Citation: Thomas Reekie (Re)
2023 BCEST 17

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Thomas Reekie

- of a Determination issued by -

The Director of Employment Standards

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/002

DATE OF DECISION: March 29, 2023

DECISION

SUBMISSIONS

Thomas Reekie — on his own behalf

INTRODUCTION

1. Thomas Reekie (the "appellant") appeals a determination issued on December 20, 2022 (the "Determination"), under section 79 of the *Employment Standards Act* (the "*ESA*"). The Determination was issued by Leslie Tubrett, a delegate (the "delegate") of the Director of Employment Standards (the "Director"). The delegate issued her "Reasons for the Determination" (the "delegate's reasons") concurrently with the Determination.

2. By way of the Determination, the delegate dismissed the appellant's complaint – by which he sought $1,680 as compensation for length of service payable under section 63 of the *ESA* – on the basis that he had voluntarily resigned from his employment.

3. The appellant appeals that latter finding asserting, first, that the Director erred in law (section 112(1)(a) of the *ES*A), and second, that the Director failed to observe the principles of natural justice in making the Determination (section 112(1)(b) of the *ESA*).

4. Prior to turning to the merits of this appeal, I wish to note that the appellant's complaint was filed on March 23, 2020. The Determination was not issued until December 20, 2022, about 2 years and 10 months later. While this delay did not deprive the Director of the jurisdiction to investigate and adjudicate the complaint, I do not believe that this delay, particularly in a relatively straightforward and uncomplicated matter, is in keeping with the dictates of sections 2(b) and (d) of the *ES*A. In making this observation, I do not wish to be taken as criticizing the delegate or the Employment Standards Branch, as there may well be reasons why this matter was not addressed much more quickly. However, neither employers nor employees are well-served by a system in which complaints linger without being resolved for significant lengths of time.

BACKGROUND FACTS

5. As detailed in the delegate's reasons and an "Investigation Report" dated March 16, 2022 (completed by a different delegate), the appellant was employed as a truck driver at a $21 hourly wage. On March 3, 2020, the appellant sustained a workplace injury which resulted in him being away from work from March 4 to March 15, 2020. The delegate made the following findings with respect to the disputed events of March 16, 2020 (delegate's reasons, pp. R3-R4):

> I find that on March 16, 2020, the [appellant] retuned to work after a leave for an injury that occurred at work on March 3, 2020. His truck was locked when he arrived, so he went to the office to retrieve the keys. A conversation took place between the [appellant], Robby Gill (Gill), Manager, and Ivan Gonzales (Gonzales), Assistant Manager. I accept that the conversation was regarding the [appellant's] return to work and the required paperwork

> needed for his return. Though the parties dispute what was said at the meeting, I rely on the actions and evidence that occurred after this conversation.
>
> I accept that after the conversation ended, the [appellant] went to his personal truck and retrieved the paperwork in question, then returned to the office. I find that after the [appellant] left the paperwork in the office, he left the work site, and did not complete any work that day.
>
> I find that on March 16, 2020 at 12:32 pm the [appellant] sent a text message to Gill that stated, "You can just stick my last cheque and paperwork in the mail. Thank you."
>
> I accept that on March 16, 2020, at 5:03 pm, Gill responded by text message, "does this mean you have resigned from your position?" I find the [appellant] did not respond to this message.
>
> On March 18, 2020 Gill sent a letter to the [appellant] that stated "At this point, we have no option but to deem you to have voluntarily resigned from your position." I find the [appellant] did not respond to this letter.

6. On March 18, 2020, the appellant's former employer issued a Record of Employment indicating that the appellant had "quit" his employment. The ROE was delivered along with a letter from the employer indicating that it was taking the position the appellant had resigned, that his final pay would be processed shortly, and asking him to return any company property. As noted above, the appellant never responded to this letter.

THE DETERMINATION

7. The delegate turned her mind to the relevant test with respect to a "quit" or resignation (the actual terms used in the *ESA* are whether the employee "terminated" their employment, or "retired" from their employment). To satisfy this test, there must be proof on a balance of probabilities (the burden of which lies on the employer) that the employee *intended* to quit (the "subjective element") and, additionally, took *affirmative steps* demonstrating that they had, in fact, quit their job (the "objective element").

8. In light of the evidence, reproduced above, the delegate determined that the following circumstances satisfied the "subjective element" of the test: i) the substance of the appellant's March 16 text message which asked for a final cheque and "paperwork" (presumably, the ROE); and ii) the appellant's failure to respond to the employer's March 18th letter. I should add that the appellant's decision to leave the workplace on March 16th, without undertaking any work, could also be taken as subjective evidence of a quit.

9. The delegate relied on the following evidence to support the "objective element" of the test: i) the appellant left the workplace on March 16th without undertaking any work; ii) he failed to report for work the next day (March 17th); iii) he failed to respond to the employer's March 16th text; and iv) he failed to respond to the employer's March 18th letter.

10. There was also evidence before the delegate from the employer to the effect that the appellant was never informed he was being terminated. Further, the appellant, while claiming that he was told he was dismissed, never produced any corroborating paperwork to that effect. The employer's position throughout the investigation was that the appellant resigned his employment, although it alternatively

maintained that if the Director determined that the appellant was dismissed, that dismissal was for just cause.

11. In any event, the delegate ultimately determined that the appellant had, in fact, resigned or abandoned his employment and thus was not entitled to any section 63 compensation.

THE APPELLANT'S SUBMISSIONS

12. As noted above, the appellant says that the Director erred in law and failed to observe the principles of natural justice.

13. With respect to the first ground, error of law, the appellant places particular reliance on a WorkSafeBC report dated June 26, 2020, prepared in relation to his claim for WCB benefits. He says that this report shows that "I did NOT refuse an unreasonable suitable offer for employment", and that this report "directly refutes statements made by [his former employer]".

14. To a large degree, the appellant's submissions in relation to the "natural justice" ground of appeal are more appropriately dealt with as an "error of law" since, in essence, the appellant is challenging the underlying evidence that the delegate relied on in determining that he voluntarily resigned his employment. He also maintains, without using this exact phrasing, that the delegate gave disproportionate weight to his former employer's evidence while unfairly discounting his own evidence. More broadly, he also says that he was victimized by bullying and harassment, and that his employer perpetrated an "insurance fraud" on WorkSafeBC.

FINDINGS AND ANALYSIS

15. Section 63 compensation for length of service ("CLS") is presumptively payable to an indefinite-term employee who is dismissed without just cause. However, CLS is not payable to an employee who "terminates the employment [or] retires from employment". Employees are, of course, entitled to resign their employment but, as was the case here, sometimes there is a dispute about whether the employee *actually* resigned or otherwise abandoned their employment. As noted above, there is a two-element test that is used to determine if an employee actually resigned, in which case they are not entitled to CLS.

16. The delegate applied the correct legal test regarding "quits". Based on the evidence before her, I am unable to conclude her determination that the appellant resigned his employment constituted a "palpable and overriding error" (see *Housen v. Nikolaisen*, 2002 SCC 33) which, in turn, would allow me to set aside that decision. The question of whether there was, as a matter of law, a valid "quit" is one of mixed fact and law. As I previously noted, the delegate did not err in law by applying an incorrect legal test. As for the relevant facts, the facts upon which the delegate relied were properly in evidence before her and, given her factual findings, she was entitled to conclude that the appellant resigned his employment.

17. The appellant says that the June 26, 2020, WCB Review Decision (the "Review Decision") was not given any, or at least an appropriate amount of, consideration by the delegate. This latter decision was not referred to by the delegate in her reasons, although she did indicate that she "reviewed all evidence provided" by the parties. The Review Decision is contained in the section 112(5) record and was submitted to the delegate by the appellant. It should also be noted that this Review Decision was not prepared until

after the appellant's employment ended (on March 16, 2020), and after he filed his *ESA* complaint (on March 23, 2020).

18. The March 16, 2022 "Investigation Report", prepared by a different delegate, summarized the evidence that the parties had submitted to the Employment Standards Branch. This report is not a determination under the *ESA*, and is not a "decision" (assuming one could even characterize it as such) that is appealable to the Tribunal. The report did, of course, summarize the parties' evidence, and was before the delegate, along with all of the other documents the parties previously filed, when the Determination was being made. The parties were invited to respond to the "Investigation Report", and both did so.

19. With respect to the Review Decision, this decision concerns the appellant's claim for WorkSafeBC benefits (which was accepted). The employer applied for a review of that decision in relation to the appellant's entitlement to wage loss benefits. In the Review Decision, the review officer notes that both "parties' submissions are concerned with labour relations issues, including whether or not the worker was fired or resigned, which are beyond the scope of this review." The Review Decision notes that the employer offered the appellant modified work – "light duties" – which the appellant declined. The Review Decision continues:

> I acknowledge the employer's submission that the worker failed to participate in its return to work program, and did not provide the requested paperwork from his physician despite repeated requests to do so. However, it appears that the worker was relying on Dr. A's advice to remain off work entirely for a period of time in refusing the employer's offer of modified duties…
>
> I acknowledge the efforts made by the employer to provide the worker with suitable selective/light employment. However, I am satisfied that the medical evidence supports that the worker was temporarily disabled as a result of his injuries, and the worker did not unreasonably refuse a suitable offer of selective/light employment. As such, I conclude that the worker is entitled to temporary total disability benefits from March 4, 2020 to March 15, 2020.
>
> As a result, I deny the employer's request [to have the appellant's wage-loss benefits award cancelled].

20. While the Review Decision does state, as the appellant asserts, that he may have had a justifiable excuse for not accepting his employer's offer to continue working with "light duties" after his March 3rd accident, this Review Decision is not, in my view, relevant to the *ESA* issue that was before the delegate. First, the employer never claimed that it was relieved from having to pay the appellant CLS because the appellant was "offered and has refused reasonable alternative employment by the employer" (section 65(1)(f) of the *ESA*). Second, the review officer had no jurisdiction regarding and, in any event expressly did not even purport to address, whether the appellant voluntarily quit his employment. In short, although this Review Decision was before the delegate, it had no probative value whatsoever in terms of the only issue that was properly before her, namely whether the appellant "quit" or was dismissed without just cause.

21. I do not have any statutory authority to determine if the appellant's former employer committed "insurance fraud" – I will say that, with respect to this very serious allegation, there is no cogent evidence before me to support it.

22. Similarly, I am not satisfied, on the record before me, that the appellant has clearly shown that he was the subject of "bullying and harassment" by his former employer. Apart from that consideration, this is not a matter within my statutory authority to address. Perhaps it falls within the ambit of the Human Rights Tribunal (discrimination based on physical disability?), but I express no view about whether such a claim might be well-founded or, even if it is, whether he has a factually and legally viable claim under the *Human Rights Act*. I do not have any jurisdiction to address a claim arising under that statute (*ESA*, section 103(g)), and neither did the delegate (*ESA*, section 86.2).

23. Although there was disputed evidence before the delegate with respect to the central issue before her – quit versus dismissal – I am not satisfied that the delegate made a palpable and overriding error when she determined that the appellant voluntarily resigned his employment, and thus was not entitled to any CLS.

24. In sum, I am satisfied that this appeal has no reasonable prospect of succeeding and, as such, must be dismissed pursuant to section 114(1)(f) of the *ESA*.

ORDER

25. 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