Employment Standards TRIBUNAL

An appeal

- by -

B & C List (1982) Ltd.
("B&C")

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/20

DATE OF DECISION: April 4, 2005

DECISION

SUBMISSIONS

Jack Hyman	on behalf of B & C List (1982) Ltd.
Gillian MacGregor	on behalf of the Director of Employment Standards

OVERVIEW

This is an appeal by B & C List (1098) Ltd. ("B&C"), pursuant to Section 112 of the *Employment Standards Act* ("the *Act*"), against a Determination of the Director of Employment Standards ("the Director") issued January 24, 2005.

David Shelkie worked part time as a sales representative/telemarketer for B & C, a publisher and market surveyor from March 4, 2002 until October 17, 2003. He worked for B & C only when it had work available for him. The employment records show that Mr. Shelkie worked from March 4, 2002 and January 29, 2003, and was laid off due to a shortage of work. He worked again from February 12, 2003 until April 7, 2003, and again from June 30, 2003 and August 12, 2003. Throughout this period, Mr. Shelkie was also employed elsewhere. He was recalled for the last period on October 6, 2003. Mr. Shelkie's employment was terminated on October 17, 2003 when he told B & C that he would be unable to work on October 20, 2003.

Mr. Shelkie filed a complaint with the Employment Standards Branch claiming that he was owed compensation for length of service.

The Director's delegate held a hearing into Mr. Shelkie's complaint on June 4, 2004. Mr. Shelkie appeared on his own behalf, and Mr. Hyman and Adele Domino appeared on B & C's behalf.

Following the hearing, the delegate determined that B&C contravened Section 63 of the *Employment Standards Act* in terminating Mr. Shelkie without just cause. She concluded that Mr. Shelkie was entitled to compensation for length of service, plus vacation pay in the total amount, with interest, of $510.26. The delegate also imposed a $500 penalty on B & C for a contravention of the Act, pursuant to section 29(1) of the *Employment Standards Regulations.*

B & C argues that the delegate erred in law in finding that it accommodated Mr. Shelkie's schedule with his other employer, and had the right to terminate his employment when he was unable to work on October 20, 2003. Further, they contend that the delegate erred in not finding that Mr. Shelkie's refusal to work amounted to insubordination, also constituting just cause.

B & C further contends that the hearing process was flawed and that it was denied the opportunity to be heard. It seeks to have the Determination cancelled, varied, or, in the alternative, referred back to the Director for further investigation.

B & C did not seek an oral hearing, and I am satisfied that this matter can be decided based on the written submissions of the parties.

ISSUES

1. Did the Director's delegate fail to observe the principles of natural justice in making the determination?

2. Did the Director's delegate err in concluding that Mr. Shelkie's employment had been terminated without just cause?

FACTS AND ARGUMENT

Although Mr. Shelkie was a full time employee, he worked for B & C on an intermittent basis due to a shortage of work. Because none of the layoffs were in excess of 13 weeks, his employment was considered continuous. Mr. Shelkie was laid off due to a shortage of work on August 12, 2003. He was recalled on October 6, 2003 for a project that was to be completed by October 17, 2003. Some time before October 17, 2003, Mr. Shelkie was told he would be required to work on October 20, 2004. Because of his other employment commitments, Mr. Shelkie told B & C he was unable to work for them that day. B & C terminated his employment.

At the hearing Ms. Domino gave evidence that Mr. Shelkie had a "bad attitude" and was frequently late for work. On June 2, 2003, B & C wrote to Mr. Shelkie, advising him that he was to attend work on a regular basis and in a timely manner, and any absences required a doctor's note. B & C argued that it had the right to expect an employee to report for work when scheduled, and that Mr. Shelkie's employment was terminated when he advised it that he was unable to do so.

Mr. Shelkie acknowledged that he had been late for work on occasion, and that it first became an issue in June, 2003. He denied he had an "attitude problem". Mr. Shelkie's evidence was that he advised B & C that he would be unable to work on October 20, 2003 when he reported to work on October 6, 2003. He testified that his absence was not a problem for B & C because the project was to be completed by that date. Mr. Shelkie also contended that B & C knew of his other employment, and had accommodated his obligations to his other employer until October 20, 2003. Mr. Shelkie contended that B & C had a duty to warn him if it had not intended to continue to accommodate his schedule. Ms. Domino conceded that B & C had accommodated Mr. Shelkie's other work obligations.

The delegate found B & C's June 2, 2003 letter to be ambiguous in that it was not clear whether it related to absences for other than medical reasons. The delegate further found no evidence that Mr. Shelkie's tardiness was a factor in B & C's decision to terminate his employment. She concluded that the sole basis for B & C's decision to terminate Mr. Shelkie was his inability to work on October 20, 2003.

The delegate found that B & C had accommodated Mr. Shelkie's other employment obligations during the term of his employment, and that Mr. Shelkie was entitled to expect it as a condition of his employment. She found that B & C did not expect Mr. Shelkie to abandon other employment, or to put his employment with them foremost. She also found that Mr. Shelkie was not told that he had to abandon his other employment if he wished to continue to work for B & C.

B & C gave Mr. Shelkie a gift of money at the time his employment was terminated. It argued that this gift ought to be considered as part of the compensation he was entitled to. The delegate found that the gift was not considered to be wages at the time it was given, and declined to consider it part of Mr. Shelkie's compensation package.

B & C contends that the delegate allowed the parties to interrupt the proceedings, and denied Ms. Domino the right to speak. Mr. Hyman says that all of the evidence was not properly considered. He also argues that given the length of time between the hearing and the decision may have caused the delegate to miss some important aspects of the case.

B & C contends that there is nothing ambiguous about its June 2, 2003 letter to Mr. Shelkie regarding his continued lateness. It says that the letter says that Mr. Shelkie had to have his absences reviewed by his supervisor on each occasion. It also argues that Mr. Shelkie had no right to arrange his work schedule to suit himself. It says that Mr. Shelkie had been given leaves of absences, but those were always on a case-by case basis. B&C contends that, although Mr. Shelkie was initially told the project he was working on would end October 17, 2003, circumstances changed and he was required to work beyond that date. It argues that if Mr. Shelkie had other employment, it was up to him to decide which employer he wished to work with. It says that Mr. Shelkie did not request a leave of absence for that day; rather, he bluntly told his supervisor that he would not report as required. It contends that Mr. Shelkie's response amounts to insubordination and that it had the right to terminate his employment. It says it is not obliged to accommodate Mr. Shelkie's other employment.

Finally, B & C argues that the payment made to Mr. Shelkie at the end of his employment was not a gift. It says that Mr. Shelkie was paid an amount of $230 that was not part of his regular wages. It says that Mr. Shelkie was paid for 20 hours of work rather than the 10.16 hours he was entitled to. In a reply submission, Ms. Adamo says that the payment was an error, and while she considered putting a stop payment on the cheque, she did not.

The delegate says that B & C does not state what "important aspects" of the evidence were missed. She says that Mr. Shelkie's evidence that his employment schedule was accommodated was not contradicted by B & C, even though it says, on appeal, that it was decided on a case-by-case basis. She submits that if B & C seeks to submit that evidence now, which was not provided as part of the appeal documents, it should not be considered, as it was available at the time of the hearing and was not presented.

The delegate says that B & C has failed to explain the reason why Mr. Shelkie was paid more than he was entitled to, and that it fails to explain the overpayment in the appeal.

The delegate contends that B & C has failed to discharge the burden of showing the Determination should be cancelled, and that the appeal should be denied.

ANALYSIS

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

The burden of establishing the grounds for an appeal rests with an Appellant. B & C must provide persuasive and compelling evidence that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice. An appeal is not an opportunity to re-argue a case that has been advanced before the delegate.

Having considered B & C's submissions, I am not persuaded the Determination should be cancelled or varied.

Principles of natural justice are, in essence, procedural rights that ensure parties a right to be heard by an independent decision maker. Although B & C contends that the delegate may have missed some important issues, it does not expressly say what those issues are. Furthermore, although it argues that it was not given a fair hearing, it does not say what evidence was not considered. I am not persuaded that B & C was denied the opportunity to respond fully to Mr. Shelkie's complaint.

B & C also contends that the delay between the date of the hearing and the date of the decision constitutes a failure to comply with the principles of natural justice. Unlike some statutes, the *Act* does not require a delegate to issue a decision within any time period. Although I appreciate B & C's concerns about the delay, I am unable to find that an interval of over seven months between the date of the hearing and the date of the decision constitutes a denial of natural justice. The delay did not interfere with B & C's ability to respond to Mr. Shelkie's complaint.

Furthermore, although B & C makes submissions on the issue of Mr. Shelkie's tardiness at work and whether its June 2, 2003 letter was ambiguous in this respect, nothing turns on this issue. The undisputed evidence was that Mr. Shelkie's employment was terminated because of his inability, failure or refusal to report for work on October 2, 2003, not because of his lateness for work. Indeed, Mr. Shelkie's Record of Employment (ROE) which was prepared by B & C and submitted as part of the record, shows that Mr. Shelkie's employment was terminated due to "absenteeism". Therefore, I find these arguments to have little bearing on the delegate's conclusion that Mr. Shelkie was entitled to compensation for length of service.

The central issue to be decided by the delegate was whether B & C had accommodated Mr. Shelkie's other employment obligations. The evidence at the hearing was that B & C had always accommodated his other work. B & C disputes this on appeal. While this may be what B & C refers to when it says that the delegate "missed some important issues", the delegate denies that B & C provided any information in support of its position that it accommodated him on a case-by-case basis at the hearing. B & C refers to the June 3, 2003 letter, which says that states that Mr. Shelkie's absences "may require a doctor's note – Please clarify with me as this occurs". While this indeed suggests that Mr. Shelkie's absences may have been accommodated on a case by case basis, this letter does not refute the evidence that Mr. Shelkie had always been accommodated until the day his employment was terminated. There appears to be no evidence as to why, after accommodating Mr. Shelkie's other employment obligations for over one year, B & C decided that it would no longer do so.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

1. A reasonable standard of performance was established and communicated to the employee;

2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

4. The employee continued to be unwilling to meet the standard.

(see: *Silverline,* BCEST #D207/96 and *Kruger* BC EST #D003/97*)*

B & C, as I understand its submissions, does not contend that Mr. Shelkie was dismissed for minor misconduct. In any event, the delegate has concluded that, even if this formed the basis for Mr. Shelkie's termination B & C had not met the four part test. I find no error in her conclusions in this respect.

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship. I understand B & C to say that it terminated Mr. Shelkie for his "insubordination", and that this single act gave rise to its right to terminate his employment immediately.

The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

In *Stein*, the court said as follows:

> …if summary dismissal is claimed to be justifiable, the question must be whether the conduct complained of is such as to show the servant to have disregarded the essential conditions of the contract of service. It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard- of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally. …I think that it is not right to say that one act of disobedience, to justify dismissal, must be of a grave and serious character. I do, however, think…that one act of disobedience or misconduct can justify dismissal only if it is of a nature which goes to show (in effect) that the servant is repudiating the contract…the disobedience must have the quality that it is "wilful": it does... connote a deliberate flouting of the essential contractual conditions. (at p. 183-184)

B & C contends Mr. Shelkie was insubordinate in not reporting for work on October 20, 2003. On the basis of the finding by the delegate that B & C had always accommodated Mr. Shelkie's other work obligations in the past, I am unable to agree that Mr. Shelkie's inability to report to work because he had

previously agreed to work for his other employer, a fact he communicated to B & C on October 15, 2003, to constitute grounds for immediate dismissal in this instance. There is no evidence that, when Mr. Shelkie first communicated his inability to work beyond October 17, 2003, B & C objected to his absence. It appeared it only became a problem when it was apparent the project would not be completed on time. If B & C did not want to accommodate Mr. Shelkie's other employment obligations as it had customarily done, it had a duty to put him on notice that it would no longer do so. That was not done, as the delegate concluded.

Mr. Shelkie's final paycheque indicates that he was paid for 30.16 hours. Although B & C denied that the overpayment was a gift, it does not say why Mr. Shelkie was paid for 20 hours he did not work, either at the hearing or on appeal. In a May 20, 2004 fax to the delegate in response to Mr. Shelkie's complaint, B & C suggests it paid Mr. Shelkie $230 more than he was entitled to for "humanitarian reasons". This explanation is at odds with Ms. Adamo's March 17, 2005 reply submission. I find Ms. Adamo's explanation, offered only after receipt of the Determination, to be lacking in credibility. I find it was open for the delegate to infer the overpayment was a gift, and decline to interfere with the delegate's conclusion on this issue.

The appeal is dismissed.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated January 24, 2005, be confirmed in the amount of $1,010.26, plus whatever interest might have accrued since the date of issuance.

Carol L. Roberts
Member
Employment Standards Tribunal