

Citation: Welbec Quesnel Ltd. and Welbec Properties Inc. (Re)
2023 BCEST 43

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Welbec Quesnel Ltd. and Welbec Properties Inc.
("Welbec")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NOS.: 2023/046 and 2023/048

DATE OF DECISION: June 20, 2023

DECISION

SUBMISSIONS

Sanjeev Kandola and Ron Singh on behalf of Welbec Quesnel Ltd. and Welbec Properties Inc.

OVERVIEW

1. This decision addresses appeals filed under section 112 of the *Employment Standards Act* (the “ESA”) by Welbec Quesnel Ltd. and Welbec Properties Inc. (collectively, the “Employer” or “Welbec”) of a determination issued by Michael Thompson, a delegate (the “deciding Delegate”) of the Director of Employment Standards (the “Director”), on March 14, 2023 (the “Determination”). While the Tribunal has treated the appeals as having been filed by each of the entities, those entities have agreed they can be considered as one employer under section 95 of the *ESA* and I have done so in this decision.
2. The Determination found Welbec had contravened section 83 of the *ESA* in respect of the termination of Jesse Fast (“Ms. Fast”). That provision prohibits an employer from engaging in several methods of retaliation against an employee because that employee initiated or was participating in a proceeding under the *ESA*.
3. The Determination ordered Welbec to pay Ms. Fast compensation in lieu of reinstatement in the total amount of \$8,925.73, an amount that included interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of \$500.00. The total amount of the Determination is \$9,425.73.
4. Welbec has appealed the Determination, alleging the deciding Delegate erred in law and failed to observe principles of natural justice in making the Determination.
5. In correspondence dated April 18, 2023, the Tribunal, among other things, acknowledged having received appeals from each of the entities, requested the section 112(5) record (the “record”) from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeals were not being sought from them at that time.
6. The record has been provided to the Tribunal by the Director and a copy has been delivered to Welbec and to Ms. Fast. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either Welbec or Ms. Fast.
7. For the purposes of these appeals, the Tribunal accepts the record is 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 appeals, the written submission filed with the appeals 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 that 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 appeals or a part of them has some presumptive merit and should not be dismissed under section 114(1), the Director and Ms. Fast will be invited to file submissions. On the other hand, if it is found the appeals satisfy any of the criteria set out in section 114(1), they are liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeals can succeed.

ISSUE

10. The issue in these appeals is whether they should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE DETERMINATION

11. Welbec owns and manages rental properties.
12. Ms. Fast was employed as a property manager from March 2, 2015, to January 8, 2021, when her employment was terminated. Following the termination of her employment, Ms. Fast filed a complaint under the *ESA* alleging Welbec had terminated her employment because she had filed a complaint against Welbec under the *ESA*.
13. Welbec disputed that allegation.
14. The complaint was investigated by a delegate of the Director (the “investigating Delegate”) who produced an Investigation Report, which was provided to Welbec and Ms. Fast, and who also received and documented responses from the parties. The Investigation Report and the responses of the parties were considered by the deciding Delegate.
15. The Determination recites, by way of background evidence, the etiology of an earlier complaint Ms. Fast had filed against Welbec on September 12, 2019, and which led to the issuance, on November 25, 2020,

of a preliminary findings letter on that complaint indicating Ms. Fast appeared to be owed \$12,733.88 in unpaid wages by Welbec.

16. The preliminary findings letter included an invitation to either party to respond to the evidence that had been provided and the issues that had been identified, to provide any additional evidence either party felt was relevant, and offered an opportunity to engage in efforts to voluntarily resolve the complaint. There was no voluntary resolution and a determination was issued on January 12, 2021, in favour of Ms. Fast for wages in the amount of \$13,347.08.
17. Ms. Fast was provided with a letter, dated January 5, 2021, terminating her employment effective January 8, 2021. No reason was given in the letter for her termination.
18. Welbec took the position that Ms. Fast's termination was the result of significant and long-standing concerns it had with her employment, but provided no evidence to show there were any concerns, or any attempt to address the alleged concerns, before September 2020. The Determination refers to, and addresses, three communications, September 9 and 16 and November 27, 2020, which Welbec characterized as disciplinary in nature. The deciding Delegate found the first communication was "clearly not disciplinary" and the other two communications were "largely not disciplinary in nature".
19. In addition to the three written communications, Welbec asserted that Ms. Fast has been given verbal warnings and produced what the deciding Delegate referred to as a "purported record of verbal warnings" given to Ms. Fast on six dates between November 30, 2020, and January 8, 2021. The deciding Delegate did not accept the record of warnings provided, finding they were "suspect on their face" – giving the appearance of having been written at one sitting, with the same pen, and in the same handwriting – and only began after Welbec had received the Investigation Report on her complaint.
20. The deciding Delegate found Ms. Fast had "an essentially clean disciplinary record" as of November 20, 2020, and that "it was "highly improbable" she had received the disciplinary verbal warnings that Welbec asserted.
21. The deciding Delegate acknowledged the evidence was circumstantial, but that the timing – mere weeks after the Investigation Report was issued – the absence of any reasonable explanation for Ms. Fast's termination, and the absence of any evidence relating to performance concerns, led the deciding Delegate to find Ms. Fast's September 2019 complaint and the associated wage liability to Welbec as a result of it formed at least a part of Welbec's reason for the termination of her employment.
22. The Determination also references a submission by Welbec related to physical limitations with lifting items, resulting from a work injury that Ms. Fast had incurred. In dismissing this submission, the deciding Delegate noted that Welbec had only raised this matter in its response to the Investigation Report.
23. In result, the deciding Delegate found Welbec has contravened section 83 of the *ESA*, that Ms. Fast was entitled to a remedy under section 79(2), and that the appropriate remedy in the circumstances was compensation in lieu of reinstatement, which the deciding Delegate calculated to be \$8,320.30 plus accrued interest.

ARGUMENTS

24. Welbec has raised the error of law and natural justice grounds of appeal.
25. At its core, their argument expresses a disagreement with the finding by the deciding Delegate that Ms. Fast was terminated because of the September 2019 complaint she filed under the *ESA*.
26. In advancing this submission, Welbec disagrees with the conclusion of the deciding Delegate that the three written communications to Ms. Fast by Welbec were not disciplinary in nature and with the decision to give the verbal warnings no effect.
27. The submission of Welbec also seeks to explain why the verbal warnings given to Ms. Fast before November 2020 and in the last six weeks of her employment were not documented or delivered to her as written warnings, stating:
- ... the reason verbal warnings were not recorded prior to November 2020 was because the Property Manager prior to that date only provided verbal warnings but did not document the verbal warnings. The Property Manager responsible for the properties (one of which the Complainant worked at) documented all verbal warnings along with notifying the office to issue written warnings.
28. Welbec says the Determination is wrong because the evidence presented by them was clear that Ms. Fast had a poor history of performance and showed she was unable to perform her job duties in a responsible manner.

ANALYSIS

29. 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.*
30. A review of decisions of the Tribunal reveals certain principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.
31. 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.
32. A party alleging a failure to comply with principles of natural justice, as Welbec 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. I find nothing in the appeal that would support a finding the deciding Delegate failed to comply with principles of natural justice.

33. The Tribunal has 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).

34. Provided the process exhibits the elements of the above statement, it is unlikely the deciding Delegate will be found to have failed to observe principles of natural justice in making the Determination.

35. Welbec's argument has not identified or argued any natural justice concerns with the Determination. I find the required natural justice elements described above were met by the deciding Delegate. This ground of appeal has no merit whatsoever.

36. 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.):

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.

37. It is well established that the grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law, either because the Director acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained: see *Britco Structures Ltd.*, BC EST #D260/03.

38. Welbec has done nothing more in these appeals than challenge findings of fact made by the deciding Delegate. A person challenging findings of fact made in a determination, as Welbec has, must demonstrate there is a palpable and overriding error in those findings of fact.

39. The argument made in this appeal – that Ms. Fast was terminated solely due to performance issues for which she received verbal warnings – simply reiterates the argument made by Welbec during the complaint process.

40. The deciding Delegate referred to, addressed, and, on the evidence, dismissed that argument in the Determination, finding there was nothing in the material that warranted a finding Ms. Fast's termination was related to performance and disciplinary concerns.
41. My assessment of the material contained in the record confirms the above finding was adequately supported on the objective evidence before the deciding Delegate, and was not perverse or inexplicable. Although not necessary for this decision, I also agree with it completely.
42. The argument made by Welbec which attempts to explain the absence of any clear written record of performance concerns that warranted disciplinary response simply makes little sense and I am not persuaded they reflect an error of law by the deciding Delegate.
43. The assertion that a record of verbal warnings was not provided prior to November 2020 because they were not documented by a previous Property Manager does not demonstrate there *were* verbal warnings given and does not affect in any way the conclusion of the deciding Delegate that there was no evidence that Ms. Fast had received any verbal warnings before November 2020 and had "an essentially clean disciplinary record" as of that date.
44. The assertion that a new Property Manager documented verbal warnings, and notified the office to issue written warnings is, like the purported record of verbal warnings itself, suspect. There is no objective evidence anywhere that these so-called verbal warnings were ever relayed to the office or transcribed into written form; there is no objective evidence in the record identifying an event that might provide a reason for issuing these alleged verbal warnings; and the list of alleged verbal warnings, which appears to have been made at one sitting, could not have been produced before January 8, 2021. On this last point, by all appearances, the list of so-called verbal warnings was prepared after Ms. Fast was terminated.
45. In sum, the submission of Welbec does not satisfactorily address the concern, in my view legitimately expressed by the deciding Delegate, that the record of verbal warnings was 'suspect' and does not demonstrate that Welbec had significant and long-standing concerns about Ms. Fast's employment.
46. The deciding Delegate was justified, in the circumstances and on the available evidence, to find Ms. Fast's 2019 complaint was a proximate reason for her termination.
47. I find Welbec has not met their burden of showing the deciding Delegate committed a 'palpable and overriding error' in finding Ms. Fast's termination was related to her filing a complaint against Welbec under the *ESA*.
48. No error of law is shown and this ground of appeal also fails.
49. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

50. Pursuant to section 115(1) of the *ESA*, I order the Determination dated March 14, 2023, be confirmed in the amount of \$9,425.73, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal