

EMPLOYMENT STANDARDS TRIBUNAL

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

-by-

Raymond Wells
("Mr. Wells")

- of a Determination issued by -

The Director of Employment Standards

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

PANEL: David B. Stevenson

FILE No.: 2023/177

DATE OF DECISION: February 15, 2024

DECISION

SUBMISSIONS

Raymond Wells on his own behalf

OVERVIEW

1. Raymond Wells (“Mr. Wells”) has filed an appeal under section 112 of the *Employment Standards Act* (the “ESA”) of a determination issued by Taylor Paulson, a delegate (“deciding Delegate”) of the Director of Employment Standards (“Director”), on October 23, 2023 (“Determination”).
2. The Determination found the *ESA* had not been contravened in respect of the termination of the employment of Mr. Wells by his employer, 1280271 B.C. Ltd. carrying on business as the Brick Invermere (“Employer”), and that no wages were outstanding.
3. Mr. Wells challenges that finding, alleging the Director committed an error of law and failed to observe principles of natural justice in making the Determination. While the appeal does not specifically set out the remedy sought by Mr. Wells, it is apparent that he wants the Tribunal to find the Determination was wrong, allow his appeal, and either vary the Determination, or cancel it and refer his complaint back to the Director for further investigation.
4. In correspondence dated December 8, 2023, the Tribunal acknowledged having received the appeal and, among other things, requested the section 112(5) record (“record”) from the Director, requested a submission from the parties on document disclosure, and notified the parties that no submissions were being sought from any other party pending a review of the appeal by the Tribunal.
5. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Wells and the Employer. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.
6. 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 appeal, the written submission filed by Mr. Wells 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 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.*

7. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Employer will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

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

THE BACKGROUND FACTS

9. The Employer operates a furniture and appliance sales and delivery service in various locations in the province, including Invermere, BC.
10. Mr. Wells was employed by the Employer as a delivery driver at their Invermere location from December 3, 2021, to December 27, 2022, when he was terminated.
11. Mr. Wells filed a complaint alleging the Employer had contravened the *ESA* by failing to pay some wages and by failing to pay compensation for length of service. The unpaid wage claims were resolved during the complaint process. The Determination addressed only the claim for compensation for length of service.
12. The Employer contended Mr. Wells was terminated for just cause.
13. On December 27, 2022, Mr. Wells was summoned to attend a disciplinary meeting with his store manager, Robin Aldred (“Mr. Aldred”). What began as a meeting to inform Mr. Wells he was receiving a written warning for an incident that had occurred on December 17, 2022, deteriorated into a verbal altercation involving shouting and profanities uttered by Mr. Wells directed toward Mr. Aldred. Mr. Aldred fired Mr. Wells at that meeting.
14. An investigation was conducted, which included taking statements from Mr. Wells, Mr. Aldred and an employee who was a party to the December 17 incident and who heard the verbal altercation on December 27. An Investigation Report (“IR”) was issued by the delegate who conducted the investigation.

THE DETERMINATION

15. The deciding Delegate identified the issue as whether Mr. Wells was terminated for cause; set out the principles applied to the issue; analyzed the position of the parties in the context of those principles and the evidence provided; and reached a conclusion on that analysis.
16. The deciding Delegate summarized the information provided by each party during the investigation that was set out in the IR, preferring the version of events provided by Mr. Aldred and supported by the employee who heard the verbal altercation, and finding “that multiple swears were yelled by [Mr. Wells] during the conversation on December 27, 2022 and that one or more of these swears were directed at Mr. Aldred specifically.”
17. The deciding Delegate found the conduct of Mr. Wells was serious and deliberate behaviour that amounted to a fundamental breach of the employment relationship, that the Employer had established just cause, and dismissed Mr. Wells’ claim for compensation for length of service.

ARGUMENT

18. Mr. Wells argues two grounds of appeal: error of law and failure to observe principles of natural justice in making the Determination.
19. The appeal submission re-states the information provided by Mr. Wells during the investigation of the events leading to his dismissal, attaching the documents he provided during the investigation of his complaint.
20. He identifies several areas in the reasons for Determination that needed to be corrected and other areas where he disagrees with the statements made in those reasons.
21. He does not specifically identify where the error of law and breach of natural justice arises.

ANALYSIS

22. 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.*
23. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

24. 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.
25. Without specifically saying so, the apparent objective of this appeal is to have this panel of the Tribunal “correct” findings made by the deciding Delegate and reach a different conclusion on just cause, and vary or cancel the Determination.
26. The facts upon which this appeal must be based, however, are those found by the deciding Delegate in the reasons for Determination, and supported by the record, unless such findings constitute an error of law.

Error of Law

27. 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.
28. The question of whether an employee has been dismissed for cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco Structures Ltd.*, BC EST # D260/03, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: “questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.” A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.
29. The appeal submission by Mr. Wells does not address this ground of appeal against the well-established principles that arise when considering if the Director erred in considering whether just cause for termination is established. Those principles were correctly identified by the deciding Delegate, were set out in the reasons for Determination, and were applied to the facts as found.
30. The deciding Delegate also correctly observed that the objective of any analysis of cause is to determine, from all the facts as found, whether the misconduct of the employee is inconsistent with the continuation of his or her employment. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, “that the misconduct is impossible to reconcile with the employee’s obligations under the employment contract” (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a “repudiatory” breach.

31. Provided the established principles have been applied, and I find they were, a conclusion on cause is essentially a fact-finding exercise. Whether or not the Director erred in law in respect to the facts, *simpliciter*, is a question over which the Tribunal has no jurisdiction. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, *supra*.
32. The correct application of the principles relating to just cause to the facts as found by the deciding Delegate does not convert the issue into an error of law. A finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal: see *Gemex*, *supra*.
33. What Mr. Wells is really saying here is that the deciding Delegate ought to have accepted his version of events. The findings of fact made by the deciding Delegate were adequately supported by the evidence provided. The misconduct of Mr. Wells was serious; it was a direct challenge to Mr. Alred’s authority to discipline Mr. Wells for the events of December 17. The conclusion of the deciding Delegate to find just cause in the circumstances was not wrong.
34. I find no merit in the error of law ground of appeal.

Natural Justice

35. Mr. Wells has raised the natural justice ground of appeal.
36. 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.
37. I am able to address Mr. Wells’ natural justice ground without the need for extensive analysis. The Tribunal has briefly 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.

38. Where the process exhibits the elements of the above statement, 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, Mr. Wells was provided with the opportunity required by principles of natural justice to present his position to the Director; he has provided no objectively acceptable evidence showing otherwise.
39. It is not a breach of principles of natural justice to make a finding on the evidence that does not accord with the position of one of the parties in the complaint process, which I view as being the case here.
40. There is no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.
41. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

42. Pursuant to section 115(1) of the *ESA*, I order the Determination dated October 23, 2023, be confirmed.

David Stevenson
Member
Employment Standards Tribunal