Citation: J. Dewitt Enterprises Ltd. (Re)
2024 BCEST 40

EMPLOYMENT STANDARDS TRIBUNAL

An appeal
pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

J. Dewitt Enterprises Ltd.

- of a Determination issued by -

The Director of Employment Standards

PANEL: Carol L. Roberts

FILE NO.: 2023/193

DATE OF DECISION: May 3, 2024

DECISION

SUBMISSIONS

Brad Martyniuk — counsel for J. Dewitt Enterprises Ltd.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* ("*ESA*"), J. Dewitt Enterprises Ltd. ("Employer") appeals a determination issued by a delegate of the Director of Employment Standards ("Director") on November 29, 2023 ("Determination").

2. Al Anderson ("Employee") filed a complaint with the Director alleging that the Employer had contravened the *ESA* in terminating his employment without paying compensation for length of service, failing to pay a bonus, and failing to pay all overtime wages.

3. A delegate of the Director ("Investigating delegate") investigated the Employee's complaint and issued an Investigation Report ("Report"). The Report was provided to the parties for response on July 6, 2023. A second delegate ("Adjudicating delegate") reviewed the information produced during the investigation, the Report, and the responses of the parties to that Report before issuing the Determination.

4. The Adjudicative delegate determined that the Employer had contravened sections 40, 42, 58 and 63 of the *ESA* in failing to pay the Employee compensation for length of service and overtime wages. The Director determined that the Employee was entitled to compensation for length of service, overtime wages and vacation pay on those outstanding wages, plus accrued interest in the total amount of $16,755.61.

5. The Director also imposed two $500 administrative penalties for the contraventions of the *ESA* for a total amount owing of $17,755.61.

6. The Employer does not dispute the Director's finding that the Employee was entitled to overtime wages and associated vacation pay. The Employer appeals the Director's finding that the Employee was entitled to compensation for length of service. The Employer contends that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

7. The Director provided a copy of the section 112 "record" to the parties. Both the Employer and the Employee confirmed to the Tribunal that the record was complete.

8. Section 114 of the *ESA* provides that the Tribunal may dismiss all or part of an appeal without seeking submissions from the other parties or the Director if it decides that the appeal does not meet certain criteria. After reviewing the appeal submissions and the record, I found it unnecessary to seek submissions from the Employee or the Director.

9. This decision is based on the section 112(5) "record" that was before the Adjudicating delegate at the time the Determination was made, the appeal submission, and the Reasons for the Determination.

FACTS

10. The facts relevant to the issue under appeal are as follows.

11. The Employer operates an excavation contracting company in Langley, British Columbia. John Dewitt was the principal of the company and one of its officers and directors. The Employee worked for the Employer as a short-haul truck driver from October 1, 2009, until December 7, 2021.

12. On December 1, 2021, Mr. Dewitt asked the Employee to meet with him the following day. The Employee initially refused, believing that the outcome of the meeting was predictable, and that the Employer wanted to terminate his employment. Mr. Dewitt informed the Employee that he would not be assigned any additional work until he met with him.

13. The parties ultimately met on December 3, 2021. What transpired at that meeting was disputed, but both parties agreed the discussion, which was about allocation of work to the Employee, and what was characterized by the Employer as 'time theft,' was heated. The Employee was of the view that, following the meeting, everything had been resolved.

14. On Sunday, December 5, 2021, the Employer texted the Employee his Monday, December 6, 2021, work assignment. On December 6, 2021, the Employer informed the Employee that the work for that day was postponed due to poor weather conditions. The Employee worked a full day on December 7, 2021.

15. On December 8, 2021, the Employer emailed the Employee a letter terminating his employment for cause, effective immediately. The Employer identified the basis for the just cause termination as time theft and for threatening Mr. Dewitt with violence during the December 3, 2021, meeting.

16. The Employer contended that it had just cause to end the Employee's employment. In counsel's submission to the Investigating delegate, the Employer amplified the Employer's reasons for the termination to include the Employee's insubordination "on a number of occasions."

17. The first issue addressed by the Adjudicating delegate was whether the Employee was entitled to compensation for length of service. The Adjudicating delegate considered section 63 of the *ESA* which provides that employees are entitled to compensation for length of service unless an employer can establish that it had just cause to terminate the employment relationship. The Adjudicating delegate also considered that an employer had the burden of establishing just cause and set out the test for determining just cause.

18. The Adjudicating delegate then considered the Employer's position that it had just cause to terminate the Employee's employment without written notice or compensation for length of service for the following reasons:

    a) Refusing previous work requests;

    b) Previous instances of insubordination;

    c) Making threats of violence during the December 3, 2021 meeting; and

    d) Intentionally logging more time than he knew he was entitled to claim.

19. The Adjudicating delegate determined that the Employer had not substantiated just cause for any of these reasons. She found that the Employer did not provide any details about where, when, or why the Employee had refused work requests or what disciplinary steps had been taken in response to those refusals. The Adjudicating delegate found that the Employer had failed to demonstrate just cause to terminate the Employee for this reason.

20. Although the Adjudicating delegate found that the Employee was insubordinate in refusing to meet with Mr. Dewitt on December 2, she concluded that, "[b]y providing the [Employee] with the opportunity to meet at alternate times and then scheduling him for more work after they did meet, the Employer demonstrated that the initial refusal and adversarial texts" were not sufficiently serious to fundamentally breach the employment relationship and establish just cause.

21. The Adjudicating delegate also considered the evidence that both parties described threats of violence at the December 3, 2021, meeting but each accused each other of making the threats.

22. She considered notes made by Mr. Dewitt related to the incidents between December 1 and 8, 2021, and determined that the notes and related text messages were insufficient to establish that the Employee made threats of violence and left the meeting following a request to be laid off.

23. The Adjudicating delegate considered that, had the Employee threatened Mr. Dewitt with violence on December 3, he would not have been offered more work. The parties agreed that the Employee was offered, and did perform, work for the Employer after this meeting. The Adjudicating delegate found that the dispute on December 3, 3021, was "not significant enough to preclude the [Employee] from continuing employment."

24. The Adjudicating delegate found that the Employer had failed to demonstrate that the Employee had made threats of violence or that he had made comments sufficiently serious to terminate the Employee's employment. The Adjudicating delegate determined that the Employer had not demonstrated just cause to terminate the Employee.

25. Finally, the Adjudicating delegate also found there was insufficient evidence to establish that the Employer had just cause to terminate the Employee for recording additional time on his daily work hours. The Employer contended this practice was "time theft" which the Employee knew was not permitted, while the Employee, while acknowledging his practice of adding time as compensation for not taking paid breaks, contended that not only was it common practice amongst employees, he was never told that it was not permitted. The Employee further argued that this issue was discussed at the December 3, 2021, meeting and he was subsequently scheduled for more work and did not receive any verbal or written warnings. The Employee's position that this was common practice was supported by a former site supervisor and by a former labourer.

26. The Adjudicating delegate concluded that the Employer had failed to demonstrate it had just cause to terminate the Employee for logging additional time for not taking his paid breaks.

ARGUMENTS

27. The Employer contends that the Adjudicating delegate:

a) erred in law in making findings and relying on findings that are unsupported by the evidence or misapprehended the evidence in determining that the Employer made a threat of violence against the Employee and in finding that the Employee did not make a threat of violence against the Employer; and

b) failed to observe the principles of natural justice in investigating the complaint rather than holding an oral hearing.

ANALYSIS

28. Section 114(1) of the *ESA* 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.

29. Section 112(1) of the *ESA* provides that a person may appeal a determination on 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.

Error of Law

30. 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.

31. The Employer contends that the Adjudicating delegate erred in law "in making findings, and relying on such findings in respect of which there is no evidence, or alternatively, no reasonable evidence that could reasonably support certain findings."

32. The Employer identifies the following passage from the Determination as a conclusion not supported by the evidence:

> Both the [Employee] and Mr. Dewitt describe threats of violence being made during the December 3, 2021 meeting, but each accuses the other of making the threats. (Determination, page R5)

33. In my view, the Employer misapprehends the Determination. There is nothing in this sentence that constitutes a finding by the Adjudicating delegate. It merely sets out the allegations the parties made against each other. The Adjudicating delegate's findings are set out later in the Determination.

34. After reviewing the evidence of the parties about what transpired at the meeting, the Adjudicating delegate found as follows:

> ...I find that the (Employer's) December 1-8, 2021 notes and related text messages are not sufficient to prove the Respondent's position that the [Employee] made threats of violence and left the meeting following a request to be laid off.
>
> As it was written contemporaneously and to the other person involved in the alleged confrontation, I have given weight to the December 8, 2021 text message where the [Employee] denies threatening Mr. Dewitt and says if anything it was Mr. Dewitt who was acting in a threatening manner. This text supports a conclusion that, while the meeting appears to have become hostile, the [Employee] did not threaten Mr. Dewitt with violence.
>
> I have considered and have given weight to the [Employee's] position that, had he threatened Mr. Dewitt with violence on December 3, 3021, the meeting would not have concluded with the offer of more work. There is no dispute that the [Employee] was offered and did perform work for the Employer after this meeting. This supports a conclusion that any dispute between Mr. Dewitt and the [Employee] was resolved and not significant enough to preclude the [Employee] from continuing employment.
>
> Mr. Dewitt's text message of December 7, 2021, in which he thanks the [Employee] for his work, acknowledges the [Employee's] frustration, explains the circumstances related to work changes and offers an additional half day of work, demonstrates that Mr. Dewitt intended to continue employing the [Employee] beyond that date and further supports the conclusion that the dispute on December 3, 2021 was not significant enough to stop the [Employee] from continuing employment.
>
> …
>
> While hostile comments may have been made by the [Employee] and Mr. Dewitt during the meeting, the Employer has failed to demonstrate that the [Employee] made threats of violence, or that the comments made during the meeting were considered serious enough to stop the [Employee] from continuing employment.
>
> For this reason, I find that the Employer has failed to demonstrate it had just cause to terminate the [Employee] for making threats of violence.
>
> (Determination page R6-R7)

35. It is clear from the Determination that the Adjudicating delegate determined that while the Employee may have made 'hostile' comments, the Employer did not consider them sufficiently serious to immediately terminate the Employee. The Adjudicating delegate concluded that the Employer had not discharged the burden of demonstrating just cause based on all of the evidence, including the Employer's December 7 text message as well as the offer of additional work following the meeting.

36. Similarly, although counsel for the Employer contends that the Adjudicating delegate erred in law by misapprehending the evidence that the Employee did not make threats of violence against the Employer, the Adjudicating delegate in fact found that the Employer had not discharged its burden of demonstrating that the Employee had made threats of violence or that the Employer considered them sufficiently serious. I find there was ample evidence before the Adjudicating delegate for her to arrive at this conclusion.

37. The Adjudicating delegate's overall conclusion was that, whatever happened in the meeting, given that the Employer offered the Employee additional work, which he performed, and sent him text messages thanking him for his work and explaining work changes, the Employer had not discharged the burden of establishing just cause. I find no error in her application of the *ESA* or her analysis of the facts in light of the Tribunal's decisions on just cause.

38. Counsel further contends that "the tenor and implication of the Delegate's comments is that upon a threat of violence being made by an employee, an employer should immediately terminate the employment relationship without consideration of the full context of the employment relationship, including a consideration of legal advice." Counsel's argument that it was appropriate for the Employer "to maintain a status quo" while seeking legal advice following the December 3, 2021, meeting is unsupported by any authority, and I find no basis in law for this supposition. While the law regarding condonation makes it clear that it is appropriate for an Employer to take a reasonable time to consider its legal position, the facts before the Adjudicating delegate supported a finding of condonation. While condonation was not expressly argued before the Adjudicating delegate, the Employer sent the Employee a text message thanking him for his work and scheduling him for further work, which supports a finding that the Employer did not consider the Employee's conduct sufficiently serious to immediately end the employment relationship. (see *Ogopogo Boat Sales Inc.*, BC EST # D099/11, and *Le Soleil Hospitality Inc*., BC EST # D050/14)

39. Given that the Employee had worked for the Employer for 12 years and had never received a letter of reprimand or verbal cautions during that time, I am not persuaded that the Adjudicating delegate's conclusions were unsupportable on the evidence before her.

40. In conclusion, I find that the Adjudicative delegate's decision was rationally based on the facts and I find no basis to interfere with the Determination.

Failure to observe the principles of natural justice

41. Natural justice is a procedural right which includes the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker.

42. Section 76 of the *ESA* grants the Director the discretion to decide the process by which a complaint will be determined. The Director's exercise of discretion in selecting the process cannot be interfered with

unless it is found to contravene a legal principle. (see the *Director of Employment Standards and Sarmiento*, BC EST # RD082/13) The Employer has not alleged any error in the exercise of the Director's discretion in this case.

43. Furthermore, the Tribunal has repeatedly stated that there is no absolute right to an oral hearing even where issues of credibility are at issue (see *D. Hall and Associates v. Director of Employment Standards and others* (2001 BCSC 575), *J. C. Creations Ltd. o/a Heavenly Bodies Sport,* BC EST #R D317/03)

44. While acknowledging there is no right to an oral hearing under the *ESA*, and that the Director has the discretion about whether to hold an oral hearing, the Employer argues that "he was not provided with any details by the Delegate as to how his conduct at the December 3 meeting could be considered a 'threat of violence' towards the Employee." Consequently, the Employer argues he was denied the opportunity to either cross-examine the Employee on his version of events or to provide further details or evidence of his conduct on that date to assist the investigation.

45. Once again, I find the Employer's argument to be misguided. The Adjudicating delegate's conclusion that the Employer had not discharged its burden of demonstrating it had just cause to terminate the employee was based primarily on the fact that the Employer offered the Employee work following the December 3, 2021, meeting. The Adjudicating delegate had sufficient objective evidence, including the Employer's text messages following that meeting, to arrive at that conclusion without conducting an analysis of the credibility of the parties. I find no error in the Adjudicating delegate's exercise of discretion not to hold an oral hearing.

46. I find, pursuant to section 114(1)(f) of the *ESA*, that there is no reasonable prospect that the appeal will succeed.

47. I dismiss the appeal.

ORDER

48. Pursuant to section 114(1)(f) of the *ESA*, I deny the appeal. Accordingly, pursuant to section 115(1) of the *ESA*, the Determination, dated November 29, 2023, is confirmed in the amount of $17,755.61, together with whatever interest that has accrued since that date.

Carol L. Roberts
Member
Employment Standards Tribunal