Citation: Stephan Schwan-den Hollander (Re)
2023 BCEST 66

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Stephan Schwan-den Hollander

- of a Determination issued by -

The Director of Employment Standards

**PANEL:** Richard Grounds

**FILE NO.:** 2022/213

**DATE OF DECISION:** August 21, 2023

# DECISION

## SUBMISSIONS

| | |
|---|---|
| Stephan Schwan-den Hollander | on his own behalf |
| Maria Belykh | counsel for The Max Tire Centre Ltd. carrying on business as OK Tire |
| Melanie Zabel | delegate of the Director of Employment Standards |

## OVERVIEW

1. This is an appeal by Stephan Schwan-den Hollander ("Appellant" or "Complainant") of a determination issued by Melanie Zabel, a delegate ("Adjudicating Delegate") of the Director of Employment Standards ("Director"), dated December 2, 2022 ("Determination"). The Appellant appeals the Determination pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Adjudicating Delegate concluded that the Appellant was not entitled to compensation for length of service from The Max Tire Centre Ltd. carrying on business as OK Tire ("Employer") because it gave the Appellant more than six weeks' written working notice of termination of his employment.

3. The Appellant submits that the Director erred in law in and failed to observe the principles of natural justice in making the Determination. The Determination was sent to the Appellant by email on December 2, 2022, so the deadline to submit an appeal was December 27, 2022. The Appellant submitted his appeal on December 23, 2022.

4. Submissions were requested from the parties and the Director on the specific issue of "consideration" and on the merits of the appeal. Submissions were received from the parties and the Adjudicating Delegate.

5. I have considered the Determination, the reasons for the Determination, the appeal submissions, the *ESA* section 115 record ("Director's Record") and the submissions received from the parties and the Adjudicating Delegate. For the following reasons, the Determination is cancelled, and the complaint is referred back to the Director.

## ISSUES

6. The issue to be decided in this appeal is whether the Adjudicating Delegate erred in law or failed to observe the principles of natural justice in making the Determination.

## FACTUAL BACKGROUND

7. The Complainant started working for the Employer as an auto service technician apprentice in Vancouver, BC on August 11, 2014. In January 2021, the Employer requested that all of its employees sign a contract of employment ("Employment Contract"). The Complainant refused to sign the Employment Contract and wanted to negotiate the terms with the Employer. The Employer was not willing to negotiate the terms of the Employment Contract.

8. On February 19, 2021, the Employer emailed the Complainant and stated in part:

> On Feb 17th you asked us to terminate your employment .... Our intent was never to terminate you and we were trying to communicate that there might be some days when it is not busy and we might have to send you home early. Since all other employees have signed the contract, you will have 25 weeks to consider signing the contract. If you choose not to sign, unfortunately, we will have no other choice but to terminate your employment by the end of the notice period.

9. The email included an offer letter dated February 19, 2021, and a copy of the Employment Contract. The offer letter stated that the Employment Contract was to be signed by July 30, 2021, and, if the Complainant chose not to sign it, his employment with the Employer would come to an end on August 13, 2021. The Employment Contract and offer letter are silent on the topic of consideration for signing the Employment Contract.

10. The Complainant went on medical leave on June 7, 2021, after he broke his ankle at work. On July 21, 2021, the Employer emailed the Complainant to remind him to sign the Employment Contract by July 30, 2021, or his employment would be terminated. The Complainant responded by email that he was unable to sign the Employment Contract as it was (without negotiating the terms). The Employer emailed the Complainant on July 22, 2021 and stated that, due to his decision not to sign the contract, his employment would end on August 13, 2021. The Complainant did not sign the Employment Contract and his employment was terminated on August 13, 2021, while he was still on medical leave.

11. On April 13, 2021, the Complainant made a complaint to the Employment Standards Branch for unauthorized deductions based on the Employer paying him advances each month that he did not agree to. By the time the Complainant was contacted by the Employment Standards Branch about his complaint, his employment had been terminated and his claim for compensation for length of service was added to the complaint. The claim for compensation for length of service was the only issue to proceed to investigation and is the subject of the Determination.

12. The Complainant's complaint proceeded to an investigation which was conducted by Emma Thomas, a delegate of the Director of Employment Standards ("Investigating Delegate"). The Investigating Delegate spoke with the Complainant and the Employer and obtained information from each of them.

13. On June 17, 2022, the Investigating Delegate spoke with the Employer and the Employer advised her that the Complainant was given 25-27 weeks of working notice after the Complainant refused to sign the Employment Contract when the Employer would not make the changes sought by the Complainant.[1] The

[1] Page 6 of the Director's Record.

Employer advised the Investigating Delegate that "all other employees signed the contract and were given a days pay."

14. On July 7, 2022, the Investigating Delegate spoke to the Complainant and advised him that her "assessment was that he was potentially owed 6 weeks" compensation for length of service.[2]

15. On July 15, 2022, the Investigating Delegate spoke with the Employer again and advised that they "can't have written notice that says termination is dependent on signing a contract."[3] The Employer disagreed and stated that they had been advised by an HR company on the Complainant's termination and asked the Investigating Delegate to speak with the HR person or possibly their lawyer. The Investigating Delegate agreed to do this but there is no other information in the Director's Record to confirm whether this was done.

16. On July 29, 2022, the Investigating Delegate spoke with the Employer and advised that her revised assessment was that the Employer's "case re notice period was strong" but she was not the decision maker.[4] On August 3, 2022, the Investigating Delegate spoke to the Complainant again and revised her assessment and advised the Complainant that the Employer had a "stronger case" than her initial assessment but she was not the decision maker.[5] There is no information in the Director's Record to explain the change in the Investigating Delegate's assessment.

17. On October 5, 2022, the Investigating Delegate sent an Investigation Report to the Complainant and to the Employer. The Investigation Report contained a summary of the information from both parties. The Investigating Delegate identified that the Complainant's position was that he had been terminated without receiving written working notice or compensation for length of service and that he was terminated because he was injured at work, and also to keep him quiet about the Employer's payroll practices. The Investigating Delegate identified that the Employer's position was that it had provided the Complainant with written working notice and did not owe the Complainant compensation for length of service.

18. The Investigation Report included a list of documents obtained for the investigation including the Complainant's complaint form, wage statements and Record of Employment, job description, and communications by the parties related to the proposed Employment Contract.

19. The Complainant and the Employer each provided a response to the Investigation Report. The Complainant focused on the lack of proper working notice of the termination of his employment. The Employer, through its legal counsel, stated that it had met the requirements for proper working notice, being whether a reasonable person who received the notice would conclude that his or her employment is terminating at a certain point (*Gregg v. Freightliner Ltd.*, 2005 BCCA 349 at para 8, citing *Yeager v. RJ Hastings Agencies Ltd.*, 1984 CanLii 533(BC SC)).

[2] Page 5 of the Director's Record.
[3] Page 7 of the Director's Record.
[4] Page 7 of the Director's Record.
[5] Page 5 of the Director's Record.

20. The Employer's response also stated that the Employer had intended to write in its February 19, 2021, email to the Complainant "on February 17th you asked us to ***lay you off*** with the Max Tire Centre. Our intent was never to ***lay you off*** …". The words "lay you off" were substituted for the words "terminate your employment" which are the words that were actually written in the email.

## THE DETERMINATION

21. The Adjudicating Delegate completed the Determination based on "a review of all information on the file, which includes the investigation report issued on October 5, 2022 summarizing the information collected from the investigation, and the responses from the parties to the investigation report." The Adjudicating Delegate did not conduct any further investigation.

22. The Adjudicating Delegate summarized the information received from the Complainant and the Employer and then outlined her findings and analysis. The Adjudicating Delegate found that the Complainant was entitled to six weeks' written notice under the *ESA*, which can include working notice. The Adjudicating Delegate acknowledged the Complainant's disagreement with the Employment Contract but found that there was insufficient evidence that the Employer agreed that it was unfair or that the Complainant was no longer required to sign it as the Complainant asserted.

23. The Adjudicating Delegate concluded that the Employer provided written working notice to the Complainant in the February 19, 2021, email and that the Complainant knew that his employment would end on August 13, 2021, if he did not sign the contract. The Adjudicating Delegate concluded that the Complainant had worked approximately 15 weeks of the notice period before he went on medical leave and that this did not render the notice period to be without effect because he had already worked more than the six weeks notice that he was entitled to under the *ESA*.

24. The Adjudicating Delegate concluded that "the Employer [was] not liable to pay compensation for length of service because it gave the Complainant significantly more that six weeks' written working notice of his employment ending." The Adjudicating Delegate did not address the issue of consideration in the Determination.

## ARGUMENTS

25. The Appellant submitted on appeal that the working notice of termination should not be upheld because it was served by email, he received no paperwork, and it was not signed and dated by both parties. The Appellant submitted that the notice period was not valid under section 67 of *ESA* because it either coincided with the period when he was on medical leave under section 67(1)(a) or his employment continued beyond the statutorily required 6 weeks of notice under section 67(1)(b).

26. Submissions were requested by the Tribunal from the parties and the Director on the specific issue of consideration and on the merits of the appeal.

27. The Appellant stated that an employer should not be able to give 25 weeks notice to an employee instead of the 7 weeks required by the *ESA* and then stop paying that employee after 17 weeks (as had happened to him after he went on medical leave when he broke his foot).

28. The Employer, through its legal counsel, submitted that the Appellant had been provided with working notice of 25 weeks that was "specific, clear and unequivocal" and that the Appellant had been paid 15 weeks before going on medical leave, which was more than the 6 weeks he was statutorily entitled to received on termination. The Employer did not address the issue of consideration.

29. The Adjudicating Delegate submitted that the Appellant had been provided with written notice of termination well in excess of the statutory minimum should he choose not to sign the Employment Contract and, accordingly, it was not necessary to examine consideration. The Adjudicating Delegate submitted that the *ESA* does not require working written notice to be served on paper or to be signed by both parties.

## ANALYSIS

30. The Appellant has appealed the Determination on the bases that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The role of the Tribunal is not to re-weigh the evidence and decide the merits of an original complaint. For the purposes of the appeal, the proven facts are that the Complainant was provided with written working notice of termination on February 19, 2021, if he did not sign the Employment Contract by July 30, 2021, and that his employment would be terminated on August 13, 2021. The Complainant did not sign the Employment Contract and went on medical leave in early June 2021, after he broke his ankle. The Complainant was still on medical leave on the date that his termination took effect.

*Error of Law*

31. The Tribunal has adopted the following definition of an error in law set out in *Gemex Developments Corp*. v. *British Columbia (Assessor of Area #12 - Coquitlam)*, [1998] B.C.J. No 2275 (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.

32. The Adjudicating Delegate considered the Complainant's submission relating to section 67 of the *ESA* that the notice period was invalid because it was served by email and because he went on medical leave during the notice period. The Adjudicating Delegate's reasons that section 67 of the *ESA* did not apply were reasonable, supported by the evidence and not contrary to the *ESA*.

33. The primary issue relating to the Complainant's termination is not whether he was provided with written working notice but whether the termination itself was valid. If the termination was not valid, then it could not be cured by a written working notice. The evidence is clear that the Employer had no intention of terminating the Complainant and he was only terminated because he refused to sign the Employment Contract.

34. Although the Employer's legal counsel suggested in the response to the Investigation Report that the Employer had misstated itself in its February 19, 2021, email where it said that it had no intention of terminating the Complainant's employment and meant to say, "lay off", nothing turns on this distinction. The evidence is overwhelming that the Employer terminated the Complainant only because he did not sign the Employment Contract.

35. The *ESA* does not prevent an Employer from terminating an employee without cause but, where they do, it must pay compensation for length of service. This can be accomplished by providing written working notice based on the intention to terminate employment. This is what occurred in the case relied on by the Employer, *Gregg v. Freightliner Ltd., supra,* which involved the closure of a manufacturing plant. In this case, however, the Employer had no intention to terminate the Complainant's employment and only did so because he refused to sign the Employment Contract.

36. The Complainant believed that he should be able to negotiate the terms of the Employment Contract and refuse to sign it if he did not agree with it. It would place employers in a difficult position if employees could frustrate the employer instituting an employment contract simply by refusing to sign the contract. The courts have addressed this difficulty by allowing an employer to require employees to sign an employment contract if the employer gives the employee something in exchange for signing the contract, i.e. consideration.

37. The issue of consideration was addressed by the Tribunal in *Maksimovic (Re)*, 2012 CanLII 151103 (BC EST # RD046/12) which was a reconsideration of BC EST # D012/12 and in *Maksimovic (Re)*, 2014 CanLII 149871 (BC EST # D026/14). *Maksimovic* involved a wage reduction agreement and complaint for compensation for length of service. In the original 2012 reconsideration decision, the Tribunal referred the matter back to the Director to investigate whether there was any consideration for the wage reduction agreement (which would make it valid). In the 2014 appeal decision, the Tribunal confirmed the Determination on the basis that there had been "adequate consideration" in the form of forbearance from dismissal.

38. *Maksimovic* discusses the distinction between *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (O.C.A.), where the Ontario Court of Appeal stated that "the law does not permit employers to present employees with changed terms of employment, threaten to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms"[6] and other cases which involved an additional "promise" by the employer "to forbear from exercising its right to terminate the employee for a reasonable period"[7]. The issue of consideration is directly applicable to the circumstances in this case.

39. The Investigating Delegate did not investigate the issue of consideration and the Adjudicating Delegate who completed the Determination did not address the issue of consideration. The Adjudicating Delegate

[6] *Maksimovic (Re)*, 2014 CanLII 149871 (BC EST), (BC EST# D026/14) at paragraph 15, citing *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (O.C.A.) at paragraph 32.

[7] *Maksimovic (Re)*, 2014 CanLII 149871 (BC EST), (BC EST# D026/14) at paragraph 17, citing *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 (O.C.A.) at paragraph 37, referencing the Supreme Court of Canada decision in *Maguire v. Northland Drug Co. Ltd.,* 1935 CanLII 35 and the Ontario Court of Appeal decision in *Techform Products Ltd. v. Wolda,* 2001 CanLII 8604 (ON CA).

maintained in the submissions requested by the Tribunal on the specific issue of consideration that consideration was not required because written working notice had been provided to the Complainant. This is an error of law because it is a misapplication of a general principle of law related to the implementation of employment contracts on employees in BC.

40. The fact that some consideration is required to implement an employment contract appears to have been recognized by the Employer because every employee who signed the Employment Contract received a day's wages in exchange for signing it. Other than this one reference in the Director's Record, there is no other evidence related to the issue of consideration and whether or not the Complainant was also paid a day's wages. There is also no evidence relating to whether the Employer promised to forbear from exercising its right to terminate the employee for a reasonable period.

41. There is insufficient evidence before me to decide whether the Complainant was provided with consideration to sign the employment contract. The issue of consideration was not investigated by the Adjudicating Delegate, but it should have been and is a key fact that needs to be decided in order to decide the Complainant's complaint. Given consideration was not investigated and the Director's Record is not sufficient to reach a conclusion about consideration, the only available outcome is to cancel the Determination and send it back to the Director to investigate and determine the issue of consideration.

*Failure to Observe the Principles of Natural Justice*

42. The principles of natural justice relate to the fairness of the process and ensure that the parties know the case against them, are given the opportunity to respond to the case against them and have the right to have their case heard by an impartial decision maker. The principles of natural justice include protection from proceedings or decision makers that are biased or where there is a reasonable apprehension of bias.

43. The Appellant has not raised any obvious issues that involve the principles of natural justice. The Appellant was informed of the issues considered by the Adjudicating Delegate and was provided with an opportunity to provide information for his complaint. The Adjudicating Delegate provided detailed reasons where she considered the evidence from both parties. An objective review of the Adjudicating Delegate's reasons does not support that she was not impartial or that she was biased against the Appellant. In addition, the circumstances do not support that there was a reasonable apprehension of bias on the part of the Adjudicating Delegate against the Appellant.

44. I am satisfied that the Adjudicating Delegate did not fail to observe the principles of natural justice in making the Determination. Despite this, the Adjudicating Delegate still erred in law in making the Determination and the Determination is cancelled.

## ORDER

45. The Appellant's appeal is allowed, and the Determination is cancelled under section 115(1)(a) of the *ESA*. Pursuant to section 115(1)(b) of the *ESA*, the Complainant's complaint is referred back to the Director.

**Richard Grounds**
**Member**
**Employment Standards Tribunal**