Employment Standards TRIBUNAL

An appeal

- by -

Guy Claude Brisebois carrying on business as Tune Town Childcare Centre
("Tune Town")

- 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.: 2016A/113

DATE OF DECISION: October 19, 2016

DECISION

SUBMISSIONS

Guy Claude Brisebois	on his own behalf carrying on business as Tune Town Childcare Centre

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Guy Claude Brisebois carrying on business as Tune Town Childcare Centre ("Tune Town") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on July 13, 2016. In that Determination, the Director found that Tune Town had contravened sections 58 and 63 of the *Act* in failing to pay Iris Twidale compensation for length of service. The Director ordered Tune Town to pay $2,236.01 in wages, and vacation pay and interest on those wages. The Director also imposed a $500 administrative penalty for the contraventions, for a total amount owing of $2,736.01.

2. Tune Town appeals the Determination contending that the delegate erred in law.

3. This decision is based on Tune Town's written submissions, the section 112(5) "record" that was before the delegate at the time the decision was made, and the Reasons for the Determination.

FACTS AND ARGUMENT

4. Iris Twidale was employed by Tune Town, a day care business, as an early childhood educator (ECE) from October 1, 2012, until March 9, 2016. On March 28, 2016, Ms. Twidale filed a complaint alleging that Tune Town contravened the *Act* by failing to pay her compensation for length of service.

5. The delegate held a teleconference hearing into the complaint on June 23, 2016. Mr. Brisebois represented Tune Town and Ms. Twidale represented herself. At the hearing, Tune Town took the position that Ms. Twidale's employment had been terminated for cause. In the alternative, Tune Town argued that Ms. Twidale was unfit for employment and that because Ms. Twidale no longer held the proper certification, it was impossible for her to perform her contract of employment.

6. Briefly, the facts before the delegate were as follows.

7. On March 8, 2016, Ms. Twidale received a note from her doctor indicating that she was "unfit for employment, for medical reasons, for the next four weeks, pending further review." Ms. Twidale submitted the note to Mr. Brisebois and to Lisa Brisebois, Tune Town's manager, by text message after she was unable to reach them by telephone. Ms. Twidale also asked Mr. Brisebois for a Record of Employment (ROE). The following morning, Ms. Brisebois texted Ms. Twidale, asking her to let her know she was okay. Ms. Twidale responded that she was fine but that the doctor was not happy with some results. On March 9, Mr. Brisebois terminated Ms. Twidale's employment "with just cause."

8. Mr. Brisebois' evidence was that Ms. Twidale's illness put him in a difficult situation because he had exactly the number of ECE's required to meet the regulatory requirements specifying the ratio of ECE's to children. Because Ms. Twidale did not know when she would be able to return to work and it was difficult to hire a replacement for her on short notice, Mr. Brisebois did not know how long he would be able to meet the

regulatory requirements. Consequently, he contacted the Vancouver Island Health Authority ("VIHA") to inquire into his options. Mr. Brisebois' evidence was that he was told that because Ms. Twidale was "unfit for employment", he could not employ her until she was fit. Mr. Brisebois asserted that the *Child Care Licensing Regulation* required him to prove that every employee was psychologically and physically fit for employment and that if they are not, their ECE license would be revoked. Mr. Brisebois said that he then contacted the Employment Standards Branch and was informed that his best course of action was to terminate Ms. Twidale for cause on the grounds that she could not meet the minimum standards for the position. Mr. Brisebois took the position that the wording of the doctor's note – that Ms. Twidale was "unfit for employment" – required a full medical assessment and constituted grounds for termination.

9. Mr. Brisebois conceded that he did not get any details of Ms. Twidale's medical condition before terminating her employment.

10. Ms. Twidale denied that her ECE licence had been revoked. She also contended that her ECE certificate was not dependent on her fitness.

11. The delegate noted that, under section 63 of the *Act*, an employer must provide written notice or compensation for length of service upon termination of an employee. That liability is discharged if an employee is terminated for cause. Section 63 also does not apply if the employment contract is impossible to perform due to an unforeseen event or circumstances. The Employer has the burden of establishing just cause.

12. The delegate concluded that Tune Town had not established grounds to terminate Ms. Twidale's employment. He noted that Mr. Brisebois had not alleged any misconduct on Ms. Twidale's part, that she had not contravened any policy or had any history of unauthorized absences, and had no prior written warnings or disciplinary action on her record. The delegate also determined that nothing that Ms. Twidale did constituted a repudiation of the employment contract.

13. The delegate also considered whether or not Ms. Twidale's illness constituted frustration of the employment contract. After reviewing the jurisprudence on this issue, he concluded that it did not because there was no evidence that Ms. Twidale's illness was permanent or potentially permanent.

14. The delegate noted that the *Child Care Licensing Regulation* permitted Mr. Brisebois to replace an ECE who is absent because of illness, emergency, vacation or temporary leave with an ECE or an ECE assistant for a period of up to 30 days. The delegate found that Mr. Brisebois was mistaken when he concluded that Ms. Twidale's ECE certificate had been revoked.

15. Finally, the delegate considered that the only information Mr. Brisebois had when he made the decision to terminate Ms. Twidale's employment was a doctor's note that indicated she would be unable to work for four weeks. The delegate found that Mr. Brisebois' interpretation of the note, which is that Ms. Twidale was "unfit" based on a full medical assessment, without any basis for that interpretation, was unfounded. The delegate found no evidence that Ms. Twidale was permanently disabled.

16. The delegate concluded that Ms. Twidale was entitled to compensation for length of service

Argument

17. Tune Town asks that the Tribunal conduct an "in depth review" of the Determination based on the delegate's misunderstanding of the *Child Care Licensing Regulation*.

18. Specifically, Tune Town contends that all employees must have "up to date medical notes" as a condition of their employment, and that employees without those notes are not employable in a childcare setting. Tune Town asserts that the delegate's failure to appreciate this evidence constituted an error of law.

19. In his appeal, Mr. Brisebois repeats many of the arguments made before the delegate including the assertion that Ms. Twidale had an ulterior motive in obtaining the doctor's note. He also repeated his arguments about the distinction between a doctor's sick note and a medical certificate. Mr. Brisebois further argued that Ms. Twidale refused to discuss her medical condition with him to "come up with a suitable plan." Mr. Brisebois also argues, as he did before the delegate, that Ms. Twidale no longer met the requirements for the job and that the delegate ought to have contacted the Vancouver Island Health Authority to inquire into the licensing requirements.

20. Mr. Brisebois relied on *Kiernan v. Qantas* in support of his argument that Ms. Twidale had an obligation to provide sufficient information to enable Tune Town to comply with health and safety regulations and to make operational arrangements to deal with her absence.

ANALYSIS

21. Section 114(1) of the *Act* provides that 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 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.

22. 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.

23. Acknowledging that the majority of appellants do not have any formal legal training and, in essence, act as their own counsel, the Tribunal has taken a liberal view of the grounds of appeal. As the Tribunal held in *Triple S Transmission Inc.*, (BC EST # D141/03), while

> …most lawyers generally understand the fundamental principles underlying the "rules of natural justice" or what sort of error amounts to an "error of law", these latter terms are often an opaque mystery to someone who is untrained in the law. In my view, the Tribunal must not mechanically adjudicate an appeal based solely on the particular "box" that an appellant has--often without a full, or even any, understanding--simply checked off.

> The purposes of the *Act* remain untouched, including the establishment of fair and efficient dispute resolution procedures and, more generally, to ensure that all parties receive "fair treatment" [see subsections 2(b) and (d)]. When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, *prima facie,* invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

24. Where there is any doubt about the grounds of an appeal, the doubt should be resolved in favour of the appellant. I have therefore considered whether or not Tune Town has demonstrated any basis for the Tribunal to interfere with the Determination. I conclude that Tune Town has not met that burden.

Error of Law

25. As I understand Tune Town's submission, the delegate erred in concluding that Tune Town had not demonstrated that Ms. Twidale's employment had been terminated for cause. Much of Mr. Brisebois' submissions are nothing more than arguments already made before the delegate and fully addressed. As the Tribunal has said on many occasions, an appeal is not an opportunity to re-argue a case that has been fully made before the delegate. Tune Town must demonstrate that the delegate's analysis constitutes an error of law.

26. 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.

27. The delegate correctly referred to section 63 of the *Act,* which establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

28. The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures. Tune Town does not dispute the delegate's conclusion that it did not assert, or demonstrate, that Ms. Twidale had failed to meet any performance standards or failed to comply with workplace rules.

29. The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship. Again, Tune Town did not assert, either at the hearing or on appeal, that Ms. Twidale's submission of a doctor's note constituted misconduct.

30. At the hearing, Tune Town's sole justification for terminating Ms. Twidale was that her doctor's note made her "unfit" for work. I find no error in the delegate's analysis of the facts or his conclusion that the submission of a doctor's note does not constitute just cause.

31. It appears that Tune Town's position at the hearing was, and remains, that because Ms. Twidale's doctor had used the words "unfit for employment," her ECE certification was invalid, causing the employment relationship to be frustrated. I note that this argument is at odds with Tune Town's written notice of termination, dated March 9, 2016, which reads, in part, as follows:

> …I am now in a position where your inability to work put great pressure on my business, and non-compliance due to ratio. I am now needing a new ECE immediately to manage the shortfall.
>
> Since your doctor's note stipulates that you will be off for 4 weeks for medical reasons, and that your situation will be reviewed at a later date, I am now forced to terminate your employment with just cause and provide you with your ROE for medical EI, and subsequent EI as required.

32. The tenor of the letter, written one day after Mr. Brisebois received Ms. Twidale's note, suggests that he was more concerned about his daycare business than Ms. Twidale's well-being or the prognosis for her return to work. There was no suggestion, or inference, in the termination letter that Tune Town was terminating Ms. Twidale's employment because she was "unfit" for work.

33. I find no error in the delegate's analysis or conclusion on the question of whether the employment contract was "frustrated". Section 65(1)(d) of the *Act* provides that an employer is not liable to pay compensation for length of service where an employee is employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance. This section codifies the common law doctrine known as "frustration" whereby a contract is deemed at an end if an external event, beyond the control of either party, renders the continued performance of the agreement impossible. The employer has the burden of demonstrating that the event makes it both impossible to perform the employment and that the impossibility of the performance was due to an unforeseeable event or circumstance. (see *Labyrinth Lumber Ltd.*, BC EST # D407/00, *Mato's Consulting Ltd.*, BC EST # D105/08)

34. In *Mohammed Khan* (BC EST # D067/01) the Tribunal said, in part, as follows:

> The *Act* was intended to prevent employers from terminating employees because they were off work temporarily for medical reasons. The *Act* was not intended to give a permanently disabled employee compensation and preferential treatment, in a "cease operations" situation because of the disability.

35. The Tribunal found that Mr. Khan was incapable of performing the contract of employment, through no fault of his own or of his employer. Among other things, the Tribunal found that the employer was not required to pay Mr. Khan compensation for length of service because the performance of the contract was impossible under s. 65(1)(d):

> In my view, the disability in this case does amount to a contract impossible to perform due to an unforeseeable event, and therefore the employer was not required to give notice of termination of employment.

36. There was no evidence before the delegate that Ms. Twidale was permanently disabled. The delegate concluded, rightfully in my view, that the note was not evidence Ms. Twidale was unable to return to work after four weeks. In other words, the medical note was evidence that Ms. Twidale was to be off work temporarily. Given that Mr. Brisebois terminated Ms. Twidale's employment one day after receiving the doctor's note there was simply insufficient time or information on which to make an assessment that she was

permanently disabled. Furthermore, Tune Town's position that the doctor's note was evidence that Ms. Twidale was medically unfit to perform her duties is untenable. The note, when read in its entirety, indicates a temporary medical incapacity.

37. Although Tune Town contends that the delegate ought to have "investigated" the childcare licensing requirements, the burden was on Tune Town to present the necessary evidence to support its position.

38. On appeal, Tune Town presented, as new evidence, an email from a licensing officer with Community Care Facilities Licensing outlining the requirements for hiring individuals in a community care facility under the *Child Care Licensing Regulation*. The *Child Care Licensing Regulation* prohibits a licensee from employing an individual unless the licensee has met with the individual and obtained, among other things, (e) *a statement signed by a medical practitioner indicating that the person is physically and psychologically capable of working with children and carrying out assigned duties in a community care facility*. [*emphasis* mine]

39. I am not persuaded that the delegate misapplied the law. The *Child Care Licensing Regulation* imposes an obligation on Tune Town to obtain a medical practitioner's note regarding a potential employee's fitness prior to hiring that individual. Clearly, Ms. Twidale met the requirements at the time she was hired. The provision does not apply to Tune Town's relationship with Ms. Twidale, who had been employed for over three years.

40. Mr. Brisebois also referred to a case identified as *Kiernan v. Qantas*. However, a copy of the decision was not provided on appeal nor did Mr. Brisebois provide a citation for the decision. It does not appear to be a Tribunal decision and it is impossible for me to consider the case without reading it and determining its application to the facts before me. However, I infer that the case involved an employee with a medical condition that prevented that employee from working, either full or part time. Given that there is no evidence Ms. Twidale was permanently unable to work or that Mr. Brisebois made any inquiries about Ms. Twidale's ability to work in any capacity before terminating her employment, I would not consider it to be relevant in any case.

41. I conclude that Tune Town has not met the burden of establishing any of the statutory grounds of appeal. I find the appeal has no prospect of success and it would not serve the objects and purposes of the *Act* to require submissions from the other parties.

42. The appeal is dismissed.

ORDER

43. Pursuant to section 115 of the *Act*, I order that the Determination, dated July 13, 2016, be confirmed in the amount of $2,736.01 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