Citation: Peter James Landry (Re)
2024 BCEST 84

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Peter James Landry

- of a Determination issued by -

The Director of Employment Standards

PANEL:	Ryan Goldvine
SUBMISSIONS:	Glen Stratton, legal counsel for Peter James Landry Mathew Osborn, delegate of the Director of Employment Standards Daniel Babcock, legal counsel for AutoMind Group Enterprises Ltd.
FILE NUMBER:	2024/050
DATE OF DECISION:	September 11, 2024

DECISION

OVERVIEW

1. This decision addresses an appeal filed under section 112 of the *Employment Standards Act* (*ESA*) by Peter James Landry ("Appellant"), of a determination made by Mathew Osborn ("Delegate"), a delegate of the Director of Employment Standards ("Director"), on April 18, 2024 ("Determination").

2. In the Determination, the Delegate concluded that the actions that formed the basis of the Appellant's complaint ("Complaint") occurred outside of the time limits for recovery under the *ESA*. As a result, the Delegate declined to continue investigating the Complaint pursuant to section 76(3)(b) of the *ESA*.

3. The Appellant appeals on the basis that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

4. Unable to dispose of the matter on the basis of the materials initially filed, I sought submissions from the parties on the merits of the appeal.

5. The Tribunal received submissions on behalf of each of the Director and AutoMind Group Enterprises Ltd. ("Employer"), and reply submissions on behalf of the Appellant.

6. Although I have reviewed all of the materials provided by the parties, I address only those portions necessary to reach my decision.

7. For the reasons that follow, I allow the appeal under section 112(1)(a) and refer the matter back to the Director for a fresh investigation.

ISSUES

8. Did the Delegate err in law when he stopped investigating the Complaint under section 76(3)(b) of the *ESA* after concluding that the *ESA* does not apply to the Complaint for the reasons set out therein.

9. Did the Delegate fail to observe the principles of natural justice in failing or refusing to provide the Appellant with further opportunities to give evidence or respond to any concerns regarding the merits of the Complaint.

BACKGROUND AND DETERMINATION

10. The Determination relates to a complaint filed by the Appellant on March 22, 2023, alleging, in essence, that he was constructively dismissed by the Employer as a result of changes made to the terms and conditions of his employment. The Appellant also alleged that he was not paid the full wages he was entitled to between April 2020 and the date he resigned.

11. The Employer operates a collision repair business and employed the Appellant as a branch manager from July 2, 2015, to October 21, 2022.

12. The Appellant resigned from his employment on October 21, 2022, claiming he had no other choice but to do so as a result of what he claims are wage discrepancies that began in or around July 2020. The Appellant sought compensation for length of service, as well as the difference between the wages he was paid, and the wages he claims he should have been paid, had the Employer not inappropriately altered his terms and conditions of employment.

13. As a preliminary matter, the Employer sought to halt, or at least postpone, the investigation into the Complaint on the basis that a parallel proceeding was underway in the Supreme Court of British Columbia. While the Appellant indicated they would consent to a postponement of the investigation, the Delegate did not address this further, given his decision to stop investigating the Complaint.

14. The Appellant alleged that his wages were reduced, inappropriately, as follows:

    a. In April 2020, agreed-to under duress; or

    b. In July 2020, when those changes should have reverted after a temporary (three-month) change; or

    c. In April 2021, when those changes should have reverted after a temporary (one-year) change.

15. Given that the Appellant's employment ended October 21, 2022, the Delegate concluded that the recovery period provided under section 80(1) of the *ESA* extended back to October 21, 2021. Because the actions complained of occurred prior to the recovery period, the Delegate concluded that the *ESA* does not apply to the Complaint, and exercised his discretion under section 76(3)(b) of the *ESA* to stop investigating the Complaint.

POSITIONS OF THE PARTIES

16. The Appellant says he was denied procedural fairness as a result of the Delegate's failure or refusal to interview him to allow him to provide his version of the events and identify the significance of the documents provided and breaches alleged.

17. Further, and as a result, the Appellant says the Determination does not accurately describe the breaches alleged, and fails to recognize a further alleged breach that occurred during the recovery period. In addition, the Appellant says the breaches were ongoing, as there continued to be a discrepancy between the wages owed and the wages actually paid, right up until his resignation.

18. The Appellant also appears to indicate a new breach occurred April 1, 2022, as a further result of the Employer's failure to return his wages to what they should have been, but does not indicate what occurred on or around this date other than being the second anniversary of the date on which his wages were reduced.

19. While the Appellant initially asserted that the proper recovery period should be April 1, 2021, to April 1, 2022, he later conceded that the recovery period established in the Determination was accurate.

20. In response, the Delegate refers to phone and email conversations between himself and counsel for the Appellant in which he sought to clarify, and received confirmation of the same, details of the Appellant's allegations that formed the basis of the Complaint.

21. The Delegate says the Appellant was given multiple opportunities to present and clarify his allegations, and underscores section 77.1 of the *ESA* which confirms that the Director is not required to conduct an oral hearing into this or any complaint.

22. While the Appellant says the Delegate has not accurately summarized the Complaint, the Delegate says the Appellant has not identified what aspects of the Complaint have been mischaracterized, or otherwise not considered.

23. The Delegate says there can be no dispute that employment ended on October 21, 2022, and this is the date from which the recovery period is calculated from under section 80 of the *ESA*. Further, to the extent that the Appellant seeks to rely on certain correspondence that should justify an extension of the recovery period, no such discretion exists under the *ESA* to do so.

24. The Employer's submissions are consistent with those of the Delegate to the extent that they highlight numerous opportunities the Appellant had to clarify his version of the events and allegations.

25. The Employer also says the Appellant has provided no basis on which to conclude a new breach of the *ESA* occurred April 1, 2022.

26. With respect to the Appellant's allegations of constructive dismissal, the Employer relies on caselaw establishing time limits on allegations of constructive dismissal claims in relation to the actions on which those allegations are based. To this end, the Employer says the Appellant cannot rely on changes that occurred 18 months prior to his resignation to ground a claim of constructive dismissal.

27. In reply, as noted above, the Appellant concedes that the appropriate recovery period is October 21, 2021, to October 21, 2022. The Appellant also provides a detailed chronology and further submissions supporting his appeal.

28. The Appellant maintains that notwithstanding the opportunities counsel had to make submissions, counsel had insisted that the Delegate hear from the Appellant directly, which he failed or refused to do.

29. The Appellant says that although the reduction to his wages occurred in April 2020, and were not returned to their previous level in 2021, the reduction in wages was not legally valid as it lacked consideration. The Appellant points to this Tribunal's decision in *Maksimovic* (Re), BC EST # D026/14, ("*Maksimovic*") and says in this case there was no consideration for the reduction in wages.

30. Further to this, the Appellant says that if the wage reduction that occurred in 2020 was not legal, then the Appellant continued to be owed wages at the higher rate at all times thereafter, including throughout the recovery period.

31. The Appellant points to section 80 of the *ESA*, which the Delegate relies on, and its reference to amounts "that became payable" during the recovery period. The Appellant submits that the initial breach does not need to have occurred during the recovery period in order for subsequent breaches to be captured by the Director's authority to order a remedy in relation to that recovery period.

32. The Appellant says that because the reduction in wages was not legally valid, the difference in wages to his previous salary remained payable each pay period throughout, and the Delegate's failure to consider this constituted an error of law.

33. The Appellant points to various notes in the record that was before the Director at the time the Determination was made in which Appellant's counsel and the Delegate discuss having the Appellant provide further evidence verbally or by affidavit to support the Complaint. The Appellant says he was under the impression he would have such an opportunity, and this was not afforded to him. The Appellant says this constitutes a failure to observe the principles of natural justice.

34. The Appellant also submits that the Director erred in law and failed to observe the principles of natural justice in failing or refusing to assess the Appellant's claim that he was constructively dismissed beyond the finding that the initial act of reducing the Appellant's wages, and the later date the Appellant says those wages should have been increased in any event, occurred outside of the recovery period.

35. Further to this, the Appellant distinguishes and rejects the Employer's submissions with respect to the timeliness of the Appellant's claim for constructive dismissal. Specifically, on the evidence, the Appellant cannot be said to have condoned the ongoing reduced wage rate, and this is underscored by the Appellant's continued protests of the changes made by the Employer.

36. The Appellant says the cumulative effects of the ongoing interactions between the Appellant and the Employer can also be relied on in assessing whether constructive dismissal has occurred.

ANALYSIS

37. 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:
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> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

38. As noted above, the Appellant is appealing both on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination.

39. I deal first, briefly, with the issue of natural justice, before addressing the alleged errors in law.

40. Natural justice has been described as the right to a fair procedure and includes specific rights such as the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker (see *Re 607730 B.C. Ltd. (cob English Inn & Resort)*, BC EST # D055/05, and *Imperial Limousine Service Ltd.*, BC EST # D014/05). To be successful on this ground of appeal, there must be credible evidence about how the determination procedure did not meet the requirements of natural justice (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99).

41. With respect to the Appellant's natural justice arguments, I find I do not need to address these given the manner in which the Complaint was dealt with, and my conclusions below. Had the Delegate continued the investigation into the Complaint, and in doing so denied the Appellant's requests to provide further evidence to support his claims, principles of natural justice may have been engaged. What occurred in the matter before me, however, was that the Delegate instead declined to continue investigating. Inherent in such a decision is a refusal to hear any further evidence, from any party.

42. It is clear the Appellant wished to provide further information in support of the Complaint, and was prevented from doing so; however, the Delegate's decision curtailed, rather than abbreviated, the process.

43. That said, for the reasons that follow, I find the Delegate's decision to stop investigating the Complaint on the basis that "the Act does not apply," constitutes an error in law.

44. The Tribunal has recognized the following ways in which an "error of law" may be found to have occurred, as set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 - Coquitlam)*, 1998 CanLII 6466 (BC CA), [1998] B.C.J. No. 2275 (BC CA) (*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.

45. Section 76(3)(b) provides that the Director may stop or postpone reviewing a complaint or refuse to investigate a complaint if satisfied that "this Act does not apply to the complaint."

46. The Delegate did not stop investigating because the Complaint fell outside of the scope of the *ESA*. Instead, the Delegate indicates that this finding was based on his conclusion that "[t]o continue to investigate…would be contrary to the Act's purposes."

47. In reaching this conclusion, I find the Delegate misapplied this section of the *ESA* by conflating sections 2 and 3, the purposes and scope sections. While section 2 sets out the purposes of the *ESA*, section 3 outlines the scope, beginning "[s]ubject to this section, this Act applies to all employees other than those excluded by regulation." Parenthetically, a complaint that falls outside of the legal jurisdiction of the *ESA* would also engage this section, though that is not what was found here.

48. Instead, the background section of the Determination confirms that the Employer falls within the jurisdiction of the *ESA*; that the Appellant was employed by the Employer; and that the Complaint was filed within the time period allowed under the *ESA*.

49. The basis for the Delegate's decision to stop investigating, however, was based on his conclusion that the remedy sought was beyond the Director's jurisdiction to award, based on the limitations in section 80. While it may be laudable to limit the use of Employment Standards Branch resources on

complaints that would not be successful, even accepting all of the facts as alleged by a complainant, I am not persuaded the *ESA* provides for such discretion.

50. That said, I find the Delegate has also misapplied section 80 of the *ESA* in making the Determination. To this end, I find the series of decisions culminating in *Maksimovic, supra,* instructive.

51. Section 80(1) reads as follows:

> 80 (1) The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning
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> (a) in the case of a complaint, 12 months before the earlier of the date of the complaint or the termination of the employment, and
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> (b) in any other case, 12 months before the director first told the employer of the investigation that resulted in the determination,
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> plus interest on those wages.

52. Since the Appellant has, subsequently, accepted that the recovery period established by section 80(1) ran from October 21, 2021, to October 21, 2022, the issues for the Delegate to determine were whether an amount of wages "became payable" during that period that was not paid to the Appellant and whether the Appellant was constructively dismissed.

53. On the first issue, such a finding requires, at a minimum, an assessment of what wages were earned during that period of time, as compared with the wages actually paid. In the matter before me, this analysis was short-circuited by the Delegate's conclusion that the change made to the Appellant's wage rate occurred before October 21, 2021. Without providing a basis for relying on this to dispose of the Complaint, the Delegate appears to have accepted as legitimate the changes made to the Appellant's wages, contrary to the Appellant's repeated assertions to the contrary.

54. In *Maksimovic*, similar circumstances arose where an employee's wages were reduced, and the delegate in that matter concluded there had been an agreement between the employer and employee to that reduction.

55. Member Thornicroft, in *Maksimovic (Re)*, BC EST # RD046/12, declined to overturn the finding of fact that there had been agreement on the reduced wage, but nevertheless referred the matter back to the Director to assess whether that agreement was legally valid. Member Thornicroft observed "I cannot ignore the fact that one of the stated purposes of the *Act* is to ensure that all employees governed by the *Act* receive the wages that they have earned and the full measure of compensation or length of service to which they are entitled."

56. Short of what occurred in *Maksimovic,* the Delegate in the matter before me did not address the issue of whether or to what extent the Appellant had agreed to a reduction in wages, let alone whether such an agreement was legally valid.

57. To this end, Member Thornicroft's decision referenced the reasoning of the Ontario Court of Appeal in *Hobbs v. TDI Canada Ltd.*, 2004 CanLII 44783 which I find to be apt. That Court confirmed "…the law does not permit employers to present employees with changed terms of employment, threaten

to fire them if they do not agree to them, and then rely on the continued employment relationship as the consideration for the new terms."

58. While the Appellant may have agreed to a reduction in wages for some period of time starting in April 2020, (and the Delegate refers to various alternative arguments made by the Appellant in this regard) it is clear on the materials before the Director that, thereafter, the Appellant maintains that he was entitled to be paid an amount more than the amount he was actually paid. A determination to the contrary requires findings of fact that include that the Appellant was paid all of the wages he was contractually owed by the Employer during the recovery period. No such finding is disclosed on the face of the Determination.

59. Further to this, the Delegate then goes on to conclude that "[t]he only remedy available in the event the Director were to deem the Complainant terminated as a result of the alleged changes would be compensation for length of service under section 63 of the *Act*." Having already addressed the flaw with this finding in ignoring whether certain wages "became payable" during the recovery period, the Delegate rejects the Appellant's allegations of constructive dismissal by concluding that the basis for this allegation is untimely.

60. Without providing support in the *ESA* for this conclusion, the Delegate notes that "[f]or the Complainant's allegations to fall within the recovery period of a complaint, he would have had to file a complaint within 12 months of when the alleged changes occurred." As the jurisprudence presented by both the Appellant and Employer demonstrate, the Director may conclude that certain allegations are too remote in time to support a conclusion that an employee has been constructively dismissed. This is not what occurred here, however, as the Delegate instead declined to make any conclusions about whether the Appellant was constructively dismissed.

61. In this respect, I find the Delegate erred in law in concluding that this aspect of the Complaint was untimely, without a basis other than his assertions with respect to the purposes of the *ESA*. As noted above, section 80 limits wage recovery resulting from a determination; it does not, however, preclude the filing of, or investigation into, a complaint that is otherwise timely.

62. Time limits are instead dealt with in section 74, and, as noted above, the Delegate concluded the Complaint itself was filed on time. Section 74 provides that a complaint "relating to an employee whose employment has terminated" must be delivered within 6 months after the last day of employment. Though there is a requirement in subsection 4 that complaints regarding certain allegations must be filed within 6 months of the alleged contravention, none of those types of allegations are relevant to the Complaint.

63. While the Employer argues that a rejection of the Delegate's reasoning would have permitted the Appellant to maintain their employment until 2040, and at that time demand the Director investigate a change that occurred 19 years earlier, I am not persuaded other arguments would not be successful at staving off such a claim, including the Director's discretion under section 76(3)(c) to refuse to investigate a claim that is frivolous, vexations, or trivial, or is not made in good faith.

64. For all of the foregoing reasons, I find the Director erred in law as indicated above and allow the appeal. As a result, I refer the matter back to the Director in its entirety for a fresh investigation.

ORDER

65. The appeal is allowed pursuant to section 112(1)(a).

66. Pursuant to section 115(1)(b), I direct that the matter be referred back to the Director for a fresh investigation.

Ryan Goldvine
Member
Employment Standards Tribunal