Employment Standards TRIBUNAL

Citation: Dmytro Ponomarov (Re)
2024 BCEST 58

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Dmytro Ponomarov
("Appellant")

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Kenneth Wm. Thornicroft
FILE NO.:	2024/037
DATE OF DECISION:	June 19, 2024

DECISION

SUBMISSIONS

Dmytro Ponomarov — on his own behalf

OVERVIEW

1. This is an appeal filed by Dmytro Ponomarov ("appellant") pursuant to subsections 112(1)(a) and (b) of the *Employment Standards Act* ("*ESA*"). The appeal concerns a Determination issued by Shannon Corregan, a delegate of the Director of Employment Standards ("delegate"), on February 20, 2024. The delegate also issued her "Reasons for the Determination" ("delegate's reasons") concurrently with the Determination.

2. The appellant says that the delegate erred in law and failed to observe the principles of natural justice in making the Determination.

3. In my view, this appeal has no reasonable prospect of succeeding and, accordingly, must be dismissed under section 114(1)(f) of the *ESA*.

THE DETERMINATION

4. The Appellant filed a complaint under section 74 of the *ESA* on March 16, 2023, in which he alleged that he had been unjustly terminated. His employment was formally terminated on September 22, 2022. At all material times, the appellant's employment was governed by a collective bargaining agreement negotiated between the BC General Employees' Union ("union") and the British Columbia provincial government.

5. Section 3(7) of the *ESA* provides as follows:

> If a dispute arises respecting the application, interpretation or operation of
>
> (a) a Part or provision of this Act deemed by subsection (3) to be incorporated in a collective agreement, or
>
> (b) a provision specified in subsection (6),
>
> the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

6. The delegate, applying subsection 76(3)(h) of the *ESA*, determined that she did not have any jurisdiction to adjudicate the appellant's complaint on its merits. Rather, she held that all issues relating to the appellant's mandatory unpaid leave and subsequent dismissal fell within the jurisdiction of a grievance arbitrator. Section 76(3)(h) states: "The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if the director is satisfied that…(h) the dispute that caused the complaint may be dealt with under section 3 (7)."

THE APPELLANT'S ARGUMENT

7. The appellant's dismissal stems from his refusal to comply with a mandatory vaccination policy. The appellant maintains that although he asked his employer to terminate him "with [an] eligible severance package," his employer refused. The appellant's employer placed him on unpaid leave, and subsequently terminated his employment based on his refusal to comply with the policy. Simply for sake of completeness, I should note that an employee has no unilateral common law right to require an employer to terminate them and provide severance pay. Further, an employee's wilful refusal to abide by a lawful workplace policy could give an employer "just cause" for dismissal, in which case no severance pay would be payable.

8. The appellant says that he filed two separate grievances regarding this entire matter. However, the appellant also filed a section 74 complaint, asserting that his employment was terminated under section 66 of the *ESA* (the so-called "constructive dismissal" provision). The appellant is not apparently seeking section 63 compensation for length of service but, rather, appears to be only seeking a declaration that his employment conditions were "substantially altered" under section 66, which provides as follows: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated."

9. The appellant says that the delegate erred in law because his complaint was not predicated on a breach of section 63, but only section 66. He says that since a decision regarding the interpretation or application of section 66 is not specifically mentioned in either of subsections 3(6) or (7), the delegate erred in law in summarily dismissing his complaint.

10. Insofar as his "natural justice" allegation is concerned, the appellant appears to be suggesting that since the delegate is a provincial government officer employed by the province (and the provincial government was also the appellant's former employer), the delegate was in an insoluble conflict. Apart from that latter argument, the appellant also says that the delegate misstated several essential facts and/or his position in her reasons.

ANALYSIS

11. The appellant says that his complaint related solely to section 66, and that he was not seeking any remedy under section 63. The appellant seemingly wants the Director of Employment Standards to issue a declaration that the terms and conditions of his employment were substantially altered when the mandatory vaccination policy came into effect. He says that he never made a claim for section 63 compensation for length of service. However, all issues arising from the introduction of that workplace policy fall within the exclusive jurisdiction of a grievance arbitrator. As the Supreme Court of Canada observed in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929 at para. 67:

> I conclude that mandatory arbitration clauses such as s. 45(1) of the Ontario *Labour Relations Act* generally confer exclusive jurisdiction on labour tribunals to deal with all disputes between the parties arising from the collective agreement. The question in each case is whether the dispute, viewed with an eye to its essential character, arises from the collective agreement.

12. The British Columbia *Labour Relations Code* provides, in section 89(g), that a grievance arbitrator is empowered to "interpret and apply any Act intended to regulate the employment relationship of the persons bound by a collective agreement, even though the Act's provisions conflict with the terms of the

collective agreement." This provision undoubtedly gives a grievance arbitrator the jurisdiction to determine if a collective bargaining unit employee's terms and conditions of employment have been substantially altered and, if so, to provide a remedy.

13. In other words, the declaration the appellant apparently seeks could be granted by an arbitrator. Further, the appellant says that he submitted two grievances in relation to his dismissal. That being the case, the delegate could have equally dismissed the complaint under one or both of subsections 76(3)(f) and (g) of the *ESA*: "The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if the director is satisfied that…(f) a proceeding relating to the subject matter of the complaint has been commenced before a court, a tribunal, an arbitrator or a mediator, [or] (g) a court, a tribunal or an arbitrator has made a decision or an award relating to the subject matter of the complaint."

14. I do not accept the appellant's interpretation with respect to the interplay between sections 63 and 66 of the *ESA*, or that the delegate erred in relation to her treatment of the appellant's section 66 argument. Section 66 is included in the *ESA* solely to address the situation where an employee is not formally dismissed, but their conditions of employment are substantially altered. "Conditions of employment" are defined in section 1(1) of the *ESA* as follows: "means all matters and circumstances that in any way affect the employment relationship of employers and employees." This definition is clearly broad enough to encompass the introduction of a mandatory vaccination policy. The Director may treat a significant alteration of employment conditions as a termination of employment.

15. Often (but certainly not always) a significant alteration of an employee's employment conditions occurs because the employer wants to encourage that employee to quit – where there is a *bona fide* quit, the employer is not obliged to pay the employee any compensation for length of service (see section 63(3)(c) of the *ESA*). Where section 66 is triggered, the employee is entitled to section 63 compensation for length of service. In this sense, I entirely agree with the delegate's position that section 66 is not functionally independent from section 63 – its statutory purpose is to enable an employee to collect compensation for length of service where the employee might not otherwise have such an entitlement because there was no *formal* dismissal.

16. If the Director of Employment Standards determines that a termination has occurred as a result of the application of section 66, the Director would then issue a remedial order under section 79(1)(b) of the *ESA*. In the event of a termination, the only compensatory order available under the *ESA* in relation to the dismissal itself is an award of section 63 compensation (together with section 88 interest and concomitant vacation pay).

17. As noted by the delegate in her reasons, section 63 is a provision that is deemed to be included in a collective bargaining agreement (by section 3(2) of the *ESA*) where the agreement does not contain a provision that meets or exceeds the requirements set out in section 63. Insofar as section 63 is concerned in the context of a *unionized* workplace, it should be noted that section 63 is only deemed by section 3(2) to be incorporated into a collective agreement if the agreement in question does not contain individual termination pay provisions that meet or exceed the requirements of section 63. Where there is no deemed incorporation, any dispute regarding the termination pay provision in the collective agreement falls within the exclusive jurisdiction of a grievance arbitrator. If the termination pay provision in the collective agreement does *not* meet or exceed the requirements of section 63 (in which case section 63 is

deemed to be included in the collective agreement), by reason of section 3(7)(a) of the *ESA*, a dispute regarding section 63 compensation must be addressed by a grievance arbitrator.

18. As previously noted, the appellant submitted at least two grievances relating to his circumstances – the first apparently in relation to his forced leave without pay, and the second regarding his subsequent termination. There is nothing in the record to indicate what has transpired in relation to these two grievances. If an arbitrator has heard and decided the grievances, then the arbitrator's decision(s) would justify a summary dismissal of the appellant's complaint under section 76(3)(g) of the *ESA* and under the legal doctrine known as *res judicata*. If the two grievances were not referred to arbitration, and if the appellant believes that the union acted in bad faith in refusing to take his grievances to arbitration (or in otherwise dealing with them), the appellant's remedy lies in a complaint to the Labour Relations Board under section 12 of the *Labour Relations Code* – neither the Employment Standards Branch nor the Tribunal has the statutory authority to review the union's decision with respect to the processing or adjudication of the two grievances.

19. Accordingly, and for the reasons set out above, I find that the appellant's "error of law" ground of appeal must be dismissed.

20. I do not find that there was a failure to observe the principles of natural justice in this case. The delegate fully considered all of the arguments advanced by the appellant. The delegate did not breach the rules of natural justice simply because she characterized the facts in a manner that was not consistent with the appellant's view of the matter. All of the delegate's findings of fact were based on a sound evidentiary foundation. I do not find that the delegate was in a conflict of interest merely because she is a provincial government employee.

21. To summarize, I am not persuaded that the delegate erred in summarily dismissing the appellant's complaint. Even if the appellant was solely seeking a declaration that he was dismissed under section 66 – and was not seeking any monetary remedy – all matters relating to the appellant's mandatory leave and subsequent termination fall within the exclusive jurisdiction of a grievance arbitrator and must be addressed under the applicable collective agreement. If the appellant has ongoing concerns about how his grievances were addressed, that is a matter that falls within the jurisdiction of the Labour Relations Board. In my view, the delegate did not fail to observe the principles of natural justice in making the Determination.

22. I note that the appellant made arguments concerning whether the delegate and the appellant's former employer are proper parties in this appeal. These arguments are not relevant because I have determined the appeal has no prospect of succeeding. In any event, I do not find the appellant's arguments, with respect to whether the delegate or the appellant's former employer would be proper parties in this appeal, to have any merit.

ORDER

23. Pursuant to section 114(1(f) of the *ESA*, this appeal is dismissed. Pursuant to section 115(1)(a) of the *ESA*, the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal