

An appeal

- by -

Manuel Conceicao  
("Mr. Conceicao")

- of a Determination issued by -

The Director of Employment Standards  
(the "Director")

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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2013A/85

**DATE OF DECISION:** February 5, 2014

## DECISION

### SUBMISSIONS

Manuel Conceicao

on his own behalf

### OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Manuel Conceicao (“Mr. Conceicao”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 22, 2013.
2. The Determination was made in respect of a complaint filed by Mr. Conceicao who alleged his former employer, Aramark Canada Ltd. Aramark Canada Ltee (“Aramark”), had contravened the *Act* by failing to pay length of service compensation and unused sick pay upon the termination of his employment.
3. The Determination found Aramark had not contravened the *Act*, no wages were outstanding and no further action would be taken.
4. Mr. Conceicao has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination. He has also grounded his appeal on evidence becoming available that was not available at the time the Determination was being made, commonly referred to as the “new evidence” ground of appeal.
5. In correspondence dated December 19, 2013, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by the Tribunal and that following such review all, or part, of the appeal might be dismissed.
6. The section 112(5) “record” has been provided to the Tribunal by the Director and a copy has been delivered to Mr. Conceicao. Mr. Conceicao has been given the opportunity to object to the completeness of the section 112(5) “record”. There has been no objection and, accordingly, the Tribunal accepts it as complete.
7. The Tribunal has decided this appeal is an appropriate case for consideration under section 114 of the *Act*. At this stage, I am assessing this appeal based solely on the Determination, the appeal and written submission made by Mr. Conceicao, and my review of the section 112(5) “record” 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 of any kind, for any of the reasons listed in that subsection, which states:

- 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:
- (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 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), Aramark will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1) of the *Act*, it will be dismissed.

## ISSUE

9. The issue to be considered at this stage of the proceedings is whether the appeal should be allowed to proceed or should be dismissed under section 114 of the *Act*.

## THE FACTS

10. Aramark operates the Maple Leaf Lounge at the Vancouver International Airport. Mr. Conceicao was employed by Aramark as a server from May 10, 2007, to January 14, 2013, at a rate of \$12.00 an hour.
11. Following the termination of his employment, Mr. Conceicao filed a claim with the Director for unused sick pay and length of service compensation.
12. The Director conducted a complaint hearing, at which two representatives of Aramark, Ms. Katherine Jones and Mr. Glenn Templeton, gave evidence and were questioned on their evidence by Mr. Conceicao. Mr. Conceicao gave evidence and was questioned on that evidence by Ms. Jones.
13. The issues for the Director were whether Mr. Conceicao was entitled to the payment of unused sick leave benefits and whether Mr. Conceicao was entitled to length of service compensation.
14. Based on the evidence, the Director found against Mr. Conceicao on both issues.
15. On the issue of the sick leave, the Director found the evidence clearly established that Aramark's sick leave policy, which provided employees with five days paid sick leave in a calendar year, did not allow the carry-over or banking of unused sick days or the payout of unused sick days on termination.
16. On the issue of length of service compensation, the Director found that Mr. Conceicao had quit his employment and, as a result, Aramark was discharged from its statutory liability for length of service compensation. The evidence on which that conclusion is based is fully detailed in the Determination. To briefly summarize the thrust of that evidence: Mr. Conceicao failed or refused to return to work following an eight day suspension for misconduct which he did not deny, but refused to accept or acknowledge as inappropriate or justifying a suspension, and despite a number of attempts by Aramark to have him report for work.

## ARGUMENT

17. In his appeal, Mr. Conceicao challenges the decision to deny him length of service compensation. He does not appear to challenge the denial of his claim for unused sick pay.

18. It is a bit difficult to follow the appeal argument, but Mr. Conceicao appears to be saying that the termination of his employment was orchestrated by his manager for reasons relating to events that occurred between the start of his employment and September 2011 and which, he says, made him the object of threats and harassment. There is reference in the Determination to this allegation, but it was not accepted. Mr. Conceicao also denies elements of the evidence relied on by the Director in reaching the conclusion he had quit. In support of his appeal he has provided his recording of a December 27, 2012, meeting and what he says were comments recently made by his former assistant manager that confirmed for him his former manager had planned his termination.
19. The appeal attaches the recording Mr. Conceicao made of the December 27, 2012, meeting. The content of that meeting, including the attempt by Mr. Conceicao to record it and the response of Mr. Templeton to that attempt, was evidence before the Director. There is no indication Mr. Conceicao sought to introduce the recording at the complaint hearing. He now seeks to have the recording accepted by the Tribunal although what relevance or probative value it might have to his appeal is not stated.

## ANALYSIS

20. When considering an appeal under section 114 of the *Act*, the Tribunal looks at its relative merits, examining the statutory grounds of appeal chosen and considering those against well established principles which operate in the context of appeals generally and, more particularly, to the specific matters raised in the appeal.
21. The grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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.
22. The Tribunal has established that an appeal under the *Act* is intended to be 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 of review identified in section 112. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.
23. It is well established that the grounds of appeal listed above 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 findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.
24. Mr. Conceicao has grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the appeal and in "new evidence" becoming available. In essence, the principles of natural justice are procedural rights that ensure parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker.

25. The appeal does not contain anything from which I can conclude there is any merit to the allegation that the Director failed to observe principles of natural justice in making the Determination. In fact, the appeal submission does not raise or refer to natural justice at all or question any aspect of the Determination in the framework of principles of natural justice, either expressly or implicitly. There is simply no basis in the appeal or in the section 112(5) “record” generally, upon which this appeal could be considered on this ground.
26. On the “new evidence” ground, the Tribunal has established that appeals based on “new evidence” require an appellant to, at a minimum, demonstrate that the evidence sought to be admitted with the appeal was not reasonably available and could not have been provided during the complaint process. This ground of appeal also requires the appellant to show, not merely state, the evidence is relevant to a material issue arising from the complaint, that it is credible, in the sense that it be reasonably capable of belief, and that it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination: see *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. All of the foregoing conditions must be satisfied before “new evidence” will be admitted into an appeal.
27. The recording of the December 27, 2012, meeting is not “new evidence”; it existed at the time of the complaint hearing and was reasonably capable of being presented to the Director during that process. It is not shown to be relevant to any issue arising from the complaint or the Determination, to be capable of belief or to be probative. In short, it does not satisfy most of the conditions necessary to be allowed and considered as “new evidence” under this ground of appeal and will not be accepted and considered in this appeal.
28. Neither do the comments Mr. Conceicao attributes to the former assistant manager satisfy the conditions necessary to be allowed and considered as “new evidence” in this appeal. Even if I accepted that this evidence was not reasonably available while the Determination was being made, there is nothing in the appeal that satisfies me this alleged evidence is either credible or probative. This proposed evidence does not come from the personal knowledge of Mr. Conceicao. Rather, it is what is called hearsay; a statement attributed to a secondary source – Mr. Conceicao stating what the assistant manager said.
29. To have any meaning or value in the circumstances of this appeal, this evidence would have to come directly from the assistant manager, preferably by way of affidavit or statutory declaration. The evidence would also have to demonstrate the comments attributed to her by Mr. Conceicao are correct and are based on facts personally known to her, not simply her opinion, would have to indicate how she became aware of these facts, and would have to show that they were conclusive of Mr. Conceicao’s view that he was being terminated by the manager in early December and not suspended for eight days as stated by Aramark and confirmed by all of the evidence presented. In my view, this evidence would also need to demonstrate Ms. Jones and Mr. Templeton were part of the plan to terminate Mr. Conceicao and show their considerable efforts to have him report to work following the suspension were a sham.
30. As it stands, the assertions made by Mr. Conceicao are not evidence which would be allowed and considered under the “new evidence” ground and cannot support this appeal.
31. I find, at its core, the appeal does nothing more than reiterate the allegations against his former manager that were made in the complaint hearing, but not accepted by the Director, seeking to have the Tribunal accept those allegations, ignoring, and in some respects reversing, findings of fact made by the Director and reach a different conclusion from that made by the Director, which in my assessment was soundly based on the evidence provided and the law under the *Act*. This appeal has no merit; it is appropriate to dismiss it at this stage.

32. In sum, an assessment of this appeal shows it has no prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.
33. I dismiss the appeal and confirm the Determination.

**ORDER**

34. Pursuant to section 115 of the *Act*, I order the Determination dated November 22, 2013, be confirmed.

---

**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**