Employment Standards TRIBUNAL

Citation: Kua Yung Chao (Re)
2023 BCEST 67

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Kua Yung Chao
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL: Brandon Mewhort

FILE NO.: 2023/059

DATE OF DECISION: August 23, 2023

DECISION

SUBMISSIONS

Jonathan Chao — on behalf of Kua Yung Chao

OVERVIEW

1. This is an appeal by Kua Yung Chao ("Appellant") of a determination issued by John Dafoe, a delegate ("Adjudicating Delegate") of the Director of Employment Standards ("Director"), dated April 6, 2023 ("Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Adjudicating Delegate found that the Appellant, a former employee of Hallmark Poultry Processors Ltd. ("Employer"), was terminated for just cause and he was not entitled to compensation for length of service.

3. Section 114(1) of the *ESA* provides that any time after an appeal is filed, and without a hearing of any kind, the Tribunal may dismiss all or part of the appeal if the Tribunal determines that, among other things, there is no reasonable prospect the appeal will succeed.

4. For the reasons discussed below, I dismiss this appeal pursuant to section 114(1) of the *ESA*, because there is no reasonable prospect it will succeed.

ISSUE

5. The issue is whether this appeal should be dismissed pursuant to section 114(1) of the *ESA*.

THE DETERMINATION

6. The Appellant was employed as a packer with the Employer, which operates a poultry processing plant, from June 22, 2015, to October 4, 2021, when he was terminated. The Appellant filed a complaint on October 5, 2021, alleging that the Employer contravened the *ESA* by failing to pay compensation for length of service. Another delegate of the Director ("Investigating Delegate") completed an investigation of the complaint and issued an investigation report on January 23, 2023.

7. The facts of the case were mostly undisputed. The incident that resulted in the Appellant's termination occurred on September 28, 2021. At that time, the COVID-19 pandemic was of significant concern and public health orders continued to be in effect, which required, among other things, employers to have COVID-19 safety plans. The pandemic was of particular concern for the poultry processing industry because it had already resulted in numerous plant shutdowns due to COVID-19 outbreaks. The Employer's COVID-19 safety plan included a provision that barred any person from entering the Employer's facilities if they share a household with another person with COVID-19 or displaying symptoms.

8. On September 28, 2021, while on coffee break from his shift at approximately 2:40 p.m., the Appellant went to move his vehicle into the parking spot of another employee who he shared a household with. At that time, the Appellant was told by the other employee that she just tested positive for COVID-19. The

Appellant then returned to work until approximately 6:40 p.m., at which time he advised his supervisor that he needed to get a COVID-19 test and self-isolate while awaiting the results. The Appellant received a test for COVID-19 the following day, which was negative. When the Appellant went to work with his negative test results on October 4, 2021, he was stopped before entering the facility and handed his termination papers.

9. In determining whether the Employer had just cause to terminate the Appellant, the Adjudicating Delegate considered the context in which the behaviour occurred, particularly the state of the pandemic and the outbreaks that had occurred in the poultry processing industry. The Adjudicating Delegate noted that the Employer was responsible for ensuring the safety of its employees and the security of its business and, to do so, it had adopted workplace safety policies, including its COVID-19 safety plan, which it had advised its employees of.

10. The Adjudicating Delegate found that the Appellant returned to work after being told by his housemate that she tested positive for COVID-19, despite knowing that it was contrary to the Employer's COVID-19 safety plan. In doing so, the Adjudicating Delegate found that the Appellant breached his duty to the Employer and committed serious misconduct. As a result, the Adjudicating Delegate determined that the Employer had just cause to terminate the Appellant and did not owe him compensation for length of service.

ARGUMENT

11. The Appellant acknowledges the basic facts of the case, which are described above, including the fact that the poultry processing industry experienced numerous plant shutdowns due to outbreaks, which resulted in the Employer prohibiting any person from entering the Employer's facilities if they share a household with another person with COVID-19 or displaying symptoms.

12. When asked in the appeal form to select his grounds of appeal, the Appellant indicated that the Director failed to observe the principles of natural justice in making the Determination. However, the Appellant did not raise any alleged failures to observe the principles of natural justice in his submission.

13. Rather, in his submission accompanying his appeal form, the Appellant argues that the Employer did not have just cause to terminate him. The Appellant argues that he only worked for four hours after learning that his housemate tested positive for COVID-19 and that he exercised due diligence because he displayed and felt no symptoms, and he still wanted to help his team finish the shift. The Appellant also noted that he received all vaccinations available.

ANALYSIS

14. Section 112(1) of the ESA provides that a person may appeal a determination on 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.

15. The appellant has the burden to demonstrate a basis for the Tribunal to interfere with a determination: see *Tejinder Dhaliwal (Re)*,2021 BCEST 34 at para 13.

16. Despite indicating in his appeal form that the Director failed to observe the principles of natural justice in making the Determination, the Appellant did not raise any issues regarding procedural fairness in his submission. On my review of the record, it appears the Appellant was given an opportunity to know the case against him and to present his evidence, which was essentially undisputed, and he was heard by an independent decision maker.

17. The question of whether the Employer had just cause to terminate the Appellant is a question of mixed fact and law, which is given deference by this Tribunal: see *3 Sees Holdings Ltd.*, BC EST # D041/13 at paras 26 to 28 ("*3 Sees*"); see also *Michael L. Hook (Re)*, 2019 BCEST 120 at para 31. As this Tribunal stated in *3 Sees* at paras 28 and 29:

> The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, *supra*).
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> In the context of cases dealing with contracts of employment where just cause is in issue, *McKinley* decides that it is for the trier of fact to determine, first, whether the evidence reveals employee misconduct and, second, whether the circumstances in which the misconduct occurred were sufficient to justify the employee's summary dismissal (see the review of the authorities in *McKinley* at paragraphs 35-39, and 49). Neither of these questions, then, can be said to be an extricable question of law of the type that is reviewable on an appeal to the Tribunal, absent palpable and overriding error.

18. In *Vancouver Dispensary Society (Re)*, 2023 BCEST 27, this Tribunal recently summarized what is required to establish just cause based on employee misconduct (at para 17):

> To establish just cause on the basis of employee misconduct, an employer must prove not only that the misconduct occurred, but also that the proven misconduct "is of such a nature and degree so as to justify termination": *Storms Restaurant Ltd.*,2018 BCEST 70at para.29. The just cause analysis "requires an assessment of whether the employee's misconduct gave rise to a breakdown in the employment relationship justifying dismissal, or whether the misconduct could be reconciled with sustaining the employment relationship by imposing a more 'proportionate' disciplinary response": *Roe v. British Columbia Ferry Services Ltd.*,2015 BCCA 1at para.27[***BC Ferries***], citing *McKinley v. BC Tel*,2001 SCC 38 (CanLII),[2001] 2 S.C.R. 161. This assessment does not exist in a vacuum. As the Employer indicates in the Appeal Submission, the employment relationship must be considered as a whole. An employer is required to prove just cause within the specific context and circumstances of its employee's employment and the alleged acts of misconduct: *John Curry*,2021 BCEST 92at para.102. In other words, "a 'contextual approach' governs the assessment of the alleged misconduct": *BC Ferries* at para.27. This involves consideration of the nature and seriousness of the alleged misconduct, and the circumstances surrounding the employee's behaviour, including factors such as the nature of the employee's position and their disciplinary history: see generally Howard A. Levitt, *Law of Dismissal in Canada*, 3rd ed. (Toronto: Thomson Reuters Canada, 2003, loose-leaf), pt. I at ch. 6.

19. In this case, while the Adjudicating Delegate did not explicitly discuss the applicable case law, he did, in my view, consider the elements of the law as summarized above, specifically the nature of the behaviour

and the context in which it occurred. I am not persuaded that the Adjudicating Delegate committed palpable and overriding error when he considered the Appellant's conduct and determined that, in the circumstances, the Employer had just cause to terminate the Appellant.

20. As discussed by the Adjudicating Delegate, and as acknowledged by the Appellant, the COVID-19 pandemic was of significant concern in September 2021, particularly for the poultry processing industry because it had already resulted in numerous plant shutdowns due to outbreaks. I agree with the Adjudicating Delegate that the Appellant's decision to continue his shift despite knowing that his housemate tested positive for COVID-19, which he knew to be in contravention of the Employer's COVID-19 safety plan, was serious misconduct given the potential consequences to the health of other employees and the Employer's business.

21. I also note there are other cases in which it was found employers had just cause to terminate employees when they disregarded their employers' COVID-19 policies. For example, in *Garda Security Screening Inc. v. IAM, District 140*, [2020] O.L.A.A. No. 162, an Ontario arbitrator held an employer has just cause to terminate an employee who attended work while waiting for a COVID-19 test result contrary to the employer's policy on testing and isolation. Also, in *Labourers' International Union of North America, Ontario Provincial District Council and Labourers' International Union of North America, Local 183 v Aecon Industrial (Aegon Construction Group Inc.)*, 2020 CanLII 91950 (ON LA), another Ontario arbitrator held an employer had just cause to terminate an employee who attended work while exhibiting COVID-19 symptoms after being instructed to stay home.

22. Accordingly, I find that the Appellant has failed to demonstrate a basis for the Tribunal to interfere with the Determination, and I dismiss the appeal under section 114(1)(f) of the *ESA* as there is no reasonable prospect it will succeed.

ORDER

23. I order that the Determination be confirmed pursuant to section 115(1) of the *ESA*.

Brandon Mewhort
Member
Employment Standards Tribunal