Employment Standards TRIBUNAL

An appeal

- by -

The Piping Industry Apprenticeship Board
("PIAB")

- 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: Robert E. Groves

FILE No.: 2012A/150

DATE OF DECISION: March 8, 2013

DECISION

SUBMISSIONS

Theodore Arsenault — counsel for The Piping Industry Apprenticeship Board

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*")The Piping Industry Apprenticeship Board ("PIAB") has filed an appeal of a determination issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on November 7, 2012 (the "Determination"), in which PIAB was found to have contravened sections 63 and 88 of the *Act* in respect of a complaint filed by its former employee, Craig B. Marshall ("Marshall").

2. The Determination required PIAB to pay Marshall compensation for length of service, annual vacation pay, and interest, in the amount of $9,660.37. The Delegate also imposed an administrative penalty of $500.00. The total found to be owed was, therefore, $10,160.37.

3. On January 30, 2013, the Tribunal issued a decision suspending the effect of the Determination pending the outcome of this appeal, on payment by PIAB of security in the amount of $5,000.00.

4. I have before me PIAB's Appeal Form and submission, the Determination and the Delegate's Reasons for the Determination, as well as the record the Director has delivered to the Tribunal pursuant to section 112(5) of the *Act*.

5. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic, telephone and in person hearings when it decides appeals. A review of the material that has been delivered in this matter persuades me that I may decide the merits of this appeal on the basis of the written documentation now before me, and without an electronic, telephone, or in person hearing.

FACTS

6. PIAB operates an accredited trade school. Marshall was employed as an instructor from December 11, 2006, until November 4, 2011, when he was dismissed without notice or pay in lieu. PIAB alleged that the dismissal occurred because Marshall had given just cause.

7. Marshall filed a complaint with the Director. On October 23, 2012, the Delegate conducted a hearing at which Marshall attended, as did counsel for PIAB, and several witnesses.

8. PIAB did not dispute the amounts to which Marshall would be entitled under the *Act* in the event that its plea of just cause was unsuccessful.

9. At the hearing, PIAB's case focused on the assertion that Marshall had an extensive discipline record and that he had repeatedly violated the terms and conditions of his employment, including several of PIAB's policies, all of which provided PIAB with just cause to dismiss him.

10. Marshall signed an employment agreement on August 30, 2010. In it, Marshall agreed:

- to comply with any reasonable policies adopted by the PIAB which were applicable to the performance of his duties and the operation of the school;
- that he was employed in a position of trust, that he would at all times act loyally and with the utmost good faith exclusively in the interests of the PIAB, and that he would avoid any conflict of interest;
- that his regular hours of work would be 7:00am to 3:30pm each day, unless otherwise directed by the Executive Director;
- that he had read and/or been briefed on his duties, the school's regulations and policies, as well as his conditions of employment, and that he understood and accepted them.

11. On August 9, 2011, PIAB issued a disciplinary letter to Marshall. It stated that, contrary to school policy, Marshall had viewed student evaluations of his teaching in their presence. It implied that he was not having the students complete their evaluations on a weekly basis as required. It also said that students were complaining that Marshall was bringing his personal problems to work, an issue that PIAB management had discussed with him before. The letter stated that it was Marshall's "last warning" concerning the evaluation policy. It also admonished him to leave his personal problems at home. The record before me does not indicate that PIAB had any subsequent concerns with Marshall regarding these matters.

12. In August, 2011, PIAB management became aware that Marshall had been involved in a personal relationship with one of his adult female students, and that he had used the school's online instruction system for personal communications with the student. Since PIAB received funding in order to provide instruction in the trades to women, and Marshall was in a position of power over the student, PIAB management concluded that Marshall had committed a serious breach of the conflict of interest provision in his employment agreement. In addition, the circumstances were aggravated by the fact that Marshall had been verbally warned on a previous occasion about a similar relationship involving a co-worker.

13. PIAB decided to suspend Marshall with pay effective August 29, 2011, and direct that he contact employee health and welfare resources for counseling. Marshall was also told that he would need to provide a report on his progress, at which time PIAB would make a further determination regarding his continued employment.

14. Marshall returned to work on October 17, 2011. The evidence the Delegate heard was that he was permitted to do so because he had completed his counseling regime, and had "dealt with" his issues. Marshall was remorseful about the relationship, and acknowledged that it was wrong. He did not challenge the discipline he received in respect of it. Again, the record reveals no further instances in which PIAB came to be concerned regarding Marshall's performance insofar as it related to issues of the type that resulted in his suspension.

15. Throughout his period of employment, Marshall was chronically late arriving at work two mornings each week. The Delegate's Reasons reveal that he was late by between ten to twenty minutes on these mornings because he was required to deliver his son to a daycare pursuant to a court order, and the facility opened at 7:00 am, the very time at which he was meant to commence work.

16. Marshall testified that the reason for his being late was well known at PIAB. He stated that he could not move his son from the daycare, as the child had become established there. He also said that he had been allowed to arrive late at work by PIAB for at least two years prior to his dismissal. He alleged that it had never been an issue. He was always present when classes commenced at 7:30 am. It was his belief that he

had an "understanding" with PIAB management that he would be a few minutes late two days a week owing to his court sanctioned obligation to deliver his son to daycare.

17. On October 24, 2011, Marshall was again late arriving to work. Later that day, Marshall's supervisor ("Mr. D.") emailed him advising that he needed to contact PIAB's operations manager ("Ms. B.") so that she could adjust his payroll records for the day to seven and a half hours. The email also advised Marshall that he could not merely stay an extra half hour at the end of his day to make up the time, as it was not within the school's policy. It also reminded Marshall that his day was from 7:00 am to 3:30 pm.

18. In his testimony, Mr. D. confirmed that Marshall was often late, that it was a breach of his employment agreement, and that he had spoken to Marshall about it on several occasions. However, Marshall's being late did not improve.

19. Mr. D. testified that he had begun to monitor Marshall's hours of work more carefully after he returned to work on October 17, 2011. He confirmed that Marshall told him the reason he had to be late was that he had to deliver his son to daycare. He denied that there was ever an agreement with Marshall that he could continue to be late. Indeed, he said that he advised Marshall he had to comply with the school's expectations regarding his hours of work, and that he should make other arrangements for daycare. He acknowledged, however, that while he had spoken to Marshall many times about his being tardy, he had never advised him that he would be terminated if he continued to arrive at work late.

20. Following receipt of Mr. D.'s October 24, 2011, email, Marshall emailed Ms. B. The email was also forwarded to Mr. D and the Executive Director for PIAB ("Mr. P."). Marshall's email said this:

> As requested by [Mr. D.], he would like me to adjust my time sheets to reflect my parental responsibilities. As previously discussed my sons daycare opens at 7:00 am and I arrive at PIAB on average by 7:15. My understanding was that I would make up this 15 minutes by staying at work till 4:00. Due to [Mr. D.] requested could you deduct my weekly hours by a one half an hour to reflect this concern.

21. Ms. B. responded with an email later the same day. That email was also copied to Mr. D. It said this:

> OK, Craig, but perhaps you can record this weekly on your time sheets when you hand them in. As I need to get approval before processing all payroll.

22. On October 28, 2011, Mr. P. met with Marshall and presented a "last chance agreement" to him. The agreement was in the form of a letter, and said this:

> As a result of your return to work on **Monday, October 17, 2011,** I want to make clear the terms of the continuation of your employment following your paid suspension.
>
> These terms are to be agreed upon by the parties, being the PIAB and Craig Marshall,
>
> As referenced in my **August 30, 2011** letter to you, on two occasions you have breached your duty of trust and the fundamental terms of the employment agreement by the way of two separate relationships, one with a co-worker and the other one with a student.
>
> **3. DUTY OF TRUST (Quoted from PIAB Instructor Employment Agreement)**
>
> 3.1 The Instructor acknowledges that he has a special relationship with the P.I.A.B., whereby he/she is employed in a position of trust, the Instructor agrees to, at all times, act loyally and with the utmost good faith exclusively in the best interests of the P.I.A.B. and to avoid any conflict of interest.

> It is further understood, that any further breach to your employment agreement and the policies and procedures of the PIAB will result in immediate termination for cause.

23. Marshall testified that he signed the October 28, 2011, letter, as he felt he had no other choice.

24. On November 2, 2011, Marshall was again late arriving at work. Mr. D. could not recall how he dealt with this further breach, but later the same day some other instructors came to him and advised that some students had complained that Marshall had driven a forklift in an unsafe manner through the welding training area. Mr. D. then reported these matters to Mr. P.

25. Regarding the forklift allegation, Mr. P. testified that he did not witness the incident, but several students advised him that Marshall had driven down an aisle in the training area in an unsafe manner. However, Mr. P. did not question Marshall regarding the incident. Instead, he considered that these new matters involving Marshall, arising so soon after the October 28, 2011, last chance agreement, constituted a culminating incident, and he determined that Marshall should be terminated.

26. On November 3, 2011 Mr. P. prepared and delivered a termination letter to Marshall. It said this:

> Please be advised that on November 2, 2011 you arrived at work 20 minutes late. You have been told on numerous occasions that your work day begins at 7:00 a.m. and ends at 3:30 p.m. There is no coming late and staying late. You also have been told that you need to contact myself and [Ms. B.] to let us know that you were late and to make adjustments to your time sheet, neither was done.
>
> On November 2, 2011, you were observed driving the forklift in an unsafe manner, between booths #36 - #31 in which several students raised the issue with their instructors.
>
> On more than two occasions you have been witnessed sleeping during the safety and instructors meeting.
>
> You have been warned several times about the extra smoke breaks that you take. The breaks are at coffee and lunch times only. You are taking additional breaks between those times also.
>
> This puts you in breach of the letter dated October 28, 2011, that you signed. I have no choice but to terminate you as of November 4th, 2011.
>
> I wish you all the best in your next endeavor.

27. At the hearing, Marshall denied that he operated the forklift in an unsafe manner as alleged. PIAB did not tender evidence from any person who observed the way that Marshall operated the forklift.

28. The evidence given by Mr. P. at the hearing revealed that Marshall had failed to attend two meetings earlier in 2011 at which safety measures regarding forklifts were discussed. However, Mr. P. also stated that he himself missed one of the meetings, and when that happened staff members were expected to follow up and review the minutes of the meeting and any relevant training materials. It appears, then, that it was not a matter for automatic discipline at PIAB if an instructor happened to miss a meeting on occasion. There also does not appear to be any evidence that Marshall did not review the minutes and other relevant materials due to his missing meetings.

29. Mr. P. further stated that he had never questioned Marshall's safety practices prior to November 2, 2011, and that Marshall had operated forklifts at the school for the previous five years without incident.

30. For his part, Marshall acknowledged that he did miss one meeting, but that it was due to the fact he had an inordinately high class ratio, and did not have the time to attend. He testified that no issue regarding his

absence was raised with him at the time. I note, further, that the November 3, 2011, termination letter makes no reference to it being a ground for his termination that Marshall missed safety meetings.

31. The issue with respect to meetings referred to in the termination letter was that it had been observed Marshall was sleeping. In response, Marshall testified that it was common practice for employees to sleep during the meetings, he did "close his eyes" on occasion, and that prior to the termination letter it had never been an issue. A witness called by Marshall at the hearing also confirmed that attendees often fell asleep at the weekly safety meetings.

32. It does not appear from the evidence in the record that any other attendee was ever disciplined for sleeping in meetings, or that Marshall fell asleep at a meeting after the last chance agreement was signed on October 28, 2011.

33. Regarding the issue of smoke breaks, the record does not reveal any specific evidence from PIAB on the issue except for the reference to it in the termination letter. For his part, Marshall testified that the matter of his taking such breaks was raised with him because some of his classes took breaks as a learning technique. He also stated that there was no resolution about the practice.

34. The Delegate declined to find that PIAB had demonstrated it was entitled to dismiss Marshall for just cause.

35. In doing so, the Delegate noted that Marshall had fulfilled the terms of his August 2011 suspension, and that the incidents causing his dismissal were unrelated to the forms of misconduct from which it resulted.

36. She also observed that while Mr. D. had made it clear, in his August 9, 2011, letter regarding student evaluations, that the letter was Marshall's "last warning" on the matter, the letter did not indicate what consequences would follow from further non-compliance. Perhaps more importantly, there was no evidence suggesting that Marshall committed any infractions of the policy thereafter.

37. Regarding the absences from meetings, the Delegate noted that Mr. P. himself had been absent from meetings, and that procedures were in place to ensure that absentees would review the minutes of the meeting and any associated material presented. She also noted that no evidence was led by PIAB to demonstrate whether Marshall had failed to follow up as required.

38. As for Marshall's sleeping in meetings, and taking excessive breaks, the Delegate stated that PIAB had tendered no evidence of substance that provided particulars as to the nature and quality of Marshall's transgressions in these areas, and what, if anything, had been done to specifically address these matters with him, prior to the termination letter being issued on November 3, 2011.

39. The Delegate found that Mr. D.'s interactions with Marshall on the issue of his being routinely late were entirely verbal for a period of years prior to the October 24, 2011, email. She also observed, correctly, that the email did not state explicitly that Marshall's being late was unacceptable, or that it could lead to disciplinary action. Instead, the email advised that it was against PIAB policy for Marshall to be late, that he could not deal with the issue by staying late, and that he was required to see that his hours for the day were adjusted to seven and a half, down from eight.

40. The Delegate concluded that Marshall complied with this latter direction when he notified Ms. B. via email that his hours should reflect his being late. Indeed, the wage statements for Marshall produced at the hearing verified that this had occurred. For the Delegate, then, it was inaccurate for PIAB to state in the

November 3, 2011, termination letter that Marshall had failed to comply with this direction in Mr. D.'s October 24, 2011, email.

41. The Delegate's responses to PIAB's assertion that the November 2, 2011, incidents were sufficient to trigger a dismissal for just cause may be summarized in the following way.

42. Concerning the issue of Marshall's being late on November 2, 2011, the Delegate concluded that while the October 28, 2011, last chance agreement stated that a further breach of his employment agreement and PIAB's policies and procedures would result in immediate termination, it was not specifically made clear to Marshall that lateness would constitute such a breach. The Delegate came to this conclusion for three reasons.

- PIAB condoned Marshall's arriving at work late for a period of years, and although Mr. D. may have told Marshall to cease doing so, no consequences were ever specified prior to the October 24, 2011, email.
- The October 24, 2011, email clarified Marshall's hours of work, prohibited him from making up late time at the end of the day, and implemented a consequence of lateness in the form of a pay adjustment. However, it did not reference any additional consequence for Marshall's coming to work late. Marshall's subsequent email to Ms. B. demonstrated that he continued to be of the view that he could continue to come to work late, a view that the Delegate stated was consistent with a provision in his employment agreement which entitled the Executive Director of PIAB to modify its terms, including his hours of work.
- The October 28, 2011, last chance agreement was a fitting opportunity for PIAB to further clarify its position regarding lateness. Instead, it focused on the reasons for Marshall's August 2011 suspension and the conflict of interest provision in his employment agreement. It said nothing specific about his continuing to come to work late. Further, there was no evidence that Mr. P. ever made it clear to Marshall that his continuing to come to work late was the type of transgression that would henceforth result in immediate dismissal.

43. Given these facts, the Delegate concluded that PIAB did not adequately notify Marshall that his employment was in jeopardy if he continued to come in late.

44. Regarding the allegation that Marshall had operated the forklift in an unsafe manner, the Delegate noted that neither Mr. P. nor Mr. D. witnessed the incident, and that the evidence led at the hearing consisted of their accounts of what other instructors and students had told them had occurred. Moreover, the Delegate was troubled by the fact that there were no details provided concerning the time, duration and severity of the incident, the manner in which it was investigated, or the way that it was addressed with Marshall.

45. Against this, the Delegate weighed Marshall's denial, his clean safety record over the five years of his employment, and the fact that he routinely operated a forklift as a part of his regular duties.

46. The Delegate then concluded that PIAB had not met the burden necessary to demonstrate that Marshall's conduct in operating the forklift provided it with grounds to dismiss him for just cause. In drawing this conclusion, the Delegate referred specifically to the fact that PIAB had neglected to provide enough reliable evidence to corroborate its version of events. She also stated that PIAB's decision to include in its November 3, 2011, termination letter a reference to Marshall's failure to contact payroll as directed after the

October 24, 2011, email, when he had clearly done so, was a discrepancy in PIAB's recording of events that the Delegate could consider when determining the reliability of its evidence against Marshall.

47. The Delegate then concluded her remarks on just cause, saying this:

> When relying upon an argument for just cause in a matter of termination, an employer bears the burden of proving the terminated employee's behaviour breached the employment agreement so severely the relationship could not continue. In consideration of all the evidence, I find [PIAB] has not met this burden, either through showing requisite steps through corrective discipline were met as claimed or that Mr. Marshall's actions warranted immediate dismissal. Conversely, I find [PIAB] condoned Mr. Marshall's repeated lateness and effectively changed the terms of Mr. Marshall's employment by allowing him to come in and stay late throughout the last years of his employment. [PIAB] also failed to show written or verbal warnings that Mr. Marshall's employment was in jeopardy for continued lateness were issued and that he acknowledged and clearly understood the consequences associated to the sole issue of lateness. Furthermore, I find [PIAB] provided insufficient evidence to substantiate the allegations made about the November 2 forklift incident.

ISSUE

48. Is there a basis on which the Determination should be varied or cancelled, or referred back to the Director?

ANALYSIS

49. The appellate jurisdiction of the Tribunal is set out in section 112(1) of the *Act*, which reads:

> 112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:
>
> (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.

50. Section 115(1) of the *Act* should also be noted. It says this:

> 115 (1) After considering whether the grounds for appeal have been met, the tribunal may, by order,
>
> (a) confirm, vary or cancel the determination under appeal, or
>
> (b) refer the matter back to the director.

51. In this appeal, section 63(3)(c) of the *Act* is the substantive section that is engaged. It says that if an employee is dismissed for "just cause," an employer's obligation to pay compensation for length of service is discharged.

52. PIAB challenges the Determination on two grounds.

53. First, it asserts that the Delegate erred in law in failing to find that Marshall was dismissed for just cause resulting from his own wilful misconduct and breach of the October 28, 2011, last chance agreement.

54. Second, it says that new evidence has become available since the Delegate conducted the hearing which, if available at the time of the hearing, would have led the Delegate to conclude that Marshall was properly dismissed for just cause. The PIAB refers to a decision of a Board of Referees under the *Employment Insurance Act*, issued on November 6, 2012, denying Marshall employment insurance benefits. The rationale for that decision was that Marshall lost his employment with PIAB by reason of his own misconduct.

55. I will deal with these grounds of appeal in reverse order.

New Evidence

56. The nub of PIAB's argument on this ground is that the Board of Referees applied the same test for misconduct that the Delegate considered when determining that Marshall should not have been dismissed, yet came to the opposite conclusion. It appears that PIAB is asserting that since the Board came to this conclusion after the Delegate came to hers, I must conclude that the Determination is fatally flawed.

57. I confess I am perplexed by this reasoning. It appears that PIAB is asking me to consider a type of *res judicata* or issue estoppel argument in reverse, given that the Board's decision followed the issuance of the Determination. Perhaps that is the reason why these legal issues are not explicitly referred to in PIAB's argument. If one were to conclude that a decision in the one forum was conclusive of what might appear, on the surface, to be the same issue in the other, one might plausibly argue that it was the Board which should have came to the same conclusion as the one that is recorded in the earlier decision of the Delegate.

58. I find that I do not need to pursue this aspect of the matter further, because there is at least one decision of our courts that holds that proceedings under the *Employment Insurance Act* where employee misconduct is an issue do not raise concerns relating to *res judicata* or issue estoppel in subsequent litigation where the employee claims damages for wrongful dismissal and the employer defends on the same basis (see: *Alderman v. North Shore Studio Management Ltd.* [1997] BCJ No.646).

59. In *Alderman*, the court found that a Board of Referees decision that a claimant was disentitled to employment insurance benefits due to his own misconduct did not determine the issues relating to cause raised in the employee's action for wrongful dismissal. The court's reasons included a finding that the test for determining misconduct under the *Employment Insurance Act* was less rigorous than the civil test for deciding whether a dismissal was "wrongful" or not.

60. When considering whether an employer has satisfied the onus the *Act* places on it to show just cause, the Tribunal takes guidance from the principles developed at common law. The decisions of the Tribunal reveal that it takes a view of what constitutes just cause that is at least as rigorous as that applied routinely in our courts when they consider claims based on allegations of wrongful dismissal (see: *Director of Employment Standards and Ellison*, BC EST # RD122/03).

61. This would appear to be sufficient to dispose of PIAB's argument on this point. I note, *a fortiori*, however, that the court in *Alderman* also found that a determination whether an employee was entitled to receive benefits under the *Employment Insurance Act* was a different legal question than the one raised in an action for damages for wrongful dismissal, because it involved a claim for temporary monetary relief, and not a claim for compensation. The court also observed that the parties in an action for wrongful dismissal were different than the parties in a proceeding before a Board of Referees. In the proceeding before the Board, the employer would not be a "privy" in the same sense as it would be in a wrongful dismissal proceeding, because it would not be called upon to make payment in any way if there was a finding made that the employee had not misconducted himself.

62. Interestingly, the court also observed that decision-makers under employment standards legislation were in a different category from Boards of Referees in that issues relating to findings of just cause decided by them could be determinative in subsequent court proceedings where the claim was for damages for wrongful dismissal. That view was later confirmed by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.* [2001] SCJ No.46.

63. It follows from this discussion that I have decided the new evidence tendered by PIAB is insufficient to form a principled basis on which I might interfere with the Determination.

Error of Law

64. PIAB's submission on this aspect of its appeal focuses on the issue of Marshall's being late for work on November 2, 2011. It does not appear to challenge, expressly, the Delegate's conclusions regarding the incident involving the forklift.

65. PIAB submits that the Delegate erred in law in two ways regarding the issue of Marshall's being late. First, it argues that the Delegate misinterpreted and misapplied the just cause standard appearing in section 63(3)(d) of the *Act*. Second, it asserts that the Delegate acted on a view of the facts that could not be reasonably entertained.

66. PIAB says that Marshall was guilty of wilful misconduct when he arrived late for work on November 2, 2011, because he knew the hours he was required to work, he knew that arriving late was a breach of his employment agreement, and he knew that the last chance agreement stipulated that any further breaches of his employment agreement would result in termination. PIAB submits, therefore, that the Delegate erred in law when she determined that Marshall's arriving late for work on November 2, 2011, did not constitute wilful misconduct, or a violation of the last chance agreement.

67. PIAB's argument is that Marshall could not help but know that a further instance of his being late would breach the last change agreement, in significant part because Mr. D.'s October 24, 2011, email admonishing him about his lateness occurred but four days before he signed the last chance agreement. It is for this reason that PIAB asserts that the Delegate acted on a view of the facts that could not be reasonably entertained when she found that Marshall's being late did not constitute a breach of his employment agreement.

68. PIAB points to Marshall's email to Ms. B. following his receipt of Mr. D.'s October 24, 2011, email. It argues that Marshall's request of Ms. B. that she alter his time sheets to reflect his "parental responsibilities" was directly contrary to Mr. D.'s evidence denying any agreement with Marshall that he could arrive late for work, and stay late, due to his son's daycare schedule. PIAB says further, that Marshall's email to Ms. B. did not reflect what he was instructed to do by Mr. D. when the latter emailed him on October 24, 2011. At the same time, PIAB argues that Marshall's email clearly establishes that he was aware of, and understood, PIAB's policy regarding his hours of work and that his arriving late and staying late was a violation of his employment agreement.

69. PIAB argues further that the Delegate erred in interpreting the November 3, 2011, letter when she concluded that PIAB was incorrect in claiming in it that Marshall had not followed Mr. D.'s instructions to contact Ms. B. in payroll so that when he was late his time sheets could be adjusted. It is clear that the Delegate believed that PIAB was referring to the instance on October 24, 2011, when Marshall was late. In its argument, however, PIAB says that it was referring to Marshall's being late on November 2, 2011, when it charged him with failing to act as directed.

70. The question whether an employee has been dismissed for just cause is a question of mixed law and fact (see *Panton v. Everywoman's Health Centre Society* [2000] BCJ No.2290 at paragraph 7). Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST # D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.

71. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

72. The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., supra*).

73. I note further, in this context, that the question whether an employer has condoned an employee's misconduct is a question of fact (see: *Nardulli v. C-W Agencies Inc.* [2012] BCJ No.2363 at paragraph 306).

74. By way of general comment, the onus on the employer to prove that it was justified in summarily dismissing an employee for just cause is a high one. Proportionality underlies the contextual approach which must be undertaken when determining this issue. In *Nardulli*, *supra*, the court referred to a previous decision of its own, where the learned judge made the following comments:

> The approach to assessing whether the employee's conduct provides cause for dismissal is objective – that is, the employer's view that the conduct is sufficient to establish cause (or the employee's view that it is not) is not determinative. However, the approach is also contextual: the court must consider "the particular circumstances surrounding the employee's behaviour...factors such as the nature and degree of the misconduct, and whether it violates the 'essential conditions' of the employment contract or breaches an employer's faith in an employee" (*McKinley v. BC Tel,* 2001 SCC 38, [2001] 2 SCR 161, at para.39). This approach balances the employer's right to dismiss an employee for cause with the importance of both the work and the manner of the dismissal to an employee's self-worth.

75. A single instance of an employee's being late by up to twenty minutes, as Marshall was on November 2, 2011, would not, in most contexts, constitute sufficient grounds for the employer to dismiss for just cause. However, Marshall had a significant history of conduct warranting disciplinary intervention, and so it is reasonable to conclude that if PIAB had, in the circumstances, made it sufficiently clear to Marshall that a further instance of his being late would be sufficient to trigger termination under the last chance agreement, the Delegate may have come to a different conclusion in the Determination.

76. The Delegate, however, found as a fact that PIAB did not make it clear to Marshall that a further instance of his being late would be a breach of the last chance agreement, notwithstanding PIAB's strong views to the contrary. There were several reasons why the Delegate came to this conclusion. First, she found as a fact

that PIAB had condoned Marshall's being late for years, and despite repeated references to his tardiness, it never informed him, expressly, that his employment would be in jeopardy if he continued to come in late.

77. Mr. D.'s October 24, 2011, email admonished Marshall for being late, to be sure, but it did not state what the consequences would be for his being late, apart from directing him to Ms. B. in payroll to ensure that his hours were adjusted to reflect the fact that he did not arrive on time. Marshall responded to this direction immediately, and the email he sent to Ms. B. reflected an understanding that he could arrive late in order to attend to his parental responsibilities, but that his time sheets would have to be adjusted to reflect his actual time at work.

78. PIAB suggests that Marshall was disingenuous when he forwarded this email, but the Delegate made no such finding. Indeed, the Delegate found that Marshall believed his hours of work set out in his employment agreement had been modified to permit him to take his son to daycare. Critically, when Marshall sent his email to Ms. B., he also forwarded it to Mr. D. and Mr. P, yet there was no evidence led which suggested anyone in authority at PIAB challenged Marshall's interpretation in his email regarding the hours he could work, and his arrival time, at any time prior to the November 3, 2011, termination.

79. There was no evidence Mr. P. discussed Marshall's lateness in the context of the delivery of the October 28, 2011, last chance agreement. Instead, that agreement focused on what must have been construed to be the much more serious misconduct on the part of Marshall relating to his personal relationships with a co-worker and a student. True, the agreement refers to any further breaches of Marshall's employment agreement, and the PIAB policies and procedures, but in light of Marshall's understanding regarding his coming in late following the email correspondence on October 24, 2011, it would not be unreasonable for him to conclude that as his hours of work had been modified, and provided he advised payroll and adjusted his time sheets when he did come in late, it would not constitute a breach of the PIAB policies and procedures, as they related to him, if he did in fact arrive late in future.

80. In this context, Marshall's coming in late but a short time thereafter cannot of necessity be construed to be an instance of wilful misconduct on his part. This is particularly so given the heavy onus the authorities have placed on employers to prove just cause.

81. Nor am I of the view that PIAB is correct when it asserts that the Delegate took a view of the facts that could not be reasonably entertained when she interpreted the November 3, 2011, termination letter as suggesting that Marshall had been disobedient because he had failed to report his being late to payroll as Mr. D. had directed in his October 24, 2011, email, when he had clearly done so. PIAB argues that the reference to Marshall's failure to report related to his being late on November 2, 2011.

82. I have read the part of the November 3, 2011, termination letter that relates to this issue and it is not obvious to me that the allegation that is made does, in fact, relate to the November 2, 2011, instance where Marshall came in late. It could be construed to mean that, to be sure, but there is a lack of specificity in the allegation, and the manner in which it is expressed, that could raise a doubt in the mind of a reasonable observer. That being so, I cannot say that the Delegate erred when she concluded, as a matter of fact, that it referred to Marshall's contacting payroll after the October 24, 2011, email from Mr. D.

83. But even if it could be said that the Delegate was incorrect in finding that the November 3, 2011, termination letter was referring to Marshall's failure to advise payroll on October 24, 2011, and not his failure to report on November 2, 2011, there does not appear to have been any evidence led at the hearing which could cast light on the precise protocol to be followed by Marshall if he did come in late. No doubt, PIAB management believed that Marshall was obligated to report immediately. I note, however, that Ms. B.'s October 24, 2011,

email to Marshall suggests that he record his being late on a weekly basis, when he handed in his time sheets. In my view, a reasonable person reading that email would conclude that it was not necessary to report an instance of late arrival immediately.

84. In the circumstances, I am unable to conclude that the Delegate's findings of fact were unreasonable, let alone perverse or inexplicable. Given the facts as found, I am not persuaded that the Delegate misapplied or misinterpreted the test for just cause. That being so, I am unable to conclude that the Delegate erred in law in the ways that have been alleged, or at all.

ORDER

85. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal