Employment Standards TRIBUNAL

An appeal

- by -

Burnell Ventures Inc. carrying on business as Sun Valley Window Cleaners
("Sun Valley")

- 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.: 2016A/152

DATE OF DECISION: March 1, 2017

DECISION

SUBMISSIONS

Ashley Burnell	on behalf of Burnell Ventures Inc. carrying on business as Sun Valley Window Cleaners
Carrie H. Manarin	on behalf of the Director of Employment Standards

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Burnell Ventures Inc. carrying on business as Sun Valley Window Cleaners ("Sun Valley") has filed an appeal of a Determination issued by a delegate (the "delegate") of the Director of Employment Standards (the "Director") on September 21, 2016.

2. On July 5, 2016, Jane Dobson filed a complaint with the Director alleging that Sun Valley contravened the *Act* in failing to pay her overtime wages and compensation for length of service.

3. Following a hearing, a delegate of the Director concluded that Sun Valley had contravened sections 18, 40 and 63 of the *Act* in failing to pay Ms. Dobson overtime wages, annual vacation pay and compensation for length of service. The Director determined that Ms. Dobson was entitled to $3,351.99, including interest. The delegate also imposed two administrative penalties in the total amount of $1,000 for Sun Valley's contraventions of the *Act*, for a total of $4,351.99.

4. Sun Valley contends that the Director erred in law in making the Determination. In my consideration of the appeal, I sought submissions from the parties on the issue of "after-acquired cause."

5. These reasons are based on the written submissions of the parties, the section 112(5) "record" that was before the delegate at the time the decision was made and the Reasons for the Determination.

ISSUE

6. Whether or not Burnell has demonstrated any statutory ground of appeal.

FACTS AND ARGUMENT

7. The delegate held a hearing into Ms. Dobson's complaint on August 23, 2016. Mr. Burnell appeared on behalf of Sun Valley and Ms. Dobson appeared on her own behalf. The issues and facts as set out by the delegate are as follows.

8. Mr. Burnell is the sole director of Sun Valley, which operates a window cleaning business, and is also a co-owner and co-director of Urban Windows. Both companies operate from the same business premises. Ms. Dobson was employed from April 28, 2015, until June 16, 2016.

9. At issue before the delegate was whether Ms. Dobson was a manager, whether or not she was entitled to overtime wages, and whether she was entitled to compensation for length of service.

10. Although Ms. Dobson's job title was office manager, Ms. Dobson contended that she did not exercise any managerial duties. She said that she did not manage employees or budget. She had authority to purchase stationary only, and field staff reported to Mr. Burnell. She said that although she could schedule and prepare quotes for small residential jobs using a template developed by Mr. Burnell, she had to discuss the quotes with Mr. Burnell before issuing them. Mr. Burnell alone prepared quotes for larger projects such as strata complexes. Ms. Dobson's other tasks included doing laundry (cleaning rags), answering the telephone and bookkeeping for Sun Valley and Urban Windows. She also updated the website content, made bank deposits, and, in December 2015, assisted with the company's move to a new location.

11. Mr. Burnell contended that Ms. Dobson exercised managerial duties, had access to bank and credit card accounts to move funds around, and had the authority to purchase office supplies. He also contended that Ms. Dobson had the authority to dispatch crews to worksites and deploy equipment to sites.

12. When Ms. Dobson was hired, there was no discussion of her hours of work or overtime and she had a flexible work schedule. Until mid-March, 2016, all employees, including Ms. Dobson, entered their hours of work in a computer system. Ms. Dobson said that she entered her hours to show that she worked eight hours per day regardless of the actual number of hours she worked. On occasion, she forgot to enter her hours, with the result being that many of the payroll records show she worked no hours on certain days. However, the time records from January 11 until mid-March, 2016, were an accurate reflection of her hours of work. In mid-March, employees were required to punch a time clock at the start and end of each day. Ms. Dobson said that she occasionally forgot to punch out and hand-wrote her time on her card. In January 2016, Ms. Dobson maintained her own personal record of her hours of work including a running total of her overtime hours less the time she took off for personal matters. She contended that she had accrued 110 hours of overtime between January 11 and the end of her employment. She did not inform Mr. Burnell of those hours during her employment, hoping to obtain a raise at some point in the future. However, she said that he would have been aware of her time given that he did the payroll until the beginning of May and would have reviewed her time cards each pay period. At no time did Mr. Burnell tell her she could not work more than eight hours per day. Ms. Dobson sought compensation for 55.1 hours of overtime.

13. Ms. Dobson said that she discussed overtime with Mr. Burnell in May 2016 in relation to extra time she would have to spend preparing tax documents for Sun Valley. Mr. Burnell authorized Ms. Dobson to work two additional days on those documents.

14. Burnell hired Lynda Flegel and her spouse as installers on a contract basis commencing May 9. Ms. Flegel also assumed responsibility for Sun Valley's payroll duties in early May 2016. On June 4, 2016, Ms. Flegel gave Mr. Burnell a letter indicating that she and her husband were resigning their jobs as installers because Ms. Dobson had informed them that Urban Windows was operating without WCB coverage and was not current on its taxes. Mr. Burnell took steps to investigate this. After satisfying himself that the company's WCB coverage and tax remittances were current, he reassured Ms. Flegel who withdrew her resignation

15. In June 2016, Mr. Burnell discussed Ms. Flegel's conversation with Ms. Dobson and showed Ms. Dobson Urban Windows' WCB coverage and income tax forms. Mr. Burnell also told Ms. Dobson that it had come to his attention that she had been maintaining an "overtime bank" without his knowledge or consent, contrary to company policy. When Ms. Dobson asked if Mr. Burnell was going to terminate her, he informed her that he had no choice but to do so.

16. Mr. Burnell testified that he tried to get an explanation from Ms. Dobson about why she said what she did to Ms. Flegel but did not get it. Ms. Dobson denied discussing Urban Windows' taxes with Ms. Flegel. She also

did not recall telling Ms. Flegel that Urban Windows did not have WCB coverage but acknowledged she could have been confused as to whether or not this was the case.

17. Mr. Burnell said that Ms. Flegel and Ms. Dobson's relationship was antagonistic and concluded that Ms. Dobson had made the comments to get Ms. Flegel to quit. Mr. Burnell stated that although he decided to terminate Ms. Dobson's employment at that point because she had discussed confidential information with another employee, he was too busy to do so that day. He said that while he never had any issues with Ms. Dobson's performance, the conversations Ms. Flegel brought to his attention undermined his confidence in Ms. Dobson. He believed that Ms. Dobson had "stockpiled" hours in an overtime bank for later payment because she instructed Ms. Flegel, who had also taken over responsibility for Sun Valley's payroll duties, to use Ms. Dobson's hours to offset what she believed was an overpayment. However, he argued that either of the incidents constituted grounds for immediately terminating Ms. Dobson's employment. He also said that, after her employment was terminated, Ms. Dobson submitted a list of expenses for which she sought reimbursement. He also discovered that Ms. Dobson had emailed confidential banking information for Sun Valley and Urban Windows to her personal email account without his knowledge or consent.

18. Ms. Dobson contended that Ms. Flegel lied about their conversation as she wanted an excuse to pursue more profitable opportunities. Ms. Dobson also contended that Mr. Burnell must have had an ulterior motive to terminate her employment as he preferred Ms. Flegel's version over hers without investigating the matter. She contends that even if her comment about WCB coverage was true, it warranted a warning rather than termination. Ms. Dobson also argued that she did nothing wrong by recording her hours of work.

19. Mr. Burnell called a number of witnesses on behalf of Sun Valley: Ms. Flegel, Vicente San Agustin, Spencer Tchir, Kirstin England and Dyan Burnell.

20. Ms. Flegel's testimony confirmed Mr. Burnell's account of the events leading up to Ms. Dobson's termination. Ms. Flegel agreed that her relationship with Ms. Dobson was strained after Mr. Burnell informed Ms. Dobson that Ms. Flegel had been hired to do Sun Valley's payroll.

21. Mr. San Agustin and Mr. Tchir both worked seasonally for Sun Valley. They both arrived at the office before 7:30 a.m. They testified that Ms. Dobson usually arrived at the office at 7:30 a.m. and was still there when they returned from their work sites. Mr. San Agustin received his job sheets and schedule from Mr. Burnell. When he was finished his job, he contacted Ms. Dobson who arranged for a tow truck to bring the equipment to the next site. Once the jobs were completed, he contacted either Mr. Burnell or Ms. Dobson to determine if there was any more work, and if not, he would go home for the day. It was Mr. Agustin's evidence that Ms. Dobson booked appointments and had the authority to set prices. She also monitored the employees to ensure they used the punch card once that was installed in mid-March. Ms. Dobson scheduled jobs and managed the operations when Mr. Burnell was away. Mr. San Agustin believed that Ms. Dobson was the company secretary until they were informed otherwise. If Mr. San Agustin needed to work overtime, he sought permission from Mr. Burnell.

22. Ms. England, who was employed as Sun Valley's office manager and occasional bookkeeper for three years, testified that during her last two years of employment she worked between 0800 and 1600 each day with some flexibility to take time off for personal matters and make up for that time later. She maintained her own record of hours of work and reported them to Mr. Burnell. She had little interaction with the crews during the day and could quote on and schedule small residential jobs without Mr. Burnell's authorization. She said these small jobs constituted 80 - 85% of the company's work.

23. Dyan Burnell is Mr. Burnell's mother and one of the company's three shareholders. She testified that she assisted Mr. Burnell interview applicants for the office manager position. She said that, during the interview, Ms. Dobson was told that she would be required to work between 0800 and 1600 and that overtime was not discussed. She also testified that Ms. Dobson was told that the company's business slowed down during the winter and that she would be laid off for three to four months. Ms. Burnell said that, after she was hired, Ms. Dobson said being laid off would be a hardship for her so Mr. Burnell kept her on and found work to keep her busy.

24. After considering the definition of 'manager', the delegate concluded that Ms. Dobson was not a manager, as she had no authority or responsibility for hiring, supervising, evaluating or terminating staff, determining that these were Mr. Burnell's responsibilities. The delegate also concluded that although Ms. Dobson's duties included the preparation of estimates for some small jobs, she did so using a template developed by Mr. Burnell and that the final authority regarding the dispatch of human and equipment resources each day lay with Mr. Burnell except on those occasions when he was unavailable. The delegate accepted that this happened on only a few occasions during Ms. Dobson's employment. The delegate also did not feel it significant that Ms. Dobson had the authority to call a tow truck to move equipment when that was necessary, determining that in doing so Ms. Dobson was not exercising independent action but simply assisting the field staff move equipment to a site for which Mr. Burnell had provided previous authorization.

25. The delegate rejected Mr. Burnell's argument that Ms. Dobson could create budgets and had access to the company's bank accounts and credit cards for the purpose of moving funds around. The delegate found Ms. Dobson's financial authority was limited to bookkeeping tasks, a component of which was estimating corporate taxes owing. The delegate determined that Ms. Dobson did not have independent authority to commit the company's financial resources without Mr. Burnell's approval with the exception of office supplies.

26. The delegate concluded that Ms. Dobson's principal activities were primarily of an administrative support nature rather than the supervision of employees, budgeting or managing company resources. In arriving at this conclusion, the delegate noted that some other employees believed Ms. Dobson was the secretary, and that Mr. Burnell himself did not treat Ms. Dobson as a manager, as he paid her a premium when he authorized her to work on a statutory holiday or overtime.

27. Having determined that Ms. Dobson was not a manager, the delegate found that because Mr. Burnell reviewed Ms. Dobson's time cards, he directly or indirectly allowed her to work overtime. Those time cards indicated that Ms. Dobson frequently worked in excess of eight hours per day.

28. Based on Burnell's records, the delegate concluded that Ms. Dobson worked a total of 79.5 hours of overtime between January 11 and June 16, 2016, and was paid for 12.65 of those hours, leaving a balance of 66.85 hours of unpaid overtime.

29. The delegate then considered whether or not Burnell had established just cause to terminate Ms. Dobson's employment.

30. The delegate wrote that Burnell's argument was that it had just cause to terminate Ms. Dobson's employment based on her disclosure of confidential, although incorrect, information to another employee, and failed to comply with company policy by maintaining a secret overtime bank.

31. After reviewing the evidence, the delegate concluded that Ms. Dobson did lead Ms. Flegel to believe that Urban Windows did not have a WCB account as she honestly, but mistakenly, believed that to be the case.

Nevertheless, the delegate noted that it was possible to obtain this information from WCB on request and did not constitute confidential information.

32. The delegate also found there was insufficient evidence to find that Ms. Dobson told Ms. Flegel that Urban Windows had not filed corporate tax returns or that it was not being operated as a 'proper company'. The delegate noted that Ms. Dobson, who was aware of the company's corporate tax status, denied this allegation.

33. The delegate concluded that because Mr. Burnell put off discussing Ms. Flegel's allegations with Ms. Dobson for several days until the issue of her overtime bank arose, he did not consider that Ms. Dobson's alleged misstatements were serious enough to warrant her immediate dismissal, despite his argument to the contrary. The delegate noted that Mr. Burnell terminated Ms. Dobson within days of discovering that she was maintaining a record of her overtime hours and concluded that this was the basis for the termination of Ms. Dobson's employment.

34. The delegate noted that although Mr. Burnell may not have been aware that Ms. Dobson was keeping a personal record of her hours of work, these were the same hours that had been submitted to him and that he reviewed each pay period. The delegate found that Mr. Burnell was aware of Ms. Dobson's hours and failed to take any steps to control them, for example, by insisting that she punch the time clock as other employees were required to do. The delegate concluded that Burnell had not established cause to terminate Ms. Dobson's employment.

35. Finally, the delegate concluded that the information Mr. Burnell presented at the hearing - namely, Ms. Dobson's emailing of confidential banking information to her personal email account - could not be relied upon as a reason to terminate her employment since it was not discovered until after Ms. Dobson's termination. Given that I was unable to determine how the delegate had arrived at that conclusion, I sought submissions from the parties on this issue.

36. The delegate submitted that the statements made by Mr. Burnell in the appeal conflicted with the evidence at the hearing. The delegate says that in his appeal submission, Mr. Burnell stated that he discovered Ms. Dobson's July 2015 e-mail of confidential information before he terminated her employment. The delegate says that this conflicts with Mr. Burnell's evidence at the hearing, in which he testified that while he discovered overtime bank information on Ms. Dobson's work computer on or about June 13, 2015, he did not examine the emails on her computer until after he had terminated her employment. The delegate says that Mr. Burnell's testimony at the hearing was corroborated by Mrs. Burnell, Mr. Burnell's mother and business partner.

37. The delegate further says that, despite Mr. Burnell's statement in his appeal submission that the July 2015 e-mail justified Ms. Dobson's immediate termination in June 2016 because it was "proof of theft," he did not specify that as one of the reasons for terminating Ms. Dobson's employment in the June 16, 2016, termination letter. In that letter, Burnell identified those reasons as being her sharing of false information and keeping a private set of banked overtime hours. The delegate further says that although Mr. Burnell corresponded with Ms. Dobson over a three-week period following her termination, he did not mention the July 2015 e-mail as one of the reasons for her termination.

38. The delegate says that, based on the oral evidence at the hearing, she concluded that Mr. Burnell did not discover the July 2015 e-mail until after terminating Ms. Dobson's employment and could not support a finding of just cause.

39. In her submissions, the delegate says that the Director does not dispute that the concept of "after-acquired cause" has application in common law to establish just cause for termination. She says, however, that the Director concurs with the reasoning in Tribunal decisions *Wendy Benoit and Ed Benoit operating as Academy of Learning* (BC EST # D138/00), *Kootenay Uniform and Linen Ltd.* (BC EST # D126/07) and *BNW Travel Management Ltd.* (BC EST # D170/04) "that the *Act* is not merely an embodiment of common law concepts; it is legislation that must be administered on its own terms in a manner consistent with the legislative intention expressed behind it."

40. The delegate also says that these decisions reflect the Director's interpretation of section 63 of the *Act* which is written in the present tense:

> In particular, section 63(3) of the *Act* says in part that an employer is relieved [of] the obligation to pay compensation for length of service if an employee **is dismissed** [emphasis added] for cause; it does not say, or **had** [emphasis added] just cause for dismissal." This interpretation is consistent with section 63(4) of the *Act* which says in part that "the amount the employer is liable to pay becomes payable on termination of employment… Consequently, the wording of the Act suggests that the legislature's intention was that an employee's entitlement to compensation for length of service would crystalize at the time of termination; it does not make the obligation to pay compensation for length of service conditional on whether the employer finds a reason after termination has occurred and statutory obligations have crystallized.

41. The delegate also says that compensation for length of service is a statutory benefit that provides for a minimum amount of wages to be paid on termination of employment in the absence of working notice to enable an employee to meet his or her immediate financial responsibilities in keeping with the purposes of the *Act*. Similarly, the delegate argues, the *Act*'s purpose to provide fair and efficient procedures for resolving disputes over the interpretation and application of the *Act* would not be served by applying the concept of "after-acquired cause;" rather, it would prolong the final resolution of a complaint while allegations of employee misconduct are investigated and adjudicated.

42. The delegate says that the Director's position is that an employer must have just cause at the time of termination; that to permit an employer to raise new grounds for just cause for dismissal well after an employee has been terminated in an attempt to extinguish its liability under section 63 is inconsistent with both the language as well as the purposes of the *Act*.

43. In his reply, Mr. Burnell says his appeal was not based on new evidence but his contention that the delegate erred in the application of the law. He says that Ms. Dobson's transmission and use of credit card and banking information was not the basis for the appeal nor did it support a basis for termination based on after-acquired information. He says that the reasons for terminating Ms. Dobson's employment were set out in his June 16, 2016 "Notice of Disciplinary action" letter, which outlined her dishonest behaviour. He submits that Ms. Dobson's dishonesty was proven by evidence acquired after her termination

ARGUMENT

44. Mr. Burnell argues that the delegate erred in law in the following ways:

- applying the wrong test for determining whether Ms. Dobson was a manager;
- failing to properly consider whether Ms. Dobson 'acted with willful misconduct, dishonesty or exhibited theft'.

ANALYSIS

45. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

- the director erred in law;
- the director failed to observe the principles of natural justice in making the determination;
- evidence has become available that was not available at the time the determination was being made.

46. 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.

47. The Tribunal as adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

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.

Did the delegate err in her conclusion that Ms. Dobson was not a manager?

48. I am not persuaded that the delegate erred in law in concluding that Ms. Dobson was not a manager. Although Mr. Burnell's submission contains references to WCB directives, the governing legislation is the *Act* and the associated *Employment Standards Regulation* (the "*Regulation*"). It is not clear to me whether or not Mr. Burnell advanced similar arguments before the delegate. However, I do not find either the WCB directives or his other arguments persuasive.

49. The *Regulation* defines "manager" as:

> *(a) a person whose principal employment responsibilities consist of supervising or directing, or both supervising and directing, human or other resources, or*
>
> *(b) a person employed in an executive capacity.*

50. In *Director of Employment Standards* (*reAmelia Street Bistro*), *BC EST # D479/97* the Tribunal considered the definition of manager. Although the definition of manager has changed somewhat since that decision was issued, the analysis remains the same: see *Howe Holdings Ltd.*, BC EST # D131/04.

51. If the employee's duties do not primarily consist of supervising and directing other employees or the employee is not employed in an executive capacity (actively participating in the control, supervision and management of the business (see *Howe Holdings* (*supra*)), then the individual is not a manager. (see also *Whitehall*, BC EST # D026/10).

52. As the Tribunal has stated on many occasions, it is irrelevant to the conclusion that the person is described by the employer as a "manager," as that would be putting form over substance:

> Typically, a manger has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a person has that authority. It must be shown to have been exercised by that person. (*Director of Employment Standards* (*reAmelia Street Bistro*), supra)

53. Furthermore, as the Tribunal has noted on many occasions (see particularly *Frontier-Kemper Constructors ULC*, BC EST # D078/12), benefits-conferring legislation is to be interpreted in such a way that exclusions from statutory protections are narrowly construed. As remedial legislation, the *Act* is to be given such large and liberal interpretation as will best ensure the attainment of its purposes and objects. (see, for example, *On Line Film Services Ltd v Director of Employment Standards*, BC EST # D319/97, and *Helping Hands v. Director of Employment Standards*, (1995) 131 D.L.R. (4th)336 (B.C.C.A.)

54. While I accept Mr. Burnell's argument that Ms. Dobson had some latitude in managing staff on occasion, I am not persuaded that the delegate erred in either applying the correct test or concluding that Ms. Dobson was not a manager.

55. I dismiss the appeal on this issue. As Mr. Burnell does not dispute the delegate's calculation of overtime wages, I confirm the delegate's award for overtime, including interest.

Did the delegate err in finding that Ms. Dobson was entitled to compensation for length of service?

56. The delegate correctly referred to section 63 of the *Act,* which establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

57. Mr. Burnell asserts that the delegate erred in law in a number of her conclusions, including finding that there was insufficient evidence Ms. Dobson purposely told Ms. Flegel about the tax statements because she wanted Ms. Flegel to quit her job, and that Mr. Burnell did not question the veracity of Ms. Dobson's statements.

58. These assertions are, in essence, that the delegate erred in her factual conclusions. The Tribunal has no authority to consider appeals based on alleged errors of findings of fact unless those findings amount to an error of law (see *Britco Structures Ltd.*, BC EST # D260/03). I find that the delegate's conclusions on these matters were all findings of fact, and are not subject to review on appeal unless they amount to factual errors.

59. In my view, there was sufficient evidence before the delegate to support her factual conclusions. While Mr. Burnell disagrees with many of those factual conclusions, that disagreement is not a basis for appeal.

60. I am not persuaded that the delegate's factual findings were perverse or unreasonable based on the evidence before her, nor am I persuaded that she applied an incorrect legal test for evaluating whether or not Sun Valley had just cause to terminate Ms. Dobson's employment. I dismiss the appeal on this ground.

61. As noted above, because I was unable to determine how the delegate arrived at her conclusion that Burnell could not rely on "after-acquired cause" as a basis for Ms. Dobson's termination, I sought submissions from the parties on this issue.

62. In *Clark Reefer Lines Ltd.* (BC EST # D114/15), the Tribunal said

> The concept of "after-acquired cause" refers to a breach that occurred during the currency of an employment relationship but is not discovered until after the employment relationship has ended. In *Groner*, *supra*, the Supreme Court of Canada clearly held that an employer is entitled to rely on such "after-acquired cause" in order to demonstrate that it had just cause for dismissal (at pages 563 – 564):
>
> > The fact that the appellant did not know of the respondent's dishonest conduct at the time when he was dismissed, and that it was first pleaded by way of an amendment to its defence at the trial does not, in my opinion, detract from its validity as a ground for dispensing with his services. The law in this regard is accurately summarized in Halsbury's Laws of England, 2nd ed., vol. 22, p. 155, where it is said:
> >
> > > It is not necessary that the master, dismissing a servant for good cause, should state the ground for such dismissal; and, provided good ground existed in fact, it is immaterial whether or not it was known to the employer at the time of the dismissal. Justification of dismissal can accordingly be shown by proof of facts ascertained subsequently to the dismissal, or on grounds differing from those alleged at the time of the employee's termination. The concept of "after-acquired cause" refers to a breach that occurred during the currency of an employment relationship but is not discovered until after the employment relationship is ended.
>
> …
>
> The notion of "after-acquired cause" continues to be part of our common law having been recently applied by our Court of Appeal in *Van den Boogard v. Vancouver Pile Driving Ltd.,* 2014 BCCA 168 and by the New Brunswick Court of Appeal in *Doucet and Dauphinee v. Speielo Manufacturing Incorporated and Manship*, 2011 NBCA 44.

63. After reviewing a number of Tribunal decisions dealing with "after-acquired cause", Member Thornicroft suggested that

> …it may be the case that after-acquired cause could fall within the ambit of the subsection 63(3)(c) "just cause" provision in a case where the relevant facts are provided to the Director of Employment Standards prior to a determination being issued.

64. The delegate has clearly set out the Director's position on "after-acquired cause" in her submissions. However, she says that the doctrine does not apply in this case because Mr. Burnell's submissions on appeal indicate that the information was, in fact, acquired after Ms. Dobson's termination.

65. Rather than addressing the discrepancy between the evidence at the hearing and submissions on appeal, Mr. Burnell says that Ms. Dobson was terminated for dishonesty generally, rather than the two specific instances set out in the letter sent to Ms. Dobson, and that her dishonesty was "proven" by the July 2015 e-mail.

66. I accept the delegate's contention that Mr. Burnell's evidence at the hearing, which was that he did not discover Ms. Dobson's July 2015 e-mails until he had terminated her employment in June 2016, conflicted with his assertions on appeal that he had discovered those emails before terminating her employment.

Mr. Burnell does not appear to dispute that inconsistency. Given Sun Valley's position, it is not necessary for me to address the Director's position on "after-acquired cause."

67. If in fact Mr. Burnell had knowledge of the July 2015 emails at the time he terminated Ms. Dobson's employment, the issue of after-acquired cause does not arise. Mr. Burnell did not rely on those emails as a basis for terminating Ms. Dobson's employment, nor did he refer to them at any time in his correspondence with her regarding her termination.

68. Similarly, if Mr. Burnell discovered the emails after terminating Ms. Dobson's employment and presented them as "proof" of the "dishonesty" he relied upon to terminate her employment, the evidence does not constitute after-acquired cause, as acknowledged by Mr Burnell. The delegate found that the reasons Mr. Burnell relied upon for the termination had not been substantiated. The delegate articulated her reasons for concluding that the grounds for termination had not been established. The July 2015 e-mails do not "prove" those grounds and would not alter my conclusion that the delegate did not err in her Determination on the issue of just cause.

69. I confirm the Determination in all respects.

ORDER

70. Pursuant to section 115 of the *Act*, I order the Determination dated September 21, 2016, be confirmed, together with whatever interest may have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal