Citation: Kua Yung Chao (Re)
2023 BCEST 90

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Kua Yung Chao

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Kenneth Wm. Thornicroft

FILE NO.: 2023/137

DATE OF DECISION: October 20, 2023

DECISION

SUBMISSION

Kua Yung Chao — on his own behalf

INTRODUCTION

1. This is a reconsideration application filed by Kua Yung Chao ("applicant") pursuant to section 116 of the *Employment Standards Act* ("*ESA*"). The application concerns 2023 BCEST 67, an appeal decision issued by a Tribunal Member on August 23, 2023 ("Appeal Decision").

2. At its core, this dispute concerns whether the applicant's former employer had just cause to dismiss the applicant. By way of a Determination issued by a delegate of the Director of Employment Standards ("delegate") on April 6, 2023, the applicant's claim for section 63 compensation for length of service was dismissed, since the delegate determined that there was just cause for the applicant's dismissal (see section 63(3)(c) of the *ESA*). The applicant's appeal of the Determination was dismissed as having no reasonable prospect of succeeding (see section 114(1)(f) of the *ESA*). The applicant now seeks to have the Appeal Decision reconsidered.

3. In my view, this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, that being the case, this application must be summarily dismissed.

BACKGROUND FACTS AND PRIOR PROCEEDINGS

4. The applicant was formerly employed in a poultry processing plant. The circumstances giving rise to the applicant's dismissal are set out in the delegate's "Reasons for the Determination" ("delegate's reasons") as follows (at page R3):

> …The incident resulting in his termination occurred on 28 September 2021. In September 2021, the Covid-19 pandemic was of significant concern and the subject of ongoing Public Health Orders. Among these orders was a requirement for employers to have in place workplace Covid safety plans. Additionally, the poultry processing industry had faced several plant shutdowns due to Covid outbreaks during the first year of the pandemic. [The employer] had put in place a Covid safety plan which included a provision specifying that any person sharing a household with a person with Covid symptoms was barred from entering the worksite.
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> [The applicant] shared accommodation with another employee…On 28 September 2021, while on his coffee break, [the applicant] went to move his vehicle into [the other employee's] parking space and found out from [the other employee] that she had just tested positive for the Covid-19 virus. This occurred at 2:40 pm in the afternoon. [The applicant] returned to work and worked until 6:40 pm at which point he advised his supervisor that he needed to go and get a Covid test and then would need to self-isolate while he waited for the results. [The applicant] was able to get a test the following day and on 30 September 2021 received the result confirming that he was Covid negative. He went to the worksite on 4 October 2021 with his negative test, but was stopped before he could enter the building and handed his termination papers.

5. The delegate held that this single contravention of the employer's workplace policy relating to Covid-19 was sufficiently serious to justify the applicant's termination (at page R4):

> The question of whether [the employer] had just cause to terminate [the applicant] must be considered in the context in which the behaviour occurred. The Covid pandemic was at an acute stage and the poultry processing industry had experienced significant Covid outbreaks during the first wave of the pandemic. [The employer] was responsible for ensuring the safety of its employees and the security of the business. Accordingly, it had adopted safe workplace policies and had advised their employees of these policies.
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> Despite this, [the applicant] made the choice to return to work after having been informed by his housemate that she had tested positive for Covid, knowing that this was contrary to the policy. He was sufficiently aware of the policy that he eventually requested time off to get a Covid test and did not return to the worksite until four days after he had received the negative test result. I find that the fact that [the applicant] tested negative, although fortunate for all concerned, makes little difference to my deliberations. I find that in returning to the plant on 28 September 2021 after finding out that his housemate was Covid positive, [the applicant] breached his duty to the Employer and committed serious misconduct. I find that [the employer] had just cause to terminate [the applicant] and that [the employer] does not owe [the applicant] compensation for length of service.

6. The applicant appealed the Determination, alleging that there had been a failure to observe the principles of natural justice in determining his complaint (see section 112(1)(b) of the *ESA*). On appeal, the Member noted that the applicant's materials did not raise any evidence or argument to support the asserted natural justice ground of appeal (Appeal Decision, para. 16). However, the Member also addressed whether the applicant has been dismissed without just cause (i.e., whether the delegate erred in law – see section 112(1)(a) of the *ESA*), ultimately concluding that the delegate did not err in finding that there was just cause for dismissal (at paras 20-21):

> …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 [applicant'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.
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> 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.

7. As previously noted, the Member dismissed the appeal as having no reasonable prospect of succeeding, and confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

8. The applicant now advances the following argument to support his position that there was no just cause for dismissal. Specifically, he says:

> I don't agree that I intend to give [the employer] Germs or Covid-19. I just felt I am healthy person to finished my job of the day. Before continuant my job I reported to supper visor I was going to take day off for Covid19 test tomorrow. **supper visor (name [omitted]) told me keep going working, not let me go home right away. that mean the staying in work floor was not my decision**. I JUST FORGOT TO INFORM IN THE BEGINNING. If my test was positive, I would stay home as the doctor or hospital's decision. fortunately, I am Negative result. that mean I am healthy, no disease to spread to anyone. If my test result is Positive, I would not complain or appeal my case.
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> [*sic*; emphasis is original text]]

9. I should add that the applicant's written submission also refers to other historical matters relating to his work record, but these matters are not relevant to the question of whether the employer had just cause for dismissal based solely on the applicant's breach of the employer's workplace policy in relation to Covid-19.

FINDINGS AND ANALYSIS

10. The applicant's reconsideration application is predicated on evidence that seemingly was not previously put before the Employment Standards Branch, or before the Tribunal on appeal. Had the applicant appealed the Determination on the "new evidence" ground of appeal (section 112(1)(c) of the *ESA*), that ground of appeal would certainly have failed. "New evidence" is admissible in accordance with the criteria set out in *Davies et al.*, BC EST # D171/03. Of particular relevance here, such evidence is only admissible if it could not have been, with the exercise of due diligence, discovered and presented to the Employment Standards Branch prior to the Determination being issued. The evidence must also be relevant, material, and credible.

11. If, in fact, a person in authority employed by the employer had specifically directed the applicant to remain at work, notwithstanding the applicant's statement that he had been quite recently directly exposed to Covid-19, this evidence could have influenced the assessment of whether there was just cause for dismissal. In that sense, the evidence would have been both relevant and material. However, this evidence is not "new"–the applicant could have provided this evidence (and it could have been more thoroughly investigated) during the course of the complaint investigation process. Further, I am of the view that the applicant's statement about being directed to remain at work is not credible.

12. The section 112(5) record reveals a consistent argument advanced by the applicant, an argument that said nothing about having been directed to work after disclosing that he had been exposed to Covid-19. In his original complaint, the applicant stated that he was fired "I am guessing because of covid, I get tested negative but they told me that I am no longer working here, they still fire me." The applicant said absolutely nothing about being told to finish his shift notwithstanding his close and very recent Covid-19 exposure. In separate January 3, 2023, January 4, 2023, and January 5, 2023 e-mails to the Employment Standards Branch officer who was investigating his complaint, the applicant maintained that since he

never tested positive, he posed no threat to his fellow workers – no mention whatsoever of having been directed to complete his shift after disclosing his exposure.

13. In a telephone conversation with the investigating officer on January 5, 2023, the Applicant's roommate relayed the following, as recorded in the investigating officer's notes of the telephone call: "[the applicant's roommate] was not aware she was sick or went for Covid testing. She did not tell [the applicant] anything about it until she found out she tested positive on Sept 28, 2021. She told [the applicant] she tested positive and he needed to get tested in the parking lot when he was moving his car. [The applicant] went back in to work and finished his shift because he was not having any symptoms or sickness of any kind" (my underlining). This statement unequivocally shows a clear breach of the employer's policy by the applicant.

14. On January 23, 2023, the investigating Employment Standards Branch officer issued an "Investigation Report" setting out the parties' respective views about the dispute. The Investigation Report was provided to both parties with a request that they respond in writing to its contents by no later than January 30, 2023. In the report, the officer stated that the applicant's evidence was that he "was aware of the company policy which stated employees were not to enter the building if they had been in contact with anyone who was symptomatic or living in the same household with a symptomatic individual." The report further stated that the applicant "found out when [his roommate] told him on September 28, 2021, when he moved his vehicle into her parking space on his coffee break…and returned to work the remainder of his shift as he felt fine and was not symptomatic."

15. On January 25, 2023, the applicant provided a written response to the Investigation Report that included various assertions, but he never mentioned that he had been directed by a supervisor to finish his shift notwithstanding his disclosure that he had been directly exposed to Covid-19. The applicant's apparent explanation for failing to explain, at an earlier point in time, that a supervisor directed him to finish his shift after disclosing his Covid-19 exposure, is that he "just forgot." At the same time, the applicant also says that he felt justified in continuing with his shift because "I just felt I am healthy person to finished my job of the day." Of course, whether the applicant was symptomatic or not is wholly irrelevant; he was not entitled to willfully breach a lawful employer policy that was put in place consistent with the best available medical evidence (and public health orders) at the time the policy was announced.

16. While I doubt the veracity of the applicant's present assertion that a supervisor directed him to complete his shift despite his disclosure that he had been exposed to Covid-19, in any event, this "new evidence" was not admissible on appeal, and it is equally inadmissible in this reconsideration application.

17. I see no reason to disturb the Appeal Decision, which I consider to have been correctly decided.

ORDER

18. This application for reconsideration is dismissed. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal