

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Bertness Enterprises Inc.
("Bertness")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE No.: 2023/008

DATE OF DECISION: April 06, 2023

DECISION

SUBMISSIONS

Mike Bertness

on behalf of Bertness Enterprises Inc

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (the “*ESA*”) by Bertness Enterprises Inc. (“Bertness”) of a determination issued by Jennifer Redekop, a delegate of the Director of Employment Standards (the “deciding Delegate”), on December 21, 2022 (the “Determination”).
2. The Determination found Bertness had contravened Part 3, section 18, Part 5, section 46, and Part 8, section 63 of the *ESA* in respect of the employment and termination of Rob Lidstone (“Mr. Lidstone”) and ordered Bertness to pay Mr. Lidstone the amount of \$8,208.47 an amount that included concomitant annual vacation pay under section 58 of the *ESA* and interest under section 88 of the *ESA*, and to pay administrative penalties in the amount of \$1500.00. The total amount of the Determination is \$9,708.47.
3. Bertness has appealed the Determination on the grounds the Director failed to observe principles of natural justice in making the Determination.
4. Bertness had initially sought an extension of the statutory appeal period, indicating some time would be required to assemble all of the information/evidence that would be needed for the appeal, but dropped that request when notified the Director was required to submit all of the documentation relating to the case, adding only that the representative of Bertness, Mike Bertness (“Mr. Bertness”) be allowed to “check it over”, once it was received by the Tribunal, to confirm it was complete.
5. In correspondence dated January 20, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record (the “record”) from the Director and notified the other parties that submissions on the merits of the appeal were not being sought at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to each of the parties. Both have been provided with the opportunity to object to the completeness of the record.
7. Neither of the parties has raised any objections to the completeness of the record and the Tribunal accepts the record as being complete.
8. I have decided this appeal is appropriate for consideration under section 114 of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed on the appeal and my review of the material that was before the Director when the Determination was being made. Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

- 114 (1) *At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of any 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 or 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.*

9. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and Mr. Lidstone will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

10. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

11. Bertness operates a mobile wheel alignment business in the lower mainland. Mr. Lidstone was employed with Bertness as an Alignment Technician from August 1, 2017 to September 30, 2020, when he was terminated. Shortly following his termination, Mr. Lidstone filed a complaint under the *ESA* alleging Bertness had contravened the *ESA* by failing to pay all regular wages owed and failing to pay length of service compensation.
12. The complaint was investigated by a delegate of the Director (the “investigating Delegate”), who produced an Investigation Report that was provided to Bertness and Mr. Lidstone. The Determination notes each party was provided the opportunity to review the Investigation Report and respond to it. Each party provided a response and any new and relevant information was exchanged.
13. The deciding Delegate found each party had the opportunity to review the evidence collected during the investigation and the arguments submitted by the other party, and to provide any clarification.
14. In respect of the claim for regular wages, the deciding Delegate found Bertness had failed to pay Mr. Lidstone all regular wages he had earned for September 2020 and, based on all of the information and evidence provided, was owed \$681.33 in regular wages and \$11.25 vacation pay for that period.

15. The Determination contains extensive analysis of the information, evidence, and argument presented by the parties – covering nearly five pages – which led to the above conclusion.
16. In respect of the claim for compensation for length of service, the deciding Delegate found, based on the evidence provided by both parties, that Bertness had not met the onus placed on it under the *ESA* to demonstrate there was cause to terminate Mr. Lidstone on September 30, 2020 and awarded him compensation for length of service in the amount set out in the Determination.
17. At page R8 of the Determination, the deciding Delegate summarized the legal principles developed under the *ESA* that apply when examining cases raising the question of whether there is cause for dismissal and applied those principles to the facts as found.

ARGUMENTS

18. Bertness alleges the Director, which in the circumstances would include the deciding Delegate and the investigating Delegate, failed to observe principles of natural justice in making the Determination. The following points are made in the appeal submission:
 - a. The investigating Delegate failed to contact persons who had information to provide relating to:
 - i. Mr. Lidstone’s smelling of alcohol while at work;
 - ii. Mr. Lidstone almost driving over a pedestrian and swearing at them; and
 - iii. Mr. Lidstone faking a WCB claim.
 - b. A delegate (neither the investigating Delegate nor the deciding Delegate) forwarded contact information for potential witnesses to the above matters to Mr. Lidstone;
 - c. The deciding Delegate stated in the Determination that Bertness did not provide proper documentation for “calculating pay, etc.”, even though Bertness had provided the number of their bookkeeper, who could have been contacted for any required documentation;
 - d. The investigation felt like a form of harassment and the delegates investigating the complaint “seemed annoyed when [Mr. Bertness] provided actual evidence and said [he] wanted an investigation.”;
 - e. The delegates involved in investigating the complaint threatened Bertness with fines;
 - f. The deciding Delegate did not fairly assess the content of the warning letters, and interpreted them in a way that was biased against Bertness;
 - g. The deciding Delegate did not consider that Mr. Lidstone made false invoices;
 - h. None of Bertness’ ‘witnesses’ were contacted;
 - i. Bertness had ample evidence of WCB fraud, but the delegates did not appear interested in seeing it;
 - j. The deciding Delegate ignored that Mr. Lidstone had been verbally warned on numerous occasions about going home early or being at home when he should have been working; and

- k. Mr. Lidstone has a history of fraud and lying.

ANALYSIS

19. The grounds of appeal are statutorily limited to those found in subsection 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.*
20. 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.
21. Bertness asserts there was a failure by the investigating and/or the deciding Delegate to observe principles of natural justice in making the Determination. I do not accept this assertion and find no merit to this ground of appeal.
22. A party alleging a failure to comply with principles of natural justice, as Bertness has done in this appeal, must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99.
23. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, 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)
24. Provided the process exhibits the elements of the above statement, it is unlikely a failure to observe principles of natural justice in making the Determination will be found. On the face of the material in the record and in the information submitted to the Tribunal in this appeal, Bertness was provided with the opportunity required by principles of natural justice to present their position to both the investigating and the deciding Delegate. Bertness has provided no objectively acceptable evidence showing otherwise.
25. There is nothing in the reasons, record, appeal forms, or submissions showing that the investigating Delegate or the deciding Delegate failed to comply with the principles of natural justice (or with the

requirements of section 77 of the *ESA*) in making the Determination. The record shows that Bertness knew the allegations against them and was given a full opportunity to respond before the Determination was made.

26. As a general response to the points made in the appeal submission, none of those points are evidence of a failure by the investigating and/or deciding Delegate to observe principles of natural justice.
27. More specifically, the allegations of Mr. Lidstone smelling of alcohol while at work, of almost driving over a pedestrian, of an attempt to defraud WCB, as well as many other allegations made over the course of the investigation seeking to justify the termination, were all raised by Bertness during the complaint process and were addressed in the Determination, with the deciding Delegate finding that Bertness had submitted no convincing evidence proving any of those allegations and, that in the absence of proof those matters could not be used to support termination. As well, the deciding Delegate noted that several of those matters which Bertness identified as misconduct and support for Mr. Lidstone's termination had elicited no disciplinary response at all when they occurred.
28. There is a statement in the Determination, at page R14 that appropriately captures the view of the deciding Delegate on the litany of allegations made by Bertness against Mr. Lidstone:
- . . . an employer must have clear and cogent evidence to support allegations of either major or minor misconduct and in the case of minor misconduct, that all steps of progressive discipline were met. For all the reasons outlined above, I find [Bertness] has failed to meet its onus of proof regarding major misconduct or the steps of progressive discipline and therefore I find [Bertness] did not have just cause to terminate [Mr. Lidstone's] employment.
29. The deciding Delegate was aware of all the reasons advanced by Bertness to justify Mr. Lidstone's termination and answered each of them.
30. Bertness says the deciding Delegate claimed "several times" in the Determination that Bertness hadn't provided proper documentation, suggesting that somehow the fault for any deficiency in the information provided by Bertness lay with the investigating and/or deciding Delegate – because "they have my bookkeepers contact info for any other accounting info they need" – and was indicative of an unfair process.
31. I have several responses to this point: first, if all of the records were not provided to the investigating Delegate, Bertness was in violation of its statutory obligation to comply with the Demand for Records that was delivered to them during the process; second, it is not the responsibility of the Director to seek out information that was within the scope of the Demand and which should have been provided by Bertness; third, the effect of a failure to comply by Bertness does not generate a failure to comply with principles of natural justice; and fourth, Bertness has not shown that what it suggests was an unfair process has affected their opportunity to know the case against them and to respond.
32. The use of terms like 'harassment' and 'bias' and the suggestion of threatening conduct by the investigating Delegate do not advance the natural justice argument when those terms are unsupported by any objective evidence.

33. The balance of the points made by Bertness do no more than re-assert facts that were addressed, and rejected, in the Determination. None of these points raise natural justice concerns, but rather, at their core, challenge findings and conclusions of fact. When viewed in its full context, it is apparent the actual objective of this appeal is to have this panel of the Tribunal ignore the central finding made by the deciding Delegate – that Bertness had not met the burden of showing just cause – accept the allegations made by Bertness, re-examine the just cause issue, and reach a different conclusion than was reached in the Determination.
34. There are several reasons why this back-door attempt to challenge findings of fact would not succeed.
35. First, the deciding Delegate made no error in identifying the principles that apply to the central issue in this case. I fully endorse the summary by the deciding Delegate, at page R8, of the legal principles developed under the *ESA* on the question of cause and the analysis the Director was required to undertake. The operative legal principles applying to the question of cause are well-established and have been consistently applied; there is nothing in the Determination that deviates from those principles.
36. Second, provided the established principles have been applied, and I find they were, a conclusion on cause is essentially a fact-finding exercise. The application of the law, correctly applied, to the facts as found by the Director does not convert the issue into an error of law.
37. Third, a finding of fact is only reviewable by the Tribunal as an error of law on the facts in limited circumstances. The test for establishing findings of fact constitute an error of law is stringent. In order to establish the Director committed an error of law on the facts, Bertness would be required to show the findings of fact and the conclusions reached by the deciding Delegate on the facts were inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. Carrying on business as Jonathan's Restaurant, supra*, at paras. 26-29.
38. Bertness has not argued error of law, either generally or on the facts, and there is otherwise nothing in the appeal or in the record, that would allow for this Panel to find the conclusions of the deciding Delegate were not adequately supported on the material before her.
39. To summarize, the grounds of appeal do not provide for an appeal based on errors of fact. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the deciding Delegate unless such findings raise an error of law. Findings of fact made by the deciding Delegate require deference. Asking the Tribunal to reassess the evidence and alter findings of fact is inconsistent with the usual deferential approach to review of findings of fact.
40. I find there is no merit to this appeal and it is, accordingly, dismissed.

ORDER

41. Pursuant to section 115 of the *ESA*, I order the Determination dated December 21, 2022 be confirmed in the amount of \$9,708.47, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal