Employment Standards TRIBUNAL

Citation: Simran Sohal (Re)
2024 BCEST 55

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Simran Sohal

- of a Determination issued by -

The Director of Employment Standards

PANEL: Ryan Goldvine

FILE NO.: 2023/192

DATE OF DECISION: June 10, 2024

DECISION

SUBMISSIONS

Simran Sohal on her own behalf

OVERVIEW

1. This decision addresses an appeal ("Appeal") filed under section 112 of the *Employment Standard Act* ("*ESA*") by Simran Sohal ("Appellant") of a determination made by Shane O'Grady, a delegate ("Delegate") of the Director of Employment Standards ("Director"), on November 30, 2023 ("Determination").

2. The Appellant had complained that her Employer, Bear Creek Medical Clinic Ltd. ("Employer"), terminated her employment due to her pregnancy or pregnancy-related leave contrary to section 54 of the *ESA*. Upon review of the evidence, the Delegate concluded the Employer did not contravene section 54 of the *ESA*.

3. The Appellant appeals on the bases that the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made.

4. I have concluded that this case is appropriate to consider under section 114(1) of the *ESA*. Accordingly, at this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the Appeal, the written submissions filed with the Appeal, and my review of the material that was before the Director when the Determination was being made ("Record"). Under section 114(1), the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in the subsection, which reads:

> 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 any appeal if the tribunal determines that any of the following apply:
>
> (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;
>
> (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.

5. For the reasons that follow, I dismiss the Appeal under section 114(1)(f) as having no reasonable prospect of success.

ISSUE

6. The issue is whether this appeal should be allowed to proceed or be dismissed undersection 114(1) of the *ESA*.

THE DETERMINATION

7. The Delegate based the Determination on a review of all of the information on the file, including an investigation report ("Investigation Report") prepared by another delegate ("Investigating Delegate") and the responses provided by the parties to the Investigation Report.

8. The Appellant worked for the Employer as a clinic manager and commenced maternity/parental leave on March 20, 2020. Although the Appellant alleged that she was terminated during her leave, the Delegate determined that the Appellant worked for three days following the conclusion of her leave, prior to being advised of her termination.

9. The Appellant alleged that in advance of returning to work, the Employer initially suggested taking an extended leave without pay, and then subsequently insisted on a gradual return to work, instead of a return to full-time hours. After three days of work, the Employer told the Appellant that the business was not doing well, and as a result, was terminating her employment. Although the Employer told the Appellant that the business was not doing well, the Appellant disputed this, and insisted it was "business as usual" and that billings were, in fact, up. The Appellant also initially indicated that after her termination the Employer hired a new clinic manager for its New Westminster location.

10. The Appellant further relied on her assertion that other employees received pay increases while she was on leave, and that a doctor associated with the Employer had predicted the Appellant would be terminated after taking leave for pregnancy. The Appellant also provided evidence in the form of a letter from a colleague who provided details she said reflected the Employer's negative treatment of employees who became pregnant and took leave.

11. In response, the Employer confirmed that the reason for terminating the Appellant's employment was a reduction in work available to justify maintaining the role of clinic manager, in part due to the transition to a new software platform, but also to reduce overhead to assist in recruiting and retaining doctors for the clinic.

12. The Employer provided evidence of correspondence between them and the Appellant suggesting the reduced work hours upon return from leave was, in fact, agreed-to by the Appellant, if not initiated by her. The Employer also rejected the Appellant's evidence that suggested it treated employees who became pregnant or took leave different than those who did not.

13. Both parties provided detailed responses to the Investigation Report.

14. The Appellant rejected the Employer's assertions with respect to when the new software was implemented, and that she was unfamiliar with the software. She also disputed the extent to which the efficiencies arising from the new software would have impacted her own workload. The Appellant also further disputed the Employer's reasons for the timing of the termination.

15. In response to the Investigation Report the Employer pointed out that the doctor whose comments were relied on by the Appellant was not part of the management team and was not involved in the decision to terminate the Appellant. Further, the Employer provided additional evidence to support its contentions with respect to the timing of the software implementation. The Employer says the Appellant is conflating the timing of one doctor introducing the new software to the Employer with the timing of the software's full implementation throughout the clinic.

16. As noted above, the Delegate confirmed that the Appellant was not terminated during her pregnancy leave, but instead three days after returning, and placed little weight on the timing being so soon after her return. In the absence of any evidence, the Delegate also rejected the Appellant's contention that the decision to terminate her had been made while she was on leave, accepting instead the Employer's evidence that the decision was made at a meeting on March 23, 2021, at which the clinic's expenses, including salaries, were discussed.

17. The Delegate ultimately accepted the evidence of the Employer that changes to its operations, including the new software implementation, and an increase in the use of telemedicine, as compared with in-person appointments, led to the decision to eliminate the position of clinic manager, and to terminate the Appellant's employment. As a result, the Delegate concluded that the Appellant was not terminated due to her pregnancy, or pregnancy-related leave, and that the Employer did not contravene section 54 of the *ESA*.

ARGUMENTS

18. As noted above, the Appellant says the Director failed to observe the principles of natural justice in reaching the Determination, and that new evidence is available that was not available at the time the Determination was made.

19. In her submissions to this Tribunal provided Monday, January 15, 2024, the Appellant argues that:

    a. Rather than looking into the issue [the Investigating Delegate] kept bringing up irrelevant topics rather than concentrating on the actual facts;

    b. Her own evidence was "altered or ignored";

    c. A witness testified that the decision was taken to fire her while she was on protected leave [and that this evidence] was not taken into consideration; and

    d. The Employer lied throughout the investigations.

20. The Appellant indicates she was told the onus was on the Employer to demonstrate that the termination was not due to her pregnancy or pregnancy-related leave, and as a result she only replied to the evidence provided by the Employer.

21. In response to the Tribunal's requests to confirm the completeness of the Record, the Appellant pointed out certain documents she said were not included in the Record, and provided those, along with a note dated March 27, 2024, from the individual who had provided evidence on her behalf during the investigation.

22. The Delegate confirmed that certain of the documents identified by the Appellant had been inadvertently left out of the Record and should be included, but objected to the March 27 note being included in the Record as it was dated after the Determination was issued. The Delegate also discovered additional omissions from the Record and included those for completeness.

23. The Appellant disagreed with the Delegate's objection in relation to the March 27 note on the basis that it is "a crucial part of the case" and demonstrates that the investigation was not done right.

ANALYSIS

24. The grounds of appeal are statutorily limited under section 112(1) of the *ESA*, which reads:

> 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.

25. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is 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.

26. The Tribunal has noted, however, that a broad view should be taken of an appellant's choice of grounds of appeal: *Triple S Transmission Inc. o/a Superior Transmissions,* BC EST # D141/03. Accordingly, I deal with each of the three grounds, in turn.

Errors

27. I begin by noting that section 112(1) does not provide for an appeal based on errors of fact, nor does the Tribunal have the authority to consider appeals seeking to have different factual conclusions reached unless the findings raise an error of law: *Britco Structures Ltd.*, BC EST # D260/03.

28. The Tribunal has adopted the following definition of "error of law" set out by the BC Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 Coquitlam),* 1998 CanLII 6466 (BCCA)(*Gemex*):

> 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.

29. Much of the focus of the Appellant's arguments appear to surround the factual conclusions reached by the Delegate, and her allegations that many of the submissions made by the Employer were untruthful. She further indicates that her own evidence was "altered or ignored."

30. While the Appellant rejects the conclusions reached by the Delegate with respect to the timing of the Employer's transition to the new software system, for example, I am not persuaded these were conclusions reached in the absence of evidence, or on a view of the facts that could not reasonably be entertained. The Determination sets out and provides a basis for the Delegate's conclusions in this regard based on a review of the testimony and documentary evidence provided by both the Appellant and the Employer.

31. Similarly, the Delegate reviewed the evidence provided by the Appellant's witness and concluded that although she made allegations that the Employer mistreated other pregnant employees, she did not articulate any allegations against the Employer with respect to the Appellant, nor provide any first-hand information relating to the Appellant's termination. For these reasons, the Delegate identified that he placed little weight on the evidence of this witness.

32. Further to the Appellant's other allegations of untruthfulness on the part of the Employer, I note she confirms that all of these allegations were provided to the Investigating Delegate during the Investigation.

33. For all of these reasons, I am not persuaded that the Determination reflects an error in law.

Natural Justice

34. With respect to subsection 112(1)(b), a party alleging a failure by the Director to comply with principles of natural justice must provide some evidence in support of that allegation: see *Dusty Investments Inc. dba Honda North*, BC EST # D043/99 (*Re Dusty*).

35. The Tribunal has summarized the natural justice principles that typically operate in the complaint process, in *Imperial Limousine Service Ltd.*, BC EST # D014/05:

> 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)

36. As long as the appropriate process elements have been followed, it is unlikely the Director will be found to have failed to observe principles of natural justice in making the Determination. On the face of the material in the Record and in the information submitted to the Tribunal in this appeal, the Appellant was provided with the opportunity required by principles of natural justice to present her allegations and evidence, both directly and in response to the submissions and evidence of the Employer.

37. The Appellant clearly takes issue with the Delegate's conclusions that prefer the evidence and explanations of the Employer, but does not otherwise appear to allege that she was otherwise denied an opportunity to present her case or respond to the information provided by the Employer.

38. I note the Appellant also asserts that her evidence was "altered or ignored," from which I infer that she seeks to suggest the Investigating Delegate was biased against her, or conducted the investigation in a biased fashion. Further, as I note below, while I am not considering the May 27, 2024, letter from the Appellant's witness in this appeal, a similar assertion is made therein by that individual.

39. With respect to allegations of bias, the Tribunal has clearly and repeatedly affirmed that an allegation of bias must be proven on the evidence. The test for determining bias, either actual or a reasonable apprehension thereof, is an objective one, and the evidence presented should allow for objective findings of fact: *Re Dusty, supra.* I am not persuaded that, to the extent the Appellant is alleging bias, or the perception of bias, that she has provided any evidence which could support such an allegation.

40. For these reasons, I find there has been no failure on the part of the Director to observe the principles of natural justice in reaching the Determination.

New Evidence

41. The appropriate test for an appeal under section 112(1)(c) is as set out in *Davies et al.,* BC EST # D171/03. The test requires that:

(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.

42. I note that the Appellant did not provide any documents along with her appeal identified as "new evidence," nor provide a basis on which to support a finding that such evidence should now be considered.

43. The Appellant did, however, provide a note from her witness dated March 27, 2024, after her appeal was acknowledged, and at the time she was being asked to confirm the completeness of the Record.

44. I agree with the Delegate who indicated that this document should not form part of the Record, given that it was not something that was before the Director at the time the Determination was being made. This document, however, appears to be the only document before me that could be considered "new evidence," on which I might infer the Appellant could be relying on under this ground of appeal.

45. That said, this document was not provided with the Appeal, but more than two months later, when the contents of the Record were being confirmed. The document did not exist at the time the Appellant filed her appeal, nor did the Appellant indicate that this was the type of evidence she was seeking to rely on in

support her appeal. Accordingly, I am not prepared to accept this new document forms part of the Appeal before me.

46. This notwithstanding, the nature of the document is such that the Appellant seeks to rely on it to impugn the investigation, and the conclusions reached with respect to her witness' evidence. The document, on its face, describes the interactions between the witness and the Investigating Delegate, and provides her opinion that the Investigating Delegate was biased against the Appellant. The document does not provide any information in relation to the merits of the complaint or the Appeal.

47. For these reasons, there is no basis to interfere with the Determination on the basis of new evidence, or any other ground of appeal. Accordingly, I dismiss the Appeal pursuant to section 114(1)(f) as having no reasonable prospect of success.

ORDER

48. The Appeal is denied. Pursuant to section 115(1)(a) of the *ESA*, the Determination dated November 30, 2023, is confirmed.

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Ryan Goldvine
Member
Employment Standards Tribunal