



An appeal

- by -

Orca Security Corporation
(“Orca”)

- 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: Shafik Bhalloo

FILE No.: 2011A/17

DATE OF DECISION: April 29, 2011

DECISION

SUBMISSIONS

Mary Chan	on behalf of Orca Security Corporation
Allan Gordon	on his own behalf
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Orca Security (“Orca”) pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”) from a determination dated January 20, 2011 (the “Determination”) of the Director of Employment Standards (the “Director”).
2. The Determination found that Orca contravened section 63 of the *Act* in respect of the employment of Mr. Allan Gordon (“Mr. Gordon”) when it failed to pay Mr. Gordon termination pay under the said section within 48 hours after terminating his employment. As a result, the Director, pursuant to section 79 of the *Act*, ordered Orca to pay Mr. Gordon termination pay totalling \$4,764.79 inclusive of \$264.00 for vacation pay and \$100.79 in accrued interest pursuant to section 88 of the *Act*.
3. The Determination also imposed on Orca an administrative penalty of \$500.00 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for the said contravention of the *Act*.
4. The total amount of the Determination is \$5,264.79.
5. Orca appeals the Determination on the sole ground that the Director erred in law in making the Determination.
6. Orca is seeking the Tribunal to cancel the Determination.
7. Pursuant to section 36 of the *Administrative Tribunals Act* (the “ATA”), which is incorporated in the *Act* (s. 113), and Rule 17 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, this appeal can be adjudicated on the basis of the section 112(5) “record”, the written submissions of the parties and the Reasons for the Determination.

ISSUE

8. While the issue raised in the appeal form is whether the Director erred in law in determining that Orca did not have cause to dismiss Mr. Gordon, the submissions of Orca that allege the delegate failed to consider all evidence adduced by Orca to justify cause for the termination of Mr. Gordon’s employment appear to also call into question possible breach of natural justice principles on the part of the Delegate. Therefore, in this appeal, I will consider both the error of law and natural justice grounds of appeal in Section 12(a) and (b) of the *Act*

FACTS

9. Orca operates a security business in British Columbia and employed Mr. Gordon as a security alarm technician from May 25, 2004, to March 19, 2010.
10. On or about April 28, 2010, Mr. Gordon filed a complaint (the “Complaint”) against Orca under Section 72 of the *Act* alleging that Orca contravened the *Act* by failing to pay him compensation for length of service pursuant to Section 63 of the *Act*.
11. On October 6, 2010, the Director’s Delegate conducted a hearing of the Complaint. In attendance at the Hearing were Mr. Gordon and, on behalf of Orca, Mr. Brian Pozzolo (“Mr. Pozzolo”), a management employee at Orca.
12. While the record submitted by the Director in the appeal shows that Orca, in advance or at the hearing, presented the Delegate with documents or evidence of several matters of issue Orca had with Mr. Gordon’s performance at work including Mr. Gordon’s honesty in timekeeping or documenting his hours worked for Orca, his alleged failure to wear kneepads during work contrary to Orca’s directions, his alleged failure to comply with Orca’s direction against overuse of company cell phone, and his alleged failure to cooperate in keeping the company vehicle he was using clean, the Hearing simply focused on a single incident of alleged misconduct on the part of Mr. Gordon on Friday, March 19, 2010. The incident in question arose out of Mr. Gordon’s dealings with Mr. Brad Morrison (“Mr. Morrison”), the owner of Orca. More specifically, on March 19, 2010, Mr. Gordon saw Mr. Morrison in the latter’s office regarding a discrepancy between when Mr. Gordon “called in his last job” on March 15 and the time recorded on his timesheet for that day. After his meeting with Mr. Morrison, when Mr. Gordon walked out of Mr. Morrison’s office, he was heard by two co-workers to have uttered the words: “fucking asshole”. When Mr. Morrison received a report of this incident by one of the employees Mr. Gordon was called into the office on Monday, March 22, 2010, and met with Ms. Marry Chan, Orca’s Customer Service Manager, and advised by her that while Orca could have terminated his employment for the incident, Orca had decided to suspend him for a week without pay. He was, at that time, required to by Orca and signed a document agreeing to apologize to Mr. Morrison for his behaviour relating to the incident and Orca took his work vehicle away including his keys and gas card and required him to collect his tools from the work vehicle.
13. Mr. Gordon, the next day, contacted the Employment Standards Branch (the “Branch”) and after speaking with an officer at the Branch took the position that his employment had been terminated by Orca on March 22, 2011.
14. According to the Delegate in the Reasons for the Determination (the “Reasons”), Mr. Pozzolo submitted at the Hearing that Mr. Gordon’s act of calling Mr. Morrison “fucking asshole” gave Orca just cause to terminate Mr. Gordon’s employment and was the sole reason for Orca’s decision to terminate him. In the circumstances, according to Mr. Pozzolo, no compensation for length of service was owed to Mr. Gordon.
15. The Delegate also noted in the Reasons that Mr. Gordon acknowledged that he muttered “fucking asshole” as he left the meeting with Mr. Morrison and passed through the office workspace. However he states that the words in question were not directed at Mr. Morrison but a mere expression of his frustration with the meeting. He further indicated that he was yelled at and felt threatened by Mr. Morrison at the meeting and in any event, the words he uttered did not give Orca cause to dismiss him.
16. The Delegate, in determining whether just cause existed for Orca to terminate Mr. Gordon’s employment, articulated the test to be employed in such case stating, “the employer must show that the complainant’s

actions were inconsistent with the continuation of his employment”. The Delegate also added “(i)n exceptional cases, an employer may rely on a single incident of provable misconduct to establish just cause...(and) (s)uch cases often involve serious misconduct”.

17. In the case at hand, the Delegate, after making a finding of fact that Mr. Gordon uttered the words “fucking asshole” as he exited the meeting with Mr. Morrison and acknowledging that Mr. Gordon admitted the same, concludes that Orca failed to discharge the burden placed on it to show that it had just cause to terminate Mr. Gordon’s employment under the just cause test articulated previously. The Delegate reasons as follows:

The employer has failed to show what adverse impact, if any, the employee’s actions had on employment relationship.

Furthermore, the complainant’s statement was made outside of direct communication with the owner, Brad Morrison. It was overheard by two fellow co-workers in close proximity to the complainant as he exited the meeting with Brad Morrison. The complainant’s actions exhibit no direct intent to curse at Brad Morrison as he had ample opportunity to do so during the course of the meeting.

In addition, the direct legal target of his expletive is brought into question by the complainant’s claim the expletive is just a show of frustration with the meeting with Brad Morrison and was not directed at any particular person. The employer provided no evidence to prove the expletive was directed at the owner Brad Morrison.

Based on the evidence, I cannot conclude the employment relationship was irreparably damaged by the employee’s actions. Nor can I conclude the complainant’s use of such language in front of other employees undermined the employer’s authority to such an extent that the complainant’s immediate dismissal was justifiable. While I do acknowledge the inappropriate nature of his behaviour, I do not find it sufficient to warrant just cause.

Accordingly, the employer has failed to prove just cause and dismissed the complainant without just cause. I therefore find the employer contravened section 63 of the *Act* by failing to pay the complainant compensation for length of service.

SUBMISSIONS OF ORCA

18. In its appeal submissions, Orca submits that the Delegate did not sufficiently weigh or consider all of the evidence and thus failed to conclude that the relationship between the parties was irreparably damaged. More specifically, Orca is here referring to all of the documentary evidence it presented in advance of or at the Hearing setting out multiple issues Orca had with Mr. Gordon, in addition to the incident where he uttered the expletive “fucking asshole” after exiting Mr. Morrison’s office. Orca, in the Appeal, resubmits that evidence wherein it raised several issues with Mr. Gordon’s performance including his honesty in timekeeping or documenting his hours worked for Orca, his alleged failure to wear kneepads during work contrary to Orca’s directions, his alleged failure to comply with Orca’s direction against overuse of company cell phone and his alleged failure to cooperate in keeping the company vehicle he was using clean.
19. Orca also submits that the Delegate erred in concluding that Mr. Gordon’s use of the expletive when exiting the meeting with Mr. Morrison was merely a show of frustration on his part. According to Orca, the expletive uttered by Mr. Gordon could not be construed otherwise than that it was directed at Mr. Morrison. Orca further states that the Delegate should have attached more weight to the severity of Mr. Gordon’s conduct in this regard, which Orca considers a slander of Mr. Morrison in front of employees of Orca.
20. As for the other evidence of dissatisfaction with Mr. Gordon’s conduct at work referred to above, Orca, in the final reply to the Director’s submissions, states, for the first time, that Mr. Pozzolo, who attended on its behalf, was “not given the opportunity to present the documents during the duration of the hearing because

of the instructions from the [Delegate] that steered him away from presenting them during the totality of the hearing session and not just during the opening arguments”.

21. Orca also, in the final reply submissions, argues that when Mr. Gordon was faced with the prospect of having his employment terminated for his conduct arising from his meeting with Mr. Morrison together with his dishonesty with the recording of his time worked, opted to accept “the lesser penalty of suspension, which he clearly could have rejected ... [but he] signed his consent to accept the suspension....”.

SUBMISSIONS OF THE DIRECTOR

22. The Director submits that in the opening statements of both parties at the Hearing, it was confirmed by both that the incident involving Mr Gordon’s utterance of the expletive “fucking asshole” as he exited his meeting with Mr. Morrison was the cause of his dismissal. I note that the Director has referred to the date of March 15, 2010 as the date when the incident in question happened but this is an error as the incident happened on March 19, 2010. This error in date is also repeated at page R3 in the reasons.
23. The Director specifically notes that the Delegate explained to both parties the Hearing process including the issue to be decided and the relevant sections of the *Act* and the tests used to determine compliance. In the case of Orca, the Director notes that the Delegate explained to Orca’s sole representative at the Hearing, Mr. Pozzolo, that the onus to establish cause was on Orca and therefore he would present the evidence first on behalf of Orca.
24. As concerns the documents of Orca presented before or at the Hearing raising other issues or concerns with Mr. Gordon’s performance, the Director submits that Mr. Pozzolo was explained “the process and specifically advised that refusal to enter the documents into the record would result in them not being considered in the decision making process”. In response, the Director states that Mr. Pozzolo stated “he no longer saw the need to enter [the documents] into evidence or to refer to them since there was no dispute in the material fact due to [Mr. Gordon] acknowledging uttering the expletive” which was the sole reason Orca was relying upon to dismiss Mr. Gordon. As a result, states the Director, the said documents did not form part of the record and at no time during the Hearing did Mr. Pozzolo raise any other grounds for Orca’s termination of Mr. Gordon’s employment.
25. According to the Director, Orca had ample opportunity to present all other evidence to the adjudicator at the hearing but did chose not to and therefore Orca “cannot now attempt to have the merits of the complaint revisited because [Orca] is dissatisfied with the result.”
26. The Director submits that there is no error of law established by Orca and the Appeal should be denied.

SUBMISSIONS OF MR. GORDON

27. Mr. Gordon in his submission, in response to Orca’s Appeal, explains in some detail how Orca has shown “disregard for the entire process” by delaying its document production or failing to participate in the mediation process. Mr. Gordon also recounts his view of how the Hearing proceeded and the conduct of Orca during the Hearing and its failure to present witnesses other than Mr. Pozzolo. I do not find those submissions responsive to or materially helpful in dealing with the issues raised by Orca in its appeal and therefore I will not reiterate in any great detail those submissions here.
28. Mr. Gordon also responds to and adduces evidence countering the allegations of Orca on appeal pertaining to the other evidence Orca adduced in advance of the Hearing to support its contention that it had cause to

terminate Mr. Gordon's employment. For the reasons I provide under the heading Analysis below, I do not find it necessary to reiterate those submissions here either.

29. I note, however, that Mr. Gordon, in concluding his submissions and asking the Tribunal to deny Orca's appeal, states that Mr. Pozzolo, during the Hearing, stated that Orca suspended him for a week without pay "for swearing". Mr. Gordon also notes that Orca's "final warning letter does not state they are terminating my employment, but rather suspending me for a week". In the circumstances, he questions how Orca can, a year later, claim that he was terminated for cause (presumably for the "swearing" and other reasons previously not argued at the Hearing).

ANALYSIS

30. In section 112(1), the *Act* delineates the limited grounds upon which an appeal may be made to the Tribunal from a determination of the Director:

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.

31. The onus is on the appellant to show that the appeal is properly based on one or more of the statutory grounds of appeal set out in section 112(1), failing which the appellant's appeal may be dismissed.

32. In this case, the appellant, Orca, on the Appeal form, has checked of the error of law ground of appeal but no other. This Tribunal in *Re Flour Child Bakeries Corp.*, BC EST # D094/06, adopted the view of the Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, wherein the Tribunal indicated that it should not "mechanically adjudicate an appeal based solely on the particular 'box' that an appellant has checked off". In *Triple S Transmission*, the Tribunal stated:

When adjudicating an appeal, I believe it is appropriate for the adjudicator to first inquire into the nature of the challenge to the determination (or the process that led to it being issued) and then determine whether that challenge, prima facie, invokes one of the statutory grounds. In making that assessment, I also believe that adjudicators should take a large and liberal view of the appellant's explanation as to why the determination ought to be varied or cancelled or why the matter should be returned to the Director.

33. Adopting the view expressed in *Triple S. Transmission Inc.* above, I have reviewed the written submissions of Orca in the Appeal including the final reply submissions and find that, while Orca has not expressly invoked the natural justice ground of appeal in its appeal, its submissions also raise that ground of appeal. Therefore, I propose to also consider the natural justice ground of appeal, in addition to the error of law ground of appeal, which is expressly checked-off in the Appeal form.

(i) *Natural justice*

34. The natural justice ground of appeal in Orca's Appeal arises in two respects: (i) out of the alleged failure of the Delegate to consider all the documentary evidence pertaining to other issues Orca had with Mr. Gordon which gave rise to just cause for Orca to terminate his employment; and (ii) the Delegate's alleged failure to

afford Orca or its representative, Mr. Pozzolo, an opportunity to present documents supporting the other grounds for terminating Mr. Gordon's employment and "steer(ing) him away from presenting" such evidence.

35. In *Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort) , BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

36. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their 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 respond to the evidence and arguments presented by an adverse party: see *B.W.I. Business World Incorporated*, BC EST # D050/96.

37. I find that in this case Orca has made bald and unsubstantiated allegations that it was denied an opportunity by the Delegate to present the other evidence supporting of just cause for terminating Mr. Gordon's employment. I also find that there is no factual basis for Orca's allegation that Mr. Pozzolo was "steered ... away" by the delegate from presenting the said evidence. I prefer the evidence of the Delegate that Mr. Pozzolo was explained the adjudication process and given the opportunity to rely upon the other documentary evidence at the Hearing but decided not to take up that opportunity in the face of Mr. Gordon's admission that he used the expletive upon exiting his meeting with Mr. Morrison which Orca relied to terminate his employment on March 22, 2010. While this may have been an unfortunate decision on the part of Mr. Pozzolo, it was an informed decision he made on behalf of Orca. In the circumstances I reject the natural justice ground of appeal of Orca.

(ii) Error of law

38. The Tribunal has consistently adopted the following definitions of "error of law" set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the *Act*;
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 be entertained; and
5. adopting a method of assessment which is wrong in principle.

39. In the Reasons, the Delegate correctly states that the onus rests on the employer to establish just cause for the complainant's dismissal and that test for just cause is one that requires the employer to show that the complainant's actions were inconsistent with the continuation of his employment. I also find that the Delegate correctly points out that in exceptional cases an employer may rely on a single incident of provable misconduct to establish just cause. The Delegate then goes on to conclude that Orca failed to discharge its

onus to establish that it had cause to terminate Mr. Gordon based on the forgoing test for just cause because Orca failed to show what adverse impact Mr. Gordon's actions had on the employment relationship. I think, partly or perhaps wholly, this conclusion of the Delegate may be influenced by or based on his following view of the facts delineated in the Reasons, namely: (i) the utterance of the expletive "fucking asshole" by Mr. Gordon was made "outside of direct communication with [Mr. Morrison]" and "exhibit[s] no direct intent to curse at Brad Morison as [Mr. Gordon] had ample opportunity to do so during the course of [his] meeting [with Mr. Morrison]"; (ii) the "expletive was just a show of frustration with the meeting with [Mr.] Morrison and not directed at any particular person"; and (iii) "the employer provided no evidence to prove the expletive was directed at the owner Brad Morrison".

40. In my respectful view, while it is not for the Tribunal on appeal to substitute its findings of fact for that of the Delegate, this is a case of the Delegate acting on a view of facts that, in my view, cannot reasonably be entertained. More specifically, I do not think it matters whether or not the very harsh expletive "fucking asshole" was made by Mr. Gordon "outside of direct communication" with Mr. Morrison. What is important is that it was made at the work place within earshot of other employees who heard it. Further, I fail to see how the Delegate could reasonably conclude that that the expletive was simply "a show of frustration" and not aimed at anyone, particularly Mr. Morrison. Mr. Gordon uttered it upon exiting his meeting with Mr. Morrison which meeting was not a happy one for Mr. Gordon as Mr. Morrison questioned his character and honesty in that meeting. I think the context in which the expletive was uttered by Mr. Gordon cannot but only be construed as being directed at Mr. Morrison.
41. I also find unpersuasive the Delegate's deduction that the expletive could not have been intended for Mr. Morrison because Mr. Gordon could have, if he wanted to, utter it during his meeting with Mr. Morrison. It could be said with equal conviction that Mr. Gordon, having been involved in an uncomfortable discussion with his employer, wanted to be out of hearing distance of his employer before uttering any expletives directed at his employer. Having said this, I note and understand that it is not for me, on appeal, to reverse any finding of facts of the Delegate simply on the basis that I may have come to a different finding of fact. I simply comment on the said deduction of the Delegate in the interest of fully responding to the basis of the Delegate's conclusion.
42. While this may have been a rare and the only occasion when Mr. Gordon may have uttered an expletive directed at his employer in his not so harmonious relationship with his employer, I find that his conduct in this instance was incompatible with the continuation of his employment with Orca. No employer desiring to run a disciplined and respectful workplace could be expected to tolerate such disrespectful outburst by his employee in front of other employees at workplace. I find that Orca has satisfied me that the Determination was based on an error of law and that Orca was justified in terminating Mr. Gordon's employment.
43. For all of the above reasons, I conclude that the determination should be cancelled.

ORDER

44. Pursuant to Section 115 of the *Act*, I order the Determination dated January 20, 2011, be cancelled.

Shafik Bhalloo
Member
Employment Standards Tribunal