Employment Standards TRIBUNAL

An appeal

- by -

Neal Graham Willis
("Mr. Willis")

- 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.: 2014A/80

DATE OF DECISION: August 28, 2014

DECISION

SUBMISSIONS

Neal Graham Willis — on his own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Neal Graham Willis ("Mr. Willis") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 27, 2014.

2. The Determination was made in respect of a complaint filed by Mr. Willis who alleged his former employer, the City of Richmond ("the City"), had contravened Part 6, section 54 of the *Act* by failing to return him to work from an authorized leave, and Part 8, section 63 of the *Act* by failing to pay length of service compensation.

3. The Determination found the City had not contravened the *Act*, no wages were outstanding and no further action would be taken.

4. Mr. Willis has filed an appeal of the Determination, alleging the Director failed to observe principles of natural justice in making the Determination.

5. In correspondence dated July 9, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from the other parties pending review of the appeal by a Tribunal Member 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. Willis, who has been given the opportunity to object to the its completeness. Mr. Willis has indicated the section 112(5) "record" appears to be complete and, there being no demonstrated deficiency, the Tribunal accepts it as such.

7. I have 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. Willis and my review of the section 112(5) "record" that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, 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:*
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> *(a) the appeal is not within the jurisdiction of the tribunal;*
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> *(b) the appeal was not filed within the applicable time limit;*
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> *(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) of the *Act*, the City 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. Mr. Willis was employed by the City from September 2, 1980, until November 30, 2012, when he chose to retire from his employment. His most recent position before retirement was Manager – Special Projects for which he received an annual salary of $37,079.96 based on a regular part-time 15 hour work week.

11. Mr. Willis has been quadriplegic since 1984. Any work related requirements associated with this disability were accommodated by the City.

12. On May 13, 2008, Mr. Willis commenced a medical leave from his employment with the City. Mr. Willis was at the time diagnosed with clinical depression which reduced his functional abilities to the point where he could not perform the full duties of his position. Subsequently, Mr. Willis was on sick leave for 26 weeks, ending November 7, 2008. Mr. Willis qualified for, and received, long term disability benefits from November 8, 2008, until age 65. In August 2009, the City's long term disability provider, Sun Life Assurance Company of Canada ("Sun Life"), informed the City that Mr. Willis was considered totally disabled from performing any occupation.

13. In January 2012, the City informed Mr. Willis that Sun Life considered him to be permanently disabled from any occupation and long term disability benefits would continue to be paid until age 65. Mr. Willis was informed he continued to be a regular full time employee and was asked to confirm he was unable to foresee a return to active employment. He was asked to agree or disagree with Sun Life's assessment and, if he disagreed, to send a letter to Mr. Pellant, the City's Director of Human Resources, advising why he disagreed and providing contact details for the medical professionals which the City could consult for further evaluation of his status.

14. On June 14, 2012, Mr. Willis sent a communication to Mr. Nazareth, the General Manager of Finance and Corporate Services for the City, advising him of his intent to return to work for the City on July 1, 2012.

15. On June 25, 2012, Mr. Pellant responded to that communication stating the City could not, at that time, honour Mr. Willis' request to return to work. Within that response, Mr. Pellant indicated the City could not accept liability for his employment until appropriate medical certification, indicating he was "fully capable of returning and in what capacity with what limitations", was provided.

16. Further communications occurred between Mr. Willis and Mr. Pellant, with Mr. Willis urging he be returned to work and Mr. Pellant indicating the City was working to find him a suitable position.

17. Mr. Willis did not provide the medical information requested.

18. On October 28, 2012, Mr. Willis notified the City of his intention to retire effective December 1, 2012. There was some additional communication relating to the effect and the mechanics of retiring. Mr. Willis retired effective December 1, 2012. These communications are fully discussed in the Determination.

19. The Director found the City had not contravened section 54 of the *Act*, as the medical leave which Mr. Willis on was not a leave included in Part 6 of the *Act*. That finding is not challenged in this appeal.

20. The Director found Mr. Willis was not entitled to compensation for length of service as there was no termination, or deemed termination under section 66, of his employment. In respect of the section 66 consideration, the Director found, that between 2009 and Mr. Willis' retirement, the City had not unilaterally altered his terms and conditions of employment. The Director found, given the assessment of Sun Life that Mr. Willis was totally and permanently disabled from performing any occupation, it was reasonable for the City to have requested Mr. Willis to provide medical information supporting a return to work.

ARGUMENT

21. Mr. Willis argues the Director failed, in two respects, to observe principles of natural justice: first, it is argued the Director displayed a bias in favour of the City and the Determination was not based on a balanced and considered assessment of the information and evidence provided; and second, the Determination was not based on a logical and reasoned evaluation of the evidence provided, as it ignored or misunderstood information and evidence that would have led the Director to a different, and opposite, conclusion.

22. In support of the first argument, Mr. Willis submits the Director demonstrated a bias in favour of the City by providing a copy of the preliminary Determination only to the City on January 24, 2014, and not delivering a copy to him until March 5, 2014, after he requested it.

23. On the second argument, Mr. Willis submits the Director based the Determination on two erroneous conclusions: that the City's request for medical documentation as a condition of returning to work was reasonable and that he had failed to comply with that request; and that it was he, rather than the City, who changed the terms and conditions of employment by remaining off work for four years.

24. Mr. Willis' argument on the first erroneous conclusion has focussed on what he says was a failure by the Director to appreciate that no representative of the City ever specifically requested medical clearance relating to his *depression* and because it was never specifically requested, he could not, logically, comply. Mr. Willis notes the City did not provide him with a medical form to complete or arrange for a third party assessment of the medical evidence they had received in 2008. Mr. Willis asserts the City bore the responsibility of taking whatever steps were available to determine his fitness for work.

25. Mr. Willis' arguments on the second erroneous conclusion challenge the acceptance by the Director of the 2009 change in his employment status made as a result of the communication from Sun Life to the City and the Director finding that, by going on medical leave for a period of four years, it was Mr. Willis who had "effectively initiated a change to the terms and conditions of is employment with the City".

ANALYSIS

26. 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.

27. 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.*

28. 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. An appeal to the Tribunal under section 112 is not intended simply as an opportunity to resubmit the evidence and argument that was before the Director in the complaint process, hoping to have the Tribunal review and re-weigh the issues and reach different conclusions.

29. A party alleging a denial of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99.

30. 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.

31. Mr. Willis has grounded this appeal in an alleged failure by the Director to observe principles of natural justice in making the Determination.

32. Mr. Willis alleges the Director demonstrated bias in favour of the City in making the Determination. Such an allegation must be proven on the evidence. As the Tribunal noted in *Dusty Investments Inc. dba Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

33. An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

34. In *R. v. S. (R.D.), [1997] 3 S.C.R. 484,* the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test (of bias or apprehension of bias) the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

35. As well, the Tribunal has adopted the view that allegations of bias against a delegate, as has been done here, must be considered in light of the fundamental nature of the statutory process within which a delegate functions and which was described as follows in *The Director of Employment Standards (re Milan Holdings)*, BC EST # D313/98:

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). At the time such a determination is made, it is an unavoidable practical reality that other investigations on related subjects may still be underway and that tentative conclusions may have been reached in respect them, pending a decision as to what, if any enforcement action is appropriate on an individual or more general basis: *Re Takarabe* (BCEST #D160/98). This is precisely the situation which presents itself here.

36. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.

37. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. The burden has not been met; there is no clear objective evidence from which it can reasonably be found the Director was disposed to hold an adverse view of Mr. Willis or his complaint such that the Director's ability to analyze the evidence neutrally and render an impartial decision was compromised.

38. It was neither unreasonable nor a reflection of bias for the Director to have applied the complaint process used in this case. Nothing in that process has compromised or denied Mr. Willis the opportunity to present evidence and argument in support of his case and to respond to the case made by the City. While one may question why Mr. Willis was not copied with the draft Determination, that is simply how the process fell out and it is far from demonstrative of bias on the part of the Director.

39. The arguments made on the second alleged errors do not raise natural justice concerns at all, but represent nothing more than disagreement with findings and conclusions of fact made by the Director and with the manner in which the Director exercised the discretion provided in section 66 of the *Act*.

40. Although Mr. Willis may disagree with the Director's characterization of the effect of the 2009 communication from Sun Life to the City, it was an entirely reasonable interpretation to view those events as signalling a "substantial change in terms and conditions of employment" as that phrase is understood in the context of the *Act* (see discussion below). In this case, it was neither unreasonable nor wrong to view the change in Mr. Willis' employment status from that of an employee on temporary sick leave from his normal occupation to one who is permanently disabled from performing any occupation as a "substantial alteration of terms and conditions". I am not persuaded this argument has any presumptive merit.

41. On the section 66 argument, it is to be noted at the outset that a decision under section 66 of the *Act* is a discretionary one and the Tribunal's authority over an exercise of discretion by the Director is limited: see *Jody L. Goudreau and Barbara E. Desmarais, employees of Peace Arch Community Medical Clinic Ltd.*, BC EST # D066/98. It is also worth repeating that this argument engages no natural justice concerns.

42. Notwithstanding, I also find there is no presumptive merit to this argument. The answer to it is found by applying the principles extracted from the following excerpt from *Robert Craig*, BC EST #D052/10, and applying those to the facts of this case:

> . . . in *Isle Three Holdings Ltd., BC EST # D084/08* (confirmed on reconsideration, BC EST # RD124/08), the Tribunal provided an overview of the interpretation and operation of section 66 within the *Act*. Included in the analysis of that decision are the following comments, found at paras. 27-31:
>
> > Section 66 of the Act states:
> >
> > > *If a condition of employment is substantially altered, the director may determine that the employment has been terminated.*
> >
> > An accurate summary of the elements of this statutory provision is found in *Bogie and Bacall Hair Design Inc.*, BC EST # D062/08, at para 41:
> >
> > > Section 66 of the *Act* provides that if a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated. There must be a finding that there is a change in the conditions of employment, that the change is substantial and that the change constitutes termination.
> >
> > Conditions of employment is defined in Section 1 of the *Act* to mean all matters and circumstances that in any way affect the employment relationship. The alteration must be substantial, or "sufficiently material that it could be described as being a fundamental change in the employment relationship": see *Helliker*, BC EST # D338/97, (Reconsideration of BC EST # D357/96). The focus of the examination in Section 66 is the employment relationship in place at the time of the alteration: *Helliker*, *supra*.
> >
> > The Tribunal has indicated that the test of what constitutes a substantial change is an objective one that includes a consideration of the following factors:
> >
> > > a) the nature of the employment relationship;
> > >
> > > b) the conditions of employment;
> > >
> > > c) the alterations that have been made;
> > >
> > > d) the legitimate expectations of the parties; and

> e) whether there are any implied or express agreements or understandings.
>
> (see for example, *Helliker*, BC EST # D338/97; *A.J. Leisure Group Inc.*, BC EST # D036/98; *Task Force Building Services Inc.*, BC EST # D047/98; and *Big River Brewing Company Ltd.*, BC EST # D324/02)
>
> The language of section 66 gives the Director discretion to decide the employment of the employee has been terminated. The exercise of that discretion is reviewable by the Tribunal: *Jaeger*, BC EST # D244/99, *Jody L. Goudreau*, BC EST # D066/98; and *Takarabe and others*, BC EST # D160/98. As expressed in the last decision, the Director must exercise discretion for *bona fide* reasons, must not be arbitrary and must not base the decision on irrelevant factors.

43. As indicated above, I find there were facts, identified in the Determination, on which the Director could reasonably conclude the substantial alteration in Mr. Willis' employment occurred in August 2009, even if, as Mr. Willis argues, such a change is contemplated by other terms in the employment relationship. That change altered the nature of the relationship going forward and justified the view taken by the Director of the events that occurred between June 2012 and Mr. Willis' retirement, specifically the conclusion that the City made no alteration in Mr. Willis' terms and conditions of employment during that time.

44. I find the Director made no error in how section 66 was applied and find Mr. Willis has not shown in this appeal there is any basis for interfering with the exercise of discretion involved in that decision or provided any other basis for setting aside the Determination.

45. In sum, on an assessment of this appeal I am satisfied it has no presumptive merit and 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.

46. As a final point I will indicate that while not specifically sought in this appeal, there is a suggestion that a claim for compensation for length of service might flow from the events of August 2009. This suggestion raises a problem of timeliness that would likely affect the acceptance of such a claim under the *Act*.

47. I dismiss the appeal and confirm the Determination.

ORDER

48. Pursuant to section 115 of the *Act*, I order the Determination, dated May 27, 2014, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal