Citation: Greg Dornian (Re)
2023 BCEST 12

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Greg Dornian

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2022/212

DATE OF DECISION: March 15, 2023

DECISION

SUBMISSIONS

Greg Dornian — on his own behalf

OVERVIEW

1. Greg Dornian (the "appellant") appeals a determination that was issued by Carrie H. Manarin, a delegate of the Director of Employment Standards (the "delegate"), on November 24, 2022 (the "Determination"). The Determination concerned a complaint filed by the appellant pursuant to which he was seeking compensation for length of service under section 63 of the *Employment Standards Act* (the "*ESA*"). By way of the Determination, the delegate dismissed that complaint.

2. Although the appellant did not specify on his Appeal Form any of the available ground of appeals set out in section 112(1) of the *ESA*, he subsequently advised the Tribunal that he was basing his appeal on section 112(1)(b) of the *ESA*, namely, that the delegate "failed to observe the principles of natural justice in making the determination".

3. As will be seen, after reading the appellant's submissions, it appears that the appellant is also asserting that the delegate erred in law (section 112(1)(a) of the *ESA*). Accordingly, I will also consider that ground of appeal (see *Triple S Transmission Inc.*, BC EST # D141/03).

4. In my view, neither ground of appeal has any reasonable prospect of succeeding and, that being the case, this appeal must be dismissed pursuant to section 114(1)(f) of the *ESA*. My reasons for reaching that conclusion now follow.

BACKGROUND FACTS

5. The appellant filed a complaint alleging that his former employer, Phaser Fire Protection Ltd. (the "employer"), wrongfully terminated his employment. He sought about $12,400 as compensation for length of service payable under section 63 of the *ESA*. As set out in the delegate's "Reasons for the Determination" issued concurrently with the Determination (the "delegate's reasons"), the appellant took a leave of absence from his employment due to a workplace injury. His last working day was October 19, 2019.

6. Thereafter, the appellant's workplace injury claim was the subject of a WorkSafe BC investigation and adjudication. Ultimately, his employment ended when, on February 23, 2021, the employer "advised the [appellant] that his extended benefits and company cell phone would be cancelled immediately" and the appellant "reasonably believed the Employer had terminated his employment as of March 2021" (delegate's reasons, page R11).

7. The delegate rejected the employer's position that the appellant had quit or otherwise abandoned his employment (page R11). However, the delegate also determined that the appellant was not entitled to any compensation for length of service in light of section 65(1)(d) of the *ESA*: "Section 63…do[es] not apply

to any employee…employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act".

8. With respect to this latter provision, the delegate found, in light of some disputed evidence regarding the appellant's actual job duties, that the appellant's "principal job was that of a sprinkler fitter who installed fire suppression systems and that these 'critical' tasks were required in order to perform that job." On February 2, 2021, WorkSafe BC wrote to the employer indicating that the appellant "had permanent disabilities that prevented him from performing his pre-injury job (without modifications) in the foreseeable future" (page R13). The delegate noted "there was no medical evidence or opinion to suggest that the [appellant] would be able to perform all of his pre-injury job duties without the restrictions identified in the February 2, 2021 WSBC decision [and] given the [appellant's] underlying, pre-existing degenerative cervical spine condition and the fact that some of the duties required of his job had aggravated that condition and caused his injury, it was unlikely that he would be able to carry out those same duties without re-injuring himself." (page R14)

9. The delegate ultimately concluded as follows: "I find that due to an unforeseen event (i.e. the Complainant's injuries) it was impossible for the Complainant to perform the employment contract (i.e. his pre-injury job) and pursuant to section 65 of the Act, the Employer is relieved of the requirement to pay compensation for length of service." (page R14)

THE APPELLANT'S APPEAL SUBMISSIONS

10. As noted at the outset of these reasons, although the appellant advised the Tribunal that his appeal is predicated on the "natural justice" ground of appeal, his submission also raises an "error of law" argument. I shall deal with each in turn.

Natural Justice

11. The appellant, who was represented by legal counsel during the course of the investigation of his complaint, maintains that "some key points that my legal counsel made were overlooked". He also says that the employer was "deceitful" in terms of its submissions to WorkSafe BC, and that he was fully able to return to work as evidenced by his new employment where is undertaking essentially similar duties. He says this fact was "overlooked in the determination".

12. Having reviewed both the section 112(5) record and the delegate's reasons, I am satisfied that the delegate considered all of the relevant evidence and argument that was submitted to her.

13. The delegate did not "overlook" the appellant's new employment; indeed, she specifically referred to it in her reasons, at page R14: "Although the [appellant] submitted that he is now employed as a foreman for a similar business, he provided no evidence to suggest that he is safely able to perform those job duties that were restricted in the February 2, 2021 WSBC decision (i.e. heavy lifting or activities that would increase the heart rate in the high range and put pressure on the aneurysm)."

14. In sum, I am satisfied that the delegate afforded the appellant a full and complete right to be heard, and considered all of the evidence and argument that either the appellant or his legal counsel provided during the course of the investigation.

15. The appellant stresses the point that his former employer should have made a greater effort to accommodate his work limitations and, in fact, could have done so. As the delegate noted in her reasons, at page R14: "…there is no requirement under the Employment Standards Act for an employer to accommodate an employee with an alternative position or modified duties; that duty arises instead under the BC Human Rights Code."

16. There is a duty to accommodate that arises under human rights legislation – an employer is obliged to make all reasonable efforts, up to the point of "undue hardship", to accommodate an employee's disabilities that prevent that employee from carrying out their usual employment duties (see, for example, *British Columbia (Public Service Employee Relations Commission) v. B.C.G.S.E.U.*, [1999] 3 S.C.R. 3). However, the Director of Employment Standards does not have any statutory authority to interpret and apply the B.C. *Human Rights Code* (section 86.2 of the *ESA*), and neither does this Tribunal (see section 103(g) of the *ESA*).

17. The appellant may be able to pursue this latter issue by way of a complaint to the B.C. Human Rights Tribunal, but the delegate did not have the statutory authority to consider whether or not the appellant was subject to unlawful discrimination on the basis of a physical disability. I should also emphasize that I pass no judgment on whether such a complaint, if it were to be filed, has any presumptive merit.

18. The issue under section 65(1)(d) of the *ESA* is whether there was an unforeseeable event or circumstance that made it impossible for the employment contract to be performed. In this case, due to the unfortunate and unforeseen circumstances relating to the appellant's health, he was no longer able to perform his typical work duties. There was ample medical evidence before the delegate to support that finding.

Error of Law

19. The appellant says, at least by implication, that the delegate erred in applying section 65(1)(d) in this instance. As noted above, I am satisfied that the delegate had a sufficient evidentiary record before her allowing her to conclude that the appellant's employment ended due to an unforeseeable event or circumstance.

20. The appellant says that the delegate's finding that he was a pipefitter was contrary to the evidence. While it is true that the appellant stated that he was not principally employed as a pipefitter (he claimed he was a foreman), his evidence in this regard was belied by other assertions and documents, some of which he himself had prepared. This issue is discussed, in detail, at pages R11 – R12 of the delegate's reasons. I am unable to conclude that that delegate's finding regarding the appellant's actual job duties constituted a "palpable and overriding error", which is the governing legal test for whether the delegate erred in law in making certain findings of fact relating to the appellant's actual job duties (see *Housen v. Nikolaisen*, [2002] 2 S.C.R. 235).

21. Finally, the appellant appears to be contesting whether he quit (he says he did not) and whether he was actually terminated by the employer (he maintains that he was). The delegate specifically held that the

appellant did *not* quit or abandon his employment (see page R11). Ordinarily, that finding would have been sufficient to crystallize the appellant's entitlement to section 63 compensation for length of service. However, the employer's presumptive obligation to pay section 63 compensation was discharged by section 65(1)(d) of the *ESA*. As previously discussed, I see no reason to disturb the delegate's finding in that regard.

ORDER

22. Pursuant to section 114(1)(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal