Employment Standards TRIBUNAL

An appeal

- by -

Joanne Neubauer
("Ms. Neubauer")

- 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/107

DATE OF DECISION: December 2, 2014

DECISION

SUBMISSIONS

Joanne Neubauer — on her own behalf

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the *"Act"*), Joanne Neubauer ("Ms. Neubauer") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 13, 2014.

2. The Determination found that Ms. Neubauer had contravened Part 8, section 63 of the *Act* in respect of the employment of Shelley A. Readman ("Ms. Readman") and ordered Ms. Neubauer to pay Ms. Readman wages in the amount of $392.38 and to pay an administrative penalty under section 29 of the *Employment Standards Regulation* (the *"Regulation"*) in the amount of $500.00. The total amount of the Determination is $892.36.

3. This appeal alleges the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. The appeal was delivered to the Tribunal on August 22, 2014, more than a month after the expiry of the statutory appeal period.

5. In correspondence dated August 26, 2014, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party 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 Ms. Neubauer., who has been given the opportunity to object to its completeness. On September 18, 2014, Ms. Neubauer communicated with the Tribunal expressing concerns with the "record'. She questioned the inclusion of documents which she said she had never seen and the exclusion of information and documents she felt should have been included. Attached to this communication were e-mails that Ms. Neubauer says were not included in the "record". On October 1, 2014, the Director responded, stating the e-mails had been reviewed for relevance and considered within the context of the complaint investigation. This response, and other responses relating to the omission of e-mails and information passing between Ms. Neubauer and the Director, will be addressed later in this decision.

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, the written submission filed with the appeal by Ms. Neubauer and my review of the material 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:*
>
> *(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) of the *Act*, Ms. Readman 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. In this case, I am looking at whether the statutory appeal period should be extended or if there is a reasonable prospect the appeal will succeed.

ISSUE

9. The issue to be considered at this stage of the proceeding is whether the appeal should be dismissed under any of the provisions in section 114 of the *Act*.

THE FACTS

10. Ms. Readman filed a complaint with the Director alleging her former employer, Ms. Neubauer, had contravened the *Act* by failing to pay compensation for length of service on the termination of her employment. Ms. Neubauer opposed the claim, taking the position Ms. Readman either quit or was terminated for cause.

11. Ms. Readman was employed by Ms. Neubauer as a caregiver from September 24, 2011, to June 1, 2013, at the rate of $183.00 a day.

12. The Director conducted an investigation on the complaint, receiving information and evidence from Ms. Readman, Ms. Neubauer and several other persons who provided evidence on behalf of one or the other party.

13. The claim by Ms. Readman arose from events that transpired on June 1, 2013. The parties provided slightly differing versions of the events, but there was common ground that the events were precipitated by a desire by Ms. Readman to change the protocol with respect to Ms. Neubauer's toileting and bowel care. There is also no disagreement that discussions prior to June 1, 2013, had resulted in Ms. Neubauer agreeing to try the new protocol. On June 1, 2013, however, Ms. Neubauer expressed concerns to Ms. Readman about the new protocol and the ensuing conversation about that resulted in Ms. Readman leaving the workplace.

14. Ms. Neubauer did not attempt to call Ms. Readman back to work after June 1, 2013, and, on June 12, 2013, received a request from Ms. Readman for her Record of Employment and termination pay.

15. On June 14, 2013, Ms. Neubauer provided a response to Ms. Readman's claim for termination pay, which included, in part, the following:

> I believe that you terminated the employment by refusing to do a particular part of the job that you had been doing since the beginning of your employment with me, an approximate 20 month time period… I informed you that I would be putting my body in jeopardy but I would be willing to try the change you

> were demanding. If your way of cleaning me hurt me I needed to know that you would stop and return to the original method. When you said you would not be willing to return to the original way it meant that I could not give you 2 weeks notice and had to let you go right away. I could not risk being hurt in order to have you stay or give you notice.…

16. The Director did not entirely accept the version of events described in the above excerpt, noting first, the parties agreed Ms. Readman stated, as she left the workplace, "I'll leave it to you to call me", and that Ms. Neubauer had apparently anticipated a disagreement with Ms. Readman by pre-arranging with another caregiver to be available to come to work. The Director summarized the evidence to be that a "difference of opinion" between the two occurred that resulted in Ms. Readman leaving the workplace, making the comment to Ms. Neubauer set out above. The Director found Ms. Readman had not quit her employment and that her employment had been terminated by Ms. Neubauer without cause or written notice.

17. The Determination states the right to appeal and the requirement deliver an appeal to the Tribunal by 4:30 pm on July 21, 2014.

18. The appeal was delivered to the Tribunal on August 22, 2014.

ARGUMENT

19. Ms. Neubauer seeks an extension of the time for delivering this appeal. Before setting out her arguments on the chosen grounds of appeal, I shall set out the reasons provided in the appeal submission for seeking an extension of the appeal period.

20. The Determination and reasons were issued June 13, 2014, and sent to Ms. Neubauer on that date. Ms. Neubauer appears to accept the letter enclosing the Determination and reasons was received, but says it was misplaced after it was received. It was located by her sometime on the August long weekend and on August 5 she phoned the Tribunal to explain she had just found the letter with the appeal deadline. She had noted the appeal deadline had passed. She was directed to the Tribunal's website but says it wasn't until August 11 that she was able to download the Appeal Form. Because of her extreme slowness at writing, she was not able to complete the appeal and deliver it to the Tribunal until August 22, 2014.

21. On the merits, Ms. Neubauer argues the Director committed the following errors of law by ignoring the evidence, which she submits showed Ms. Readman committed an act of wilful misconduct that justified her immediate dismissal. She adds that her act of misconduct was totally inconsistent with her continued employment.

22. Ms. Neubauer also argues the Director failed to observe principles of natural justice in making the Determination by:

1. failing to indicate what evidence was relied on in making the finding on Ms. Readman's entitlement to compensation for length of service;
2. not providing Ms. Neubauer with an opportunity to respond to Ms. Readman's testimony; and
3. not referring to evidence provided by her.

ANALYSIS

23. The grounds of appeal are statutorily limited to those found in section 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. 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 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal.

25. Before addressing the relative merits of the appeal, I will consider Ms. Neubauer's request to extend the appeal period, applying the circumstances of this case to the principles and factors used by the Tribunal in considering such requests.

26. The *Act* imposes an appeal deadline, and the other deadlines relating to the efficient handling of appeals, to ensure appeals are dealt with promptly: see section 2(d). The *Act* allows the appeal period to be extended on application to the Tribunal. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:

> Section 109 (1) (b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

27. The Tribunal has developed a principled approach to the exercise of its discretion as set out in *Re Niemisto*, BC EST # D099/96. The following criteria should be satisfied to grant an extension:

i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory limit;

ii. there has been a genuine and ongoing *bona fide* intention to appeal the Determination;

iii. the respondent party (*i.e.,* the employer or employee), as well the Director, must have been made aware of the intention;

iv. the respondent party will not be unduly prejudiced by the granting of an extension; and

v. there is a strong *prima facie* case in favour of the appellant.

28. The above criteria have been considered and applied in numerous decisions of this Tribunal. These criteria are not exhaustive. Other, perhaps unique, criteria can also be considered. The burden of demonstrating the existence of any such criterion is on the party requesting the extension of time. The Tribunal has required "compelling reasons": *Re Wright*, BC EST # D132/97.

29. Although the delay in this case is fairly lengthy that fact does not determine the outcome of the request. I must consider all of the criteria identified above, as well as any unique criteria that have been identified in the

request. In this case Ms. Neubauer has raised her "severe physical disability" as having affected her being able to attend to an appeal in a timely manner.

30. Considering the listed criteria, it does not appear that Ms. Neubauer expressed to the Director an intention to appeal the Determination or convey to any other party an intention to do so prior to the expiry of the appeal period.

31. A consideration of undue prejudice is, in this case, a neutral factor.

32. In the circumstances, I am less than satisfied that the explanation for the delay in this case is reasonable and credible. Even accepting Ms. Neubauer's disability delayed the formulation of her appeal submission during the period from August 11 to August 22, 2014, she admittedly had mislaid the Determination for a period extending from the date of receipt – deemed by section 122 of the *Act* to be no later than July 21, 2014 – until the August long weekend without any apparent concern or making any effort to acquire another copy. Based on the numerous communications she had with the Director during the complaint process, I find this failing somewhat perplexing and that it negatively impacts on the stated "shock and relief" she felt at coming across the Determination in her duffel bag. The lack of diligence shown in this period militates against an extension of the appeal period.

33. Finally, one of the criteria considered in deciding whether the appeal period will be extended is the *prima facie* strength of the case on appeal. I also note that the presumptive merits of an appeal stand as a distinct consideration on which an appeal may be dismissed under section 114(1)(f) of the *Act*, which is set out above.

34. When considering the relative merits of an appeal, or the *prima facie* strength of the case on appeal, the Tribunal considers the basis for the appeal and applies that to the statutory grounds of appeal and to well established principles which operate in the context of appeals generally and, more particularly, to the issues raised by the appeal. On that basis, I will now consider the relative merits of this appeal and its prospects for succeeding.

35. Ms. Neubauer argues the Director committed an error of law by ignoring evidence that showed wilful misconduct by Ms. Readman justifying immediate termination. 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.

36. The Tribunal has also recognized that a failure to observe principles of natural justice is a species of error of law: see *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BC EST # RD317/03.

37. One of the difficulties for Ms. Neubauer in advancing this aspect of the appeal is that the question of whether an employee has been dismissed for just cause is predominantly a question of fact. Occasionally this question can be one of mixed law and fact but that is not the case here.

38. The principles that operate in the context of the arguments made by Ms. Neubauer on this ground of appeal are: first, matters the Tribunal might be construe as errors of law are those identified in the *Gemex Developments Corp.* decision, above, which the Tribunal has accepted, adopted and consistently applied in its decisions; second, what is an error of law does not include errors of fact or errors of mixed law and fact that do not contain a discreet and extricable question of law; third, the Tribunal has no authority to consider appeals based on challenges to findings of fact that do not amount to an error of law; fourth, an error of law, in such circumstances, requires an appellant to show the fact finder made a "palpable and over-riding error" or that the finding of fact was "clearly wrong"; fifth, the weight to be given to evidence presented during the complaint process is a matter in the discretion of the delegate of the Director charged with assessing the facts and reaching conclusions on those facts and; sixth, the Tribunal is reluctant to second guess findings of fact that are grounded in the evidence or are based on a view of the evidence provided that could reasonably have been entertained.

39. By way of a general comment, the onus on Ms. Neubauer to prove she was justified in summarily dismissing Ms. Readman for cause is a high one. Ms. Neubauer says the Director committed an error of law by ignoring facts that demonstrated wilful misconduct on the part of Ms. Readman and subsequently committed an error of law by failing to find this act of misconduct justified summary dismissal.

40. I do not accept this argument, for two reasons.

41. First, the Tribunal conducted an extensive examination of the jurisprudence involving "wilful disobedience" in *James Stephens - and - Chamberlain Spring Ltd.*, BC EST # D131/00. Of relevance on this point is that key factual elements for finding wilful disobedience include evidence of a "clear and specific" order and a "deliberate and intentional refusal to obey the order". The jurisprudence also requires, in most circumstances, that the employee be forewarned that a refusal, or continued refusal will result in their immediate dismissal.

42. Second, my examination of the Determination and the section 112(5) "record" facts do not show that Ms. Readman was clearly and specifically ordered to perform the original protocol and "deliberately and intentionally refused"; there is also an absence of any indication that she would be immediately dismissed if she did not perform the toileting and bowel care according to the original protocol. The evidence of Ms. Neubauer set out in the Determination indicates that following the discussion concerning the protocol, "Ms. Readman lingered in the workplace for a bit and then asked if she could leave and Ms. Neubauer told her to go ahead".

43. On the facts, therefore, there was no need for the Director to consider whether Ms. Readman could have been summarily dismissed for wilful misconduct – there was no evidence of wilful misconduct. It may have been helpful for the Director to have said that, but I find the Director did not err by addressing the issue of Ms. Readman's leaving the workplace from the perspective of a possible quit. In this respect, I note that in her initial response, the substance of which is reproduced above, Ms. Neubauer squarely raised the spectre of a quit. Also, there is simply no evidence to support summary dismissal.

44. For the above reasons, this appeal cannot succeed on the error of law argued by Ms. Neubauer as that term is defined in the *Gemex Developments Corp.* decision.

45. Ms. Neubauer also submits there was a breach of natural justice by the Director in making the Determination. I shall address each of the arguments made in the appeal submission as they are set out.

46. Ms. Neubauer says the Director failed to indicate which evidence was relied on in making the Determination. I disagree. On a reasonable reading of the Determination the Director provided a satisfactory analysis of whether Ms. Readman quit her employment. The evidence relied on by the Director on that question is obvious and clearly stated in the context of the test for deciding whether an employee has quit their employment. Applying a contextual approach to the reasons given in the Determination, it is also apparent the Director was not required to provide reasons for not finding facts supporting just cause. In this case, the absence of such facts speaks for itself when the section 112(5) "record" is considered.

47. Ms. Neubauer says she had no opportunity to respond to Ms. Readman's evidence. That assertion does not really address whether Ms. Neubauer was provided with the procedural rights that are required to be accorded to parties to a complaint proceeding under the *Act*. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal briefly summarized the natural justice concerns that typically operate in the context of the complaint process:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party: see *BWI Business World Incorporated*, BC EST #D050/96.

48. It is clear from the "record" that Ms. Neubauer was afforded the procedural rights contemplated by the above statement, which, I note, are also statutorily protected by section 77 of the *Act*.

49. Ms. Neubauer knew the case against her, which was a claim for compensation for length of service arising from her termination of Ms. Readman on June 1, 2013, and was given the opportunity to present evidence and argument to the Director in support of her position. Ms. Neubauer was aware of the facts on which the claim was based and given the opportunity to respond to those facts.

50. The fact the Director did not refer to particular evidence in the Determination is neither indicative of a failure to consider that evidence nor determinative of breach of natural justice. It is clear from the communications that transpired between the Director and Ms. Neubauer on September 23, 26 and 29, 2013, that the Director understood the position taken by her.

51. The excerpts from the *Interpretation Act*, [RSBC 1996] CH. 238 do not assist this appeal as their application to the issues is not apparent and is not explained in the appeal submission.

52. It is appropriate here to address Ms. Neubauer's submissions concerning the section 112(5) "record". I am not persuaded there is any deficiency in the completeness of the "record". The series of e-mails which Ms. Neubauer contends should be included relate primarily to the process, not to elements that would comprise or impact on the findings made in the Determination. It is noteworthy that in response to Ms. Neubauers's several demands to be provided with "copies of Ms. Readman's submitted case against me", the Director says, in a 28 Oct 2013 e-mail:

> Ms. Readman is alleging that her employment was terminated without written notice or just cause. If I have concern about any evidence that I receive, I will be sure to contact you and put the evidence to you so would have an opportunity to dispute it.

53. It is not unusual that notes of telephone discussions are not included in the "record". I am making no final judgement on whether this practice will be consistent with the requirements of the *Act* concerning disclosure of the "record" in all cases, but it appears in this case, the substance of the parties' positions concerning glove compliance was noted in the Determination, but not considered as it was not found to be relevant to the issue being decided. The Director says "I am not prepared to offer any opinion as to which protocol provided the better quality of care."

54. My final comment relates to the October 17, 2014, correspondence from Ms. Neubauer. While this document purports to be a reply to a submission of the Director concerning the completeness of the "record", in fact it is a re-working of Ms. Neubauer's position on the termination of Ms. Readman, containing challenges to findings of fact and statements of fact that were not accepted by the Director and are not justified on an examination of the "record". Overall, the document is not an appropriate response and I may not consider it. Those submissions that do comment on the "record" do not add weight to her initial submission on its contents and completeness.

55. In sum, I find there is no natural justice issue which arises in the circumstances and this ground of appeal has no reasonable possibility of succeeding.

56. For the above reasons, I find no reason to consider extending the time period for filing an appeal; I find the reason provided for the delay is not reasonable and credible and on its face the appeal does not demonstrate a strong case. As well, for the reasons stated above, I find there is no reasonable prospect this appeal can succeed.

57. The purposes and objects of the *Act* would not be served by requiring the other parties to respond to it.

58. I therefore, dismiss the appeal under section 114(b) and (f) of the *Act* and confirm the Determination.

ORDER

59. Pursuant to section 115 of the *Act*, I order the Determination dated June 13, 2014, be confirmed in the amount of $892.38, together with any interest that has accrued under section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal