the Delegate erred in law and failed to observe principles of natural justice in making the Determination and evidence has become available that was not available at the time the Determination was made.

3. For the reasons set out below, I dismiss the appeal under section 114(1)(f) of the *ESA*, because it has no reasonable prospect of success.

4. My decision is based on the submissions made by the Appellant in the Appeal Form, the sub-section 112(5) record (the "Record"), the Determination, and the Reasons for the Determination (the "Reasons").

ISSUE

5. The issue before the Employment Standards Tribunal (the "Tribunal") is whether this appeal has a reasonable prospect of success under section 114(1)(f) of the *ESA*.

BACKGROUND

6. The Appellant filed a complaint (the "Complaint") with the Employment Standards Branch (the "Branch") alleging the Employer breached the *ESA* because it substantially altered a condition of her employment such that her employment should be deemed terminated and therefore, she is owed compensation for length of service.

7. The Employer operates a locksmith business in Victoria, Campbell River, and Courtenay.

Issues Before the Delegate

8. The issue before the Delegate was whether the Employer terminated the Appellant by making a unilateral substantial alteration of a condition of her employment: *ESA*, section 66.

Evidence Relied on by the Delegate

9. A delegate of the Director (the "Investigating Delegate") investigated the Complaint and completed an investigation report on July 29, 2022 (the "Investigation Report"). In making her Determination, the Delegate reviewed all the information collected by the Investigating Delegate, including the Investigation Report.

10. The Appellant told the Investigating Delegate she worked at the Employer's Courtenay and Campbell River offices. She says she went on medical leave on October 5, 2020, and returned on November 30, 2020. When she returned, she was told the Employer had been restructured and all accounting duties were centralized to the Victoria office. The Appellant said she ended her employment on February 5, 2021, because her job was so significantly altered by the Employer that she considered herself terminated.

11. The Appellant said her job title was "bookkeeper" and she did this for 13 years. She provided a document she used for a mortgage application that said her position was as a bookkeeper. This document was signed by her manager. The Appellant submitted about 90% of her duties involved accounting type work before she went on medical leave, and she provided a list of many of her pre-leave duties.

12. The Appellant said the Employer removed almost all her payroll and bookkeeping duties after her medical leave, replacing them with invoicing, administrative tasks, and inventory work. The Appellant provided emails between her and the Employer confirming the Employer had removed her accounting duties as part of company changes. The Appellant provided a list of her duties after her leave. She also said the change in her work duties resulted in a reduction in her hours.

13. The Employer told the Investigating Delegate the Appellant voluntarily resigned from her position. The Employer said there was no written employment contract, and the Appellant had a fluid job description that changed over time. The Employer said the Appellant was always an office assistant and not a bookkeeper. The Appellant's wage statements, and her email signature line indicate her position was "Administration."

14. The Employer stated that the Appellant worked part-time, which was consistent with the Appellant's evidence that she worked four to seven hours a day, four days a week, before taking her leave. The Employer further said the Appellant could increase or decrease her hours as she saw fit and could choose to work each day at one of the Courtenay and Campbell River locations or at both.

15. The Employer acknowledged that prior to the Employer's restructuring about 50% of the Appellant's duties involved accounting. The Employer provided a list of the Appellant's post leave duties. According to the Employer, after the Appellant returned from her medical leave, accounting represented about 15% of her duties and most of her other pre-leave duties were retained.

16. The Employer's position was also that the Appellant acquiesced to the change in her duties after her leave because she continued to work for the Employer for two months.

The Delegate's Decision

17. The Delegate first reviewed the relevant provisions of the *ESA*. She noted section 63(3) says the liability of an employer to pay compensation for length of service is deemed discharged if an employee terminates, retires, or is dismissed from employment, but section 66 says that even where an employee quits, they may ask the Director to declare they were in fact terminated:

> **Director may determine employment has been terminated**
>
> **66** If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated.

18. Conditions of employment are broadly defined in section 1 of the *ESA* as, "all matters and circumstances that in any way affect the employment relationship of employers and employees." The Delegate noted examples of employment conditions include wages, benefits, job classification, job responsibilities, hours of work and location of work.

19. The Delegate said not all changes to conditions of employment result in a conclusion that there was a deemed termination. To succeed with a claim under section 66 of the *ESA*, an employee must establish: (1) the employer unilaterally altered a condition of employment without providing the employee with proper notice of the alteration; and (2) the alteration was substantial, meaning it is reasonably described as fundamentally changing the nature and/or contractual terms of the employment relationship.

20. The Delegate understood that the test for whether a change to an employee's condition of employment is substantial is an objective test: Would an ordinary or reasonable person consider the changes to be substantial?

21. Applying the above principles to the evidence, the Delegate found there was no deemed termination. While the Employer altered the Appellant's conditions of employment, the changes were not substantial.

22. Neither party established the Appellant had a fixed, well-defined role with specific job duties throughout her employment. A job title in a letter, like a job title in an email signature, is not proof of the work an employee does on a day-to-day basis. Based on the Appellant's description of her work before and after her leave, the Delegate found she had a fluid job description with responsibility for a wide variety and assortment of work. The Delegate further found the Appellant's job duties would have gradually changed as the Employer evolved as a company and adopted new processes and technology.

23. Also, objectively viewed, the duties the Appellant said she did before and after her medical leave were not significantly different. The nature of her job duties remained the general office administration of two store locations. Even though there was a moderate reduction in some of her accounting duties, this work was replaced with other duties that still fell within the scope of general office administration. Therefore, the Delegate did not conclude the alteration to the Appellant's work was so substantial that it could reasonably be described as a fundamental change to the nature and/or contractual terms of her employment relationship.

24. Besides the change to her job duties, there was no evidence any other of the Appellant's conditions of employment were changed: locations of work, wage rate, part-time schedule and flexible hours all remained the same. While the Appellant said she worked fewer hours because of the change in her job duties, the Delegate found any change in her hours was her own doing as she was in control of her hours and could increase and decrease them as she saw fit.

25. The Delegate determined the Appellant was not deemed terminated under section 66 of the *ESA*.

ARGUMENTS

26. The Appellant says the Delegate erred in law and breached principles of natural justice in making the Determination and there is evidence now available that was not available at the time the Determination was made that supports her Complaint.

27. The Appellant's arguments on appeal are the same as her arguments to the Branch:

a. In August 2020, the Appellant's work answering the phone and writing up service orders was given to a central dispatch in the Employer's Victoria office;

b. Prior to having surgery on October 5, 2020, the Employer assured the Appellant her administrative and bookkeeping duties would be maintained by the Employer's staff in Victoria and she could return to her job after her medical leave;

c. Upon returning from her medical leave on November 30, 2020, the Employer told the Appellant she would no longer have her pre-surgery administrative and bookkeeping duties and would do other work as assigned by her manager;

d. After she returned from her medical leave there was not enough work for her to work full-time;

e. By the end of January 2021, it was clear to her she no longer had a job with the Employer; and

f. She believes her age (74) was the reason her work was taken away.

ANALYSIS

28. An appeal is not a re-hearing of the matter and is not another opportunity to give one's version of the facts. Section 112(1) of the *ESA* says a person may appeal a determination on any 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.

29. I find this appeal has no reasonable prospect of success.

Error of Law

30. In the context of appeals to the Tribunal, an error of law occurs in the following situations:

1. a misinterpretation or misapplication by the decision-maker of a section of its governing legislation;

2. a misapplication by the decision-maker of an applicable principle of general law;

3. where a decision-maker acts without any evidence;

4. where a decision-maker acts on a view of the facts that could not reasonably be entertained; and/or

5. where the decision-maker is wrong in principle:

Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam), 1998 CanLII 6466 (BC CA). The Tribunal has adopted this definition: see e.g., *Re: C. Keay Investments Ltd. (Re)*, 2018 BCEST 5, at para. 36.

31. The Delegate identified the applicable principles of law and did not misinterpret or misapply sections 1 and 66 of the *ESA*. In *Helliker*, BC EST # D338/97, the Tribunal determined that to find a termination of employment under section 66, any alterations to these conditions must be "sufficiently material that it could be described as being a fundamental change in the employment relationship." In *Robert Craig*, BC EST # D052/10, reaffirmed in *Willis*, BC EST # D076/14, the Tribunal said:

> ... the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
>
> a) the nature of the employment relationship;
>
> b) the conditions of employment;
>
> c) the alterations that have been made;
>
> d) the legitimate expectations of the parties; and
>
> e) whether there are any implied or express agreements or understandings.

32. The Tribunal has also affirmed common law principles regarding constructive dismissal in determining whether an employer has substantially altered a condition of employment under section 66: see, for example, *Short*, BC EST # D061/04. Therefore, the Director must: (1) identify the terms and conditions (both express and implied) of the parties' employment contract; (2) determine whether the employer breached one or more terms of that contract by way of a unilateral change; and if so (3) determine if the change was substantial.

33. The Delegate correctly applied the above principles to the facts. Her finding that there was no deemed termination was reasonable based on the facts she found. Further, the Delegate had evidence on which she could reasonably find these facts and make her Determination.

34. I find the Director did not err in law.

Natural Justice

35. The Appellant says the Director failed to observe the principles of natural justice. However, the Appeal Form does not provide any specifics about the alleged failure.

36. The principles of natural justice and procedural fairness include the right to know and respond to the case advanced by the other party, the right to have the case heard by an unbiased decision-maker, and the opportunity to present information and submissions to that decision-maker. The Record before me shows

that the Appellant had a fair opportunity to make her case to the Director, including the opportunity to make further submissions after reviewing the Investigative Report.

37. I conclude the Director did not breach principles of natural justice.

New Evidence

38. An appeal is decided on the record that was before the Delegate. The only exception to this is if there is new evidence available that was not available at the time the Determination was being made: *ESA*, sub-section 112(1)(c). To rely on new evidence on appeal, an appellant must establish that:

- 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;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential 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.

Bruce Davies et al., BC EST # D171/03 at p. 3.

39. The Appellant submitted a letter in her Appeal Form (the "Letter") from a person who covered the Appellant's bookkeeping duties while she was on medical leave. According to the Letter, the work she did was most of the Appellant's work so if these duties continued to be done in Victoria after the medical leave, the Appellant was effectively out of a job.

40. I find the information in the Letter does not meet the test for admission of new evidence. Accordingly, I do not admit the Letter as evidence.

ORDER

41. Pursuant to section 114(1)(f) of the *ESA*, this appeal has no reasonable prospect of success and pursuant to section 115(1)(a) of the *ESA*, I confirm the Determination dated September 20, 2022.

Maia Tsurumi
Member
Employment Standards Tribunal