Citation: Century Pacific Foundry Ltd. (Re)
2024 BCEST 5

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Century Pacific Foundry Ltd.
("Century Pacific")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2023/172

DATE OF DECISION: January 18, 2024

DECISION

SUBMISSIONS

Melanie Samuels — counsel for Century Pacific Foundry Ltd.

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*"ESA"*) by Century Pacific Foundry Ltd. ("Century Pacific") of a determination issued by Sheri Bor, a delegate of the Director of Employment Standards ("deciding Delegate"), on September 29, 2023 ("Determination").

2. The Determination found Century Pacific had contravened section 63 of the *ESA* in respect of the employment of Pardeep Singh Nagra ("Mr. Nagra"). The Determination ordered Century Pacific to pay Mr. Nagra wages in the total amount of $7,109.15, an amount that included concomitant vacation pay and interest under section 88 of the *ESA*, and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $7,609.15.

3. Century Pacific has appealed the Determination alleging the deciding Delegate erred in law in making the Determination.

4. In correspondence dated November 15, 2023, the Tribunal, among other things, acknowledged having received the appeal, requested the section 112(5) record ("record") from the Director, invited the parties to file any submissions on personal information or circumstances disclosure and notified the other parties that submissions on the merits of the appeal were not being sought from them at that time.

5. The record has been provided to the Tribunal by the Director and a copy has been delivered to Century Pacific, in care of their legal counsel of record, and to Mr. Nagra. Both have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received from either Century Pacific or Mr. Nagra.

6. The Tribunal accepts the record is complete.

7. 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 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.

8. If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1), the Director and Mr. Nagra 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 can succeed.

ISSUE

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

THE DETERMINATION

10. Century Pacific operates a manufacturing business in Surrey, BC.

11. Mr. Nagra was employed as a Green Sand Molder from October 18, 2010, to September 22, 2022. Following the termination of his employment, Mr. Nagra filed a complaint under the *ESA* alleging Century Pacific had contravened the *ESA* by failing to pay compensation for length of service.

12. Century Pacific disputed the claim, saying Mr. Nagra had abandoned his employment through his poor attendance and his failure to provide documentation for his absences or, alternatively, that there was just cause for terminating Mr. Nagra.

13. The deciding Delegate found Century Pacific had not established either that Mr. Nagra had abandoned his employment or that there was just cause for dismissal.

14. In assessing the contention by Century Pacific that there was just cause for dismissal, the deciding Delegate noted that just cause can be based on a single incident of misconduct which is sufficiently serious that it amounts to a fundamental breach of the employment relationship or on what are instances of minor misconduct or performance issues.

15. In respect of the former, the deciding Delegate stated there was no evidence that Mr. Nagra had performed an action justifying immediate dismissal for major misconduct.

16. In respect of the latter, the deciding Delegate set out what the employer must show to establish just cause on this basis:

1. a reasonable standard of performance was established and communicated to the employee;

2. the employee was informed how he or she was not meeting the standard;

3. the employee was adequately warned that a failure to meet the standard would result in dismissal; and

4. If the employee fails to meet the required standard, the employee is dismissed.

17. The deciding Delegate found no clear evidence that Century Pacific had informed Mr. Nagra that he was not meeting the standard expected or had warned him that a continuing failure to meet an expected standard would result in his dismissal. Based on the absence of such evidence, the deciding Delegate found Century Pacific had not established just cause for what Century Pacific had indicated in its termination letter to Mr. Nagra was a "continuous disregard to Century code of conduct and attendance policy."

18. In result, the deciding Delegate found Mr. Nagra was entitled to compensation for length of service in the amount set out in the Determination, vacation pay on that amount, and interest.

19. The deciding Delegate also found Century Pacific had contravened section 63 of the *ESA* and imposed an administrative penalty for that contravention.

ARGUMENTS

20. Century Pacific argues the deciding Delegate committed two errors of law in assessing the question of whether they had established just cause for terminating Mr. Nagra: first, in treating Mr. Nagra's failure to attend work as minor misconduct, rather than an act of misconduct warranting summary dismissal; and second, by ignoring evidence in a way that affected the conclusion reached by the deciding Delegate on just cause.

21. On the first argument, the contention of Century Pacific appears to be that, as a matter of law, the failure of an employee to attend work is just cause for summary dismissal and, as such, it was an error of law for the deciding Delegate to address that failure as minor misconduct requiring them to show Mr. Nagra was advised that his repeated and unexplained absences was not meeting an expected standard which, if it continued, would result in his dismissal.

22. On the second argument, Century Pacific says that even if Mr. Nagra's dismissal was assessed as minor misconduct, the deciding Delegate erred in law by ignoring and misconceiving evidence that showed Mr. Nagra had received warnings from the General Manager of Century Pacific which are identified in the appeal submission as Mr. Nagra acknowledging he was told that if he did not come back to work, he was not needed, and from his supervisor during a visit to his home, which are identified as the supervisor saying that if Mr. Nagra did not show up for work, his job might be in jeopardy.

ANALYSIS

23. 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.

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

25. 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.

26. I will note at this point that Century Pacific does not challenge the finding of the deciding Delegate that the evidence did not support the assertion of Century Pacific that Mr. Nagra had abandoned his employment. In any event, the finding of the deciding Delegate on this point does not raise an error of law as the deciding Delegate applied the correct legal test to the factual findings that were well grounded in the evidence contained in the record.

27. The issue raised by the appeal is whether Century Pacific had established just cause for the dismissal of Mr. Nagra and whether the deciding Delegate made an error of law in deciding they had not.

28. 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.

29. The grounds of appeal under the *ESA* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's factual findings raise an error of law, either because the Director acted without any evidence or acted on a view of the evidence that cannot reasonably be entertained: see *Britco Structures Ltd.*, BC EST # D260/03.

30. 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.*, *supra*, 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.

31. There are two elements to the ground of appeal relied on by Century Pacific.

32. The first is that the Director erred in not finding Century Pacific had cause to summarily dismiss Mr. Nagra. This element of the error of law ground only incidentally examines the legal principles and the test applied under the *ESA* for addressing the issue of cause under section 63.

33. The principles for examining cases raising the question of whether there is cause for dismissal that have been developed under the *ESA* are well established, have been consistently applied, and are expressed as follows (*Kruger*, BC EST # D003/97):

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offenses are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    1. A reasonable standard of performance was established and communicated to the employee;
    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;
    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and
    4. The employee continued to be unwilling to meet the standard.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

34. The reasons for Determination incorporate and express the above principles in its analysis.

35. I will note here that while the Tribunal has been guided by the common law on the question of just cause, the principles of cause for dismissal used by the Director and the Tribunal have been developed and applied to reflect the purposes and objectives of the *ESA* and to provide effective and efficient administration of the provisions of the *ESA* relating to termination of employment and need to be applied in such a way as to respect the principle of proportionality and fairness expressed in section 2(b) of the

ESA. Finding just cause will result in the employee being deprived of the statutory benefit in the form of compensation for length of service which the employee has earned while working for an employer during the period that precedes the end of the employment. Since compensation for length of service is an accrued right that augments an amount merely by reason of an employee's continuous tenure, it should not, in my view, be denied to the employee unless the circumstances justifying the application of section 63(3)(c) of the *ESA* are clear: see *Director of Employment Standards (Re K&R Poultry Ltd.)*, BC EST #RD126/15 at paras. 63-64.

36. The Tribunal has also been consistent in stating that the objective of any analysis of cause is to determine, from all the facts provided, whether the misconduct of the employee has undermined the employment relationship, effectively depriving the employer of its end of the bargain.

37. 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) . . .

38. In this respect, the Tribunal has embraced the approach endorsed in *McKinley*, *supra*, applying an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the misconduct in order to assess whether it is reconcilable with sustaining the employment relationship. The deciding Delegate correctly identified this as the objective of the analysis and correctly identified the principles to be applied to that analysis.

39. Nothing in the appeal submission shows that approach is an error of law.

40. That being so, the questions the deciding Delegate was required to determine were, first, whether the evidence revealed employee misconduct and, second, whether the circumstances in which the misconduct occurred were sufficient to justify the employee's dismissal, either summarily or for a cumulation of minor misconduct.

41. Neither of the questions set out above can be said to be an extricable question of law of the type that is reviewable on an appeal to the Tribunal. They are questions of fact.

42. As expressed above, the grounds of appeal do not provide for an appeal based on errors of fact and the test for establishing that findings of fact constitute an error of law is stringent. They are only reviewable by the Tribunal as errors of law in situations where it is objectively shown that a delegate has committed a palpable and overriding error on the facts.

43. The letter sent to Mr. Nagra confirming his termination stated the reason as his "continuous disregard for the Century code of conduct and attendance policy."

44. The deciding Delegate can be forgiven for not providing an extensive analysis of the termination of Mr. Nagra as a single incident justifying summary dismissal as Century Plaza never took that position during

the investigation; their position was that Mr. Nagra had abandoned his employment, or alternatively, as the letter confirming his termination indicates, he had continuously disregarded company policies.

45. There is no unequivocal rule that equates a failure to attend work with just cause for summary dismissal. The appeal submission of Century Pacific refers to two decisions of the Tribunal in which a failure to attend work was found to be just cause for termination. I have two comments to make about those cases. First, both were decided pre-*McKinley*. While the result in each of those cases might be the same, the analysis of each case would have been substantially different. Second, both cases were decided before section 112 of the *ESA* was amended to remove appeals based on errors of fact and both cases made findings of fact different from those made in each of the determinations on the issue of just cause.

46. In any event, the deciding Delegate found the evidence presented did not indicate Mr. Nagra had "performed an action justifying immediate dismissal for major misconduct": reasons for Determination, page R8. That is a finding of fact.

47. I find the above conclusion is supported by the facts, which include those expressed in the findings relating to the analysis of whether Century Pacific had satisfied the elements for just cause based on minor instances of misconduct – that Mr. Nagra had a discipline free record; there were no recorded warnings or discipline relating to any matter over his more than twelve years of employment with Century Pacific, and more specifically relating to allegations of a disregard for Century Pacific's code of conduct and attendance policy; though Century Pacific acknowledged Mr. Nagra struggled with substance abuse issues, there was no evidence he had ever contravened Century Pacific's drug and alcohol use policy; and there was no evidence he was warned that a failure to provide a doctor's note for his September 2022 absences would result in his immediate termination. The reasons for Determination also records evidence of a substantial number of unexplained absences and sick leave taken by Mr. Nagra in 2022 which were never addressed by Century Pacific in any formal way.

48. While none of my comments should be taken as condoning Mr. Nagra's apparent attitude toward his employment responsibilities, the concept of just cause needs to be applied in such a way as to respect the principle of proportionality and fairness to both employers and employees expressed in section 2(b) of the *ESA*. There is an adage which applies to the circumstances of this case: one can't allow a person to climb to the end of a branch and then, without warning, cut it off behind them; if Mr. Nagra's conduct through 2022 was unacceptable to Century Pacific, that ought to have been brought home to him in a way that identified the seriousness of his conduct and the consequences of it continuing.

49. I find the deciding Delegate did not make a "palpable and overriding error" in finding there was no evidence to support summary dismissal; this argument is denied.

50. The second element of the appeal submission is similar to the first, both in substance and in result. Century Pacific submits the deciding Delegate ignored, or misconceived, evidence in a way that affected her conclusion that Century Pacific had not satisfied the second and third parts of the test for using instances of minor misconduct to justify and support Mr. Nagra's dismissal. The submission contends the deciding Delegate ignored evidence showing Mr. Nagra had been warned by both the General Manager and his supervisor that if he did not come to work, his job was in jeopardy.

51. It is apparent from an examination of the record that there was evidence provided by the parties of discussions concerning the consequences of Mr. Nagra not attending work. The reasons for Determination indicate the deciding Delegate was aware of that evidence and considered it, but found it was not sufficiently clear to satisfy the requirement of providing an adequate warning. I agree with the observations made by the deciding Delegate on pages R7 and R8 of the reasons for Determination that, in all the circumstances, something more than a comment made during a personal visit by Mr. Nagra's supervisor, that could not reasonably be considered a definitive warning of the consequences of continued failure to attend work, was required.

52. I do not agree with the contention in the appeal submission that the part of the discussion between Mr. Nagra and the investigating Delegate, which is set out in the appeal submission, is clear evidence that Mr. Nagra was adequately warned by the General Manager of the consequences of his continued failure to attend work, nor do I agree that it was ignored or misunderstood by the deciding Delegate.

53. In sum, I am not persuaded the deciding Delegate committed a 'palpable and overriding error' in finding there was no clear evidence Mr. Nagra had been adequately warned of the consequences of his continuing failure to attend work.

54. I do not accept this aspect of the appeal submission has merit and it is dismissed.

55. I find there is no apparent merit to this appeal and no reasonable prospect it will succeed. The purposes and objects of the *ESA* would not be served by requiring the other parties to respond to this appeal and it is, accordingly, dismissed.

ORDER

56. Pursuant to section 115(1) of the *ESA*, I order the Determination dated September 29, 2023, be confirmed in the amount of $7,609.15, together with any interest that has accrued under section 88 of the *ESA*.

David B. Stevenson
Member
Employment Standards Tribunal