

An appeal

- by -

Always "On" UPS Systems Inc.
(“UPS”)

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2007A/9

DATE OF DECISION: April 12, 2007

for dismissal. The complaint hearing also dealt with the issue of whether Price was entitled to length of service compensation since he had not completed the probationary period set for him by UPS.

11. Both parties were represented at the complaint hearing and presented evidence supporting their respective positions on the issues. The Determination summarizes the evidence that was given by the parties at the complaint hearing.
12. The Director concluded UPS had not established just cause to terminate Price.
13. The Determination reflects a consideration of two arguments made by the representative for UPS: first, that Price was not entitled to length of service compensation because he had not completed his probationary period; and second, that Price committed acts of wilful misconduct which justified his summary dismissal.
14. In respect of the second argument, UPS relied on two incidents as being demonstrative of wilful misconduct sufficient to justify summary dismissal. The first was a refusal by Price to sweep the warehouse floor and the second was a refusal by Price to go home when he was told to do so.
15. The Director rejected the first argument on the wording of Section 63 of the *Act*, which says that after three consecutive months of employment an employer becomes liable to pay an employee an amount equal to one week's wages as compensation for length of service (subsection 63(1)). That conclusion is entirely correct and I do not read anything in the appeal that challenges that conclusion.
16. The Director rejected the second argument on a consideration of the evidence. The Director found Price had not engaged in wilful misconduct.
17. The Director did not accept that the refusal of Price to sweep the warehouse floor was wilful misconduct because that activity was one which Price was unable to perform because of a pre-existing back problem. The Director also noted the evidence indicated Price's physical limitation to performing that type of work was known to his employer and had been accommodated on previous occasions. On the particular day in question, his inability to continue to do the work had been conveyed to John Christie, the vice-president of the company, and Ted Naito, the operations manager for the company.
18. The Director did not accept that the refusal by Price to go home constituted wilful misconduct. Several circumstances are referred to in the Determination in support of this decision, including: a finding that it was not reasonable to have ordered Price to go home without attempting to accommodate his inability to perform certain work when the company had made that accommodation in the past; a finding that the facts did not show Price was actually "ordered" by any person to go home and refused that order; and the absence of any indication that Price understood if he did not go home, as had been suggested by Mr. Christie and Mr. Naito at some point, he would be fired. The Director also considered that Price was discussing the possibility of performing other work with Merv Flahr, the production foreman, when Mr. Frey told him to get out of the building – which he did.
19. In reaching the conclusion that Price had not engaged in wilful misconduct, the Director considered several factors that are normally used in assessing whether the conduct of an employee can properly be considered to be "wilful misconduct".

20. The appeal includes a recitation of selected facts, much of which is inconsistent with findings of fact made by the Director. The appeal submission says, "... the Director ... erred on a number of occasions", and proceeds to take issue with several statements found in the Determination. Some of the challenged statements are general background and unrelated to the final decision, some are argumentative, another challenges whether witness statements from Mr. Naito, Mr. Christie and Nicholas Roch were introduced as exhibits by the company or the complainant and another speaks to the Director's comment concerning the "real" reason for Price's dismissal. As to the last matter, its relevance eludes me, as it is apparent the Director considered the dismissal from the perspective of both the alleged refusal to sweep the floor and the alleged refusal to go home when he was told to do so.

ARGUMENT AND ANALYSIS

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

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

- (a) the director erred in law;*
- (b) the director failed to observe the principles of natural justice in making the determination;*
- (c) evidence has become available that was not available at the time the determination was made.*

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

23. UPS has grounded this appeal in the allegation that the Director failed to observe principles of natural justice in making the Determination. As the Tribunal said in *Imperial Limousine Service Ltd.*, BC EST #D014/05:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; the right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act*, and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity to respond to the evidence and arguments presented by an adverse party (see *BWI Business World Incorporated*, BC EST #D050/96).

Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

24. There is no evidence in this case that UPS was not provided an opportunity to know the claims being made against them and an opportunity to present their position on the claims. There are no submissions in the appeal specific to this ground. I find, therefore, that the Appellant has failed to meet the onus of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

25. At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by UPS with the conclusion that they did not establish just cause to summarily dismiss Price for wilful misconduct. In that respect, I make two points.
26. First, while a decision about whether there is just cause for dismissal does include questions of law, it is predominantly fact driven. The Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings amount to an error of law (see *Britco Structures Ltd.*, BC EST #D260/03). UPS has not shown any error of law in respect of the findings of fact made by the Director. The challenged findings were made after an analysis of the evidence presented by the parties during the complaint hearing and are rationally supported by that evidence. UPS has not shown any of the factual findings and conclusions were made without any evidence at all or were perverse and inexplicable.
27. Second, UPS has not shown the Director erred in applying the principles of just cause for wilful misconduct to the facts as found. The Tribunal has identified and consistently applied several principles to questions of just cause for dismissal (see *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST #D374/97) and, in *James Stephens*, BC EST #D131/00), has affirmed an analysis of the law regarding just cause for dismissal for “wilful misconduct or disobedience” that accords with the analysis undertaken by the Director in this case.
28. UPS has not shown there are any grounds for their appeal that are reviewable under Section 112, and, accordingly, it is dismissed.

ORDER

29. Pursuant to Section 115 of the *Act*, I order the Determination dated January 9, 2007 be confirmed in the total amount of \$1,014.05, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal