

An appeal

- by -

Core Security Group Inc.
(“Core”)

- 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: Carol L. Roberts

FILE No.: 2013A/91

DATE OF DECISION: April 22, 2014

DECISION

SUBMISSIONS

Tom Beasley, Bernard LLP	counsel for Core Security Group Inc.
Ghulam Farid Saqib	on his own behalf
Reena Sharma	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) Core Security Group Inc. (“Core”) has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 15, 2013. In that Determination, the Director ordered Core to pay its former employee, Ghulam Farid Saqib, \$1,146.65 in wages and interest. The Director also imposed an administrative penalty in the amount of \$500 for Core’s contravention of section 63 of the *Act*, for a total amount payable of \$1,646.65.
2. Core appeals the Determination alleging that the delegate erred in law in determining that it terminated Mr. Saqib’s employment. Core contends that Mr. Saqib quit.
3. Core also asserts that evidence has become available that was not available at the time the Determination was being made.
4. Initially assigned for consideration under section 114 of the *Act*, I determined that it was appropriate to have the positions of all parties on the issues raised. I requested, and received, submissions from the Director and Mr. Saqib. I have also received a final reply from Core’s counsel to the submissions of the Director and Mr. Saqib.
5. I find that the appeal can be decided based on the written submissions of the parties, the section 112(5) “record” that was before the delegate at the time the decision was made, and the Reasons for the Determination as well as any additional evidence allowed by the Tribunal to be added to the “record”.

FACTS

6. The facts are drawn from the Determination, the section 112 “record” and the submissions of the parties.
7. Core is a security services company operating in British Columbia. Core had a contract with IKEA Canada to provide security services at its Coquitlam Store. That contract ended effective March 4, 2013.
8. Mr. Saqib worked for Core as a security guard from February 29, 2012, until March 1, 2013. On April 1, 2013, Mr. Saqib filed a complaint with the Director alleging that Core had contravened the *Act* in failing to pay compensation for length of service.
9. The Director scheduled a mediation of Mr. Saqib’s complaint for July 18, 2013. Core did not attend the mediation. On August 28, 2013, the Director scheduled a hearing of the complaint before a delegate of the Director for October 7, 2013.

10. Darwin Nickel appeared at the complaint hearing on Core's behalf and Mr. Saqib appeared on his own behalf. Mr. Nickel acknowledged that he had no first-hand information about the circumstances surrounding Mr. Saqib's last day of work; that all of the evidence he was to present was based on information he had obtained from Pat Dickson, Core's director of operations, James Peterse, Mr. Saqib's supervisor, and Karen Leiper, Core's receptionist.
11. The parties agreed that Mr. Saqib worked the graveyard shift at the IKEA Coquitlam site from Monday to Friday for the entire period of his employment. They also agreed that, on Monday, March 4, 2013, Mr. Saqib contacted Mr. Peterse, to ask why he was not working that night. Mr. Peterse told Mr. Saqib that Core had lost its contract with IKEA and that, as a result, he would not be working that evening.
12. On March 5, 2013, Mr. Saqib emailed Mr. Dickson:

Last night I reported on my duty as usual and check in with S/O James. He informed me that IKEA is not with Core Security any more.

So what is new site or schedule for me? Please let me know in advance what is happening.
13. Approximately one half hour later, Mr. Dickson responded as follows:

I was of the understanding that you had been absorbed into the new security company there. They absorbed everyone else.
14. Mr. Saqib's evidence was that Mr. Dickson erroneously assumed that he had accepted employment with Securitas Canada, the company contracted to provide security to IKEA's Coquitlam store. Mr. Saqib said that he did not do so because Securitas was offering a lower hourly wage.
15. Mr. Saqib's evidence was that he telephoned the office on March 6, 2013, to speak with Mr. Dickson. As Mr. Dickson was unavailable, he asked Ms. Leiper about his schedule. Ms. Leiper told Mr. Saqib she had no shifts available for him. Mr. Saqib told Ms. Leiper if there was no work for him she should issue a Record of Employment (ROE).
16. On March 7, 2013, Core issued Mr. Saqib an ROE indicating a "shortage of work".
17. Mr. Nickel's evidence was that when Mr. Saqib went to Core's office to get his paystub on March 8, 2013, Mr. Dickson offered to keep Mr. Saqib on Core's "active list." Mr. Saqib declined the offer. Mr. Nickel stated that Mr. Saqib threw his uniform on the desk and told Ms. Leiper that he quit. Mr. Nickel provided the delegate with a hand written note from Ms. Leiper that stated "*offered work from Pat, need details, offer turn in uniform quit! Redo ROE*". The note is undated and Mr. Nickel provided no other information about the note.
18. Mr. Saqib's evidence was that when he went to Core's office on March 8, 2013, he was given two separate pay cheques. Mr. Saqib spoke with Mr. Dickson, who repeated his understanding that Mr. Saqib had been absorbed into Securitas. Mr. Saqib informed Mr. Dickson that he did not go to work for Securitas because he did not find their offer acceptable. Mr. Saqib testified that he gave his shirts back to Mr. Dickson because he was informed Core no longer had any work for him. Mr. Saqib denied that he threw his uniform.
19. Mr. Nickel's evidence was that all security companies maintain a pool of guards on an "active list" and if work becomes available, the guards are called until one is found to work a shift. Mr. Nickel contended that Mr. Saqib was on the "standby" list.

20. Mr. Nickel asserted that there was a miscommunication between Core and Mr. Saqib. He said that in mid-February, Core was aware that it would be losing the IKEA contract and that it was likely Mr. Saqib was aware of that fact because Securitas contacted Mr. Saqib's colleagues to discuss the possibility of continued employment at that job site. Mr. Nickel contended that it was Mr. Saqib's responsibility to determine what Mr. Peterse meant when he told Mr. Saqib that Core had no work available for him that evening.
21. Mr. Nickel contended that Core did not terminate Mr. Saqib's employment and that it was relieved of its obligation to pay compensation for length of service when Mr. Saqib returned his uniform to Ms. Leiper and stated that he quit.
22. Mr. Saqib denied that he quit or intended to quit his employment.
23. The delegate noted that the burden was on Core to establish that Mr. Saqib had quit his employment and was thus not entitled to compensation for length of service. She noted that the right to quit was personal and had to be voluntarily exercised by the employee. The delegate also noted that, in order to exercise that right, the employee had to both form an intention to quit and carry out an act inconsistent with the continuation of their employment.
24. After reviewing the evidence of the parties, the delegate concluded that Mr. Saqib did not quit his employment. She noted that shortly after Mr. Saqib was told he would no longer be working at the IKEA site, he contacted Core regarding his continued employment. She concluded that this was not the action of an employee intending to quit their employment.
25. The delegate noted that although Mr. Nickel testified to conversations Mr. Saqib had with Mr. Dickson and Ms. Leiper, he had no first-hand knowledge of those conversations and neither Mr. Dickson nor Ms. Leiper testified or provided affidavit evidence. The delegate gave little weight to Mr. Nickel's evidence in light of Mr. Saqib's conflicting evidence regarding those conversations. She also noted that, in any event, Mr. Nickel's evidence was at odds with the ROE Core issued to Mr. Saqib on March 7, 2013.
26. The delegate concluded, after weighing all of the evidence, that Core had not discharged its burden of substantiating that Mr. Saqib quit his employment.

ARGUMENT

New evidence

27. Counsel for Core says that Mr. Nickel mistakenly believed that the complaint hearing was a mediation, and that, had he appreciated it was a hearing, he would have brought witnesses to the hearing, including Core's receptionist, Karen Leiper, James Peterse, Mr. Saqib's supervisor, and Pat Dickson, Core's Director of Operations. Attached to Core's appeal is an affidavit of Mr. Nickel containing information that these individuals communicated to him. Core contends that the Director's delegate did not weigh Ms. Leiper's, Mr. Peterse's, and Mr. Dickson's evidence properly.
28. Counsel asserts that the *Act* does not give the Director's delegate power to conduct adjudication hearings, but does not provide any authority to support this assertion.
29. The delegate says that Core did not attend the mediation, and that the *Notice of Complaint Hearing*, which was sent by registered mail and signed for by Mr. Dickson on August 30, 2013, clearly indicated that the parties were to provide the Branch with two copies of any documents they intended to rely on by September 20,

2013, and provide a list of people they intended to call as witnesses as well as a brief summary of the evidence those witnesses were expected to give. In addition, the *Notice of Complaint Hearing* required Core to provide all documents required in the Demand for Employer Records.

30. The delegate further submits that on October 3, 2013, another delegate of the Director informed Mr. Dickson of the October 7, 2013, hearing by way of email, and that Mr. Dickson confirmed that Mr. Nickel would attend as Core's representative. The delegate also says that at no time did Mr. Nickel ask for an adjournment or say he misunderstood the nature of the proceedings.
31. The delegate says that the evidence provided by Mr. Nickel on behalf of Ms. Leiper, Mr. Peterse, and Mr. Dickson was hearsay evidence and notes that Mr. Nickel does not dispute that he did not have first-hand knowledge of the events that took place with respect to Mr. Saqib's employment.

Error of Law

32. Core contends that the Director erred in concluding that Mr. Saqib did not quit his employment. In advancing this argument, Core refers to findings contained in the Determination as well as assertions advanced in Mr. Nickel's affidavit. Core says that the evidence established that Mr. Saqib quit and is basing that assertion on evidence that was disputed only in the new evidence presented with the appeal submissions. The delegate submits that Core did not take the position at the hearing that the handwritten note was Mr. Saqib's, and did not examine Mr. Saqib on the conversations surrounding the note.
33. Counsel for Core submits that Mr. Saqib formed the intention to quit, announced that he quit and asked for the ROE to be amended from laid off to quit, and turned in his uniform. Counsel submits that the subjective and objective elements of the test of whether an employee has quit had been met.
34. Core contends that the delegate did not properly consider the fact that Mr. Saqib did not respond to Mr. Dickson's March 5 email about his understanding that Mr. Saqib had been hired by Securitas Canada; that Mr. Saqib asked to have his ROE issued to show that he quit and that he would turn in his uniform, and that on March 8, 2013, Mr. Saqib did turn in his uniform and state that he quit.
35. Finally Core argues that Mr. Saqib misled the delegate by failing to inform her that he was employed by another security firm, Securitas Canada, from February 28, 2013.
36. The delegate says that there was no dispute that Mr. Saqib returned his uniform. She submits that neither Mr. Dickson nor Ms. Leiper attended the hearing to present evidence regarding their conversations with Mr. Saqib regarding the circumstances of that event, nor did they provide any written statements.
37. The delegate further notes that Core confirms that Mr. Saqib was provided with an ROE indicating "shortage of work" as the reason for issuing it and did not issue another indicating "quit" despite Mr. Saqib's request that it do so.
38. The delegate says there was no evidence Mr. Saqib had been temporarily laid off and placed in a pool of "active employees" and that Mr. Saqib quit within that time, as contended by Core.
39. The delegate submits that Core is attempting to reargue the case; that Core has not substantiated that the delegate erred in law; and that the test of new evidence has not been met.

40. Mr. Saqib seeks to have the Determination confirmed. Mr. Saqib's submission contains evidence that does not appear to be part of the record and disputes some of the assertions made by Core's counsel regarding the facts. Mr. Saqib also refers to certain events that apparently occurred at the mediation. As mediations are conducted on a "without prejudice" basis, I will not refer to those comments, save to say that Mr. Saqib disputes Core's assertion that it failed to attend the mediation. Mr. Saqib further contends that Mr. Nickel was well aware of the fact he was attending a complaint hearing.
41. Mr. Saqib disputes the accuracy and authenticity of aspects of the "new evidence"; that is, information contained in Mr. Nickel's affidavit.
42. Finally, Mr. Saqib also says that Core never questioned him about his current employment with Securitas at the complaint hearing and that he never misled the delegate about his employment with that company.
43. In reply, Core's counsel contends that the delegate cannot be the representative of the Director on appeal, nor can she "respond to the merits of the Appeal" under Rule 23(1) of the Tribunal's *Rules of Practice and Procedure* (the "Rules").
44. While acknowledging that the Director has a "role to play in the internal appeal process" (*British Columbia Securities Commission v. Burke v. Burke*, 2008 BCSC 1244, at para. 61), Counsel submits that role cannot be performed by the delegate who made the decision.
45. Core's counsel says that, in a judicial review or in an internal statutory appeal, the decision-maker never makes submissions to the review or appellant body; those submissions are made by the agency, not by the decision-maker. Core submits that although the Director can assign someone to respond to the merits of the Appeal, that person must not be the delegate who made the Determination. Core argues that the Tribunal must not consider the delegate's submission, and to do otherwise "brings the whole ESA system into disrepute."
46. Citing *Northwestern Utilities Ltd. v. Edmonton (City of)*, ([1979] 1 S.C.R. 684), Core's counsel argues that it is a breach of natural justice for a decision-maker to attempt to justify its actions on a review or appeal. Counsel submits that while the Director has a role in the statutory review system, that role must abide by the principles outlined in *Northwestern*.
47. Counsel submits that the delegate's submission goes well beyond explaining the jurisdiction and moves well into advocacy, and makes further findings of fact and law, demonstrating bias.
48. Core submits that Mr. Saqib's submission sets out new evidence.

ANALYSIS

49. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law;
 - the director failed to observe the principles of natural justice in making the determination;
 - evidence has become available that was not available at the time the determination was being made.
50. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds. I conclude that Core has not met that burden.

51. Although Core contends that the Director cannot adjudicate complaint hearings, section 76(3) of the *Act* provides that the Director may “refuse to accept, review, mediate, investigate or adjudicate a complaint or may stop or postpone reviewing, mediating, investigating or adjudicating a complaint” when certain criteria are met. I find no merit to Core’s submission on this issue.

Proper Role of Director on Appeal

52. The nature and extent of the participation of the Director’s delegate on Appeal was set out by the Tribunal in *British Columbia Securities Commission* (BC EST # RD121/07, Judicial Review dismissed, *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244). In that case, the Tribunal reiterated principles originally set out in *BWI Business World Incorporated*, BC EST # D050/96, which contemplate the Director having a role in the appeal and, as a matter of policy in light of the purposes and objects of the *Act*, is permitted to make complete submissions on all aspects of appeal. The Tribunal has said that “It will fall to the adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one of the other parties is not crossed.”
53. There is nothing in the *Act*, Tribunal jurisprudence, or *British Columbia Securities Commission* that prohibits the delegate who either conducted the investigation or heard the complaint from explaining the resulting Determination. In my view, it is not inconsistent with the object and purposes of the *Act* to have a delegate who decided the matter at first instance to explain the Determination.
54. The delegate has made submissions regarding the events leading to the hearing on October 7, 2013. The submission includes a copy of a Notice of Mediation. It also referenced an email between a delegate of the Director and Mr. Dickson. I find the submissions relating to the background to the hearing to be entirely proper. As this information is relevant to deciding this appeal, I have found it unnecessary to consider the other aspects of the delegate’s submission or to decide whether these other aspects “cross the line.”

New Evidence

55. The basis of Core’s appeal is that the delegate erred in law. In support of that argument Core submits the affidavit of Darwin Nickel, Core’s representative at the hearing before the delegate. The affidavit contains new evidence.
56. The Tribunal has established a stringent test for the admissibility of new evidence: (see *Davies et. al*, BC EST # D171/03):
- (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.
57. Core says that Mr. Nickel “misunderstood” the nature of the Complaint hearing, believing it to be a mediation. I do not accept this argument.

58. The delegate says that the notice of the Mediation session was sent June 26, 2013. Given that mediations are conducted on a without prejudice basis, I have not considered Mr. Saqib's assertions about what transpired at that session. However, Core acknowledges that it did not appear.

59. The Director then issued a Notice of Complaint Hearing. That Notice states:

The Director of Employment Standards has appointed a Branch Adjudicator to conduct a hearing into the issue(s).. The hearing will take place...

The Branch Adjudicator may make a Determination based on information before them, **even if you choose not to participate or be represented at the hearing.**

For additional information on the hearing process, please refer to the *Adjudication Hearings* factsheet attached. Please provide a copy of the attached *Being a Witness* factsheet to any witness you intend to call.

(Emphasis in original)

60. The delegate say that on October 3, 2013, another delegate of the Director informed Mr. Dickson, by email, that a hearing was scheduled for October 7, 2013. Mr. Dickson responded that Mr. Nickel would attend as Core's representative.

61. I find that Core knew, or ought to have known, that the hearing on October 7, 2013, was a hearing on the merits of Mr. Saqib's complaint and that a decision would be made following the hearing. The Notice is unambiguous as to the nature of the process. Information on how to present a case, including the calling of witnesses, was included with the Notice.

62. Mr. Nickel appeared on Core's behalf at the hearing on October 7, 2013. There is no evidence, and Core does not submit, that he sought an adjournment or expressed any confusion at the hearing about the nature of the hearing at that time.

63. It is only on appeal that Mr. Nickel asserts that he misunderstood the nature of the hearing.

64. I have also considered that all of the "new evidence" consists of additional "hearsay" evidence – information Mr. Nickel says has been reported to him and which he believes. There is no evidence supporting of any of his statements, including his assertion that Mr. Saqib began work with Securitas on February 28, 2013.

65. An appeal to the Tribunal under section 112 is not intended to be an opportunity to submit evidence and argument that was not provided during the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach a different conclusion.

66. Consequently, I do not find Core has met the test for new evidence.

Error of Law

67. The Tribunal as 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.

68. I am not persuaded that the delegate made any palpable or overriding error or reached a clearly wrong conclusion of fact or acted without any evidence or on a view of the evidence that could not be entertained.

69. I do not find the delegate erred in law in concluding that Core terminated Mr. Saqib's employment.

ORDER

70. Pursuant to section 114 (1)(f) of the *Act*, I dismiss the appeal. Accordingly, pursuant to section 115 of the *Act*, the Determination, dated November 15, 2013, is confirmed in the amount of \$1,646.65, together with whatever further interest that has accrued under section 88 of the *Act* since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal