Employment Standards TRIBUNAL

Citation: Thanh Vu (Re)
2024 BCEST 51

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Thanh Vu
("Mr. Vu")

- of a Determination issued by -

The Director of Employment Standards

PANEL: David B. Stevenson

FILE NO.: 2024/033

DATE OF DECISION: June 3, 2024

DECISION

SUBMISSIONS

Thanh Vu — on his own behalf

OVERVIEW

1. Thanh Vu ("Mr. Vu") has filed an appeal under section 112 of the *Employment Standards Act* (*"ESA"*) of a determination issued by Stephanie Zegarac, a delegate ("deciding Delegate") of the Director of Employment Standards ("Director"), on January 3, 2024 ("Determination").

2. The Determination found the *ESA* had not been contravened in respect of the termination of the employment of Mr. Vu by his employer, Tiger Tool International Incorporated, carrying on business as Tiger Tool ("Employer"), and that no wages were outstanding.

3. Mr. Vu challenges that finding, alleging the deciding Delegate committed an error of law and failed to observe principles of natural justice in making the Determination. While the appeal does not specifically set out the remedy sought by Mr. Vu, the logical inference is that he seeks to have the Tribunal find the Determination was wrong, allow his appeal, and either vary the Determination, or cancel it and refer his complaint back to the Director for further investigation.

4. On February 12, 2024, Mr. Vu attempted to email his appeal documents to the Tribunal. On the same day, he contacted the Tribunal by telephone seeking confirmation his appeal had been received by email. Due to an administrative error, he was incorrectly advised his appeal had been received. His appeal was re-sent by email and received by the Tribunal on March 8, 2024.

5. In correspondence dated March 19, 2024, the Tribunal acknowledged having received the appeal and, among other things, requested the Director provide the Tribunal and the parties with the section 112(5) record ("record"), and notified the parties that no submissions were being sought from any other party on the merits pending a review of the appeal by the Tribunal.

6. The record has been provided to the Tribunal by the Director. A copy has been delivered to Mr. Vu and the Employer. An opportunity has been provided to both to object to its completeness. There has been no such objection and, accordingly, the Tribunal accepts the record as being complete.

7. I have decided this appeal is appropriate for consideration under section 114(1) of the *ESA*. At this stage, I am assessing the appeal based solely on the Determination, the reasons for Determination, the appeal, the written submission filed by Mr. Vu with the appeal, and my review of the material that was before the Director when the Determination was being made. 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 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.

8. If satisfied the appeal or a part of it should not be dismissed under section 114(1), the Director and the Employer will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it is liable to be dismissed. In this case, I am looking at whether there is any reasonable prospect the appeal will succeed.

ISSUE

9. The issue here is whether this appeal should be allowed to proceed or be dismissed under section 114(1) of the *ESA*.

THE BACKGROUND FACTS

10. The Employer operates an automotive tool manufacturing business in Abbotsford, BC.

11. Mr. Vu was employed by the Employer as a CNC Machine Operator from October 29, 2012, to April 6, 2022, when he, and another employee (who has also filed an appeal which is addressed in a separate decision), were terminated.

12. Mr. Vu filed a complaint alleging the Employer had contravened the *ESA* by failing to pay compensation for length of service.

13. The Employer contended Mr. Vu was terminated for just cause, which was identified as manipulating the time clock system and committing time theft.

14. A delegate of the Director ("investigating Delegate") investigated the complaint and issued an Investigation Report ("IR") which was delivered to each party, who were each provided the opportunity to respond to it.

THE DETERMINATION

15. The deciding Delegate identified the issue of whether Mr. Vu was terminated for cause, set out the principles which applied to the issue, analyzed the position of the parties in the context of those principles and the evidence provided, and reached a conclusion on that analysis.

16. The deciding Delegate summarized the information provided by each party during the investigation that was set out the IR. A summary of the positions of the Employer and of Mr. Vu are set out at pages R4 and R5 of the Reasons for Determination ("reasons"). It is recorded that Mr. Vu "denies taking longer lunches than allowed for or manipulating the time clock system by punching out for lunch after already taking a partial break."

17. The findings of the deciding Delegate on the question of just cause is captured in the following paragraphs from the reasons at page R6:

> I . . . find that this was not a case of failing to pay sufficient attention to break times or unintentionally extending the meal time. Rather, this was a pattern of behaviour that resulted in [Mr. Vu] intentionally claiming 15 minutes of his break as work, followed by a 30 minute unpaid meal break. [Mr. Vu], in essence, defrauded the employer by "punching-in" for only a portion of the time he had taken as a meal break with the other additional amount of time claimed as "work time".
>
> Time theft in the employment context is viewed as a very serious form of misconduct. Given that trust and honesty are fundamental to an employment relationship, I find that [Mr. Vu's] misconduct of not recording his entire break as unpaid time was intentional, is serious, and led to an irreparable breakdown of the employment relationship by harming the trust between the parties.

18. On the facts, the deciding Delegate found Mr. Vu engaged in a series of incidents of time theft that were serious and intentional and which had the effect of fundamentally breaching the employment relationship, that the Employer had established just cause, and dismissed Mr. Vu's claim for compensation for length of service.

ARGUMENT

19. Mr. Vu argues two grounds of appeal: error of law and failure to observe principles of natural justice in making the Determination. The appeal submission provided by Mr. Vu is virtually identical to that submitted with the appeal of the other employee who was terminated at the same time, and for the same reasons, as he was. As such, my analysis on his appeal will be substantially the same as that provided in the other employee's appeal.

Error of Law

20. Mr. Vu submits the deciding Delegate did not correctly apply the law and/or misinterpreted or misapplied the law. Under this assertion, Mr. Vu advances the following propositions:

i. Work hours could not be falsely or dishonestly manipulated;

ii. The pattern of taking longer breaks does not constitute major misconduct;

iii. Even if, on the facts of the case, Mr. Vu was considered to have engaged in major misconduct – time theft – such misconduct cannot be considered a ground for immediate dismissal without having given him a warning, or warnings, and provided him with an explanation of employer's applicable policy;

iv. The decision of the deciding Delegate is at odds with the decision of the Social Security Tribunal of Canada, General Division – Employment Insurance Section;

v. The reasons for termination advanced by the Employer, and their proffered lack of awareness of Mr. Vu's pattern of behaviour relating to meal breaks, are disingenuous and their 'painting' of the circumstances of the case as justifying immediate dismissal is dishonest;

vi. The Employer's version of what transpired on his last day, prior to his dismissal, is "entirely made up/wrong";

vii. The investigating Delegate ignored facts showing the Employer's story was completely made-up and the deciding Delegate has "whole-heartedly gone along with the Employer's crooked presentation of facts and ignored straight-forward facts available in [Mr. Vu's] long record … with the [Employer]."

21. Within this argument, Mr. Vu challenges the finding of the deciding Delegate that he had engaged in a pattern of misconduct that was intentional and had the effect of defrauding the Employer by claiming 15 minutes of his break as 'work,' asserting "[w]ork hours were recorded in [the Employer's] system and could not be falsely or dishonestly manipulated by the employee." Relating to that finding, he denies he ever "accepted that he had, in the past done, what was being alleged [by the Employer]."

Natural Justice

22. Under this ground of appeal, Mr. Vu submits the complaint process has been "completely inadequate."

23. Mr. Vu asserts he had requested the investigating Delegate to have the Employer provide video footage for all employees during the relevant period if the video footage related to his movements was going to be relied on. The reasoning in this argument is that such video may have shown discrepancies in the time records of other employees and possibly affect the Employer's accusation that Mr. Vu had been dishonest and manipulating the time system. He says looking at other videos would have supported other aspects of his position.

24. Lastly, Mr. Vu says the Investigation Report and the reasons show a "superficial approach to the whole matter and a bias" in favour of the Employer.

ANALYSIS

25. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *ESA*, 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.

26. A review of decisions of the Tribunal reveals certain broad principles applicable to appeals that have consistently been applied. The following principles bear on the analysis and result of this appeal.

27. 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.

28. Without specifically saying so, the apparent objective of this appeal is to have this panel of the Tribunal "correct" findings made by the deciding Delegate, reach a different conclusion on just cause, and vary or cancel the Determination.

29. The facts upon which this appeal must be based, however, are those found by the deciding Delegate in the reasons, and supported by the record, unless such findings constitute an error of law.

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 question of whether an employee has been dismissed for cause is one of mixed law and fact, requiring applying the facts as found to the relevant legal principles of cause developed under the *ESA*. A decision by the Director on a question of mixed law and fact requires deference. As succinctly expressed in *Britco Structures Ltd.*, BC EST # D260/03, citing paragraph 35 of the Supreme Court of Canada in *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.*, [1997] 1 S.C.R. 748: "questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests." A question of mixed fact and law may give rise to an error of law where a question of law can be extricated that has resulted in an error.

32. The appeal submission by Mr. Vu does not address this ground of appeal against the well-established principles that arise when considering if the deciding Delegate erred in considering whether just cause for termination is established.

33. The deciding Delegate was alert to the burden on the Employer in this case and correctly observed that the objective of any analysis of just cause resulting in immediate termination is to determine, from all the facts as found, whether there was employee misconduct and whether the misconduct of the employee, Mr. Vu in this case, was inconsistent with the continuation of his employment. In *Jim Pattison Chev-Olds, a Division of Jim Pattison Industries Ltd.*, BC EST # D643/01 (Reconsideration denied in BC EST # RD092/02), the Tribunal made the following comment:

> While any number of circumstances may constitute just cause, the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract" (see *McKinley v. B.C. Tel*, 2001 SCC 38); in other contractual settings, this fundamental failure is referred to as a "repudiatory" breach.

34. The applicable principles were correctly identified by the deciding Delegate, were set out in the reasons, and were applied to the facts as found. The deciding Delegate did not misinterpret or misapply any section of the *ESA*.

35. At its root, Mr. Vu's dispute with the Determination is simply a disagreement with the conclusion of the deciding Delegate that his pattern of behaviour was a very serious form of misconduct justifying his termination for cause.

36. Provided the established principles have been applied, and I find they were, a conclusion on cause is essentially a fact-finding exercise. Whether or not the deciding Delegate erred in law in respect to the facts, *simpliciter*, is a question over which the Tribunal has no jurisdiction.

37. Under section 112 of the *ESA*, the Tribunal has no authority to consider appeals which seek to have the Tribunal reach different factual conclusions than were made by the Director unless such findings raise an error of law: see *Britco Structures Ltd.*, *supra*. More particularly, a finding of fact is only reviewable by the Tribunal as an error of law on the facts under the third and fourth parts of the definition of error of law adopted by the Tribunal.

38. The findings of fact made by the deciding Delegate were adequately supported by the evidence provided. The weight of evidence supported the assertions of fact made by the Employer. The deciding Delegate was entitled to reject the denial of Mr. Vu.

39. I will add here, it is not an error of law or breach of principles of natural justice for the deciding Delegate to have accepted the evidence of one party over that of another, provided that that choice is adequately supported in fact and law.

40. The misconduct of Mr. Vu was serious; it was an intentional and continuing pattern of behaviour that was, in my view, theft, pure and simple. The conclusion of the deciding Delegate to find just cause in the circumstances was neither wrong on the facts nor an error of law.

41. The cases cited in the appeal submission do not help Mr. Vu. They are entirely different cases on their facts, and nothing stated in those cases is inconsistent with the analysis undertaken by the deciding Delegate in this case. I note that the *Esquimalt Enterprises Ltd.* decision, BC EST # D562/01, contains the following statement at page 4:

> The Tribunal recognizes, however, that a single act of misconduct may be of such a serious nature that it may justify an employee's immediate dismissal. Some examples of such misconduct are insubordination, theft, fraud and conflict of interest on the part of the employee.

42. The view of the deciding Delegate that this was conduct of a serious nature should come as no surprise; it is not inconsistent with how the Tribunal has treated other cases involving theft.

43. The decision of the Social Security Tribunal is also of no assistance to Mr. Vu. It is firmly established that decisions made in a different statutory context do not determine how the *ESA* is applied.

44. I find no merit in the error of law ground of appeal.

Natural Justice

45. Mr. Vu has raised the natural justice ground of appeal.

46. 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. Mr. Vu has alleged bias; that is a serious allegation. Bias should not be found except on the clearest of evidence and such evidence should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias.

47. I am able to address Mr. Vu's natural justice ground without the need for extensive analysis. The Tribunal has briefly summarized the natural justice principles that typically operate in the complaint process, including this complaint, 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).

48. Where the process exhibits the elements of the above statement, 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, Mr. Vu was provided with the opportunity required by principles of natural justice to present his position during the complaint process; he has provided no objectively acceptable evidence showing otherwise.

49. There is no evidence whatsoever of actual, or a reasonable apprehension of, bias.

50. I am not persuaded the was a breach of natural justice in the contention that the investigating and/or deciding Delegate should have sought production and reviewed video footage for all employees. The possibility – and, on the evidence and information provided by the Employer and persons interviewed by the investigating Delegate, I consider it to be a remote possibility – that other employees were engaging in similar misconduct does not alter the fact that Mr. Vu was committing time theft.

51. There is no factual or legal basis for this ground of appeal and no reasonable prospect it will succeed.

52. Based on all of the above, I find this appeal has no reasonable prospect of succeeding. The purposes and objects of the *ESA* are not served by requiring the other parties to respond to it. The appeal is dismissed under section 114(1)(f) of the *ESA*.

ORDER

53. Pursuant to section 115(1)(a) of the *ESA*, I order the Determination dated January 3, 2024, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal