Citation: Shane Parker (Re)
2023 BCEST 13

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Shane Parker

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2022/203

DATE OF DECISION: March 15, 2023

DECISION

SUBMISSIONS

Shane Parker — on his own behalf

OVERVIEW

1. This is an appeal by Shane Parker (the "Employee") of a decision of a delegate of the Director of Employment Standards (the "Director") made on November 14, 2022 (the "Determination").

2. On April 13, 2022, the Employee filed a complaint with the Director alleging that his former Employer, PWTransit Canada Ltd., (the "Employer") had contravened the *Employment Standards Act* (the *"ESA"*). In his complaint, the Employee alleged that his employment had been unfairly terminated.

3. A delegate of the Director (the "Investigative Delegate") investigated the Employee's complaint and issued an Investigation Report (the "Report"). The Report was provided to the parties for response. A second delegate (the "Adjudicative Delegate") reviewed the Report and the responses of the parties to that Report before issuing the Determination.

4. The Adjudicative Delegate determined that the Employer had not contravened the *ESA* and that no wages were outstanding.

5. The Employee appeals on the grounds that the Director erred in law.

6. The deadline for filing the appeal was December 8, 2022. Although the Employee filed his appeal along with supporting documents and some of his reasons and arguments for appeal on November 29, 2022, he sought an extension of time to October 1, 2023, in which to perfect that appeal. The Employee indicated that he required the additional time to provide additional arguments and supporting documents, including video records of bus interactions.

7. The Tribunal granted the Employee until February 13, 2023, to provide the documents, and noted that in the absence of any exceptional circumstances, no further extensions would be granted.

8. 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 Director and the Employer.

9. 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

10. Whether the Tribunal should grant the Employee an extension to the appeal period.

BACKGROUND AND ARGUMENT

11. The Employer operates a transit business. The Employee was employed to clean company busses from April 9, 2018 until March 18, 2022.

12. The record discloses that the Investigative Delegate corresponded with the parties largely by way of e-mail and asked both parties to submit information in support of their positions.

13. During the investigation, the Employer provided information regarding the actions it took, in response to complaints it received from other employees and customers related to the Employee's conduct, that ultimately led the Employer to terminate the Employee's employment.

14. The Employee provided information regarding the Employer's actions as well as his view that he was a victim of bullying and harassment from his colleagues and management.

15. Prior to the issuance of the Report, the Employee complained to the Employment Standards Branch that the Investigative Delegate failed to understand his complaint and that bribery had occurred. On October 12, 2022, the Investigative Delegate's supervisor wrote to the Employee advising him that, after reviewing all the material in the file, she agreed with the Investigative Delegate's assessment of the information gathered to date that it was likely that compensation for length of service would not be found to be owed to the Employee. The supervisor also informed the Employee that a separate delegate would be making the final evaluation of the complaint in order to "ensure as much neutrality as possible in the process." The supervisor further informed the Employee that she saw no evidence of his allegations of bribery, but if the Employee had any further information, he was to respond directly to her with that evidence.

16. The Investigative Delegate completed the investigation into the complaint and, on October 31, 2022, provided the parties with a 105-page Report summarizing the complaint and setting out each of their positions. The Employee's conduct and the Employer's actions were outlined in some detail in the Report. Appended to the Report were a series of emails the Employee sent to management regarding the complaints against him. The Report also included incident reports from the Employer, the Employee's "transcript" of a March 12, 2022 incident and subsequent meeting as well as a "transcript" of the March 18, 2022 meeting at which his employment was terminated.

17. In the Report, the Investigative Delegate requested the parties review the Report carefully and advised that if they wished to respond, they must do so by no later than November 7, 2022. She also asked the parties to identify any relevant documents they felt were missing from the Report and to explain why they should be included. The Investigative Delegate informed the parties that documents not listed in the Report and not identified as relevant in their responses "may not be considered in making the determination." The parties were advised that the Report and any responses to it made by the parties would be considered in making a final determination regarding the complaint.

18. On November 1, 2022, the Employee sought an extension of time to respond to the Report. The Investigative Delegate informed him that the response period was an opportunity to clarify errors or omissions in the report and to provide additional evidence. The Investigative Delegate declined to grant the extension as the Employee had not provided a specific reason for the extension sought.

19. The Record shows the Employee advised the Investigative Delegate that she had misinterpreted a situation in the Agreed Upon Facts section of the Report. When asked what parts of the Report led the Employee to believe the Investigative Delegate had misinterpreted the facts, the Employee indicated, on November 6, 2022, that the Report did not include his responses to the Employer's complaints through the years, which demonstrated that the Employer had not treated him fairly. The Employee provided the Investigative Delegate with screenshots of conversations which he believed to be relevant.

20. In the Determination, the Adjudicative Delegate addressed the Employee's request for a one-month extension of time to respond to the Report and found that he had been provided with a reasonable opportunity to present his evidence and argument, and to review the evidence and argument provided by the Employer. The Adjudicative Delegate noted that "on November 6, [the Employee] did make a submission to the [Report]." Considering this finding, the Adjudicative Delegate determined that it was not necessary to grant the Employee an extension to the response period for providing a response to the Report.

21. The Adjudicative Delegate summarized the incidents detailed in the Report as follows:

- on June 6, 2018, the Employer met with the Employee to discuss how to resolve conflict in the workplace following an incident in which he refused to turn off a vacuum;
- on November 2, 2018, the Employee was told that he was not permitted to work between 7:30 am and 4:30 pm to avoid interactions with a colleague;
- on February 14, 2019, the Employee was told that he could not work with another driver following a negative interaction;
- on February 20, 2019, a mechanic told the Employer that he would not work with the Employee any longer due to the Employee's behaviour and threats;
- on June 24, 2020, another employee filed a complaint after hearing the Employee disparaging his colleagues. The Employee was told he should no longer comment on his colleagues' work;
- on August 5, 2021, a manager with the Employer met with the Employee to discuss the Employee's obligation to communicate professionally with colleagues and clients. The Employee was warned that his employment was at risk if he did not improve. Following a meeting on August 9, 2021, the Employee was suspended without pay for three days. In its August 9, 2021 letter to the Employee, the Employer warned that "further occurrences of this nature will lead to further discipline up to and including termination of your employment"; and
- on March 16, 2022, Employer managers met with the Employee to discuss his interactions with a colleague and a client which had resulted in a complaint being filed against him. The Employer informed the Employee that he would be working a new schedule so he would no longer be working with the employee who had filed the complaint. Following this meeting, the Employer decided it would terminate the Employee's employment rather than implement the new schedule because, according to the Employer, the Employee had not accepted accountability for his actions.

22. Although the parties did not dispute the circumstances which led to the termination of the Employee's employment, the Adjudicative Delegate noted that the parties disagreed about whether those circumstances amounted to just cause. In the Employee's view, the Employer's actions constituted harassment while the Employer believed it had just cause to terminate the Employee's employment.

23. The Adjudicative Delegate found, based on the records supplied by the parties, that the Employee "often communicated rudely and aggressively at work, and responded to discipline with an attitude approaching insolence." The Adjudicative Delegate further found that "the discipline and standards imposed by [the Employer] were reasonable and justifiable given the nature and number of complaints raised about [the Employee] by … staff and clients." (Determination, p. R4)

24. The Adjudicative Delegate also found that the Employer "set a reasonable standard for respectful communication" for the Employee to meet and "set appropriate boundaries regarding where, when, and with whom he would work in order to assist him in peaceably completing his work." Further, the Adjudicative Delegate found that the Employer warned the Employee that his employment would be terminated if he continued to breach the standard set." (Determination, p. R4).

25. The Adjudicative Delegate determined that the Employee's actions in March 2022 "clearly did not meet the standards" the Employer had established, and that the Employer had met the burden of demonstrating that the Employee had been terminated for just cause.

Argument

26. In his Appeal Form, the Employee indicated that he had provided some of his reasons and arguments for his appeal.

27. In his submission, the Employee contends that the Adjudicative Delegate acted on a view of the facts which could not reasonably be entertained. He further contends that the Adjudicative Delegate erred in finding that the Employer applied no progressive discipline. In support of his argument, the Employee included a photocopy of what he submits to be a page on dismissal for cause from a book entitled "Corporate Counsel Guide to Employment."

28. The Employee submits that the Adjudicative Delegate referred to "clients" in the Determination and when he inquired with the Adjudicative Delegate who the "clients" were, he did not get a response. The Employee is of the view that the Adjudicative Delegate made the Determination based on information that was not provided to the Employee.

29. The Employee further contends that the Employer's expectation, which I infer is the standard set, was not achievable.

30. The Employee submitted a large number of documents in support of his appeal including diagrams, photographs, information relating to work schedules, and transcripts of conversations.

31. The Employee also included a link to the BC Provincial Government's Policy for termination for just cause. I note that this policy applies to employees of the BC Provincial Government.

ANALYSIS

Request to extend the statutory appeal period

32. Section 109(1)(b) of the *ESA* provides that the Tribunal may extend the time period for requesting an appeal.

33. The burden is on an appellant to demonstrate the appeal period should be extended. In determining whether to extend the appeal period, the Tribunal considers the following factors (see *Niemisto*, BCEST # D099/96):

a) whether there is a reasonable and credible explanation for the failure to file the completed appeal on time;

b) whether there has been a genuine and ongoing *bona fide* intention to appeal the determination;

c) whether the respondent party and the Director have been made aware of the intention to appeal;

d) whether the respondent party will be unduly prejudiced by granting the extension; and,

e) whether there is a strong *prima facie* case in favour of the appellant.

34. The above factors are not exhaustive.

35. The Employee has requested the appeal period be extended to October 1, 2023, an additional period of just under 10 months, so that he can provide additional documentation to show that he was unfairly treated, including bus videos. With more time, the Employee asserts, he "can think and write out more interactions showing [he] was unfairly treated. [He] need[s] to be sure [he is] looking at the correct dates and knowing [he has] a set time, allows the comfort for [him] to proceed. … [He] has more information [he] need[s] to find."

36. I have reviewed the Employee's submissions and I find he does not have a strong *prima facie* case to appeal the Determination. It is contrary to the purposes of the *ESA* for efficient and timely resolution of appeals to prolong cases with little merit (see *0388025 B.C. Ltd. (cob as Edgewater Inn)*, BC EST # D019/12, and *U.C. Glass Ltd.*, BC EST # D107/08).

37. The Employee continues to argue, as he did before the Director, that he was treated unfairly. The *ESA* prescribes minimum standards respecting such things as payment, compensation and working conditions. It does not oblige an employer to treat an employee according to that employee's perception of what is fair. I am not persuaded that granting the Employee additional time to gather documentation regarding "fair treatment" is a basis for extending the appeal period.

38. I therefore decline to extend the appeal period.

39. However, even if I had not declined to extend the appeal period on the basis that the Employee does not have a strong *prima facie* case, as shown below, I would have dismissed the appeal on the merits.

The Merits of the Appeal

40. 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.

41. Section 114 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.

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

43. While I understand that the Employee believes the Determination is wrong, there is nothing in the submissions which persuades me that the Adjudicative Delegate erred in finding that there had been no contravention of the *ESA*.

44. Acknowledging that most appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. (*Triple S Transmission*, (BC EST #D141/03)). I have addressed the Employee's arguments under each ground of appeal.

New Evidence

45. 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 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.

46. The Employee's appeal submissions include photos, emails containing "transcripts" of conversations with Employer managers, references to bus numbers and statements the Employee alleges were made to him by Employer managers.

47. None of the information submitted on appeal meets the test for new evidence, as it was all available to the Employee during the investigation. Indeed, many of the emails sent regarding the appeal contains information that is identical to that provided to the Director.

48. Furthermore, I find that some of the material, including the photographs and bus schedules, even if they had been provided to the Director, would not have led the Adjudicative Delegate to a different conclusion. None of the photographs or schedules pertain to the question of whether the Employer had just cause to terminate the Employee's employment.

49. I find no basis for an appeal on this ground.

Natural Justice

50. 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 an appellant considers just and fair.

51. There is nothing in the submissions that speaks to this ground of appeal. Having reviewed the record, I am unable to find that the Employee was denied the opportunity to present his argument and evidence supporting his complaint. He was also given the opportunity to respond to the Employer's information. The record demonstrates that he had many conversations with the Investigative Delegate and submitted a significant number of documents. Additionally, after the Employee complained to the Investigative Delegate's supervisor about the Investigative Delegate's failure to understand his complaint, the supervisor reviewed his complaint and invited the Employee to submit further evidence regarding his allegations of bias. The record indicates that no such information was provided.

52. Finally, the Employee was provided with the Report and made submissions in response to it. Those responses were considered by the Adjudicative Delegate before he made the Determination.

Error of Law

53. 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.

54. While not expressly stating as such, it appears that the Employee disputes the Director's factual findings. While errors of law are a ground of appeal, errors of fact are not. Only errors of fact which rise to the level of constituting errors of law give rise to a ground of appeal:

> In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if she establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see also *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST #D028/06). (*Rose Miller, Notary Public* BC EST # D062/07)

55. It is not for the Tribunal to reconsider the evidence and substitute different findings of fact for those made by the Director unless those factual findings are not supported by the evidentiary record.

56. I am not persuaded the Adjudicative Delegate misapprehended, misstated, or ignored the facts.

57. The Employee also argues that the facts do not support a finding that the Employer used progressive discipline.

58. At issue before the Director was whether the Employer had grounds to terminate the Employee's employment, thereby discharging the Employer's liability to pay compensation for length of service pursuant to Section 63 (3)(c) of the *ESA*. The Adjudicative Delegate set out the test for just cause as follows:

> …Just cause may be demonstrated where an employee has engaged in a pattern of relatively minor misconduct and an employer has engaged a process of progressive discipline, establishing a reasonable standard for the employee to meet, providing a reasonable period of time and reasonable support for the employee to meet the standard, clearly warning the employee that failure to meet the standard will result in termination, and ultimately showing that the employee had failed to meet the standard. Just cause may also be demonstrated where an employee has engaged in misconduct of such serious character that the employment could not reasonably be expected to continue. (p. R3)

59. The Adjudicative Delegate's statement of principles was established by the Tribunal in *Kenneth Kruger* (BC EST #D003/97).

60. The Tribunal has followed and applied these principles to questions of just cause on many occasions. In *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, (BC EST # D374/97), the Tribunal noted that:

> the concept of just cause requires an employer to inform an employee, clearly and unequivocally, that his or her performance is unacceptable and that failure to meet the employer's standards will result in dismissal. The principal reason for requiring a clear and unequivocal warning is to avoid any misunderstanding, thereby giving an employee a false sense of security that his or her work performance is acceptable to the employer.

61. The Report detailed what the complaints against the Employee consisted of as well as the Employer's responses to them. The record demonstrates that the Employee was insubordinate and had conflicts with other staff and clients. At least five different employees or bus drivers complained about the Employee's conduct and the Employer directed the Employee not to interact with some of them. The Employer altered the Employee's schedule to eliminate the interaction between him and the other employees.

62. The Adjudicative Delegate noted that the Employee met with the Employer on at least five occasions regarding his conduct and interactions with other employees and customers between June 2018 (two months after his employment began) and August 5, 2021. On August 5, 2021, the Employer suspended the Employee for three days and in a letter on August 9, 2021, informed him that further instances of unprofessional conduct would lead to further discipline including termination. Following yet another complaint from a colleague and a client on March 16, 2022, the Employee's employment was terminated.

63. It is apparent that the Employee disagrees with the Determination. However, I am not persuaded that he has demonstrated that the Adjudicative Delegate misapplied the law relating to just cause, including the application of progressive discipline.

64. I find no basis for the appeal.

CONCLUSION

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

ORDER

66. Pursuant to section 115 of the *ESA*, I confirm the Determination dated November 7, 2022.

Carol L. Roberts
Member
Employment Standards Tribunal