Citation: Westvac Industrial Ltd. (Re)
2024 BCEST 33

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Westvac Industrial Ltd.
("Appellant")

- 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: Brandon Mewhort

FILE NO.: 2023/188

DATE OF DECISION: April 10, 2024

DECISION

SUBMISSION

Kyle Bowen — on behalf of Westvac Industrial Ltd.

OVERVIEW

1. This is an appeal by Westvac Industrial Ltd. ("Appellant") of a determination issued by Ben Hutchinson, a delegate of the Director of Employment Standards ("Delegate"), dated November 8, 2023 ("Determination"). The appeal is filed pursuant to section 112(1) of the *Employment Standards Act* ("*ESA*").

2. In the Determination, the Delegate found that the Appellant did not have just cause to terminate a former employee ("Employee"), and that the Employee was therefore entitled to compensation for length of service, as well as outstanding vacation pay. The Delegate also imposed an administrative penalty on the Appellant in the amount of $500.

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)(f) 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 operates a municipal and industrial dealership in Surrey, British Columbia, where the Employee worked as a service technician from April 1, 2018, to May 20, 2022. The Appellant terminated the Employee claiming that it had just cause to do so, which relieved it of its obligations to pay compensation for length of service.

7. In the Determination, the Delegate discussed the following elements an employer must satisfy to establish just cause for an employee's termination for minor conduct:

   (a) A reasonable standard of performance was established and communicated to the employee.

   (b) The employee had sufficient time and a reasonable opportunity to meet the standard.

   (c) The employee was warned that failure to meet the standard would result in dismissal.

   (d) The employee did not meet the required standard.

8. The Delegate then discussed a final warning letter that was issued to the Employee, which listed four points the Employee needed to address: the use of an uncontrolled illegal substance; smoking in a company vehicle; unacceptable housekeeping of the company vehicle; and attendance and reliability. The Delegate found that, between the time the final warning letter was issued and the termination of the Employee, there was no evidence to suggest the Employee did not meet the required standard apart from possible absenteeism, but that appeared to be justified by illness or injury. For that reason, the Delegate determined the Appellant did not satisfy the elements necessary to establish just cause for minor misconduct.

9. The Delegate also discussed how an employer may rely on a single incident of major misconduct to establish just cause. To establish just cause for major misconduct, the employer must demonstrate that the conduct occurred and that it was serious enough in nature to irreparably harm the employment relationship.

10. The Appellant alleged that the Employee engaged in major misconduct by stealing gasoline. The parties disputed whether gasoline purchased by the Employee on the Appellant's company credit card was used for business or personal purposes. The Delegate considered the evidence of both parties and concluded that the Appellant failed to discharge its burden to establish that the theft of gasoline occurred.

11. Accordingly, the Delegate determined that the Appellant did not have just cause to terminate the Employee and they were owed a total of $5,677.11, including compensation for length of service, vacation pay, and interest. The Delegate also imposed a $500 administrative penalty on the Appellant for its breach of section 63 (liability resulting from length of service) of the *ESA*.

ARGUMENT

12. When asked in the appeal form to select its grounds of appeal, the Appellant indicated that evidence has become available that was not available at the time the Determination was being made. In its submission, the Appellant essentially reiterates why it had just cause to terminate the Employee. The Appellant discusses the verbal and written warnings that it gave to the Employee and the various types of alleged misconduct engaged in by the Employee, including theft, which the Appellant argues gave it just cause to terminate the Employee.

13. The Appellant also attached numerous documents to its submission, including absence reports of the Employee, emails and text messages, and warning reports and letters that were given to the Employee. Notably, at least some of those documents are already included in the record that was before the Director at the time the Determination was made.

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

16. This Tribunal set out the test for new evidence in *Davies et al.*, BC EST # D171/03, as follows (emphasis added):

> We take this opportunity to provide some comments and guidance on how the Tribunal will administer the ground of appeal identified in paragraph 112(1)(c). This ground is not intended to allow a person dissatisfied with the result of a Determination to simply seek out more evidence to supplement what was already provided to, or acquired by, the Director during the complaint process if, in the circumstances, that evidence could have been provided to the Director before the Determination was made. The key aspect of paragraph 112(1)(c) in this regard is that the fresh evidence being provided on appeal was not available at the time the Determination was made. In all cases, the Tribunal retains a discretion whether to accept fresh evidence. In deciding how its discretion will be exercised, the Tribunal will be guided by the test applied in civil Courts for admitting fresh evidence on appeal. That test is a relatively strict one and must meet four conditions:
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> (a) the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
>
> (b) the evidence must be relevant to a material issue arising from the complaint;
>
> (c) the evidence must be credible in the sense that it is reasonably capable of belief; and
>
> (d) the evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

17. In this case, I find that, to the extent they are not already included in the record that was before the Director at the time the Determination was made, the documents included with the Appellant's submissions do not meet the test for fresh evidence, because, on their face, there is no indication that they – or any information contained in them – could not have been provided during the investigation of the complaint. The Appellant also did not provide any explanation in its submissions for why the documents could not have been provided earlier.

18. I am also not convinced the documents included with the Appellant's submissions have high probative value, because they do not appear to provide any new information that would have led the Director to a different conclusion on whether the Appellant had just cause to terminate the Employee. Rather, the documents seem to contain the same or similar information to the evidence the Delegate considered in making the Determination.

19. Despite not explicitly saying so in the appeal form or its submissions, it seems the crux of the Appellant's appeal is that the Delegate erred in law in determining that it did not have just cause to terminate the Employee. I will therefore also consider that ground of appeal in determining whether there is a reasonable prospect that the appeal will succeed.

20. The question of whether the Appellant had just cause to terminate the Employee 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*).
>
> 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.

21. In *Vancouver Dispensary Society (Re)*, 2023 BCEST 27, this Tribunal recently summarized what is required to establish just cause based on major 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 70 at 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 1 at 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 92 at 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.

22. In my view, the Delegate considered the necessary elements of the law discussed above and I am not persuaded that the Delegate committed a palpable and overriding error when he considered the alleged conduct and determined that, in the circumstances, the Appellant did not have just cause to terminate the Employee. The Delegate weighed the evidence before him, much of which was conflicting, and came to a reasonable decision, particularly considering the Appellant had the burden to prove that it had just cause to terminate the Employee.

23. 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

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

Brandon Mewhort
Member
Employment Standards Tribunal