Employment Standards TRIBUNAL

An appeal

- by -

Cornell Holdings Ltd., carrying on business as
Comfort Hotel & Conference Centre Victoria
("Cornell")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2012A/115

DATE OF DECISION: February 22, 2013

DECISION

SUBMISSIONS

Donald R. McLeod	counsel for Cornell Holdings Ltd., carrying on business as Comfort Hotel & Conference Centre Victoria
Christopher Marchant	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards

INTRODUCTION

1. An employer may lawfully summarily dismiss an employee without giving any prior notice, or paying any "severance pay" in lieu of notice, if the employer has "just cause" for dismissal. This is so under both the common law and the *Employment Standards Act* (the "*Act*" – see subsection 63(3)(c)). The appellant, Cornell Holdings Ltd., carrying on business as Comfort Hotel & Conference Centre Victoria ("Cornell"), employed Christopher Marchant ("Marchant") as its controller from January 9, 2004, until May 12, 2011, when it terminated him, allegedly for just cause. Mr. Marchant, believing that he was wrongfully terminated, filed a timely complaint under section 74 of the *Act*. On April 3, 2012, a delegate of the Director of Employment Standards (the "delegate") presided at a complaint hearing and on September 11, 2012, issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") in which he concluded that Mr. Marchant was dismissed without just cause. Accordingly, the delegate issued a Determination ordering Cornell to pay Mr. Marchant $8,443.24 as compensation for length of service (including section 88 interest) and, in addition, he levied a $500 monetary penalty against Cornell (see section 98) based on its contravention of section 63 of the *Act*.

2. Cornell now appeals the Determination – and asks that it be cancelled – on the grounds that the delegate erred in law (subsection 112(1)(a)) and failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)). Further, in its reply submission, Cornell submitted "new evidence" and says that this evidence is admissible under subsection 112(1)(c). Mr. Marchant says that this "new evidence" is irrelevant and thus should not be admitted.

3. I am adjudicating this appeal based on the parties' written submission (I summarize these submissions, below) and, in addition, I have reviewed the material included in the section 112(5) record that was before the delegate when he issued the Determination. Both Cornell and Mr. Marchant filed extensive submissions. The delegate, on the other hand, submitted a 1-sentence letter stating "…that the Director of Employment Standards will not be making further submissions in this matter".

BACKGROUND FACTS AND SUMMARY OF THE DETERMINATION

4. Cornell operates a hotel in Victoria and the property also includes a restaurant and a retail liquor outlet. As noted above, Mr. Marchant was employed as Cornell's controller for over 7 years and was, at all material times, a "certified general accountant" subject to the regulatory authority of a self-governing professional body, the Certified General Accountants Association of British Columbia ("CGA-BC"). At the time of his dismissal he was earning an annual salary of about $65,000.

5. At the complaint hearing, Cornell asserted that Mr. Marchant was a "fiduciary" and that he breached the fiduciary duty he owed to Cornell in several separate ways. I will deal with Cornell's assertion that Mr. Marchant was a "fiduciary" later on in these reasons but, at this juncture, I will note that *all* employees have common law duties of fidelity, loyalty and faithful service and that the scope of these duties depends, to a large degree, on the employee's status – and, principally, on whether the employee is fairly characterized as an "ordinary" or a "key" employee (see *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312 and *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2008] 3 S.C.R. 79).

6. Cornell argued that, individually or collectively, the following circumstances gave it just cause to dismiss Mr. Marchant:

- Mr. Marchant failed to reimburse Cornell for the cost of exercise equipment that Mr. Marchant purchased using a Cornell corporate account (thereby allowing Mr. Marchant to obtain a discounted price);
- He abused his meal allowance and dry cleaning/laundry privileges;
- He encouraged other employees to abuse the employer's meal/bar policy;
- He breached his professional ethical standards and obligations;
- He wrongfully diverted credit card rebates and/or other benefits for his own personal benefit;
- He wrongfully maintained a private accounting practice at Cornell's premises on the employer's time and using the employer's equipment; and
- Following his termination, he returned to Cornell's premises – an alleged trespass – and improperly deleted certain files on Cornell's computer system.

7. At the complaint hearing, Cornell did not provide any (or only hearsay or other unreliable) evidence regarding several of these allegations, namely, Mr. Marchant's charging dry cleaning for his wife's clothes to the employer's account; encouraging employees to breach the employer's meal allowance policy; and the alleged trespass.

8. The delegate's factual findings and legal conclusions regarding those instances of alleged misconduct where there was at least some probative evidence are summarized, below.

9. First, Mr. Marchant acknowledged that he purchased the exercise equipment (a treadmill) but also testified that he simply forgot to reimburse Cornell. He did reimburse Cornell immediately after the issue was brought to his attention (some 6 months later). He also wrote a "letter of apology" (although it reads more like a letter of supplication) for his "breach of trust" and he ended his letter as follows: "I hope you will allow me to stay in your employ and leave the decision in your hands". Cornell accepted the apology and continued Mr. Marchant's employment, albeit with a warning that any further "dishonesty" would result in immediate termination. Although Mr. Marchant maintained that the matter was one of simple oversight, the delegate did not make an affirmative about his state of mind nor did he make a finding about whether the letter was genuinely heartfelt or written simply to save his job (delegate's reasons, page 14). The delegate did conclude that there was no "unlawful activity" but that finding is somewhat problematic in that if Mr. Marchant *did* intend to defraud his employer that certainly is criminal conduct (both *mens rea* and *actus reus* would be present); on the other hand, if he did not intend to defraud, the issue is purely a civil matter.

10. In any event, the delegate ultimately determined that this incident did not give Cornell just cause for dismissal since: i) the event in question occurred five years earlier; ii) Cornell did not see fit to terminate Mr. Marchant

at the time; and iii) there was no evidence of similar misconduct in the ensuing years. Finally, and in addition, the delegate observed: "While conceding at the time it was an abuse of trust, Mr. Marchant testified that the incident was predicated on an honest oversight, which he corrected once [the former general manager] brought it to his attention. I cannot determine on the evidence before me whether Mr. Marchant's letter of apology to [Cornell's president and principal shareholder] was motivated by a genuine admission on Mr. Marchant's part, or what [Cornell's general manager] told him he should do to keep his job." (delegate's reasons, page 14).

11. Second, and with respect to the allegations regarding Mr. Marchant's breach of Cornell's meal allowance policy, the evidence before the delegate was that in early 2005, Cornell established a policy whereby employees could charge up to $267.50 per month for a daily meal allowance in the hotel's restaurant (essentially, one complimentary meal per day). Cornell retained Mr. Joachim Striegan, a person with extensive hotel experience, as a consultant to review the hotel's operations; shortly after Mr. Marchant's dismissal, Cornell hired him on a full-time basis. Mr. Striegan uncovered what he characterized as "rampant abuse" of the hotel's meal policy and he attributed those abuses to Mr. Marchant's failure to exercise proper managerial control (delegate's reasons, page 8). On the other hand, Mr. Marchant reported to a general manager (three individuals during his tenure – Mr. Terry Mills, Mr. Cornell Babie, Cornell's principal, and later, Mr. Babie's son) and it appears that none of these individuals took any affirmative steps to deal with this problem. Mr. Marchant conceded that he occasionally took his wife and/or other family members to dinner and charged these meals back to the hotel; however, these occasions were not merely social but, rather, allowed him "to critique the food, service and ambience and to provide his feedback to the chef" and that "nothing was hidden" (delegate's reasons, page 10).

12. The delegate determined that Mr. Marchant' conduct with respect to Cornell's complimentary meal policy did not give Cornell just cause for dismissal since Mr. Marchant was openly following his understanding of the policy (which was not unreasonable) for many years without any critical comment from the general manager (page 14).

13. Third, with respect to Mr. Marchant's ancillary accounting practice, the evidence showed that Mr. Marchant carried on a private accounting practice and that he did so using the employer's equipment and during his normal workdays. Mr. Marchant maintained that his accounting practice was wound up in 2009 but this statement was untrue; Cornell's computer records showed that Mr. Marchant was still carrying on his practice as late as April 2011 (delegate's reasons, pages 11-12). The delegate determined (page 14) – and this now appears to have been a clear error in fact-finding – that "CGA-BC investigated and found that Mr. Marchant was not in breach of the Code" [the *Code of Ethical Principles and Rules of Conduct* – the "Code"] regarding his failure to advise his employer that he was concurrently carrying on an accounting practice.

14. The delegate ultimately concluded that Mr. Marchant's behaviour in carrying on a separate accounting practice did not give Cornell just cause for dismissal. The delegate found that Mr. Marchant gave misleading evidence at the complaint hearing regarding the scope of this accounting practice. Nevertheless, the delegate did not find this conduct (surreptitiously operating a private practice) legally justified Mr. Marchant's summary dismissal because (page 15): "he rarely took lunch breaks…[and it was] possible that he was performing outside work during his break time"; "the use of the Employer's computer equipment did not deprive the Employer in any material way"; "(w)hile the Code may have required Mr. Marchant to notify his employer in writing , there is nothing…that makes it dishonest, particularly in the absence of any policy in regard to the use of the Employer's equipment"; and finally: "it is significant that the Employer did not discover Mr. Marchant's outside accounting activity until after Mr. Marchant's termination; therefore, it was not a factor in deciding to terminate Mr. Marchant's employment."

15. At this juncture, I wish to note that while the delegate may have correctly asserted that Mr. Marchant's surreptitious accounting practice did not factor into Cornell's decision to terminate his employment (due to the simple fact that Cornell had no knowledge about the matter at that time), it does not follow that Cornell was not entitled to rely on this conduct to justify Mr. Marchant's dismissal. It has been the common law for over 100 years that:

> 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.

(See *Lake Ontario Portland Cement Co. Ltd. v. Groner*, [1961] S.C.R. 553 at page 564; for more recent statements to like effect see: *Dowling v. Ontario (Workplace Safety and Insurance Board)*, 2004 CanLII 43692 (Ont. C.A.) and *Doucet and Dauphinee v. Spielo Manufacturing Incorporated and Manship*, 2011 NBCA 44).

16. Fourth, Cornell maintained that Mr. Marchant wrongfully diverted some ancillary credit card benefits to his own use. More specifically, Mr. Marchant had a "Costco" membership card in his name (but paid for by Cornell) and he used this card and his personal credit card – I understand with Cornell's knowledge and, seemingly, at least tacit acceptance – to purchase tobacco products for the hotel but he retained the "travel points" that accumulated according to the volume of purchases made with his credit card. Cornell maintained that these points belonged to it and that Mr. Marchant wrongfully appropriated these points. The delegate, at page 15, rejected this conduct as grounds for summary dismissal noting that the evidence showed there was "a long standing practice of reimbursing employees for tobacco purchases made with the employee's credit card" and that there was "no evidence to suggest that the Employer had a policy in regard to credit cards and the purchase of tobacco".

REASONS FOR APPEAL

17. Cornell appeals the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (subsections 112(1)(a) and (b)). However, in its reply submission dated and filed December 13, 2012, Cornell advanced a further ground of appeal, submitting that there was "new evidence" that the Tribunal should receive under subsection 112(1)(c). I will now summarize Cornell's arguments concerning each of these grounds of appeal.

Alleged Natural Justice Breaches

18. As I understand Cornell's legal counsel's submissions, there are three elements to this ground of appeal, two of which were only raised in its reply submission. While the respondents were given an opportunity to respond to these latter two matters, as a general rule, new allegations should not be raised in a reply submission. Parties should be cognizant that the Tribunal may, in the interests of adjudicative fairness, decide not to address arguments raised for the first time in a reply submission.

19. Cornell's counsel (Cornell did not have legal representation at the complaint hearing) says, firstly, that the delegate should not have proceeded with the complaint hearing but, rather, should have refused to deal with Mr. Marchant's complaint until Cornell's B.C. Provincial Court (Small Claims) action (filed November 14, 2011) was concluded. Counsel characterizes the delegate's decision to proceed with the complaint hearing as an error of law but, in my view, this matter is more appropriately characterized as a natural justice issue. Secondly, counsel says that the delegate should not have accepted a letter tendered at the complaint hearing from a former employee of the hotel (to CGA-BC and in relation to a complaint filed by Cornell against Mr.

Marchant) given that it had not been disclosed to Cornell prior to the hearing. Thirdly, Cornell's counsel complains that portions of the record provided by the delegate were "redacted" – in other words, "blacked out". Counsel says: "To withhold part of the Appeal Record is to deny the Appellant the ability to fully present its case on Appeal".

Alleged Errors of Law

20. Although Cornell's legal counsel identified a series of alleged legal errors made by the delegate, the central thrust of counsel's submissions is that the delegate erred in law in finding that there was no just cause for dismissal. Counsel asserts that Mr. Marchant was a fiduciary *vis-à-vis* Cornell and that he breached his fiduciary duties in several distinct ways. He says that Mr. Marchant was not a credible witness and that his evidence ought to have been viewed with a sceptical eye – and, more importantly, had the delegate taken that approach, he would not have rejected Cornell's "just cause" arguments.

New Evidence

21. The "new evidence" is an internal memorandum that Cornell apparently discovered while preparing its reply submission.

FINDINGS AND ANALYSIS

22. I propose to first address Cornell's natural justice concerns, in the same order as I outlined them, above, and then I will turn to the "just cause" and "new evidence" issues.

Did the delegate fail to observe the principles of natural justice?

23. On November 14, 2011, Cornell filed a Small Claims Court action against Mr. Marchant seeking $25,000 against him for wrongful misappropriation of Cornell's property. The allegations made in the Notice of Claim are essentially identical to those raised in these proceedings in support of Cornell's position that it had just cause for dismissal. Mr. Marchant filed his *Act* complaint on August 14, 2011, so his complaint actually *preceded* Cornell's Small Claims action (contrary to the assertion made in Cornell's material) and Mr. Marchant's complaint was limited to a claim for compensation for length of service under section 63 of the *Act* – a purely statutory claim legally distinct from "severance pay in lieu of notice" under the common law (see *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220 and *West Bay SonShip Yachts Ltd. (Re)*, 2009 BCCA 31). In light of the B.C. Court of Appeal's decision in *Macaraeg v. E Care Contact Centers Ltd.*, 2008 BCCA 182, it would appear that the Small Claims Court does not have the jurisdiction to address Mr. Marchant's claim for compensation for length of service.

24. In any event, Cornell submits that the delegate should not have proceeded with the complaint hearing but, rather, should have "[held] off [his] investigation until the existing lawsuit had been dealt with". Cornell's concerns appear to be that the "[Small Claims Court] may well find Mr. Marchant liable and this will be in conflict with the Determination". Simply for the sake of completeness, I should also note that Mr. Marchant does not recall Cornell actually applying for an adjournment and the delegate, as noted earlier, did not file a submission addressing the merits of Cornell's appeal.

25. I do not consider this argument to be well-founded. In my opinion, the delegate did not err in law, nor did he breach the principles of natural justice, in deciding to proceed with the complaint hearing. I say this for two principal reasons. First, Mr. Marchant's complaint preceded Cornell's filing of its Small Claim Court action and he is entitled to have his claim adjudicated in a timely manner – indeed, that is dictated by

subsection 2(d) of the *Act*. Second, there is not necessarily an inevitable and insoluble conflict between the two proceedings – Mr. Marchant's claim for compensation for length of service stands separate from Cornell's claim to be reimbursed for certain items such as laundry and meal charges that it says were improperly claimed by Mr. Marchant. Further, to the extent that there might be a clear overlap as between the two proceedings, the Small Claims Court would not be likely to issue a decision in direct conflict with that issued by the Employment Standards Branch or the Tribunal by reason of the legal doctrine known as issue estoppel.

26. At the complaint hearing, the delegate accepted a letter from a former Cornell employee addressed to CGA-BC concerning the complaint that Cornell filed against Mr. Marchant. This letter largely supported Mr. Marchant's position with respect to Cornell's meal allowance policy. Cornell says that this letter was not provided to it in advance of the hearing and "had that letter been provided to [Cornell] prior to the hearing, then [Cornell] could have compelled the attendance of [the letter's author] to be examined concerning it contents". Counsel further asserts: "…it is expected that her evidence would have been different than as set out in the letter".

27. Three points should be noted regarding this "natural justice" allegation. First, there is nothing in the record or submissions before me to indicate that Cornell formally objected to the admission of this letter into evidence. Second, it does not appear that Cornell sought an adjournment of the hearing so that this witness could be summoned to appear at a later date. Third, and most problematic, the assertion that this individual would have disavowed the contents of her own letter is rank speculation made without a scintilla of evidence to support it. Counsel could have, but did not, obtained a statement from this individual post-hearing and, had he done so, this evidence might have been admissible on appeal. Given the foregoing, I see no merit whatever in this ground of appeal.

28. Cornell's third "natural justice" ground concerns the contents of the section 112(5) record. This ground does not concern the Determination *per se*, but rather the appeal proceedings now before the Tribunal. I query whether this is a valid "ground of appeal" but, in any event, I shall deal with it so that all matters raised by Cornell in its submissions are dealt with. As previously noted, some portions of the record were "redacted" or blacked out. I have reviewed the record – in the form of a 223 page PDF file – and although there are a number of instances where information has been blacked out, so far as I can determine, the missing information uniformly appears to be addresses or other private information such as a telephone number or an e-mail address (almost always relating to Mr. Marchant). Cornell's counsel says that these redactions "deny the Appellant the ability to fully present its case on appeal" and that it has been "hobbled in [its] appeal". In my view, that assertion is wholly untenable. I fail to see how Cornell being denied access to Mr. Marchant's address, telephone number or e-mail address compromises its ability to present its case. Indeed, counsel appears to acknowledge that this information would not be helpful: "The issue is not whether or not the withheld material would be of assistance to the Appellant, but is a question of fundamental fairness".

29. Section 75 of the *Act* reflects a policy designed to protect the confidentiality of complainants. While Mr. Marchant's identity has obviously been disclosed, I certainly can appreciate that he might wish to protect other personal information such as his residential address, telephone number and e-mail address. Redacting this latter information from the record does not, in my opinion, impair in any way the fundamental fairness of the appeal process. Rule 9(1) of the Tribunal's *Rules of Practice and Procedure* further justifies the redaction of non-essential personal information from records made available to parties. If I were satisfied, even on a *prima facie* basis, that some of the redacted information might be relevant and could affect Cornell's ability to present its case, I would not hesitate to personally review the missing information and then make a determination about disclosure (see, *e.g.*, *Director of Employment Standards and Super Save Disposal Inc. et al.*, BC EST # RD172/04). But in this case I see absolutely no reason to follow that path.

30. In my view, none of the "natural justice" grounds of appeal is meritorious. I now turn to the alleged errors of law and, more particularly, to the matter of whether the delegate erred in finding that there was no just cause for Mr. Marchant's dismissal.

Did Cornell have just cause to dismiss Mr. Marchant?

31. Cornell's counsel says that Mr. Marchant was a fiduciary and that, since he breached his fiduciary duties, there was just cause for his dismissal. I am not prepared to find that Mr. Marchant was a fiduciary. Two employees reported to Mr. Marchant and I think it fair to say that he was a "key" employee. As such, he had heightened duties of loyalty, fidelity and faithful service relative to what is sometimes called an "ordinary" or "mere" employee (see *Valley First Financial Services Ltd. v. Trach*, 2004 BCCA 312). Not all managerial, professional or technical employees, even though they may have some discretionary authority in their day-to-day activities (indeed, *most* do), are properly characterized as fiduciaries. One should heed the caution of Justice Abella in her dissenting opinion in *RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2008] 3 S.C.R. 79 (but not on this point), that fiduciary employees typically exercise actual authority or control over the employer's operations. Mr. Marchant reported to a general manager who exercised that sort of authority and control; Mr. Marchant, by contrast, had defined duties within a limited sphere (dealing with Cornell's financial record-keeping and reporting) and he did not have the wide-ranging and autonomous decision-making authority that typifies a fiduciary (see *Pan Pacific Recycling Inc. v. So*, 2006 BCSC 1337, and *Zoic Studios BC Inc. v. Gannon*, 2012 BCSC 1322).

32. The branch manager in *RBC Dominion* was *not* held to be a fiduciary but his status as a key employee justified holding him to a high standard of fidelity, loyalty and faithful service (which he was found to have breached). Some judicial decisions refer to employees with heighted duties of fidelity, loyalty and faithful service as "quasi-fiduciaries" (a point that was raised, but not addressed, in *RBC Dominion* at para. 22); however, I do not find that term particularly helpful. Fiduciary status (like pregnancy) is a binary notion (one is neither "sort of" a fiduciary anymore than one is "sort of" pregnant) and, in my view, Mr. Marchant was not a fiduciary. On the other hand, he *was* a key employee who reported to Cornell's general manager (who, in turn, reported to Cornell's president) and, as such, had heightened (relative to other lower level employees) duties of loyalty, fidelity and faithful service.

33. In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada mandated that a "contextual approach" should be taken when evaluating if an employee's dishonesty gives an employer just cause for dismissal (at paras. 48 and 49):

> …I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
>
> In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal…

34. Although this approach was formulated in the context of alleged employee dishonesty, later appellate decisions have confirmed that *McKinley* is a road map for addressing all forms of employee misconduct (see, *e.g.*, *Brazeau v. International Brotherhood of Electrical Workers*, 2004 BCCA 645; *Wise v. Broadway Properties Ltd.*, 2005 BCCA 546; and *Grewal v. Khalsa Credit Union*, 2012 BCCA 56). Thus, the two key questions raised by this

appeal are: i) Did Mr. Marchant breach his duties of loyalty, fidelity and faithful service? and ii) If so, did that conduct justify his summary dismissal?

35. Cornell's position may be summarized as follows. First, while it does not say that Mr. Marchant's past (5 years prior to his termination) behaviour regarding his purchase of the exercise equipment using a corporate account gave Cornell just cause for dismissal in 2011, it does maintain that this behaviour was relevant in the sense that he was "on a short leash" and, specifically:

> The purpose of bringing that incident to the [complaint hearing] was to show that Mr. Marchant had been given a "break" and therefore was aware that his conduct in the future must be above reproach; that he must no [sic] in the future misuse his employer's assets or abuse the trust reposed in him.

36. The delegate, as noted above, rejected this behaviour as having any current relevance since, among other things, it occurred about 5 years earlier and Cornell did not terminate Mr. Marchant when it first learned about the matter. If the delegate had in mind the notion of "condonation" – the principle that an employer cannot later discipline an employee for behaviour that it failed to sanction when it first occurred (see, *e.g.*, *King v. Mayne Nickless Transport Inc.*, 1994 CanLII 1735 (B.C.C.A.) – it should be noted that Cornell certainly did not "condone" Mr. Marchant's behaviour. Mr. Marchant was warned and given clear notice that any future similar conduct would not be tolerated. In his letter of apology to Cornell, Mr. Marchant wrote: "I have seriously damaged [my] credibility with you and it will take me many years to make up the damage I have created". Further, Cornell was entitled to rely on this conduct as part of its overall assessment of Mr. Marchant's character and integrity. As our Court of Appeal recently observed in *Grewal v. Khalsa Credit Union*, 2012 BCCA 56 (at para. 110):

> As noted in *McKinley v. BC Tel*…Ms. Grewal's conduct must be assessed within a contextual approach. The September 1 Letter cannot be considered in a vacuum. It was the culmination of a litany of ongoing difficulties in the employment relationship. While the prior matters in themselves may not have justified termination, *KCU was entitled to consider her past misconduct in determining whether it had just cause for dismissal*: *Nossal v. Better Business Bureau of Metropolitan Toronto Inc.* (1985), 19 D.L.R. (4th) 547 (Ont. C.A.). (my *italics*)

37. Second, Cornell says that Mr. Marchant committed a "breach of trust" when he retained the "travel points" attached to the use of his "Costco" membership and personal credit cards. I might also add that in regard to this issue, Cornell says that the delegate breached the principles of natural justice when he received "letters from employees purporting to confirm" the practice of allowing employees to retain incidental benefits attached to their credit cards. Counsel says that since these letters were not produced in advance of the hearing, it was denied the opportunity to (presumably) summon these witnesses to the hearing to show that they "were mistaken", "untruthful" or "had a grudge".

38. Having reviewed the record, I see only one note of a conversation with a former employee that speaks to the "credit card" issue. It appears to have been connected to the CGA-BC investigation that was triggered by Cornell's complaint about Mr. Marchant. For the reasons given above relating to another document that was tendered at the hearing, I do not consider the delegate's consideration of this document to constitute a breach of the principles of natural justice. I might also add, simply for the sake of completeness, that Mr. Marchant disputes Cornell's position that it did not have this document. In his submission, Mr. Marchant states: "All documents provided to the Employment Standards with the exception of the CGA findings were forwarded to the Appellant prior to the mediation held in November 2011". The delegate did not file a submission, which might have clarified this matter, and thus I find myself unable to resolve this particular factual dispute between the parties. Regardless, even if I accept Cornell's view of the matter, I still do not consider that it amounts to a failure to observe the principles of natural justice within subsection 112(1)(b).

39. It appears that the delegate may have become aware of this evidence only after the hearing and as a result of information provided to the delegate *by Cornell*. As noted in the delegate's reasons, at page 12, Cornell submitted CGA-BC's decision letter, dated March 29, 2012 (and forwarded to Cornell by letter dated April 11, 2012), concerning its complaint about Mr. Marchant after the complaint hearing was concluded. The delegate accepted this evidence (see pages 12-13) and indicated that he would be taking it into account in rendering his decision. The information from the former Cornell employee essentially confirming Mr. Marchant's understanding of Cornell's "credit card" policy is expressly set out at pages 25-26 of the CGA-BC report. Clearly, Cornell knew about this evidence and, in addition, had the opportunity to make further submissions to the delegate regarding it (and, through its legal counsel, did so), prior to the delegate issuing the Determination. In those circumstances, I am of the view that the delegate fully complied with section 77 of the *Act*.

40. Returning to the "breach of trust" allegation regarding Mr. Marchant's use of his "Costco" and personal credit cards, the delegate noted that Cornell did not provide any evidence regarding a formal written policy about these ancillary benefits (nor did it provide evidence of any such written policy in its appeal materials) and thus the delegate's finding continues to stand unchallenged. Cornell says that "Mr. Marchant diverted a benefit to himself", secretly "misappropriated" "his employer's money" and that the delegate's failure to take this into account in determining if there was just cause was an error in law. For my part, I see no error in the delegate's findings regarding the "credit card" issue – they appear to be wholly supported by the evidentiary record. An allegation of theft or similar misconduct is a serious matter and "evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test" (*F.H. v. McDougall*, [2008] 3 S.C.R. 41 at para. 46). The evidence before the delegate fell well short of establishing that Mr. Marchant engaged in any sort of dishonest conduct in relation to the "Costco"/credit card allegation. In my view, the delegate did not err in finding that this matter did not, either singly or in combination with other conduct, give Cornell just cause for dismissal.

41. I now turn to the third and final argument that Cornell says gave it just cause to dismiss Mr. Marchant, namely, that he was carrying on a private accounting practice on his employer's time and using his employer's tools and equipment.

42. The evidence before the delegate unequivocally showed that Mr. Marchant was carrying on a private accounting practice from his office at Cornell's business premises. Mr. Marchant maintained that he ceased his practice in 2009 but his evidence in this regard was untruthful as evidence showed he was still carrying on his practice as late as April 29, 2011 (see delegate's reasons, page 15). Cornell filed a complaint against Mr. Marchant with CGA-BC relating to this conduct and CGA-BC's report letter relating to that complaint was part of the record before the delegate. The Ethics Committee of CGA-BC determined that Mr. Marchant breached certain professional and ethical standards set out in the Code.

43. First, he breached "Ethical Principles" Nos. 1 (Responsibilities to Society) and 2 (Trust and Duties) by, respectively, failing to ensure timely reimbursement to Cornell for his purchase of exercise equipment using Cornell's account and by using Cornell's computer equipment (and installing personal software) without first obtaining Cornell's permission. Second, he breached Rule 514 (Personal Practice When an Employee), Rule 517 (Registration), Rule 518 (Practice Review Requirements) and Rule 519 (Professional Liability Insurance). These breaches related to Mr. Marchant carrying on a professional accounting practice without Cornell's (and CGA-BC's) knowledge and permission. Third, he was found to have breached Rule 101 (Discredit) and Rule 606(a) (Detrimental Actions). These breaches related to his failure to meet professional standards in light of his position as Cornell's controller. In the end result, CGA-BC levied the following sanctions against Mr. Marchant: i) a $7,000 fine; ii) pay $2,000 towards costs of the investigation; iii) complete the 3-day

CGA-BC "Essentials of Controllership" course; and iv) he must undertake to abide by certain reporting and other obligations.

44. Despite the findings of CGA-BC, I note that in his May 10, 2012, submission to the delegate, Mr. Marchant steadfastly maintained that he had done nothing wrong and that he should have been entitled to maintain a separate accounting practice because, among other things, "it was not against company policy to have a part time job". He further maintained that his practice was wound up by 2009 and that any private accounting services he undertook at work was during his "coffee breaks". One of his subordinates, however, provided information to CGA-BC that Mr. Marchant was, in fact, dealing with his private practice "during normal working hours" and he identified several of the clients for whom Mr. Marchant was providing accounting services and this fact was confirmed by his other subordinate who went further and stated that Mr. Marchant actually met with private clients in his Cornell office. The information that Mr. Marchant provided to CGA-BC showed that his practice billings ranged from about $22,300 in 2006, to over $64,000 in 2007, and over $55,000 in 2008 but that he had much smaller billings in 2009 (about $10,800) and 2010 (about $2,200).

45. I think it important to note that Mr. Marchant's gross practice billings for 2007 and 2008 represent, approximately, 99% and 85% of his annual salary from Cornell as at the date of his termination. Further, although he maintained before the delegate that his practice was wound up in 2009, he still recorded practice billings for 2010 and on his 2010 tax return advised the Canada Revenue Agency that his practice was still ongoing. Although he provided to CBA-BC his Canada Revenue Agency "Notice of Assessment" for the calendar years 2006 to 2009, he maintained that he could not provide the 2010 Notice because he was unable to find it.

46. Cornell's position is that Mr. Marchant breached his duties of loyalty and good faith by carrying on a private accounting practice using Cornell's equipment when he should have been devoting his full-time efforts to Cornell's business. Cornell notes that Mr. Marchant did not have professional liability insurance and may have exposed Cornell to a liability risk.

47. The delegate concluded that Cornell was not entitled to rely on Mr. Marchant's conduct relating to his failure to make timely reimbursement for his purchase – using a Cornell account – of a treadmill. As I have indicated, above, this was an error of law. Although Mr. Cornell was disciplined for this matter and thus could not be disciplined a second time for the same misconduct, the delegate was obliged to consider this misconduct as part of the overall context within which the most recent misconduct occurred (*Grewal v. Khalsa Credit Union*, *supr*a). This incident showed a failure on Mr. Marchant's part to be scrupulously careful in the management of Cornell's funds. One might characterize this behaviour as a mere oversight but, for my part, I find it hard to believe how Mr. Marchant – Cornell's controller charged with primary responsibility for the firm's financial records – would have allowed this matter to simply "slip through the cracks". Mr. Marchant himself characterized his behaviour as an "abuse of trust".

48. During the years 2007 and 2008, Mr. Marchant was carrying on a private accounting practice on his employer's time and using his employer's office and equipment, and it was a much more significant practice that he was prepared to acknowledge. I think the only reasonable inference to be drawn from the evidence is that Mr. Marchant was dishonest (again) in regard to this matter. He concealed his accounting practice – contrary to the professional standards and ethics of his profession – from his employer. He said the practice was not significant, being carried out only on "coffee breaks" but his practice billings show that the practice was quite a significant one in 2007 and 2008 (his billings almost equalled his total salary) and the suggestion that this was all undertaken on coffee breaks (and despite his two subordinates' evidence to the contrary) shows yet again further evidence of a general lack of candour and trustworthiness. Mr. Marchant maintained that he wound up his practice in 2009 but his billings and other cogent evidence shows that he was untruthful

about this matter as well. In my opinion, the evidence overwhelming shows that Mr. Marchant was in a "conflict of commitment" and that he was undertaking a for-profit private practice on his employer's time and using his employer's office and equipment. Mr. Marchant, of course, should have disclosed this matter to his employer and obtained the requisite permission to proceed but instead chose to operate the practice without notifying his employer. Although I am not persuaded that his private accounting practice exposed his employer to a significant liability risk, the fact remains that he was practising without proper registration or professional insurance and that his employer was possibly exposed to a liability risk on account of his actions.

49. The delegate concluded that Cornell could not rely on this behaviour to justify Mr. Marchant's dismissal since it was not aware that he was conducting a private accounting practice from its premises when it decided to terminate him. As discussed above, the delegate erred in law in so concluding (see *Lake Ontario Portland Cement Co. Ltd. v. Groner*, *supra*). The delegate held that Mr. Marchant's behaviour in surreptitiously carrying out a significant private accounting practice, then lying about the scope of it, was not dishonest. I find myself unable to agree with the delegate's conclusion. Indeed, the delegate explicitly recognized that Mr. Marchant, in certain respects, *had been dishonest*. For example, at page 16 of his reasons, the delegate noted that there were "certain credibility gaps in Mr. Marchant's testimony"; Mr. Marchant testified that CBA-BC "had rejected all of the Employer's allegations" [relating to the complaint] but, quite obviously, that was not the case; and the delegate also noted that Mr. Marchant was untruthful regarding when he wound up his private accounting practice. The delegate concluded, however, "I do not find the matter to be determined to turn on the question of credibility". In my view, this observation misses the point that Mr. Marchant was employed in a key position that required Cornell to repose a good deal of trust in him. Cornell quite rightly now has legitimate concerns about Mr. Marchant's veracity and integrity and, on that basis, it would seem that this employment relationship is no longer repairable or viable.

50. While Cornell did not apparently suffer any direct economic loss flowing from Mr. Marchant's private professional practice, there still was a conflict of commitment and time spent on his accounting practice was time *not spent* dealing with Cornell's financial affairs – the very thing that he was hired and paid to do.

51. So, in sum, we have an employee who was, some years ago, dishonest (perhaps one might charitably treat his misconduct as grossly, but not deliberately, cavalier) in failing to ensure that he reimbursed his employer for the cost of a piece of exercise equipment he purchased using a Cornell account. In later years, and without notifying his employer, let alone seeking his employer's permission – and in clear violation of the standards and ethics of his profession – he maintained a significant private accounting practice using his employer's time, office and equipment. When confronted with the evidence relating to the practice, he maintained that his practice was not significant (only undertaken on "coffee breaks") and was wound up by 2009 both of which statements I find to be untruthful.

52. Although I am not persuaded that Mr. Marchant was a fiduciary *vis-à-vis* Cornell, he did hold a responsible position and, as such, owed Cornell a high duty of fidelity, loyalty and faithful service commensurate with his position as a "key" employee. It must be remembered that Mr. Marchant was principally charged with managing Cornell's financial affairs and in that capacity was given a significant measure of trust and responsibility. Cornell, in turn, was entitled to demand of him a high standard of honesty and trustworthiness. Regrettably, Mr. Marchant, by reason of certain key failings reflecting a lack of candour, failing to disclose relevant information, dishonesty and a general failure to live up to the high standards reposed in him by virtue of his position and professional status, created a irreparable rift in the employment relationship between himself and Cornell.

53. In my view, the totality of the evidence, when properly evaluated in light of the applicable legal principles, clearly demonstrates that Cornell had just cause for dismissal and it was an error of law for the delegate to determine otherwise.

New Evidence

54. In light of my decision that Cornel had just cause to dismiss Mr. Marchant, its application to introduce "new evidence" under subsection 112(1)(c) of the *Act* is now a moot point. Nevertheless, for the sake of completeness, I shall briefly address this ground of appeal.

55. Cornell wishes to introduce, on appeal, a memorandum dated February 8, 2005, from Mr. Marchant to a former Cornell employee regarding meal allowances for "Managers and Supervisors" that was to take effect as of February 1, 2005. Cornell says that this memorandum shows that Cornell's meal allowance policy was much less generous than was set out in a January 14, 2005, memorandum that was before the delegate. Mr. Marchant says that this memorandum is not relevant since it deals with the meal policy for lower level supervisory employees and was wholly separate from the meal allowance policy that applied to him.

56. "New evidence", tendered in accordance with subsection 112(1)(c) of the *Act*, is admissible under the criteria established in *Davies et al.*, BC EST # D171/03. In accordance with those criteria, I find this memorandum to be inadmissible. First, this document was clearly "available" and could have been presented to the delegate had Cornell undertaken a more diligent search of its records. Second, given that it is addressed to another employee and sets out a policy that seemingly only applies to employees below Mr. Marchant in the organizational hierarchy, I fail to see its relevance. If Mr. Marchant was bound by this lower meal policy limit, then where is the document that expressly says as much? Thirdly, I think it most inappropriate for "new evidence" to be tendered for the very first time in a reply submission.

ORDER

57. I find that the delegate erred in determining that Cornell did not have "just cause" to terminate Mr. Marchant (see subsection 63(3)(c) of the *Act*). Accordingly, pursuant to subsection 115(1)(a) of the *Act* the Determination is cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal