Employment Standards TRIBUNAL

An appeal

- by -

Stephen Albert Mark
("Mr. Mark")

- 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: Carol L. Roberts

FILE No.: 2014A/2

DATE OF DECISION: March 25, 2014

DECISION

SUBMISSIONS

Stephen Albert Mark and Linda Salter — on behalf of Stephen Albert Mark

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*") Stephen Albert Mark has filed an appeal of a Determination issued by the Director of Employment Standards (the "Director") on November 28, 2013. In that Determination, the Director ordered McKee Vacuum Truck Services Ltd. carrying on business as Chetwynd Fresh Water (2011) ("Chetwynd") to pay Mr. Mark, its former employee, $2,236.55 in annual vacation pay and interest. The Director also imposed an administrative penalty in the amount of $500 for Chetwynd's contravention of section 58 of the *Act*, for a total amount payable of $2,736.55.

2. Mr. Mark appeals the Determination contending that the delegate failed to observe principles of natural justice in making the Determination.

3. Section 114(1) of the *Act* and Rule 22 of the Tribunal's *Rules of Practice and Procedure* (the "*Rules*") permit the Tribunal to dismiss all or part of an appeal without seeking submissions from the other parties. I have decided that this appeal is an appropriate case for consideration under section 114(1) of the *Act*. Accordingly, I have evaluated the appeal based solely on the reasons for the Determination, Mr. Mark's written submissions, and my review of the section 112(5) "record" that was before the Director at the time the Determination was made.

4. If I am satisfied that Mr. Mark's appeal, or a part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, the Tribunal will invite Chetwynd and may invite the Director to file Reply submissions on the appeal, and Mr. Mark would be afforded an opportunity to make a final Reply to those submissions, if any. If the appeal is not meritorious, it will be dismissed.

FACTS AND ARGUMENT

5. Mr. Mark's employment was terminated on July 20, 2012. On October 24, 2012, Mr. Mark filed a complaint with the Director of Employment Standards alleging that Chetwynd had contravened the *Act* in failing to pay vacation pay and compensation for length of service.

6. The delegate held a hearing into Mr. Mark's complaint on June 26 and 27, 2013. Both parties were represented by counsel. At the hearing, Chetwynd agreed that Mr. Mark was owed annual vacation pay in the amount set out above. The sole remaining issue before the delegate was whether or not Mr. Mark's employment was terminated for just cause.

7. The facts and evidence are comprehensively set out in the Determination and it is not necessary to repeat them in detail.

8. The delegate heard evidence from six witnesses on Chetwynd's behalf: Donald McKee, Chetwynd's current owner; George Bergen, Chetwynd's previous owner; two Chetwynd customers, Kwal Harroff and Mike Podolecki; and two Chetwynd employees, Lucas Stewart and Brian Saunders. Mr. Mark called no witnesses.

9. Chetwynd asserted that Mr. Mark's employment was terminated for cause which the delegate summarized as being an altercation Mr. Mark had with a co-worker, Mr. Mark's inclination to carry a rifle in his truck despite company policies to the contrary and Mr. Mark's refusal to stop objectionable conduct when asked to do so.

10. Mr. McKee owns McKee Vacuum Trucks, a service he has operated since 2006. Mr. McKee purchased Chetwynd Fresh Water from Mr. Bergen in 2011 and operated both businesses as Chetwynd. Mr. Mark began his employment with Chetwynd under Mr. Bergen in May 2007 as a water delivery driver. The business premises contained a residence that Mr. Bergen rented to Mr. Mark. Mr. Mark continued to reside in the residence after Mr. McKee purchased the business.

11. Mr. Bergen's evidence was that when he sold Chetwynd, he told Mr. McKee that he had concerns with Mr. Mark's approach to safety, specifically his failure to wear his personal protection equipment and his habit of carrying a rifle in his truck contrary to company policy.

12. Mr. Bergen issued Mr. Mark a written reprimand after Mr. Mark had verbally threatened to use a rifle on another employee. Mr. Mark's counsel objected to the admissibility of the reprimand letter on the grounds of relevancy and contended that Chetwynd could not rely on the letter in support of progressive discipline. The delegate admitted the letter and permitted Mr. Mark's counsel to make post-hearing submissions regarding the weight the delegate ought to accord the document.

13. Mr. Bergen believed that Mr. Mark had stopped carrying his rifle in his vehicle. However, a Safety Officer subsequently discovered the rifle in Mr. Mark's vehicle during a safety audit. Mr. Bergen verbally reprimanded Mr. Mark and Mr. Mark agreed not to bring the rifle to work. Mr. Bergen also testified that he had received customer complaints that Mr. Mark was not wearing his personal protection equipment.

14. Mr. Bergen reported these incidents to Mr. McKee at the time of the sale as he felt that the business might be affected if a customer audit discovered a rifle in the vehicle, although he could not recall whether or not he mentioned the reprimand letter to Mr. McKee. Mr. Bergen said that many of Chetwynd's clients were in the oil and gas industry and had very strict safety standards.

15. Mr. Bergen was unable to recall if he ever told Mr. Mark that his employment would be terminated for his conduct. He agreed that although he told Mr. Mark that his employment could be terminated if he continued to carry his rifle, this communication was not documented in his personnel file.

16. Mr. McKee testified that when he purchased the business, he was aware that Mr. Bergen had spoken to Mr. Mark about carrying a rifle in his vehicle but he had no knowledge of any disciplinary actions Mr. Bergen may have taken against him. Upon assuming ownership of the company, Mr. McKee told Mr. Mark that he would not be permitted to carry a rifle in his vehicle.

17. Mr. McKee testified that in the spring of 2012, local authorities told him that an owner had to reside on the company's property, so he took steps to end Mr. Mark's tenancy.

18. Mr. McKee testified about a number of arguments he had with Mr. Mark regarding, among other things, rent payments and wage increases. He said that Mr. Mark often complained about other drivers and made "veiled threats" if he did not get his way, and, on one occasion, told Mr. McKee that if he were to get a percentage of the company, "all of his problems at the shop would go away."

19. Mr. McKee issued Mr. Mark verbal warnings after receiving a report that Mr. Mark was not wearing his personal protection equipment and again after Mr. Mark was involved in a physical altercation with another employee that resulted in an RCMP investigation.

20. Mr. McKee said that he received so many complaints from other employees regarding Mr. Mark's conduct that he became "numb" to his behaviour. However, he did speak to Mr. Mark after receiving a report from Mike Podolecki. Mr. Podolecki, who was an acquaintance of Mr. Mark's, testified that Mr. Mark said that he wanted to harm Mr. McKee because Mr. McKee was evicting him. Mr. Podolecki was sufficiently concerned that he reported the threat to Mr. McKee verbally and in an email.

21. On July 12, 2012, Mr. McKee met with Mr. Mark to discuss his conversation with Mr. Podolecki. Mr. McKee testified that he was concerned about how Mr. Mark's negative comments could affect his business, causing loss of income and reputation.

22. Mr. McKee told Mr. Mark that he would have to stop "denigrating the company" and speaking negatively about him. When Mr. McKee asked Mr. Mark if he would assure him that his conduct would stop, Mr. Mark asked for time to think about it. Mr. McKee told Mr. Mark that he expected a response by July 20, 2012. He suspended Mr. Mark and removed all the vehicles from the shop (which was also Mr. Mark's residence) because he and the other employees feared going there. Neither Mr. McKee nor any of the employees returned to the shop until Mr. Mark moved out in September 2012.

23. Mr. Harroff, a long-time friend of Mr. McKee's, testified that in 2011, Mr. Mark told him that although Mr. McKee told him not to carry a rifle in the vehicle, he would do so if he wanted to. Mr. Harroff reported the conversation to Mr. McKee at the time it occurred and later provided a written summary of the conversation to Mr. McKee on July 19, 2012.

24. Mr. Stewart and Mr. Saunders both testified that Mr. Mark spoke negatively about Mr. McKee and made threats about wanting to harm him. Mr. Stewart did not consider the threats to be serious but Mr. Saunders did. Mr. Saunders also gave evidence about a physical altercation he had with Mr. Mark and was afraid to return to the shop because of that.

25. Counsel for Mr. Mark asserted that Mr. McKee terminated Mr. Mark's employment in order to make it easier to end his tenancy, an assertion Mr. McKee denied. Mr. McKee's evidence was that he did not confront Mr. Mark until July of 2012 because he thought things would settle down but eventually realized that they were not going to.

26. Mr. Mark agreed that his relationship with Mr. McKee deteriorated after Mr. McKee purchased the business. He acknowledged that he was unhappy when Mr. McKee purchased the business because he had wanted to but could not afford to do so. Mr. Mark also acknowledged that he told Mr. McKee that if he raised his voice with him, he would "hurt" him, and that he told other people that he had "warned Don McKee."

27. Mr. Mark's counsel contended that Mr. Mark was never warned that his employment was in jeopardy, and argued that none of incidents, taken alone, constituted just cause to terminate his employment. Counsel for Mr. Mark further contended that Mr. Mark's conduct had been brought to Mr. McKee's attention on many occasions and because nothing had been done, it had been condoned and therefore Chetwynd could no longer rely on it to terminate his employment.

28. The delegate heard lengthy and substantive arguments from counsel for both parties following the conclusion of the evidence. The parties made submissions on whether or not Mr. Mark's conduct was such to justify

termination, whether or not Mr. Mark had been warned that his employment was in jeopardy and whether or not Mr. Mark's conduct amounted to insubordination. Counsel for Mr. Mark also made post-hearing submissions on the issue of whether or not Mr. Bergen's actions could be considered when assessing progressive discipline.

29. After considering the evidence and the submissions, the delegate concluded that Chetwynd had met the burden of demonstrating that Mr. Mark's employment was terminated for just cause.

30. The delegate found Mr. McKee's evidence compelling, noting that his responses to questions from both counsel was both "fulsome" and occasionally against interest. On the other hand, the delegate found Mr. Mark's responses to be vague and argumentative. Where Mr. Mark's evidence differed from Mr. McKee's, the delegate preferred that of Mr. McKee. She specifically rejected Mr. Mark's evidence that Mr. McKee offered to fight Mr. Mark.

31. Although the delegate found that Mr. Mark acted aggressively, threateningly and sometimes violently towards others, she concluded that Chetwynd could not rely on previous instances of progressive discipline to support just cause.

32. The delegate found Mr. Mark's threats of physical violence and insults towards Mr. McKee during his conversation with Mr. Podolecki to be worthy of just cause dismissal. She considered Mr. McKee's request that Mr. Mark cease denigrating Chetwynd to be a reasonable one and Mr. Mark's response to be a repudiation of the employment relationship:

> [Mr. Mark] knew, or should have known, that threatening and insulting his employer to a member of the public who was also a customer, combined with his refusal to comply with Mr. McKee's quite reasonable request to end this type of behavior would end his employment.

33. The delegate noted that there was some issue as to whether or not Mr. Mark knew that Mr. Podolecki was a Chetwynd customer. She considered the size of the town of Chetwynd as well as the fact that Mr. Mark and Mr. Podolecki were acquaintances in concluding that Mr. Mark was aware of Mr. Podolecki's business association with Chetwynd. The delegate concluded that it was unreasonable for Mr. Mark to assume that the conversation was confidential given that it occurred in a public place.

34. The delegate found that Chetywnd's tolerance of Mr. Mark's aggressive behavior in the past did not prevent it from disciplining him for it in the future. She concluded that Chetwynd was under no obligation to continue to accommodate Mr. Mark's aggression.

35. The delegate concluded that Chetwynd had met the burden of substantiating just cause.

Argument

36. Mr. Mark makes two main points in his appeal:

a. he did not obtain full disclosure of documents before the hearing. Specifically, he says that he did not obtain a copy of the note Mr. Harroff sent to Mr. McKee prior to the hearing and that he was unable to respond adequately to that evidence. He also contends that Mr. Harroff's evidence was false, since he could not have had any discussions with Mr. McKee in May 2011 about whether or not it was permissible to carry a rifle in the water truck because he did not work for Mr. McKee at that time.

b. in his five years working for Chetwynd, he never delivered water to Mr. Podolecki or Mr. Harroff and that findings of the delegate that he knew these individuals were Chetwynd customers are in error. He further says that if they were Chetwynd customers, he was unaware of that fact. Mr. Mark asks the Tribunal to "re-examine the evidence" and to "require further evidence" from the Employer regarding statements made by Mr. Harroff and Mr. Podolecki that they were Chetwynd customers.

37. Ms. Salter, who I infer from the "record" is Mr. Mark's partner, added that she felt Mr. Mark's counsel erred by not calling her as a witness and that her written account should be taken into consideration. Ms. Salter also says that at the time of the hearing, Mr. Mark was suffering from a serious infection and was in pain during the hearing, which may have contributed to his "vagueness."

ANALYSIS

38. Section 114 of the *Act* provides that at any time after an appeal is filed and without a hearing of any kind the Tribunal may dismiss all or part of the appeal if the Tribunal determines that any of the following apply:

(a) the appeal is not within the jurisdiction of the tribunal;

(b) the appeal was not filed within the applicable time limit;

(c) the appeal is frivolous, vexatious, trivial or gives rise to an abuse of process;

(d) the appeal was made in bad faith or filed for an improper purpose or motive;

(e) the appellant failed to diligently pursue the appeal or failed to comply with an order of the tribunal;

(f) there is no reasonable prospect the appeal will succeed;

(g) the substance of the appeal has been appropriately dealt with in another proceeding;

(h) one or more of the requirements of section 112(2) have not been met.

39. Having reviewed the section 112(5) "record" and Mr. Mark's submissions, I dismiss the appeal.

40. Section 112(1) of the *Act* provides that a person may appeal a determination on 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 being made.

41. The Tribunal has consistently said that the burden is on an appellant to persuade the Tribunal that there is an error in the Determination on one of the statutory grounds set out in section 112 of the *Act*. This burden requires the appellant to provide, demonstrate or establish a cogent evidentiary basis for the appeal. I conclude that Mr. Mark has not met that burden.

42. Although Mr. Mark advances a failure to comply with natural justice as the basis for his appeal, I find no merit in his submissions.

43. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, are given the opportunity to reply, and have the right to have their case heard by an impartial decision maker.

44. Although Mr. Mark contends that he did not obtain full disclosure of documents prior to the hearing, the "record" does not bear that out. However, even if Mr. Mark was in fact taken by surprise by the late disclosure of certain documents, his counsel had every opportunity to either seek an adjournment or to respond to that evidence at the hearing. I note that Mr. Mark's counsel made post-hearing submissions on the reprimand letter, and I infer that those submissions could also have addressed Mr. Harroff's letter, had counsel felt that evidence to be relevant to the issue of just cause. Furthermore, Mr. Mark does not say what evidence he would have provided in response to Mr. Harroff's letter had he received it in advance and what affect that might have made in the ultimate determination.

45. Mr. Mark further asserts, but provides no evidence, that Mr. Harroff lied at the hearing. Mr. Mark, who was represented by counsel at the hearing, had every opportunity to cross-examine Mr. Harroff on his evidence and to introduce evidence that might have contradicted his testimony. Having failed to either raise any arguments at the hearing or provide fresh evidence on appeal to support this assertion, I find it without merit.

46. In any event, as I understand the Determination, Mr. Harroff's letter formed no part of the delegate's decision that Chetwynd had substantiated just cause.

47. Mr. Mark's other submission appears to suggest that the delegate erred in law. Factual errors do not constitute errors of law unless an appellant can demonstrate that findings of fact are perverse and inexplicable; that they are made without any evidence, they are inconsistent with and contradictory to the evidence or that they are made without any rational foundation. (*Britco Structures Ltd.*, BC EST # D260/03)

48. Mr. Mark says that the delegate erred in concluding that he knew Mr. Podolecki or Mr. Harroff were Chetwynd customers and seeks to have the Tribunal "re-examine the evidence" in this regard. Mr. Mark's counsel made arguments on the issue of whether or not Mr. Mark knew that Mr. Podolecki was a customer at the hearing. The delegate concluded that Mr. Mark knew, or ought to have known, that his comments about his employer were not confidential. I am unable to find the delegate erred in her conclusions.

49. The "record" contains an email from Mr. Podolecki with the subject heading: "Concerned Customer of Don McKee." This email was part of the "record" disclosed to the parties before the hearing. Mr. Mark had every opportunity to question Mr. Podolecki in this regard or present contrary evidence. I find there was an evidentiary basis for the delegate to conclude that, at least, Mr. Podolecki was a Chetwynd customer.

50. However, even if the delegate erred in her conclusions on this point, her decision does not rest entirely on that finding. It also rested, at least in part, on the undisputed fact that, when asked, Mr. Mark refused to agree to cease denigrating his employer. She quite properly, in my view, found Mr. Mark's actions to be a repudiation of the employment relationship.

51. Ms. Salter contends that Mr. Mark's counsel ought to have called her as a witness. This is not a ground of appeal and I make no comment about the quality of Mr. Mark's representation save to say that I infer counsel acted on Mr. Mark's instructions.

52. I find that this appeal has no prospect of succeeding and the object and purposes of the *Act* would not be served by requiring a response from the other parties.

53. The appeal is dismissed.

ORDER

54. Pursuant to section 115 of the *Act*, I order that the Determination, dated November 28, 2013, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal