

An appeal

- by -

Donald R. Oliver

- of a Determination issued by -

The Director of Employment Standards
(the “Director”)

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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2007A/22

DATE OF DECISION: May 10, 2007

DECISION

SUBMISSIONS

Donald R. Oliver	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards
Coll Gordon	on behalf of Brackenhurst Farm (1978) Ltd.

OVERVIEW

1. This is an appeal by Donald Oliver, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued February 6, 2007.
2. Mr. Oliver worked as a dairy farmer for Brackenhurst Farm (1978) Ltd. ("Brackenhurst") from June 26, 1996 until March 29, 2006. Mr. Oliver filed a complaint alleging that he was owed compensation for length of service.
3. The Director's delegate held a hearing into Mr. Oliver's complaint on November 10, 2006. At issue was whether Brackenhurst had just cause to terminate Mr. Oliver's employment for cause. The delegate determined that Brackenhurst had not contravened the *Employment Standards Act* and that no wages were outstanding.
4. Mr. Oliver contends that the delegate erred in law and failed to observe the principles of natural justice in admitting evidence that had not been previously disclosed, by relying on evidence that he had disputed, and in determining that there was just cause for dismissal.
5. Section 36 of the *Administrative Tribunals Act* ("ATA"), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 16 of the Tribunal's Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Mr. Oliver sought an oral hearing, I conclude that this appeal can be adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which does not turn on the credibility of the parties or whether additional evidence needs to be considered. There is also no need to hear *viva voce* evidence on the issue of whether there is a denial of natural justice. This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination

ISSUES

1. Whether the delegate erred in law in concluding that Brackenhurst had just cause to terminate his employment; and
2. Whether the delegate failed to observe the principles of natural justice in arriving at the Determination

ARGUMENT

6. Mr. Oliver set out the grounds of appeal as follows:
 - a) the delegate failed to observe the principles of natural justice in allowing evidence “without proper prior disclosure”;
 - b) the delegate failed to observe the principles of natural justice “by allowing personal bias to impact the weighing of the evidence”;
 - c) the delegate erred in law by “allowing the admission of evidence that was not produced in a timely manner in accordance with the provisions of the statute” ;
 - d) the delegate failed to observe the principles of natural justice “by relying upon evidence disputed by the appellant and then using that refusal to validate evidence the Appellant had not seem as a basis for improperly weighting the credibility of the Appellant” (sic);
 - e) the delegate erred in law by “determining the act of kicking a cow and disciplining a cow was sufficient grounds for dismissal in the absence of any evidence of harm”;
7. The delegate submitted the record before him at the time the Determination was made, and made no submissions.
8. Brackenhurst seeks to have the appeal dismissed. It says that Mr. Oliver has failed to establish that the delegate erred in law or failed to observe the principles of natural justice.

THE FACTS AND ANALYSIS

9. Although not recorded in the Determination, the parties attended a mediation session on September 13, 2006. Although the substance of that session are confidential, Brackenhurst says, and I accept, that it disclosed a warning letter (the “warning letter”) issued to Mr. Oliver at that session, and indicated its intention to raise the letter at a hearing if the settlement discussions were unsuccessful.
10. Brackenhurst is a dairy farm with 200 head of cattle, 90 of which are milking cows. Mr. Oliver was originally hired to work for Brackenhurst as general help, and rose to the position of herdsman. He was acknowledged as a senior employee, and other employees reported to him in a formal or informal capacity.
11. At the hearing, David Aylard, owner and president of Brackenhurst, testified that Mr. Oliver had an anger management problem. His evidence was that Mr. Oliver’s physical aggression towards another employee in 2000 had caused the employee to quit. The employee successfully obtained compensation for length of service on the grounds that Mr. Oliver’s aggression had created intolerable working conditions for him. Brackenhurst warned Mr. Oliver about his behaviour by way of a written letter in July 2000 (the “warning letter”). Although Mr. Oliver’s signature was on the letter, at the hearing Mr. Oliver initially denied receiving a copy of it. Mr. Oliver then denied remembering that he received it. Ultimately, Mr. Oliver acknowledged that he signed a letter without having read it.

12. Mr. Aylard also testified about a physical altercation Mr. Oliver had with another employee (Mr. Neely) in 2002, and a 1998 incident in which a cow lost an eye after being kicked by Mr. Oliver. Mr. Oliver did not dispute the evidence that a cow lost an eye after he struck it with a plastic cane.
13. Mr. Aylard's evidence was that he terminated Mr. Oliver's employment after Mr. Neely reported to him about Mr. Oliver's treatment of a cow, purportedly after being kicked by the cow. Mr. Neely said that Mr. Oliver kicked the cow in the udder four or five times and shoved manure down its throat. Mr. Aylard said that he confronted Mr. Oliver about the treatment, and that Mr. Oliver acknowledged kicking the cow in the hocks and putting manure on its nose. Mr. Oliver told Mr. Aylard that if manure got in the cow's mouth it was by accident. The evidence of both Mr. Neely and Mr. Oliver at the hearing was consistent with their reports to Mr. Aylard. Mr. Oliver denied that he kicked the cow in the udder because he said that was "where the money was made".
14. Mr. Aylard accepted Mr. Neely's version of events and terminated Mr. Oliver's employment.
15. The hearing was set for November 10, 2006. On November 6, 2006, Brackenhurst faxed two documents to the delegate and to Mr. Oliver on which it said it intended to rely at the hearing. Those documents were the warning letter and an April 4, 2006 written statement from Mr. Neely about the 2002 incident. On November 8, 2006, Mr. Oliver submitted letters of reference from a previous and his current employer.
16. At the outset of the hearing, Mr. Oliver objected to Brackenhurst's evidence because it had not been submitted at least 14 days prior to the hearing as required by the *Notice of Complaint Hearing*. The delegate admitted the documents into evidence on the basis that they corroborated oral evidence and did not contain information either party did not already have or could respond to on short notice. The delegate was satisfied that neither party had been prejudiced by the short notice of the evidence.
17. The delegate found Mr. Oliver's evidence, particularly his responses to the warning letter, to be "evasive" and given in a "selective manner". The delegate found it "most improbable" that Mr. Oliver did not know about the letter. The delegate found Mr. Neely's evidence to be forthright and credible, and preferred Brackenhurst's evidence about the March 2006 incident over that of Mr. Oliver.
18. The delegate then assessed whether Mr. Oliver's conduct was sufficient grounds for termination for cause. Brackenhurst contended that his conduct constituted both severe misconduct as well as failure to correct minor misconduct after being warned about that behaviour, both of which constituted grounds for termination for cause.
19. The delegate determined that Brackenhurst had not substantiated just cause for minor misconduct. He noted that Mr. Oliver had only one written warning about his behaviour, that having been sent six years prior to the date his employment was terminated. He concluded that Mr. Oliver had not been adequately warned that his employment was in jeopardy because of his temper.
20. The delegate then analyzed whether kicking a cow four or five times in its udder and shoving manure down its throat to constitute sufficiently serious misconduct to terminate Mr. Oliver's employment. The delegate acknowledged that he had no expert evidence to determine the effect of Mr. Oliver's actions on the cow. However, he found that a reasonable person would understand the potential for damage if a cow was kicked in the udder. He noted that lesser kicking and hitting cows appeared to be an acceptable cow management tool. The delegate concluded, based on Mr. Oliver's agreement that kicking a cow in the

udder was serious, that such action constituted serious misconduct, and that Brackenhurst had just cause to terminate his employment without paying compensation for length of service.

21. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination; or
 - (c) evidence has become available that was not available at the time the determination was being made

22. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Oliver must provide clear and convincing reasons why the Tribunal should interfere with the Determination on any of the three stated grounds of appeal. A disagreement with the result, in and of itself, is not a ground of appeal.

23. I will deal with the second ground of appeal first.

Natural Justice

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

25. The principles include a requirement that decision makers must base their decisions, and be seen to be basing their decisions, on nothing but admissible evidence (the rule against bias).

26. Mr. Oliver contends that he was prejudiced in advancing his complaint when the delegate allowed Brackenhurst to submit the warning letter and Mr. Neely's statement four days, rather than 14 days, in advance of the oral hearing. He also contended that, by allowing these documents after the 14 day period, the delegate both failed to observe the principles of natural justice and erred in law.

27. As this Tribunal has often said, an investigation or hearing under the *Act* does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. One of the purposes of the *Act* is to provide a mechanism allow appeals with some informality, with the minimum possible reliance on lawyers, and at the lowest possible cost to the parties. (see *O'Reilly* (BC EST #RD165/02)).

28. Section 77 of the *Act* requires that the Director "make reasonable efforts to give a person under investigation an opportunity to respond". It is a legislated minimum procedural fairness requirement, consistent with the purposes of the *Act* to "promote fair treatment of employees and employers" and to "provide fair and efficient procedures for resolving disputes over the application and operation of this *Act*." (ss. 2(b) and (d)) (see *Insulpro Industries Inc.* (BC EST #D405/98), and *J. C. Creations Ltd.* (BC EST #RD317/03).

29. In *Re Inshalla Contracting Ltd.* (BC EST #RD054/06), the Tribunal held that the duty of fairness requires both the employer and the employee to be given adequate notice in order to afford them a reasonable

opportunity to present evidence and argument. In this respect, there is an overlap between section 77 and the common law of natural justice.

30. I am unable to find that the delegate either erred in law or denied Mr. Oliver a fair hearing.
31. The documents at issue consisted, firstly, of a warning letter which contains Mr. Oliver's signature which suggests that he had knowledge of it. Indeed, Mr. Oliver acknowledged that he had, although he initially denied it, then agreed he had signed it without reading it. Brackenhurst also referred to the warning letter at a mediation session conducted on September 13, 2006. Therefore, the warning letter ought not have been a surprise to Mr. Oliver. Furthermore, although the letter was sent four days before the start of the hearing, had Mr. Oliver felt he could not have properly responded to it, he ought to have asked for an adjournment to enable him to do so. He did not. It is not clear, and Mr. Oliver does not say, how he was prejudiced in his response to the warning letter. I can only infer, in the absence of any submissions, that he was not.
32. The second document was a one page note written by Mr. Neely describing, in a cursory manner, an incident between Mr. Neely and Mr. Oliver in December, 2002. Mr. Neely appeared in person and gave the same evidence under oath. Mr. Oliver had full opportunity to ask questions on that evidence. Furthermore, given that he was one of the parties involved in the incident, he had every opportunity to present his version to the delegate.
33. I am unable to find that the delegate either erred in law failing to apply section 77, or failed to observe the principles of natural justice. I note, in any event, that the delegate determined that Brackenhurst had just cause to terminate Mr. Oliver's employment for reasons unrelated to the warning letter or the 2002 incident with Mr. Neely.
34. Mr. Oliver also says that the delegate was biased against him as he found his evidence to be "evasive" and "selective", and that had he been given prior notice of the evidence, he would have had proper time to reflect on the same.
35. An allegation of bias against a decision maker is serious and should not be made speculatively:
- An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.))
- To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* (B.C.C.A.) September 28, 1999)
36. The delegate heard two different versions of Mr. Oliver's behaviour with the cow. He preferred Mr. Neely's evidence over that of Mr. Oliver. Findings of credibility are within the jurisdiction of the delegate, and the fact that the delegate found against Mr. Oliver is not evidence of bias. In the absence of any evidence of bias, I dismiss this ground of appeal.

Error of Law

37. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:
1. A misinterpretation or misapplication of a section of the Act;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not be reasonably entertained; and
 5. Exercising discretion in a fashion that is wrong in principle
38. Questions of fact alone are not reviewable by the Tribunal under section 112. In *Britco Structures Ltd.*, BC EST #D260/03, the Tribunal held that findings of fact were reviewable as errors of law if they were based on no evidence, or on a view of the facts which could not reasonably be entertained.
39. Mr. Oliver also appears to suggest that the delegate erred in law by preferring Mr. Neely's evidence over his. The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error. Findings of credibility are also within the purview of the delegate (*Dr. Kevin Orioux, Inc. operating as Clover Dale Dental Clinic and Aararat Consulting*, BC EST #D144/03). The delegate found Mr. Oliver's responses on the issue of the warning letter to be evasive and selective. The record appears to support that conclusion, particularly since Mr. Oliver's signature is on the letter, and the letter was referred to in the mediation session. Mr. Neely, on the other hand, appeared to give evidence in a straightforward manner. Mr. Oliver had the opportunity to ask questions of Mr. Neely, who had no personal interest in the matter before the delegate. In the absence of any persuasive and compelling reason to find that the delegate ought not to have preferred Mr. Neely's evidence over that of Mr. Oliver, I find no basis for this argument.
40. Mr. Oliver contends that the delegate erred in law by failing to recognise the common law duty of progressive discipline and the duty to warn. I also find no basis for this argument. The delegate correctly set out the two grounds on which Brackenhurst could terminate Mr. Oliver's employment, the first being minor misconduct which would require a warning. The delegate not only referred to the common law duty of progressive discipline, he found in Mr. Oliver's favour on this point.
41. Mr. Oliver says that, in the absence of any evidence of injury to the cow, the delegate erred in law in finding that his actions constituted a single incident of gross misconduct. Mr. Oliver says the delegate viewed the conduct as evidence of temper, and then, having previously found it not to have been the subject of proper notice, erred in finding that it constituted just cause. He said there was evidence that disciplining and motivating cows by force was condoned and expected, and that Brackenhurst failed to provide clear direction and instruction in the handling of cows. Brackenhurst submits that the delegate's conclusion that kicking a cow in its udder four or five times amounts to gross misconduct, as purposely endangering a cow's milk production at a dairy farm undermines an essential aspect of the employment relationship.
42. I am unable to find that the delegate erred in law in concluding that Mr. Oliver's conduct amounted to gross misconduct. The delegate found that physical force was an acceptable form of disciplining and

motivating cows. He acknowledged that he had no medical evidence to understand the physiological ramification of Mr. Oliver's conduct on the cow, but concluded that kicking a dairy cow in its udder was serious misconduct, based on Mr. Oliver's own testimony. Although Mr. Oliver suggested that the delegate viewed this act as evidence of his temper, the delegate did not refer to Mr. Oliver's temper in arriving at his conclusion on this point.

43. I dismiss the appeal.

ORDER

44. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 6, 2007, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal