Citation: Can-Call Management Inc. (Re)
2024 BCEST 68

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Can-Call Management Inc.

("appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
SUBMISSIONS:	Martin Palin, on behalf of Can-Call Management Inc.
FILE NUMBER:	2024/047
DATE OF DECISION:	July 26, 2024

DECISION

INTRODUCTION

1. On March 21, 2024, Courtney Milburn, a delegate of the Director of Employment Standards ("delegate"), issued a determination ordering the appellant, Can-Call Management Inc. ("appellant"), to pay a former employee ("complainant") the total sum of $13,054.85 ("Determination"). The Determination was issued under section 79 of the *Employment Standards Act* ("*ESA*"). Further, and also by way of the Determination, the delegate levied three separate $500 monetary penalties against the appellant based on its contraventions of sections 17, 45, and 63 of the *ESA*. Accordingly, the appellant's total liability under the Determination is $14,554.85.

2. The appellant appeals the Determination on the basis that "evidence has become available that was not available at the time the determination was being made" (see section 112(1)(c) of the *ESA*). This is the only ground of appeal specifically advanced. However, presumably the appellant's "new evidence" has been tendered to support an argument that the delegate erred in law in determining that the complainant was dismissed without just cause.

3. In my view, this appeal is fundamentally misconceived and must be dismissed pursuant to section 114(1)(f) of the *ESA* because it has no reasonable prospect of succeeding.

ANALYSIS AND FINDINGS

Is the appellant's "new evidence" admissible?

4. This dispute arises from an employment relationship that spanned the period from September 29, 2014, to October 20, 2021, when the complainant's employment was terminated, allegedly for lawful cause. The complainant had been employed as a telemarketer. The complaint was filed on November 9, 2021, which, in turn, prompted an investigation by an officer employed by the Employment Standards Branch ("Branch").

5. During the course of the investigation, both parties submitted various documents, all of which were before the delegate when she issued the Determination. Although the appellant submitted two separate audio files to the Branch during the investigation, it now submits 81 additional audio files as "new evidence." The appellant describes these audio files as follows: "We have compiled a summary of all calls a month prior to [the complainant's] discharge [and] we also have audio recordings of all these calls." Presumably, these audio recordings have been tendered to support the appellant's position that it had just cause for terminating the complainant's employment. However, the audio files have simply been submitted without further explication. Apart from failing to explain why it failed to provide this evidence to the Branch during the investigation, the appellant has not explained how or why these files support its apparent position that the delegate erred in determining that it dismissed the complainant without just cause.

6. In addition to the audio files, the appellant submitted what it described as a "monitoring report," which the appellant says demonstrates the complainant's "lack of productivity." As with the audio

files, the monitoring report spans a period dating from one month prior to the complainant's dismissal.

7. The audio files are recordings of conversations during September and October 2021. The "monitoring report" relates to calls made during September 2020.

8. Prior to the issuance of the Determination, a Branch officer summarized the evidence and argument of the parties in an "Investigation Report" dated May 17, 2023. This report was delivered to both parties and the officer specifically invited the parties to provide any additional information they wished the Branch to consider. Although the appellant did provide some additional evidence and argument to the Branch by way of response to the Investigation Report, it did not provide the evidence it now tenders on appeal.

9. "New evidence" is admissible in accordance with the criteria established in *Davies et al.*, BC EST # D171/03. Evidence is admissible under section 112(1)(c) provided the evidence is truly "new" in sense that, with the exercise of due diligence, it could not have been discovered and presented to the Director of Employment Standards during the complaint investigation process. Apart from this overriding consideration, the evidence must also be relevant to a material issue arising from the complaint(s); the evidence must be credible in the sense that it is reasonably capable of belief; and 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 of Employment Standards to a different conclusion on a material issue.

10. In this case, the appellant has simply submitted a rather large volume of evidence (most of which being telephone recordings) without, in any fashion, attempting to explain how this evidence is admissible under the *Davies* criteria.

11. The appellant had ample opportunity to provide to the Branch the evidence, now submitted as "new evidence," prior to the issuance of the Determination. Indeed, the appellant was specifically requested to file whatever further evidence it wished to have considered prior to the issuance of a determination.

12. Clearly, the evidence now tendered on appeal was "available" at the time the Determination was being made; indeed, this evidence was, and has always been, exclusively within the appellant's custody and control. On this basis alone, the so-called "new evidence" is inadmissible, since it obviously fails to satisfy the "unavailability" requirement set out in section 112(1)(c) of the *ESA*. Apart from that latter consideration, there is nothing in the material before me that speaks to the other *Davies* criteria, such as materiality and significant probative value.

13. I might add, simply for the sake of completeness, that based on the evidentiary record that was before the delegate, I see no reason whatsoever to question her finding that the appellant did not have just cause to dismiss the complainant, or to question the delegate's unpaid wage calculations given her findings of fact.

14. It follows that this appeal must be dismissed since it is, on its face, without merit.

Possible section 8 contravention?

15. That said, I am troubled by certain aspects of the Determination and the delegate's accompanying "Reasons for the Determination" ("delegate's reasons").

16. The complainant was a temporary foreign worker ("TFW") hired under a "closed" work permit pursuant to which she was only lawfully permitted to work for the appellant (although the TFW program does allow for some flexibility where, for example, there is an abusive employment situation). Pursuant to her approved employment contract, the complainant was hired to work 35 hours per week at an hourly wage of $30.50 as a "business methods analyst."

17. As set out in the delegate's reasons, the complainant never undertook the duties for which she was hired (as described in a position description appended to her employment contract); the complainant simply worked as a telemarketer. Despite a contractual agreement regarding her job duties and weekly hours, she never worked, or was paid, in accordance with that contractual agreement (for example, her weekly hours were 30, not 35 and she was not paid the $30.50 agreed hourly rate).

18. The appellant's position, as recorded at page R8 of the delegate's reasons, was as follows: "The written employment contract was understood by both parties to be not the contract under which the Complainant worked, and the purpose was solely for the LMIA [Labour Market Impact Assessment – the federal government document that authorized the appellant to hire the complainant] and work permit issuance." For her part, the complainant stated that she expected to undertake the duties of the position offered to her, and never agreed to work 30, rather than 35, hours per week as a telemarketer. Further, she was paid the prevailing minimum wage plus a commission, rather than the contractual $30.50 per hour rate. Although she complained to the appellant about the situation, she believed her options were limited due to the closed nature of her work permit (see delegate's reasons, page R4).

19. Based on the evidence before me, it appears that the appellant secured legal authority to hire the complainant using a ruse designed to deceive the federal government about the true nature of the TFW position being offered. Although the delegate ultimately awarded the complainant wages based on the $30.50 per hour rate, the delegate did not base the complainant's unpaid wage award on a 35-hour work week (at page R14): "The Complainant has confirmed she did not work 35 hours a week, and accordingly, only hours in which the Complainant was scheduled and available for work are contemplated in this analysis to determine whether wages are owed."

20. On its face, it appears that the appellant contravened section 8 of the *ESA* – by making false representations regarding the job position offered and wages to be paid – which, in turn, could have triggered a section 79(2) "make whole" remedy. If the complainant had succeeded in a section 8 claim, a section 79(2) remedy would likely have produced a larger monetary award than that made under the Determination. Neither the Branch officer responsible for the investigation, nor the delegate, ever turned their mind to this issue, a situation I find rather puzzling given that a section 8 contravention appears to have been clear and obvious. However, since the complainant is not appealing the Determination, I do not consider it appropriate to refer this matter back to the Director

for purposes of further investigation. That said, the federal government agency responsible for administering the TFW program might well consider it appropriate to investigate this matter.

Summary of findings

21. Insofar as this appeal is concerned, I consider it to be entirely devoid of merit. The only ground of appeal advanced is the "new evidence" ground (section 112(1)(c) of the *ESA*) and in that regard, the evidence submitted on appeal is clearly inadmissible. Even if the appellant's submissions could be taken, if read very liberally, as a challenge to the delegate's "no just cause" finding (see *Triple S Transmission Inc.*, BC EST # D141/03), based on the evidentiary record that was before the delegate, I am not persuaded that the delegate made any palpable or overriding error (see *Housen v. Nikolaisen*, 2002 SCC 33) in determining that the complainant was dismissed without just cause.

22. I note that the appellant has not challenged, directly or indirectly, any other findings made by the delegate, such as her unpaid wage calculations.

ORDER

23. Pursuant to sections 114(1)(f) and 115(1)(a) of the *ESA*, this appeal is dismissed, and the Determination is confirmed as issued in the total amount of $14,554.85, together with whatever further interest that has accrued under section 88 of the *ESA* since the date of issuance.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal