Employment Standards TRIBUNAL

An appeal

- by -

Ryan Manufacturing Inc.
("Ryan Manufacturing")

- 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.: 2015A/139

DATE OF DECISION: January 11, 2016

DECISION

SUBMISSIONS

Andrew Spence — counsel for Ryan Manufacturing Inc.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Ryan Manufacturing Inc. ("Ryan Manufacturing") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on October 9, 2015.

2. The Determination found Ryan Manufacturing had contravened Part 7, section 58 (failure to pay vacation pay) and Part 8, section 63 (failure to pay compensation for length of service) of the *Act* in respect of the termination of Rozbeh Raessinia's ("Mr. Raesinnia") employment and ordered Ryan Manufacturing to pay Mr. Raessinia wages in the amount of $4,353.06 and to pay an administrative penalty in the amount of $500.00. The total amount of the Determination is $4,853.06.

3. This appeal alleges the Director erred in finding Mr. Raessinia did not quit his employment, in finding the conduct of Mr. Raessinia did not constitute insubordination and in finding Mr. Raessinia's workplace record, taken as a whole, did not justify termination. The appeal is also grounded on evidence becoming available that was not available when the Determination was being made.

4. In correspondence dated October 27, 2015, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed.

5. The section 112(5) record (the "record") has been provided to the Tribunal by the Director and a copy has been delivered to Ryan Manufacturing, through its legal counsel, and they have been provided with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.

6. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. 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, my review of the material that was before the Director when the Determination was being made and any other material allowed by the Tribunal to be added to the record. 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 period;*
>
> *(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 has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Director and Mr. Raessinia 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

8. The issues in this case are whether there is evidence which has become available that should be allowed to be introduced and considered in this appeal and whether there is any reasonable prospect this appeal can succeed.

THE FACTS

9. Ryan Manufacturing operates a cable manufacturing business. Mr. Raessinia was employed by Ryan Manufacturing as a Technician from November 15, 2006 to May 27, 2014 at a rate of $14.10 an hour when his employment ended. Mr. Raessinia's employment with Ryan Manufacturing was ended following events that occurred on May 26. 2014. The Determination summarizes these events at page R3 as follows:

> On May 26, 2014 George Paderes ("Mr. Paderes"), Production Manager, asked Mr. Raessinia to move to a different department. Mr. Raessinia refused. Mr. Paderes reported Mr. Raessinia to Mr. Fatemi. Mr. Fatemi spoke to Mr. Raessinia who confirmed that he did not want to move.
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> Mr. Fatemi issued Mr. Raessinia with a letter on May 27, 2014. The letter stated it was to serve as Mr. Raessinia's final warning and referred to Mr. Raessinia's refusal to perform a duty requested by Mr. Paderes, and his "dismissive and disrespectful manner". The letter also referred to the final warning issued in June 2011 and mentioned that Mr. Fatemi had spoken to Mr. Raessinia several times regarding his attitude and behaviour, as well as his being persistently late for work. In the letter, Mr. Fatemi stated that he believed he could terminate Mr. Raessinia's employment but offered Mr. Raessinia the opportunity to take one week off from work, "in order to seek help for … [his] communication, time management and anger issues". The letter clarifies that if Mr. Raessinia took the week off, then the letter could be considered a final warning. However, it also states, "… if [Mr. Raessinia did] not take these necessary actions to get help, that [Mr. Fatemi would] have no choice but to terminate [Mr. Raessinia's] employment". The letter included a section for Mr. Raessinia to sign, acknowledging the letter would constitute a final warning if he took one week off. Mr. Raessinia did not sign the letter.
>
> Mr. Fatemi met with Mr. Raessinia on May 28, 2014. Mr. Raessinia again refused to sign the letter and asked for his Record of Employment ("ROE").

10. The Director heard evidence from Mr. Raessinia, on his own behalf, and from Mr. Fatemi, Mr. Paderes and Ali Behdahrvandian ("Mr. Behdahrvandian"), Mr. Raessinia's supervisor over the last few years of his employment, on behalf of Ryan Manufacturing.

11. The Director made findings relating to a vacation pay claim by Mr. Raessinia, which have not been challenged and do not need to be addressed in this appeal.

12. The Director found Mr. Raessinia was entitled to compensation for length of service. In doing so, the Director considered whether Ryan Manufacturing had discharged its statutory liability to pay Mr. Raessinia

length of service compensation, noting that such liability can be discharged by showing just cause for termination or that the employee quit his employment. The Director found Ryan Manufacturing had not met the burden of showing either just cause to terminate Mr. Raessinia or that he had quit his employment.

13. Both findings were based on assessment by the Director of the evidence provided by the parties. The findings of the Director are summarized in the following excerpts from the Determination:

> There is, however, simply insufficient evidence for me to conclude Mr. Raessinia quit. In fact, the evidence is clear that Mr. Raessinia was given a choice, one of which was to take a week off and get a final written warning, and the other being that he would be fired. He chose the latter. There is no evidence that Mr. Raessinia independently made the decision to quit. . . . (page R12)
>
> I . . . find that Ryan Manufacturing cannot rely on Mr. Raessinia's minor misconduct to establish just cause . . . . (page R13)
>
> … the evidence before me suggests that Mr. Raessinia was in fact asked to move. Mr. Raessinia stated that another employee had also been asked to move departments and refused. Where the request was presented as a choice, it seems reasonable to me that Mr. Raessinia viewed it as open to him to refuse to move, which is what he did. This does not amount to serious insubordination such as to justify a just cause dismissal. (page R13)

14. The analysis preceding the above findings outlines the evidence presented by the parties and draws conclusions based on that evidence.

ARGUMENT

15. Counsel for Ryan Manufacturing submits the Director committed three errors in the Determination which, individually or cumulatively, led to the wrong result:

1. concluding Mr. Raessinia did not quit;
2. concluding the direction to Mr. Raessinia to move to another work area was presented as a choice and not an order; and
3. concluding Mr. Raessinia's history of workplace behaviour was not of a chronic and ongoing nature and did not establish just cause.

16. I will only briefly summarize the arguments.

17. In respect of the first matter, counsel for Ryan Manufacturing submits the Director failed to give effect to evidence given by Mr. Behdahrvandian that he overheard the discussion between Mr. Paderes and Mr. Raessinia on May 26 during which the latter said "he would like to be fired". It is argued that such a statement by Mr. Raessinia should have been treated as an "ultimatum" by Mr. Raessinia that Ryan Manufacturing was entitled, in all the circumstances, to treat as a resignation.

18. Counsel for Ryan Manufacturing submits several tests evolving from court decisions that speak to what comprises a resignation and a dismissal, which he submits, support his argument that Mr. Raessinia had repudiated his employment contract and ought to have been found to have resigned from his employment.

19. Counsel for Ryan Manufacturing also argues there was evidence that during the May 27 meeting Mr. Fatemi attempted, unsuccessfully, to persuade Mr. Raessinia to accept the week off, rather than a termination. He submits the decision of Mr. Raessinia to be terminated was evidence of his "independently" making a

decision to quit and in concluding he "did not independently make a decision to quit" the Director has taken a view of the facts that "could not have been reasonably based upon the evidence".

20. In respect of the second matter, the appeal submission challenges the finding by the Director that Mr. Raessinia was not insubordinate, arguing the direction to move to another work area was presented as an order Mr. Raessinia was required to obey, not a choice he could decline.

21. In support of this argument, a copy of a submission presented on behalf of Mr. Raessinia in a WorkSafeBC complaint is included with the appeal. It is submitted this submission should be allowed and considered under section 112(1)(c) of the *Act* and is evidence the direction to move was never presented to Mr. Raessinia as a choice and he understood that to be the case.

22. In respect of the third error alleged to have been made by the Director, counsel for Ryan Manufacturing submits the evidence of "ongoing, persistent behaviour issues and ongoing discussions with management staff regarding the same" was overwhelming; the Director erred by taking a view of the facts that "could not be reasonably entertained".

ANALYSIS

23. 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.*

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. 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 the findings of fact made by the Director.

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. In *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, BC EST # D041/13, the Tribunal considered the allowable scope of review on a decision by the Director on just cause, noting that the question of whether an employee has been terminated for just cause is a question of mixed law and fact requiring a conclusion about whether the facts of the case satisfy the relevant legal tests. As stated in *Britco Structures Ltd.*, *supra*, "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." By way of example, an error on a question of law would occur if the decision-maker applied the incorrect legal standard to the facts as found. In the context of dealing with questions where just cause is the issue, it is for the trier of fact to determine, first, whether the evidence reveals employee misconduct and, second, whether the circumstances in which the employee's misconduct occurred were sufficient to justify the employee's termination. Neither of these questions can be said to involve an extricable question of law that is reviewable by the Tribunal without establishing the Director committed an error of law, which in the circumstances requires Ryan Manufacturing to show the factual conclusions drawn by the Director, or the inferences drawn by those conclusions, are inadequately supported, or wholly unsupported, by the evidentiary record with the result there is no rational basis for the conclusions and so they are perverse or inexplicable: see *3 Sees Holdings Ltd. carrying on business as Jonathan's Restaurant*, *supra*, at paras. 26 – 29.

29. In this appeal, Ryan Manufacturing does not seriously challenge the legal tests applied by the Director to the "quit" and "just cause" questions. However, if the submission of counsel for Ryan Manufacturing is meant to infer the Director applied the wrong legal tests to those questions, I respectfully disagree. The tests developed by the Tribunal for addressing questions relating to the entitlement of an employee to length of service compensation have occurred in the context of the particular nature of the *Act* and in recognition that it is socially beneficial legislation that compels an approach to such questions that is fair, consistent, easily understood and easily applied. The importance of appreciating this particular nature of the *Act* was expressed by the Supreme Court of Canada who recognized employment standards legislation is intended to provide "… a relatively quick and cheap means of resolving employment disputes": *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460. See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.

30. The test used under the *Act* for deciding whether an employee had quit their employment was set out in *Wilson Place Management Ltd.*, BC EST # D047/96:

> The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment. (at page 5)

31. See also *Burnaby Select Taxi Ltd.* and *Zoltan Kiss*, BC EST # D091/96, at pages 10 – 11.

32. I am unable to accept the argument based on the assertion that Mr. Raessinia issued an "ultimatum" to Ryan Manufacturing that it should be considered a resignation on his part.

33. Most obviously, there was no finding of fact by the Director supporting this assertion. Additionally, there is no evidence, even if the recollection of Mr. Behdahrvandian of the May 26 conversation between Mr. Paderes and Mr. Raessinia could be accepted - and I note here there is no indication in the summary of Mr. Paderes' evidence supporting this recollection - that Ryan Manufacturing ever acted upon the purported demand from Mr. Raessinia to fire him. Nor is there any evidence that Mr. Fatemi, in fashioning his May 27 letter, was doing so in the context of what Mr. Behdahrvandian said he heard. If that were the case, one would have expected the May 27 letter to reference, in some way, an acceptance of Mr. Raessinia's resignation rather than a threat to terminate. Instead, the evidence clearly shows what Ryan Manufacturing did, and what the Director found, was to issue their own ultimatum in response to the circumstances: take a week off or be fired.

34. On balance, I find it was open to the Director, on the evidence provided, to find the decision to be terminated was not a freely formed expression of intent by Mr. Raessinia but rather was the result of the ultimatum imposed upon him by Mr. Fatemi. It follows, and I conclude, the Director did not err in finding Mr. Raessinia did not terminate his own employment and that Ryan Manufacturing was not, on that basis, relieved of its liability for length of service compensation to him. While I do not need to decide the matter, it is entirely probable that the one-week suspension, had Mr. Raessinia chosen that option, could in any event have been found by the Director to be a termination of employment under section 66 of the *Act*.

35. On the just cause question, the Director correctly set out the legal tests used under the *Act* for assessing whether a single act of misconduct or cases involving an accumulation of instances of minor misconduct are sufficient to justify termination.

36. Counsel for Ryan Manufacturing submits the error made by the Director was in finding the instruction given to Mr. Raessinia to move from one department to another was an order, and not a request he could reject. He submits the finding by the Director was one which could not have been reasonably entertained based on the evidence.

37. It is in this context that counsel for Ryan Manufacturing raises the ground of appeal set out in section 112(1)(c) of the *Act* - evidence becoming available that was no available when the Determination was being made, and seeks to add new evidence, which is a copy of a submission made on behalf of Mr. Raessinia in a WorkSafeBC complaint.

38. The Tribunal has frequently addressed the criteria relating to this ground, noting the Tribunal has discretion in regards to accepting new or additional evidence and has taken a relatively strict approach to the exercise of this discretion. The Tribunal tests the proposed evidence against several considerations, including whether such evidence was reasonably available and could have been provided during the complaint process, whether the evidence is relevant to a material issue arising from the complaint, whether it is credible, in the sense that it be reasonably capable of belief, and whether 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. New or additional evidence which does not satisfy any of these conditions will rarely be accepted. This ground of appeal is not intended to give a person dissatisfied with the result of a Determination the opportunity to submit evidence that, in the circumstances, should have been provided to

the Director before the Determination was made. The approach of the Tribunal is grounded in the statutory purposes and objectives of fairness, finality and efficiency: see section 2(b) and (d) of the *Act*.

39. I am not persuaded to allow this document to be included as new evidence in this appeal. While I accept it was not reasonably available at the time of the complaint hearing, it became available shortly after the complaint hearing was completed and was available well before the Determination was issued. It does not appear any effort was made by Ryan Manufacturing to submit this document to the Director and argue its relevance to the questions raised at the complaint hearing. As well, this document is not, in any legal sense, admissible evidence of the facts for which it presented. It represents nothing more than a submission made in the context of a proceeding before another tribunal. I am not satisfied it is either relevant, credible or probative to the findings made in the Determination.

40. Overall, the submissions made on this point do no more than disagree with the findings of fact made by the Director on whether Mr. Raessinia's refusal could be characterized as serious insubordination justifying his immediate and summary dismissal. I note here that the Director did find Mr. Raessinia had refused to move to another department, but also found such refusal was, on the evidence, a response which Mr. Raessinia reasonably believed was open to him and was not demonstrative of serious insubordination having the effect of fundamentally breaching the employment relationship.

41. I am unable to accept there was any reviewable error in the assessment of the Director on this point.

42. In respect of the argument alleging error on the part of the Director relating to what was alleged to be "ongoing behavioural problems", the law is clear that prior to termination for minor discipline, such as negative attitude, excessive absenteeism and poor performance, an employer must be shown to have taken a corrective and progressive disciplinary approach towards unacceptable behaviour. The requirements for establishing just cause for termination where minor misconduct is the basis for termination is accurately set out in the reasons for Determination. I agree completely with the analysis made by the Director on this question; the findings made by the Director and the conclusion reached from those findings were adequately supported on the evidence. In particular, I find the Director was entirely justified in reaching the conclusion that:

> … beyond the final written warning issued in 2011, which is too far in the past to be of relevance to Mr. Raessinia's dismissal in 2014, I am not satisfied that Ryan Manufacturing's approach to the management of Mr. Raessinia's performance meets the established test for minor misconduct just cause … (page R13)

43. In respect of the question of just cause overall, I am satisfied the findings and conclusions of the Director on this aspect of the matters being addressed was grounded in evidence that was provided to the Director in the complaint hearing; the findings are not "perverse and inexplicable in the sense that they are made without any evidence". The view taken by the Director of that evidence, however much Ryan Manufacturing may disagree with that view, is not "inconsistent with or contradictory to the evidence or without any rational foundation". In the absence of a demonstrated error of law relating to the facts, Ryan Manufacturing is advancing an attack on the Determination the Tribunal is without authority to consider: see *Britco Structures Ltd.*, *supra.*

44. In sum, I am satisfied this appeal has no reasonable prospect of succeeding. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

ORDER

45. Pursuant to subsection 115(1) of the *Act*, I order the Determination dated October 9, 2015, be confirmed in the amount of $4,853.06, together with whatever further interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal