Citation: Taylor Babiuk (Re)
2024 BCEST 14

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Taylor Babiuk

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/165

DATE OF DECISION: January 31, 2024

DECISION

SUBMISSIONS

Stefanie Busch — on behalf of Taylor Babiuk

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* ("*ESA*") by Taylor Babiuk ("Complainant" or "Appellant") of a determination made by Dawn Rowan, a delegate ("Delegate") of the Director of Employment Standards ("Director"), on October 25, 2023 ("Determination").

2. The Appellant alleged that he was entitled to compensation for length of service ("CLOS") when he was terminated without just cause. The Determination found that the *ESA* had not been contravened and no wages were owing.

3. The Appellant has appealed the Determination on the grounds that the Director failed to observe the principles of natural justice in making the Determination.

4. I have concluded that this case is appropriate to consider under section 114 of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submissions filed with the appeal, 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 the appeal if the tribunal determines that any of the following apply:
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> (a) the appeal is not within the jurisdiction of the tribunal;
>
> (b) the appeal was not filed within the applicable time limit;
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> (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.

5. For the reasons that follow, I dismiss the appeal under section 114(1)(f) as having no reasonable prospect of success.

ISSUE

6. The issue is whether this appeal should be allowed to proceed or be dismissed under section 114 (1) of the *ESA*.

THE DETERMINATION

7. The complaint filed by the Appellant alleged that his employer, Two Pillars Construction Ltd. ("Employer"), terminated his employment without cause, and without payment of CLOS.

8. At issue in the Determination was the applicability of an exemption from liability for CLOS set out in section 65(1)(e) of the *ESA*.

9. An employer is required under section 63 of the *ESA* to pay CLOS to an employee upon termination of employment unless that obligation is discharged under certain conditions set out in that section, or if one of the exceptions in section 65 applies.

10. One such exception is found in section 65(1)(e) which establishes that section 63 does not apply to an employee "employed at one or more construction sites by an employer whose principal business is construction."

11. The Delegate confirmed that two conditions must be met to fall under the section 65(1)(e) exception: the employer's principal business is construction, and the employee was employed at one or more construction sites.

12. The Delegate was satisfied, based on the investigation report prepared by another delegate, and on the response to that report provided by the Appellant, that there was no dispute that the Employer's principal business is construction.

13. Further, although there was a period of three to four months during which the Appellant performed general work at the Employer's head office, the majority of the Appellant's time employed with the Employer was spent at construction sites working as a rigger and crane operator. It was not disputed that the Appellant worked on-site at construction sites from the beginning of his employment in 2013 until March 2021, and returned to working at construction sites from February 2022 until his employment was terminated at the end of April 2022.

14. Having reached these conclusions, the Delegate accepted that, as a result, the Appellant was not entitled to CLOS, due to the exception for construction employers set out in section 65(1)(e).

ARGUMENTS

15. The Appellant does not agree that the criteria set out in section 65(1)(e) have been met in his case, and so the exception should not apply.

16. The Appellant relies on a reference letter provided by the Employer in April 2021 which indicates that his work is both full-time and permanent.

17. The Appellant provided a letter from the Deputy Minister, Ministry of Labour, which indicates that the section 65(1)(e) exception is a longstanding provision that "relates to the fact that construction work is typically project-based and of limited or fixed duration."

18. The Appellant says the fact that his employment was both full-time and permanent means that the section 65(1)(e) exception was not intended to apply to him as he was not employed on a project or fixed-term basis.

ANALYSIS

19. The grounds of appeal are statutorily limited under section 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.

20. The Appellant has indicated he is appealing on the basis that the Director failed to observe the principles of natural justice in reaching the Determination; however, the substance of his appeal appears directed at the Delegate's interpretation of the exemption noted above in section 65(1)(e) of the *ESA*, and so I also review the law applicable to appeals on the basis of error in law.

Natural Justice

21. With respect to subsection 112(1)(b), a party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

22. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, 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)

23. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the Record and in the information submitted to the Tribunal in this appeal, the Appellant was

provided with the opportunity required by principles of natural justice to present his position to the Director. Although the Appellant alleges a failure on the part of the Delegate to consider the intent of the exception in section 65(1)(e), the Deputy Minister's letter was included in the materials reviewed by the Delegate.

24. The Appellant does not otherwise appear to allege that he was otherwise denied an opportunity to present his case or respond to the information provided by the Employer.

25. Accordingly, I find there has been no failure on the part of the Director to observe the principles of natural justice in reaching the Determination.

Error in Law

26. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam),* 1998 CanLII 6466 (BCCA)(*Gemex*):

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.

27. Further to the above, I infer from the Appellant's submissions that he is, in fact, alleging that the Delegate has misinterpreted or misapplied a section of the *ESA*, namely, section 65(1)(e).

28. Section 65(1)(e) reads as follows:

> 65 (1) Sections 63 and 64 do not apply to an employee
>
> …
>
> (e) employed at one or more construction sites by an employer whose principal business is construction

29. The Appellant does not dispute that the Employer's principal business is construction, nor does he dispute that, but for the few months he worked in the yard, he was employed at one or more construction sites, both from the outset of his employment, and most recently prior to the end of his tenure.

30. While the Deputy Minister's letter may provide context for the reason why this exception may have been drafted into the law, it does not serve in any way to constrain the legislation itself.

31. The Delegate found, and I accept, that a plain reading of the exception in section 65(1)(e) requires two conditions to be met: that the Employer's principal business is construction, and the employee is, or was, employed at one or more construction sites. The exception is not negated by any commitment on the part of the Employer with respect to hours of work, or permanency of employment.

32. Accordingly, I am not persuaded that the Delegate has erred in law in her application of the section 65(1)(e) exception.

ORDER

33. The Appeal is dismissed pursuant to section 114(1)(f) of the *ESA* as having no reasonable prospect of success. Pursuant to section 115(1)(a) of the *ESA*, the determination is confirmed.

Ryan Goldvine
Member
Employment Standards Tribunal