Citation: Buckley Industrial Consulting Inc. (Re)
2023 BCEST 36

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Buckley Industrial Consulting Inc.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Robert E. Groves

FILE NO.: 2022/216

DATE OF DECISION: May 30, 2023

DECISION

SUBMISSIONS

Sebastian Chern — counsel for Buckley Industrial Consulting Inc.

OVERVIEW

1. Buckley Industrial Consulting Inc. (the "Employer") appeals a determination (the "Determination") issued by a delegate (the "Adjudicating Delegate) of the Director of Employment Standards (the "Director") on December 6, 2022.

2. The Determination was issued following a complaint (the "Complaint") delivered by Shahnaz (Tina) Novin (the "Complainant") to the Employment Standards Branch pursuant to section 74 of the *Employment Standards Act* (the "*ESA*"), and a subsequent investigation of the Complaint conducted by another delegate of the Director (the "Investigating Delegate").

3. The Complaint, and the investigation which followed, required the Adjudicating Delegate to decide whether the Employer had contravened the *ESA* by failing to pay the Complainant regular wages, overtime wages, statutory holiday pay, compensation for length of service, and vacation pay. In the Determination, the Adjudicating Delegate ordered that the Employer pay sums referable to all these categories of the Complainant's claim, together with accrued interest, totalling $4,769.73. The Adjudicating Delegate also imposed four $500.00 administrative penalties, which included penalties based on the Employer's failure to pay wages in a timely way, and a penalty imposed due to the Employer's neglecting to ensure that the Complainant completed split shifts within twelve hours of commencing to work, as required by section 33 of the *ESA*. The total found to be payable was, therefore, $6,769.73.

4. The Employer's appeal has been brought pursuant to section 112 of the *ESA* on the grounds there is evidence that has become available that was not available at the time the Determination was being made, and that the Director erred in law.

5. I have before me the Employer's Appeal Form, its submission in support of its appeal, correspondence to the parties from the Tribunal regarding the appeal, and the record the Director was required to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. Included within these materials are the Adjudicating Delegate's Determination and the Reasons for the Determination (the "Reasons").

6. Section 114(1) of the *ESA* stipulates that the Tribunal may dismiss all or part of an appeal at any time after an appeal is filed, and without a hearing, if any of a listed number of criteria is satisfied. In this instance, I am persuaded that it is appropriate to consider the criterion established in section 114(1)(f). That section permits the Tribunal to dismiss an appeal if it determines there is no reasonable prospect that the appeal will succeed.

ISSUE

7. Should the appeal be permitted to proceed, or should the Tribunal exercise its discretion pursuant to section 114(1)(f) and dismiss the appeal because there is no reasonable prospect that it will succeed?

THE DETERMINATION

8. The Adjudicating Delegate's Reasons state that the Employer operates a seniors' home care business. The Employer employed the Complainant, as a part-time caregiver primarily, for the clients of the business in their homes, from March 20, 2020, until February 5, 2021.

9. In a telephone conversation with the Investigating Delegate, the principal of the Employer alleged that the Complainant was a "fraud" and that the Employer had terminated her employment for just cause because she had asked for the payment of wages for work she did not perform. The specifics of this allegation were that the Complainant had claimed wages for work she said she had performed, despite her failure to sign in as required at the venues where the work was to occur, and therefore to confirm her attendances on site. The Adjudicating Delegate noted that the Employer did not respond to the Investigating Delegate's Demand for Employer Records, nor did the Employer provide any further information or evidence to substantiate the principal's allegations of dishonesty made verbally over the phone.

10. Following a review of the documents and information gathered by the Investigating Delegate, including payroll, email, text, employment, and other documents provided in support of her oral evidence by the Complainant, the Adjudicating Delegate determined that the Employer had, during the Complainant's tenure, failed to pay the Complainant the wages to which she was entitled on multiple occasions. The wages found to be owed included regular wages, overtime wages, and statutory holiday pay. The Adjudicating Delegate also found that vacation pay was owed on the wages the Employer had failed to pay while the Complainant was employed.

11. On February 5, 2021, the Complainant sent an email to the Employer resigning from her position as an employee due to the Employer's having breached her employment contract. The Adjudicating Delegate determined that the Complainant had departed because the Employer had substantially altered a condition of the Complainant's employment when it unilaterally, and without the Complainant's consent, removed from her work portfolio certain important new duties, other than strictly caregiving responsibilities, she had agreed to perform, which meant that section 66 of the *ESA* mandated the departure must be characterized as a termination, and not as a resignation. For clarity, section 66 provides that "[i]f a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

12. The Adjudicating Delegate rejected the Employer's allegations of cause because the Employer's bald assertions of fraud were uncorroborated by any other evidence, including the evidence of witnesses, which the Employer's principal told the Investigating Delegate he had in his possession, but which he did not provide, despite the Investigating Delegate's request that he deliver it. In addition, the Complainant provided a plausible account of her work practices which served to rebut the Employer's concerns. She stated that it was her practice to go directly to her clients' rooms at the facilities where she was providing services for them, and since the staff at the facilities knew who she was, and the purpose of her visits, she

was not required to sign in. The Adjudicating Delegate concluded, therefore, that the Employer had failed to meet the burden resting on it to establish its assertion it was justified in terminating the Complainant's employment for cause and, accordingly, the Complainant was entitled to an award of compensation for length of service pursuant to section 63 of the statute.

ARGUMENTS

13. As I have stated, the Employer submits that evidence has become available that was not available at the time the Determination was being made, and further that the Director erred in law.

14. The Employer's submission provides further particulars of its claim made during the investigation of the Complaint regarding the Complainant's alleged dishonesty in reporting work she did not perform. The Employer states that the Complainant told its principal, and another employee, that she had worked on February 5, 2021, when a relative of the client for whom she was to have provided services on that day had informed the Employer that no one was present with the client, implying that the Complainant had not attended. In addition, the Employer's submission states that the facility where the Complainant was to have attended had no record she had done so on that day.

15. The Employer states that it utilizes a smartphone application which permits employees like the Complainant to sign in to work via their phones if they are within a geographic distance from the work site they are visiting. The Employer submits that the Complainant would routinely communicate with the Employer's 24-hour call centre to advise that she was having difficulty with her phone, and so the centre should sign in for her as she had attended at work. The Employer implies that the Complainant was not actually at work on these occasions.

16. The Employer alleges another instance of dishonest behaviour by the Complainant. It says that the Employer's scheduler, who oversaw payroll approval for staff hours of work, had "advised" that, after a payroll was approved, the Complainant would claim extra hours for herself. The Employer states that the Complainant's access to the payroll software was restricted to stop her from "falsifying hours".

17. In answer to the Complainant's evidence, accepted by the Adjudicating Delegate, that the facility in question did not require the Complainant to sign in when she attended there because they knew her, the Employer submits that the facility's sign in policy was strict at the time, due to their experience with COVID outbreaks, and so it is unlikely the facility would permit the Complainant to attend there without following sign in protocols.

18. The Employer argues, therefore, that no orders for payment of wages should have been made in favour of the Complainant nor, it follows, concomitant penalties imposed, as the Complainant "committed time theft for hundreds of hours either by boosting her own hours in the payroll software or simply…not attending to patients that she had been assigned to."

19. The Employer argues further that it is implausible it would have asked the Complainant to perform the administrative duties the Complainant told the Investigating Delegate the Employer had removed from her, which justified the Adjudicating Delegate to find that the Employer had contravened section 66 of the *ESA*. The reason, the Employer submits, is that the Complainant was an unregistered caregiver, and she had no training to perform those administrative duties. The Employer says, too, that it never agreed

to an appointment for the Complainant to perform those duties, as the Employer's principal never approved the "promotion", and the employee who purported to do so on its behalf was terminated subsequently.

20. Finally, the Employer says that since it never agreed the Complainant should perform any extra administrative duties apart from her ordinary duties as a caregiver and, indeed, as she never actually did any administrative work, it was wrong in law for the Adjudicating Delegate to decide that a condition of the Complainant's employment was substantially altered when the administrative duties were removed from her, so as to engage the application of section 66 of the *ESA*. Alternatively, the Employer argues that since a period of approximately two months passed from the time of the alleged removal of duties to the date the Complainant departed, the Complainant must be deemed to have condoned the demotion.

ANALYSIS

21. The appellate jurisdiction of the Tribunal is set out in subsection 112(1) of the *ESA*, which reads:

> 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.

22. Subsection 115(1) of the *ESA* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

New Evidence

23. In *MSI Delivery Services Ltd.*, BC EST D051/06, it was stated, and I agree, that the Tribunal should take a strict view of what constitutes new evidence on an appeal. Section 112(1)(c) of the *ESA* must not, therefore, be construed to provide an invitation to a party dissatisfied with a determination to seek out new evidence to supplement an appeal, if that evidence could have been presented to the Director before the determination was issued. That said, the Tribunal does retain a discretion to allow new evidence where it was not reasonably available to the appellant prior to the determination, the evidence is material to a relevant issue, and the evidence is credible, meaning it is reasonably capable of belief. It has also been stated that the probative value of any new evidence offered in an appeal must be high, meaning that it might have led the Director to draw a different conclusion on a material issue.

24. In my view, the Employer has not satisfied the burden resting on it to establish that the evidence it seeks to have admitted in the appeal is "new" having regard to the criteria I have described.

25. I accept that the evidence appears to be material to the question whether the Employer lawfully dismissed the Complainant for cause, and whether, therefore, the Complainant was entitled to an award of compensation for length of service. However, the evidence seems to be of a type it is reasonable to expect that a diligent party in the Employer's position could have obtained and delivered prior to the issuance of the Determination, yet the Employer provides no explanation why this did not occur. Moreover, the evidence sought to be admitted consists of statements made by counsel for the Employer in a submission, based largely on what appear to be communications from third parties and the principal of the Employer, with no written confirmation of the information from those individuals themselves, or any other documentation offered in support.

26. There is, in my opinion, another major difficulty facing the Employer that undermines the strength of its assertion it should be permitted to tender new evidence in its appeal. The Employer declined to participate fully in the process of the investigation of the Complaint. Apart from a telephone conversation with the Employer's principal initiated by the Investigating Delegate to discuss the Complaint and gather information, during which the principal alleged that the Complainant was a "fraud", and that she had been properly dismissed for cause, the Employer neglected to provide any further evidence or contact information for any witnesses which might have assisted the Investigating Delegate to confirm the Employer's accusations, despite the principal's assertion that the evidence existed, and despite specific requests by the Investigating Delegate that the Employer deliver it. The Employer also failed to respond to a formal Demand for Employer Records the Investigating Delegate prepared and delivered subsequently.

27. The conclusion I draw is that the Employer's decision to stand aside during the investigation, and to refrain from collecting and delivering the evidence on which in now seeks to rely, was conscious and deliberate. In circumstances of this nature, it is the practice of the Tribunal to decline to provide relief in an appeal grounded on a claim that there is new evidence which should be admitted (see, for example, *Re J. P. Metal Masters 2000 Inc.*, BC EST #D057/05, and *Re Senor Rana's Cantina Ltd.*, BC EST #D017/05). I see no compelling reason to depart from this practice in this case.

28. The Employer's appeal that the appeal should succeed because there is "new" evidence is dismissed.

Error of Law

29. The Employer argues that the Adjudicating Delegate's findings of fact regarding the Complainant's hours of work are incorrect, and so the orders for payment of wages and penalties made in the Determination are unwarranted.

30. I disagree.

31. What the Employer's submission fails to acknowledge is that an appeal is not a re-investigation of a complaint, nor is it intended to be an opportunity to re-argue positions taken during the investigation process in the hope that the Tribunal will come to a different conclusion. Rather, an appeal is an error correction process, with the burden of showing error resting solely on an appellant (see *MSI Delivery*

Services Ltd., *supra*). If the Tribunal were to re-investigate and re-hear every complaint on appeal it would act in a manner contrary to section 2(d) of the *ESA*, which states that one of the purposes of the statute is to provide fair and efficient procedures for resolving disputes over the application and interpretation of its provisions (see *McKay*, BC EST #D146/05).

32. In addition, the *ESA* provides no opportunity for the Tribunal to correct a delegate's errors of fact, unless those errors can be said to constitute errors of law. Errors of fact do not become errors of law except in rare circumstances where they reveal what the authorities refer to as palpable and overriding error. A decision by the Tribunal that there has been a palpable and overriding error presupposes a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are so unsupported by the evidentiary record that there is no rational basis for the findings made, and so they are perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's findings of fact if the appellant establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have reached the conclusions set out in the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

33. Here, the best evidence before the Adjudicating Delegate, collected by the Investigating Delegate, came from the Complainant, due in large part to the fact that the Employer made no effort to offer any compelling evidence of misconduct by the Complainant in rebuttal. This was significant because, as the Adjudicating Delegate noted, it was a burden resting on the Employer to establish an assertion that the Complainant had been lawfully dismissed for cause. The Reasons show that the Adjudicating Delegate took pains to weigh the quality of the evidence tendered by the Complainant, and the Adjudicating Delegate determined that it was reliable. It is trite to state that conclusions regarding the evidence a delegate will accept, and the weight to be attributed to it, are matters for the delegate to decide, and the Tribunal will not interfere absent a party's establishing one of the grounds of error to which I have referred above.

34. The Employer says that the new evidence it now presents in the appeal, and the information it provided to the Investigating Delegate, should have convinced the Adjudicating Delegate that the Complaint should be dismissed. However, I have decided that the evidence the Employer now wishes to tender is not new, and so it is inadmissible. For the reasons I have earlier stated, the information the Employer provided to the Investigating Delegate was incomplete, and woefully inadequate, to say the least. In no way can it be said that the Employer has shown the findings of fact made by the Adjudicating Delegate regarding the Complainant's hours of work were perverse or inexplicable.

35. The Employer submits further that the order the Adjudicating Delegate made in the Determination for a payment of compensation for length of service was in error because the Complainant never possessed the administrative duties she claimed were removed from her portfolio unlawfully and, alternatively, even if they were, the Complainant condoned the demotion.

36. Here, too, the Adjudicating Delegate found as a fact that the Complainant had been assigned administrative duties in addition to her responsibilities as a caregiver, and that those duties had been unilaterally removed from her without her consent. There was, moreover, documentary evidence generated at the time the administrative duties were assigned to the Complainant which corroborated the Complainant's version of events. In particular, the former Assistant General Manager of the Employer,

who was the person who offered the administrative duties to the Complainant, gave evidence during the investigation that the principal of the Employer approved the Complainant's continuing to work in her new capacity. The Employer never challenged this specific evidence during the investigation, although it does so now, too late, in the appeal. For these reasons, I am not persuaded that the Adjudicating Delegate's findings on this point should be disturbed.

37. The Employer's argument regarding condonation, which it offers in the alternative for the first time on appeal, is based on the claim that the Complainant waited too long to assert a dismissal pursuant to section 66. It relies on evidence that the alleged demotion occurred in early December 2020, and the Complainant did not resign until early February 2021, a lapse of two months.

38. While there is Tribunal authority that affirms the principle a finding of a termination pursuant to section 66 may be rendered unavailable due to the passage of time while an employee continues to work following a substantial alteration in a condition of their employment (see, for example, *Re Gordon*, BC EST #D399/02, and *Re Simpson*, BC EST #D043/06), I have decided that the submission of the Employer on this point cannot succeed, for two reasons.

39. First, the Employer never raised its concern regarding delay at any time prior to the issuance of the Determination. As with any submission regarding new evidence on appeal, the Tribunal is loath to entertain arguments relating to the merits of a determination where, as occurred here, an appellant neglects or refuses to accept the opportunity to participate fully in the investigation of a complaint and make any relevant arguments within that process (see, for example, *Re Syncon Investments Ltd*. *(c.o.b. George & Dragon Pub Style Restaurant))*, BC EST #D094/97, and *Re AWC Developments Ltd.* 2019 BCEST 11).

40. Second, even if I were to decide that the Complainant waited too long to give notice of her departure following her demotion, which I specifically decline to do, the Adjudicating Delegate could, in my view, have decided that section 66 of the *ESA* was nevertheless engaged for yet another reason, namely, that the Employer neglected or refused to pay the Complainant all the wages to which she was entitled, including all the wages she earned during her final four days of work before she accepted the Employer's repudiation of her employment contract on February 5, 2021. There are several decisions of the Tribunal which make it clear that a failure to pay wages can cause a termination within the ambit of section 66 (see, for example, *Re Alpha Neon Ltd.*, BC EST #RD032/12, *Re H.L.N.T. Networks (Canada) Inc.*, BC EST #D274/02. *Re Star Touch Enterprises Inc. (c.o.b. Salon 41)*, BC EST #D032/03, and *Re 582195 B.C. Ltd. (c.o.b. Great Clips)*, BC EST #D049/03). It follows that the decision of the Adjudicating Delegate should not be disturbed for this reason also, because it was correct in the result.

41. For the reasons I have set out, I have decided that the appeal should be dismissed pursuant to section 114(1)(f) of the *ESA.* There is no reasonable prospect that the appeal will succeed.

ORDER

42. Pursuant to sections 114(1)(f) and 115(1)(a) of the *ESA*, I order that the appeal be dismissed and that the Determination dated December 6, 2022, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal