

An appeal

- by -

Gabe Mallek
("Mallek")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/151

DATE OF DECISION: February 4, 2008

DECISION

SUBMISSIONS

Gabe Mallek	on his own behalf
Donaven DeWitte	on behalf of DeWitte Ventures
Joe LeBlanc	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the “Act”) by Gabe Mallek (“Mallek”) of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 30, 2007.
2. The Determination was made in relation to a complaint filed by Mallek against Donaven DeWitte carrying on business as DeWitte Ventures (“DeWitte”). The complaint alleged that DeWitte had contravened Section 21 of the *Act* by deducting the cost of motel accommodation from his wages and had contravened Section 63 of the *Act* by terminating his employment without cause, notice or compensation in lieu of notice.
3. The Section 21 complaint against DeWitte was settled; the Section 63 complaint against DeWitte was dismissed by the Director in the Determination under appeal. The Director concluded DeWitte had established just cause for terminating Mallek’s employment. Mallek disagrees with that conclusion. He says the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. Mallek does not seek an oral hearing on the appeal.
5. The Tribunal has a discretion whether to hold a hearing on an appeal and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103), Rule 16 of the Tribunal’s Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575. In this case, the Tribunal has reviewed the appeal, the submissions and the material submitted by all of the parties, including the Section 112 (5) record filed by the Director, and has decided an oral hearing is not necessary in order to decide this appeal.

ISSUE

6. The issue in this appeal is whether Mallek has shown the Director erred in law or failed to observe principles of natural justice in making the Determination.

THE FACTS

7. DeWitte operates a truck logging business in Osoyoos, BC. Mallek was employed by DeWitte as a driver from November 19, 2006 to March 23, 2007, when he was terminated.
8. During the investigation, DeWitte claimed Mallek was terminated for reasons relating to the unsafe manner in which he operated the truck. The specific areas of concern referred to by DeWitte were Mallek's failure to properly maintain the driver's daily log book, not using the safety chains and overloading the truck.
9. Mallek denied the allegations related to the daily log book; he admitted that he had been cited by the Ministry of Transport ("M.O.T.") during a routine inspection for not connecting the safety chains. He said there was only one occasion during his employment where he had failed to connect the chains. As for the overloading, Mallek said the truck scales were not working properly and that he had no choice but to instruct the loader operator to load him the same as those trucks that had scales.
10. There was evidence provided during the complaint investigation in the form of a Vehicle Inspection Report from the M.O.T. dated January 16, 2007, which cites Mallek for not maintaining his daily log book and failing to connect the safety chains; two citations from the M.O.T. for running the truck over its rated capacity; and a letter from Terry Soukeroff, the loader operator, about Mallek regularly asking him to overload the truck.
11. Mallek denied the assertions made by Mr. Soukeroff. He said the truck scales were faulty. He accused Mr. Soukeroff of acting out of a "deep seated personal hatred", although no objective foundation for that allegation was ever presented to the Director. Nor was the claim that the truck scales were faulty ever borne out by any objective evidence. The evidence suggested that Mallek had consciously and intentionally disabled the truck scales by unplugging them. DeWitte indicated the "problem" with the scales was corrected by plugging the truck scale back in and that the purported problems with the truck scales disappeared after Mallek left his employ. No repairs to the truck scales were ever required.
12. DeWitte said the delay between the above incident and the dismissal of Mallek was because he was prepared to give Mallek the benefit of the doubt which came to an end when he got the truck back from Mallek and found no problem with the truck scales and that Mallek had been running the truck overloaded for months.
13. In his analysis, the Director notes that Mallek was not terminated for a single incident, but for a number of incidents which viewed together demonstrated a "pattern of unsafe behaviour" justifying his dismissal. The Director found no efforts by DeWitte to follow a system of progressive discipline, but also found that because safety issues were involved, strict adherence to a system of progressive discipline was outweighed by workplace and public safety considerations.
14. The Director found that parts of Mallek's version of events lacked credibility.

ARGUMENT

15. Mallek says the Determination was made following only a "superficial investigation" by the Director. He submits the Director was duped by DeWitte and failed to develop a sufficiently "full understanding" of the case to make a fair decision.

16. His appeal submission provides an outline of facts and an argument about why those facts should not have resulted in the Determination that was made.
17. In response, DeWitte says the right decision was made. His response provides other examples of concerns which DeWitte developed about Mallek's suitability as a driver and employee.
18. The Director has filed a reply to the appeal and has provided the Section 112 record. The submission notes that the claim by Mallek for motel expenses was resolved by agreement between the parties. Apart from clarifying that matter in the appeal, the Director's submission is entirely unnecessary and inappropriate. It does nothing more than elaborate on the reasons for the Determination and, in the process, advocate against Mallek. I have disregarded this part of the submission.
19. During the appeal process, DeWitte submitted additional evidence which he says supports his decision to terminate Mallek. I am unable to accept this evidence or to consider it in this appeal.
20. In response to the submission by DeWitte providing the additional evidence, Mallek has taken the opportunity to make a final submission. This submission adds nothing to the appeal, essentially repeating all of the points made in the appeal submission. I have given it limited consideration.

ANALYSIS

21. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, 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 made.*

22. The Tribunal has consistently indicated that the burden in an appeal is on the appellant to persuade the Tribunal that there is an error in the Determination under one of the statutory grounds.

23. Mallek has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said 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).

24. Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).
25. There are no submissions in the appeal specific to this ground and no evidence that Mallek was not provided an opportunity to know the position being taken by DeWitte and given an opportunity to respond. I find that Mallek has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.
26. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by Mallek with the conclusion of the Director that DeWitte had established just cause to dismiss him. In that respect, I make two points.
27. First, while a decision about whether there is just cause for dismissal does include questions of law, it is predominantly fact driven. That is apparent from an examination of the appeal submission, which primarily comprises Mallek's own summary of the facts on which he makes his argument against the conclusion of the Director in the Determination. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). Mallek has not shown any error of law in respect of the findings of fact made by the Director. The Determination followed an analysis of the evidence presented by the parties during the complaint process and is rationally supported. While I appreciate that Mallek disagrees with the conclusion, it is not shown that any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable. The facts support two conclusions reached by the Director: that the conduct of Mallek established in the evidence shows he engaged in a pattern of unsafe behaviour over the course of his employment with DeWitte; and that his attitude to clear safety violations indicated a general disregard for his own safety and the safety of others.
28. The second point is that Mallek has not shown the Director erred in applying the principles of just cause to the facts as found. The Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97). The fundamental consideration running through the established principles is whether the facts show the employee's misconduct is inconsistent with a continuation of employment.
29. I find that Mallek has failed to show there was an error of law made by the Director in assessing the facts and concluding DeWitte had established just cause for his dismissal. The appeal is dismissed.

ORDER

30. Pursuant to Section 115 of the *Act*, I order the Determination dated October 30, 2007 be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal