Citation: Dr. S. Kara Inc. (Re)
2023 BCEST 18

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Dr. S. Kara Inc. carrying on business as Sage Dental Centre
("the Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2022/193

DATE OF DECISION: April 06, 2023

DECISION

SUBMISSIONS

Erin S. White and Nazeer T. Mitha, K.C.	counsel for Dr. S. Kara Inc. carrying on business as Sage Dental Centre
Michael Thompson	delegate of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the "*ESA*") by Dr. S. Kara Inc., carrying on business as Sage Dental Centre, (the "Appellant"), of a determination made by Michael Thompson, a delegate (the "Delegate") of the Director of Employment Standards (the "Director"), on October 3, 2022 (the "Determination").

2. The Determination found that Dominique Larsen (the "Complainant") was entitled to payment in lieu of reinstatement and accrued interest under s. 54 of the *ESA*.

3. The Appellant appeals on the basis that the Director erred in law and failed to observe the principles of natural justice in reaching the Determination and asks that the determination be cancelled.

4. The Tribunal received submissions from the Director on January 12, 2023, and reply submissions from the Appellant on February 6, 2023.

5. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed with the appeal, my review of the material that was before the Director when the Determination was being made, and the submissions received from the parties.

6. Although I have reviewed all of the materials provided by the parties, I address only those portions necessary to reach my decision.

7. For the reasons that follow, I deny the appeal and confirm the Determination.

ISSUES

8. Did the delegate err in law in finding that he had jurisdiction over the Complaint?

9. Did the delegate err in law or fail to observe the principles of natural justice in concluding that the Appellant violated s. 54 of the *ESA* when it terminated the Complainant's employment?

THE DETERMINATION

10. The Determination relates to a complaint filed by the Complainant on September 2, 2020, alleging her employment was wrongfully terminated and claiming compensation for length of service and vacation pay.

11. The Complainant was a Certified Dental Assistant ("CDA") employed by the Appellant.

12. In March 2020, the Appellant was closed for a period of time due to COVID-19 and was scheduled to reopen June 1, 2020. At the time of reopening, the Complainant was pregnant and in or around the beginning of her third trimester she expressed concerns about COVID-19 safety precautions and the unknown potential risks of infection by COVID-19 to her pregnancy.

13. The Complainant initially provided a medical note recommending the use of an N95 mask and face shield in the event she returns to work as a CDA.

14. The Complainant remained concerned about COVID-19 and asked to be accommodated in a different position than her CDA role.

15. The Appellant advised that the only other position available would be a sanitization position that involved fewer hours and a lower rate of pay than her CDA role. The Complainant declined the sanitization role on the basis that it would not provide her sufficient income.

16. The Appellant wrote to the Complainant on June 24, 2020, advising that if the Complainant did not agree to return to work, it would consider her to have abandoned her employment.

17. The Complainant provided a further medical note on June 25, 2020, indicating she would be absent from work for medical reasons until September 8, 2020.

18. On July 24, 2020, the Appellant wrote to the Complainant advising that her employment had been terminated, either for cause, or on the basis that the Complainant had abandoned her employment.

19. Another delegate prepared an investigation report summarizing agreed facts and the positions of the parties. The Appellant also provided submissions in response to the investigation report.

20. Relying on the investigation report and response from the Appellant, the Delegate determined that the Complainant's employment was terminated "because her pregnancy and the circumstances of the pandemic rendered her medically unable to work in the dental practice" and that this was contrary to s. 54 of the *ESA*.

21. Having concluded that the Appellant contravened s. 54 when it terminated the Complainant's employment, the Delegate concluded that the Complainant was entitled to payment in lieu of reinstatement under s. 79(2) of the *ESA* and awarded compensation from the date the Complainant would have returned to work following her pregnancy leave, to the date she accepted alternate employment. This award included 4% vacation pay on that amount, as well as interest, and imposed a $500 administrative penalty for the breach of s. 54 of the *ESA*.

ARGUMENTS

22. In summary, the Appellant says the Delegate erred:

a. In determining the Director has jurisdiction over the Complaint;

b. In making findings without any evidence, or acting on a view of the facts which could not be reasonably entertained;

c. In making findings on matters that are not grounded in the *ESA*; and

d. In failing to properly canvass the issue and apply the correct legal test of whether the complainant abandoned/resigned from her employment, or whether the Employer had just cause for termination.

23. The Appellant says the Determination was grounded on the Delegate's conclusions that the Complainant's concerns around COVID-19 exposure justified her refusal to attend work, and that she was entitled to refuse the Appellant's offer of accommodated work in the sanitization role.

24. The Appellant submits that the substantive issue in dispute is whether it sufficiently accommodated the Complainant's medical condition. It says this is a matter squarely under the jurisdiction of the *Human Rights Code*, and that, pursuant to s. 86.2 of the *ESA*, it is beyond the jurisdiction of the Director to decide.

25. In the alternative, the Appellant asserts the Delegate erred in law when they concluded that the Appellant "terminated Ms. Larsen's employment because her pregnancy and the circumstances of the pandemic rendered her medically unable to work in the dental practice."

26. The Appellant says this conclusion was reached in the absence of evidence to support the finding. Specifically, the Appellant submits that there was no evidence on which to conclude that both Ms. Larsen and her doctor were sufficiently concerned about the risks of exposure to COVID-19 that she should not attend work at the dental practice at all. It says in fact the Complainant's own evidence was that she would have been prepared to attend work in a "float" position, and that the reason she refused to accept the accommodated position that was offered was due to the lower pay associated with it.

27. The Appellant submits as well that the Delegate erred in law in concluding that the Complainant was not obligated to accept a reduced rate of pay and reduced hours, and by failing to properly canvass the issue of whether the Complainant had either abandoned her employment or given the Appellant just cause to terminate her employment. The Appellant also says the Delegate erred in finding that the Complainant did not consent to any changes to the terms of her employment when, in fact, the evidence demonstrates that it was the Complainant herself who requested alternate work.

28. Further, the Appellant says the Delegate erred in law, or failed to observe the principles of natural justice, in finding that the Complainant was on a "medical or COVID-19 leave" until September 8, 2020. The Appellant says no such leave was requested, nor did the Complainant allege in her complaint that she was on such a leave.

29. The Delegate says in response that all the issues raised by the Appellant, save for one, were canvassed in the Determination. The Delegate says the Appellant is simply seeking to have the evidence re-weighed in their favour on each of the findings referenced.

30. The Delegate submits that the Complainant alleged she was terminated "due to her pregnancy and the COVID-19 pandemic" and that is what the Determination decided.

31. The Delegate says he did not make reference to or make a decision under the *Human Rights Code*, and so there is no basis for ousting the Director's jurisdiction.

32. The Delegate takes the position that the medical note provided by the Complainant indicating she would be off work due to illness supports the conclusion that the Complainant's doctor "supported her decision to stay home due to the COVID-19 pandemic." The Delegate says this evidence was unchallenged.

33. The Delegate says the Complainant's refusal to attend work in her normal capacity was obviously related to her pregnancy, and that the *ESA* prohibits employers from changing terms or conditions of employment due to pregnancy and without written consent.

34. The Delegate asserts based on this, and in the absence of any other evidence or basis in law, the Appellant was not permitted to terminate the Complainant's employment based on her refusal to accept lesser wages or hours than her normal position.

35. The Delegate agrees that the Complainant did not formally request a leave as required by s.52.12 but says the Tribunal has consistently held that such technicalities cannot disentitle an employee from a protected leave.

36. This notwithstanding, the Delegate says the Determination did not find that the *ESA* was contravened by failing to provide the Complainant with a COVID-19 leave or an unprotected medical leave. Rather, the Delegate says the finding on which the Determination is based was that the Complainant was terminated because she was unable to work due to her pregnancy. The Delegate says the reference to COVID-19 leave and medical leave was "solely for determining the [Complainant's] remedy under section 79(2) of the [*ESA*]."

37. In reply, the Appellant disputes the assertion that there is any general power to award compensation in relation to the "COVID-19 pandemic" and takes the position that sections 50, 52.12 and 54 are not engaged in this Complaint. In particular, the Appellant says the Complainant never requested a leave under s. 52.12, nor would she have met the statutory requirements for such a leave in any event.

38. The Appellant also disputes that the evidence before the Director supports the finding that the Complainant's "evidence was that the medical concerns she had discussed with her doctor were her pregnancy and the potential to catch COVID-19." Instead, the Appellant points to the Complainant's own statement regarding having "some concerns" about the "lack of medical information reguarding (sic) pregnant women and fetuses."

39. The Appellant says the Complainant's job was available to her at all times after June 1, 2020, and the Appellant only offered her an alternate role with less wages and fewer hours at the Complainant's request. They say there is ample caselaw to support that if an employee refuses to attend work for many weeks, they may be taken to have abandoned or quit their employment, or provided just cause for termination.

ANALYSIS

40. The grounds of appeal are statutorily limited to those found in section 112(1) of the *ESA*, which says:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more 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.

41. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

42. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the determination under one of the statutory grounds.

43. The Appellant has applied to overturn the Determination under subsections 112(1) (a) and (b), which I will assess in turn.

44. Turning to s. 112(1)(a), the Tribunal has recognized the following ways in which an "error of law" may be found to have occurred, as 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.)(*Gemex*):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex,* the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

45. I deal first with the issue of jurisdiction, followed by the errors alleged in the Determination itself.

Did the Delegate err in determining the Director had jurisdiction over the Complaint?

46. Section 86.2 of the *ESA* provides that the Director does not have jurisdiction to apply the *Human Rights Code*.

47. The Appellant says that in the circumstances of the Complainant, it is not possible to decide whether the Complainant was terminated for just cause, or terminated because of her pregnancy, without assessing whether the Appellant has met its duty to accommodate the Complainant. They say such a conclusion inherently requires a determination under the *Human Rights Code*.

48. While I appreciate the Complainant's circumstances may have engaged human rights principles, this fact alone does not oust the jurisdiction of the Director. The Director is precluded from applying the *Human Rights Code*. Applying the *Human Rights Code*, however, is different from dealing with complaints under

the *ESA* that may involve facts which could engage rights under the *Human Rights Code*. To conflate the two would render meaningless the prohibition under s. 54(2) of the *ESA* against terminating an employee because of their pregnancy.

49. In the present case, I agree with the Delegate that the Determination does not make reference to, nor decide a violation of any provision of the *Human Rights Code*. The Delegate interpreted and applied sections of the *ESA* in reaching the Determination. Although it appears the substance of the Appellant's argument is that the Complainant refused a reasonable accommodation and failed or refused to attend work in an accommodated position, the Determination was based on findings of fact that led to the conclusion that the Complainant was terminated "because of her pregnancy."

50. Accordingly, I am not persuaded that the Determination exceeded the jurisdiction of the Director, as the *Human Rights Code* was not applied.

Did the Delegate make material findings of fact without any evidence, or act on a view of the facts which could not be reasonably entertained?

51. A determination may be set aside where material findings of fact are not supported by the evidence. (*Britco Structures Ltd. (Re),* BC EST # D260/03)

52. The Appellant says the following findings of fact were not supported by the evidence:

a. The Complainant's physician supported her decision to stay home due to the COVID-19 pandemic;

b. The Complainant's uncontested evidence was that she and her doctor were concerned about exposure to COVID-19;

c. The Complainant was not obligated to accept a reduced rate of pay and reduced hours, and that she did not consent to any changes to the terms of her employment; and

d. The Complainant "would have remained on a medical or COVID-19 leave" until September 8, 2020.

53. Section 126(4)(c) of the *ESA* places the onus on an employer to prove that an employee's pregnancy is not the reason for terminating her employment. In this case, the Delegate concluded that the Appellant "terminated Ms. Larsen's employment because her pregnancy and the circumstances of the pandemic rendered her medically unable to work in the dental practice." In doing so, he concluded the Appellant violated s. 54 of the *ESA*.

54. Notwithstanding the Appellant's arguments above, I find the conclusion reached was not made without evidence, or on a view of the facts that could not be reasonably entertained.

55. The Appellant was aware the Complainant was pregnant and does not dispute that she was concerned about the risks associated with COVID-19 specific to the fact that she was pregnant. The medical note dated May 22, 2020, from the Complainant's physician indicated that "severe COVID-19 infections have been associated with adverse pregnancy outcomes." While the Complainant's physician made recommendations to mitigate the risks of infection from COVID-19 while working as a CDA, the

Complainant maintained that even with the recommended precautions, she did not feel safe returning to work.

56. Although there were further discussions between the Complainant and the Appellant about the prospective of alternate work, which may have alleviated her concerns, the Complainant was ultimately not prepared to accept that work. While I agree these discussions could constitute the foundation for an assessment under the *Human Rights Code* as to whether the Appellant owed and had met its duty to accommodate the Complainant, that is not what the Delegate was reviewing under the *ESA*.

57. The Complainant continued to express to the Appellant that she felt unsafe as a result of her pregnancy and the risks associated with COVID-19 and did so again in an email May 28, 2020. In a further email on June 25, 2020, the Complainant wrote advising that she would be dropping off a doctor's note confirming a medical leave retroactive to June 1, 2020. She writes "I informed you that my Dr. [h]as taken me off work until my maternity leave starts."

58. The medical note the Complainant provided indicated that she would be "absent from work…for medical reasons" until September 8, 2020. While the Appellant disputes the reliability of this medical note, they made no further inquiries as to the underlying bases for the Complainant's inability to attend work. The Determination accepts that the Appellant terminated the Complainant's employment because they believed she had no medical basis to refuse to return to work, however, the Delegate noted that the Appellant provided no evidence to dispute the evidence before him.

59. The Complainant was terminated for her failure or refusal to attend work, either in her original CDA position, or in the sanitization position offered at a lower wage and with fewer hours, notwithstanding the medical note provided that indicated she was unable to attend work. Apart from the Appellant's general assertions to the Delegate and to this Tribunal that the medical note is on its face insufficient, I agree with the Delegate that there is no evidence to support this contention.

60. Further to the Delegate's findings that the Appellant was not permitted, because of the Complainant's pregnancy, to "change a condition of employment without the [her] written consent," the Delegate took no issue with the fact that it was the Complainant that first inquired about alternate work. This does not equate with a finding of written consent.

61. The Appellant does not, however, dispute that the Complainant did not ultimately consent, in writing or otherwise, to the alternate work offered. Instead, the Appellant's email to the Complainant June 24, 2020, indicated that the Complainant's original CDA position had been filled, and that "[w]e still have the sterilization position open and require you to attend work in that position."

62. My understanding of the Appellant's argument on this point is that it is not as much a dispute over the Delegate's findings of fact, but instead a dispute over the proper legal analysis. Whereas the Delegate applied the facts before him to the prohibition in s. 54 on changing terms and conditions of employment, the Appellant is suggesting the analysis that should have been undertaken instead is an assessment of the duty to accommodate and whether the Appellant's offer of this alternate work was unreasonably refused.

63. I am not persuaded that the Delegate's findings of fact, or application of those facts to the prohibitions in s. 54 of the *ESA*, constitute an error of law.

Did the Delegate err in law in failing to canvass the issue of whether the Complainant abandoned her employment, or whether the Appellant had just cause to terminate the Complainant's employment?

64. The email terminating the Complainant's employment provides alternative bases for the decision. The email states:

> …[w]e send you this email to advise that we consider you have resigned your employment or improperly failed to attend at work and provided the company with cause to terminate your employment. Either way, your employment with the Sage Dental is terminated effective immediately.

65. The Delegate's findings in this respect, based on the investigation report and Complainant's emails, are that the Complainant "continually reiterated that she was not quitting her employment." The Delegate also found that the Complainant had not abandoned her employment, having remained in contact with her employer.

66. These are findings of fact deserving of deference, and while the Appellant disagrees with the analysis conducted by the Delegate, these are not findings of fact made without evidence. The materials before the Delegate evidence a clear rejection by the Complainant of the notion she had resigned. In addition, the medical note provided by the Complainant indicating an absence from work due to illness from June 1 until September 8, 2020, supports the conclusion reached that the Complainant had not abandoned her employment.

67. Accordingly, I find the Delegate did not err in law in concluding that the Complainant had not resigned or abandoned her employment.

Did the Delegate err in law or fail to comply with the principles of natural justice when he made reference in his decision to a COVID-19 leave under s. 52.12?

68. With respect to subsection 112(1)(b), a party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

69. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party. (see *BWI Business World Incorporated* BC EST #D050/96)

70. The Appellant submits that the Delegate committed a breach of natural justice in finding that the Complainant was on a "medical or COVID-19 leave". The basis for this submission is that the Appellant points out that the Complainant does not allege that she requested, or was on, a COVID-19 leave under s.

52.12. I infer from this that the Appellant is taking the position they were denied the opportunity to make submissions on this issue.

71. The Delegate responds, first, that the fact that the Complainant did not specifically request a leave under s. 52.12 does not necessarily disentitle her to such a leave, as this is a technicality, and the Tribunal has held that similar technicalities have been found in the past not to disentitle someone from a certain benefit or protection.

72. This notwithstanding, the Delegate points out, and I accept, that his reference to s. 52.12 was only to note that the Complainant would not, in any event, have been entitled to any wages for the period from her termination to the date her pregnancy leave was to begin. The Determination does not conclude that a s. 52.12 leave, or a request for one, was a factor in the Complainant's termination.

73. Further, I note the Determination finds that during this period the Complainant would have "remained on a medical **or** COVID-19 leave" (emphasis added) describing two types of leave, either one of which may have applied.

74. Although the Appellant may not have had an opportunity before the Delegate to make submissions on whether or not the Complainant was or could have been on a leave pursuant to s. 52.12, this finding is, in fact, to the benefit of the Appellant, as the Delegate accepted the Complainant's medical note precluded her from working during this period. Because she was precluded from working, this period was not included in the compensation award.

75. For these reasons I am not persuaded the Delegate's reference to s. 52.12 in the Determination constitutes either an error of law or a failure to comply with the principles of natural justice.

ORDER

76. The appeal is dismissed, and the Determination is hereby confirmed pursuant to s. 115 of the *ESA*.

Ryan Goldvine
Member
Employment Standards Tribunal