Citation: Thanh Vu (Re)
2024 BCEST 75

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Thanh Vu
("Applicant")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Robert E. Groves
SUBMISSIONS:	Thanh Vu, on his own behalf
FILE NUMBER:	2024/079
DATE OF DECISION:	August 20, 2024

DECISION

OVERVIEW

1. Thanh Vu ("Applicant") seeks a reconsideration ("Application") of a decision ("Appeal Decision") of a member ("Member") of the Employment Standards Tribunal ("Tribunal") dated June 3, 2024, and referenced as 2024 BCEST 51. The Application is brought pursuant to section 116 of the *Employment Standards Act* (*ESA*).

2. The matter arose when the Applicant's employer, Tiger Tool International Incorporated ("Employer"), dismissed the Applicant for cause. The Applicant filed a complaint ("Complaint") with the Director of Employment Standards ("Director"). The Applicant sought compensation for length of service pursuant to section 63 of the *ESA*.

3. A delegate of the Director ("Investigating Delegate") investigated the Complaint and issued an Investigation Report ("Report") dated September 13, 2023. The Report summarized the information collected during the investigation of the Complaint.

4. Another delegate of the Director ("Adjudicating Delegate") issued a determination ("Determination") of the Complaint dated January 3, 2024. In it, the Adjudicating Delegate stated that she had considered the contents of the Complaint file, including the Report and the subsequent information provided by the parties. The Adjudicating Delegate determined that the Employer had lawfully dismissed the Applicant for cause, that it had not contravened the *ESA*, and that no wages were owed.

5. The Applicant appealed the Determination pursuant to section 112 of the *ESA*, claiming that the Director had erred in law, and that there had been a failure to observe the principles of natural justice. In his Appeal Decision, the Member concluded that the appeal had no reasonable prospect of succeeding. Accordingly, the Member decided that the Determination should be confirmed.

6. I have before me the Applicant's Appeal Form and the Application, his submissions in support of both, the Determination and its accompanying Reasons ("Reasons"), the Appeal Decision, and the record the Director was obliged to deliver to the Tribunal pursuant to section 112(5) of the *ESA*. I have not requested submissions from the Employer and the Director.

ISSUES

7. Should the Appeal Decision be reconsidered?

8. If so, should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the original panel of the Tribunal or to another panel?

BACKGROUND FACTS

9. The Employer operates an automotive tool manufacturing business.

10. The Employer employed the Applicant as a machine operator from October 29, 2012, until April 6, 2022, when it dismissed the Applicant for cause. The Employer claimed that a dismissal on this ground was lawful because the Applicant had committed "time theft." The Employer contended that the Applicant had repeatedly ceased to work at his machine prior to his scheduled break time for lunch, went upstairs to the break room for fifteen minutes, left the break room to log out of the timeclock system the Employer maintained to monitor the time its employees were taking for breaks, then returned to the break room for his full thirty minute allowable unpaid lunch break, before he again logged in back to work and returned to his machine.

11. During the investigation of his Complaint the Applicant advanced arguments that included a denial he had taken breaks for lunch that were longer than authorized, and a submission that the evidence supporting the Employer's position regarding the matter was inconclusive.

12. The Reasons include several important findings of fact. The Adjudicating Delegate found that the Applicant regularly delayed his required punching out at the commencement of his lunch break, and that the Applicant's conduct revealed an intention to defraud. The Adjudicating Delegate then said this, at R6:

> Time theft in the employment context is viewed as a very serious form of misconduct. Given that trust and honesty are essential to an employment relationship, I find that the [Applicant's] misconduct of not recording his entire break as unpaid time was intentional, is serious, and led to an irreparable breakdown in the employment relationship by harming the trust between the parties.
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> I find that the Employer has overcome the burden of establishing that the [Applicant] committed a serious and intentional series of incidents of time theft that fundamentally breached the employment contract, establishing just cause for his dismissal.

13. As I have noted, the Member dismissed the Applicant's appeal and confirmed the Determination. The Member concluded that the Determination revealed no error of law regarding the Adjudicating Delegate's application of the relevant legal principles to the facts as found on the issue of just cause. He also decided that the Applicant had failed to demonstrate the process leading to the Determination was unfair, or that it was tainted in some way due to bias.

ARGUMENT

14. The Applicant seeks orders varying the Appeal Decision which would have the effect of cancelling the Determination and setting a sum to be paid to him by way of compensation for length of service. His Application contains submissions that are identical to those made in a reconsideration application delivered to the Tribunal by another employee whose employment was terminated on the same day, and for the same reasons, as occurred in the case of the Applicant. For this reason, my analysis in this decision is for the most part the same as appears in my decision issued in the case of the other employee.

15. A number of the submissions advanced by the Applicant focus on the fact that the Employer did not warn the Applicant his employment was in jeopardy before the Employer dismissed him for cause.

16. The Applicant submits that natural justice requires adjudicators to provide reasons for their decisions. He says the reasons given in the Reasons and in the Appeal Decision are inadequate because they do not explain why the Employer should not have been obligated to provide a warning to the Applicant that he must cease to take unauthorized breaks if he was to avoid dismissal.

17. The Applicant contends that it was an error for the Adjudicating Delegate to determine, and for the Appeal Decision to confirm, that his "lateness" constituted a form of major, rather than minor, misconduct justifying a dismissal for cause even where, as in this case, the Employer chose to characterize the Applicant's actions as "time theft." He argues that while the Employer did prescribe the duration of breaks there was "no clearly laid down policy or established process for enforcing those durations," nor was it ever "clearly mentioned that failure to adhere to the duration limit could result in job loss."

18. The Applicant submits further that his "lateness" should have been noticed by the Employer and, again, a warning given. He says that it was an error for the Adjudicating Delegate to determine, and the Appeal Decision to confirm, that no warning was necessary in the Applicant's case.

19. The Applicant also argues that it was unfair for the Adjudicating Delegate to decide, and for the Member to affirm, that it was unnecessary to require the production, and a review, of all the video recordings of all the work and break areas at the Employer's worksite, in addition to the video evidence relating to the movements of the Applicant, before a determination could be made whether the Applicant was guilty of time theft. The Applicant's position was, and is, that the video evidence of the activities of other employees should have been made available to determine if they, too, had abused their breaks and, if so, whether their conduct was condoned by the Employer.

20. The Applicant asserts the Member's statement, at paragraph 50 in the Appeal Decision, that there was a remote possibility other employees might have engaged in similar conduct to his own, but the video evidence relating to them need not be produced, raises a question whether the Employer satisfied the burden resting on it to prove that the Applicant had given cause for his dismissal. The Applicant submits further that the decision not to explore the conduct of other employees "smacks of bias."

21. Similarly, the Applicant states that if the Employer allowed a pattern of behaviour to develop, it would be obligated to clarify the accepted policy and give an appropriate warning before a summary dismissal could lawfully occur.

22. In his appeal, and again in this Application, the Applicant has also relied on a decision of the Social Security Tribunal (General Division) (SST) in respect of his application for employment insurance benefits following his dismissal by the Employer. That application was apparently successful. In the Appeal Decision, the Member observed that the SST decision was of no assistance to the Applicant. The Applicant argues, however, that since the submissions made by the Employer, and by him, before the SST were in essence the same as those they have made in these proceedings under the *ESA*, and since, he says, it is the practice of the SST to "follow the local (provincial) labour laws in determining just cause," the Tribunal must come to the same conclusion on the issue of cause as the one reached by the SST.

ANALYSIS

23. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

24. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

25. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

26. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Director of Employment Standards (Milan Holdings Inc.*, BC EST # D313/98). In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A "yes" answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant a reconsideration.

27. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

28. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

29. In my view, the Application should be dismissed at the first stage of the inquiry because it fails to establish any requisite matters of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that a reconsideration is warranted. Instead, the Application, in substance, merely repeats submissions challenging the Adjudicating Delegate's rationale for the Determination which were presented, and rejected, by the Tribunal in the appeal.

30. I am not persuaded the rationales of the Adjudicating Delegate in her Reasons, or the Member in the Appeal Decision, that a finding of dismissal for cause was lawful in this case, are inadequately described.

31. The Applicant asserts that neither the Adjudicating Delegate, nor the Member on appeal, explained why a warning to correct his actions extending his lunch breaks, and an opportunity to comply, were not provided to the Applicant before the Employer dismissed him for cause.

32. I disagree.

33. The Adjudicating Delegate's Reasons note, at R3, that most employment offences are minor, and would be insufficient on their own to justify dismissal. Instead, "an employer would generally need to demonstrate it had followed a course of progressive discipline."

34. Progressive discipline is a concept in employment law that recognizes the salience of several important elements including, at a minimum, the establishment of standards of employee conduct, notice to employees where conduct falls below the accepted standards, discipline that is progressively more severe yet proportionate to the nature and quality of the misconduct at issue, and warnings that further discipline, including dismissal, may be imposed if the employee's performance does not improve, or further misconduct occurs.

35. It follows, by inference, that the Adjudicating Delegate was alive to the principle that warnings to correct employee misconduct are often required before an employee may be dismissed for cause.

36. However, the Adjudicating Delegate also observed, correctly, at R3-R4, that there are instances where an employee's misconduct may warrant a dismissal for cause even where there has been no progressive discipline. An example of such a "single act" cited by the Adjudicating Delegate occurs where an employee commits theft, including circumstances where the employee "falsely or dishonestly manipulates their recorded work hours to be paid for time they did not actually work."

37. In the case of the Applicant, the Adjudicating Delegate found as a fact, at R6, that he engaged in "a pattern of behaviour that resulted in the [Applicant] intentionally claiming 15 minutes of his break as worked followed by a 30 minute unpaid meal break." In essence, the Applicant "defrauded the [E]mployer 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.'"

38. The inference to be drawn from the Adjudicating Delegate's determination the Applicant's conduct warranted summary dismissal, without a warning, or any other form of progressive discipline, is that since the circumstances surrounding the Applicant's conduct amounted to fraud, the conduct was repudiatory, and fundamentally undermined the trust necessary for the relationship to continue. In such a case, a warning was unnecessary.

39. Like the Member, I see no legal error in the Adjudicating Delegate's approach. As the Member observed in the Appeal Decision, at paragraph 34, the relevant principles were identified and applied in the Determination, as set out in the Reasons. There is nothing in the Reasons that suggests the

Adjudicating Delegate misinterpreted or misapplied any provisions in the *ESA* when deciding that the Applicant had been lawfully dismissed for cause.

40. I concur, too, with the Member's statement in the Appeal Decision, at paragraph 40, that the Applicant's time theft activities were serious. As I have noted, the Adjudicating Delegate found as a fact that the Applicant's actions were intentional, and fraudulent, because they constituted a theft of time during which the Employer was paying the Applicant to perform work. Given these circumstances, it was entirely reasonable for the Adjudicating Delegate to determine that the Applicant's misconduct was not minor.

41. As the Member also noted at paragraph 36 of the Appeal Decision, and I agree, a determination that an employee has given cause for summary dismissal is essentially an exercise in finding facts, a process in which the Tribunal has no jurisdiction to interfere absent a conclusion a delegate has erred in law. A simple disagreement with the Adjudicating Delegate's finding of fact that the Applicant's misconduct was major, and not minor, does not meet that threshold.

42. In my opinion the Member was also correct to confirm, at paragraph 50 of the Appeal Decision, that there was no failure to observe the principles of natural justice when neither the Investigating Delegate nor the Adjudicating Delegate sought the production, and a review, of all the Employer's video library to determine if other employees were abusing the time taken for their breaks. Even if one were to say it is possible they were – anything being possible – the evidence of the actions of other employees would still be irrelevant when considering the fraudulent conduct of the Applicant unless, perhaps, he was able to produce some evidence, apart from speculation, or a bald accusation, demonstrating that such misconduct had in fact occurred, which the Applicant knew the Employer had condoned. However, the Applicant never produced any such evidence. It follows the Member was right to observe that there was no basis for the Applicant's allegation the Determination is tainted by bias because the Adjudicating Delegate declined to accede to the Applicant's request that the Employer produce its entire video library.

43. I also agree with the Member's statement in the Appeal Decision, at paragraph 43, that the decision of the SST regarding the Applicant's employment insurance claim is of no assistance in proceedings arising under the *ESA*. As the Member noted, there are many decisions of the Tribunal which have held that judgments of other decision-makers interpreting other statutory schemes do not determine how the *ESA* is to be applied (see, for example: *Oriental Interiors Ltd.*, BC EST # D281/02; *Koivisto*, BC EST # D006/05; *Beach Place Ventures Ltd. v. Employment Standards Tribunal*, 2022 BCCA 147). In the *Beach Place* decision in particular, the Court of Appeal, at paragraph 37, affirmed that, as regards the *ESA*, expertise in questions arising under it rests with the Director and the Tribunal, who have been assigned the role of interpreting and applying the will of the legislature as expressed in the statute, and to allow principles of *res judicata* to supplant a decision of a legislatively mandated authority would undermine the integrity of the administrative scheme. While the Applicant asserts that the decision of the SST is somehow binding on the Director and the Tribunal, the authorities to which I have referred do not support his contention and I must, therefore, reject it.

CONCLUSION

44. The Application is dismissed.

ORDER

45. Pursuant to section 116(1) of the *ESA*, I order that the Appeal Decision referenced as 2024 BCEST 51 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal