

An appeal

- by -

Southern Cross Machining Inc.  
(“SCM”)

- 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.:** 2010A/38

**DATE OF DECISION:** May 12, 2010

## DECISION

### SUBMISSIONS

Leon Massa on behalf of Southern Cross Machining Inc.  
Gagan Dhaliwal on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal pursuant to section 112 of the *Employment Standards Act* (the “*Act*”) brought by Mr. Leon Massa (“Mr. Massa”), the President of Southern Cross Machining Inc. (“SCM”), of a Determination issued against SCM on February 9, 2010, by a delegate of the Director of Employment Standards (the “Director”). The Determination found that SCM contravened section 63 of the *Act* in respect of the employment of Mr. Bill G. Picha (“Mr. Picha”) when it failed to pay Mr. Picha 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 SCM to pay Mr. Picha termination pay totalling \$4,279.74 inclusive of \$39.74 in accrued interest pursuant to section 88 of the *Act*.
2. The Determination also imposed on SCM an administrative penalty of \$500.00 under section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) for the said contravention of the *Act*.
3. The total amount of the Determination is \$4,779.74.
4. The grounds of appeal advanced by Mr. Massa on behalf of SCM are twofold, namely, the Director failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made.
5. Mr. Massa is seeking the Tribunal to either cancel the Determination or refer it back to the Director presumably for a new hearing.
6. 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 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.

### ISSUES

7. The issues in this appeal are twofold:
  - (I) Did the Director fail to observe the principals of natural justice in making the Determination?
  - (II) Is there new evidence that has become available that was not available at the time the Determination was being made?

### FACTS

8. SCM operates a machining business and employed Mr. Picha, as of October 2, 2002, to assemble engines for it at \$20.00 per hour.

9. On September 12, 2009, SCM terminated Mr. Picha's employment for cause based on an allegation of a conflict of interest on the part of Mr. Picha.
10. Subsequently, on October 21, 2009, Mr. Picha filed a complaint under section 74 of the *Act* alleging that SCM contravened section 63 of the *Act* by failing to pay him compensation for length of service (the "Complaint").
11. On January 15, 2010, the delegate held a hearing (the "Hearing") of the Complaint. Mr. Picha attended the Hearing on his own behalf. Mr. Massa attended on behalf of SCM. SCM also made available by telephone its witness, Mr. John Uptigrove ("Mr. Uptigrove") of Innovator Technologies, one of SCM's customers.
12. At the Hearing, Mr. Massa submitted that he terminated Mr. Picha's employment due to a conflict of interest. He claimed that Mr. Picha, who was hired to assemble engines and not speak with customers or make sales calls, spoke with "all sorts of people" about SCM's business and did things that were not required of him by SCM.
13. Although Mr. Massa said there were numerous incidents relating to Mr. Picha which SCM could rely upon to support just cause for his termination, he was only relying on one incident, namely, the conversation Mr. Picha had with Mr. Uptigrove of Innovator Technologies wherein Mr. Picha discussed his frustrations about SCM. Mr. Uptigrove ultimately reported this conversation to Mr. Massa, initially by telephone and subsequently by way of a follow-up e-mail. According to Mr. Massa, Mr. Picha had overstepped his boundaries in divulging SCM's information and complaining about SCM to the latter's customer, which Mr. Massa considered a "conflict of interest".
14. While Mr. Massa, in advance of the Hearing, provided the delegate with a list of witnesses, both employees and customers of SCM, and their availability to testify at the Hearing presumably to provide additional evidence of Mr. Picha's misconduct on other occasions and further justification for his termination for cause, at the Hearing Mr. Massa decided not to call or present those witnesses. Instead, Mr. Massa preferred to rely primarily on the incident involving Mr. Uptigrove.
15. Mr. Massa also adduced a statement dated May 13, 2009, from a foreman of SCM, Paul Massa, but did not call him as a witness. The witness statement pertained to an incident that could have been classified as insubordination on the part of Mr. Picha if proven. The statement in question is not directed at anyone in particular but records Paul Massa as reporting that when he asked Mr. Picha, on May 13, 2009, to sweep the floor around the machine he was operating, Mr. Picha responded with a profanity. As noted, the statement is dated May 13, 2009, several months prior to the termination of Mr. Picha's employment. It would appear that SCM did not consider the incident serious enough to do anything about it at the time as Mr. Picha's employment carried on thereafter. There is also no evidence of any disciplinary action taken against Mr. Picha for this or other incidents produced at the Hearing.
16. In the case of the incident involving Mr. Uptigrove, at the Hearing Mr. Uptigrove testified by telephone that while he had a different view of SCM after his conversation with Mr. Picha, the business relationship between his company, Innovator Technologies, and SCM continued. Thus, there was no financial loss experienced by SCM as a result of Mr. Picha's conversation with Mr. Uptigrove.
17. Further, the delegate noted that the evidence presented by SCM did not establish a conflict of interest on the part of Mr. Picha. According to the delegate, while Mr. Picha may have discussed his frustrations with SCM with the latter's customer, he did not attempt to compete with SCM or have any involvement in business with SCM's customers. At worst, Mr. Picha's actions constituted a breach of a duty of fidelity and may be cause

for some sort of disciplinary action, but not summary dismissal, according to the delegate. The delegate therefore found that SCM did not have cause to dismiss Mr. Picha.

18. As both parties at the Hearing, in advance, agreed that in the event it was found that Mr. Picha was dismissed without proper cause, he would be entitled to \$4,000.00 for compensation for length of service, the delegate accordingly ordered SCM to pay Mr. Picha the said amount, plus accrued interest pursuant to section 88 of the *Act*. Additionally, the Director imposed, under the *Regulation*, an administrative penalty of \$500.00 for SCM's breach of section 63 in relation to Mr. Picha's employment.

### **SUBMISSIONS OF SCM**

19. Mr. Massa, in his written appeal submissions, first points to the "Just Cause" fact sheet (the "Fact Sheet") published by the Employment Standards Branch ("the Branch") to argue that according to the Fact Sheet, one provable incident is sufficient to justify an employee's termination by the employer. He states that in the case of Mr. Picha, he chose only to focus on one incident for that reason, although there were many others. He says he did not want to be perceived as "being on a witch hunt" by bringing out other evidence of misconduct against Mr. Picha.
20. Mr. Massa also reiterates his position at the Hearing that Mr. Picha had no business discussing with a customer of SCM the latter's business. He also states that he has since discovered that Mr. Picha has done the same with other customers of SCM with a view to "solicit(ing) their business for himself".
21. Mr. Massa further argues that the decision to terminate Mr. Picha's employment was not a "spare of the moment [sic]". He states that SCM's case at the Hearing "went undisputed and [his] witness supported his claim". He challenges the delegate's conclusion in the case by picking on a comment of the delegate in the Determination that there is "no rule defining the degree of employee misconduct" and says, rhetorically, "how can it be said [then] that there was no 'just cause' if I have proven misconduct? Misconduct is misconduct."
22. Mr. Massa also feels that the written statements signed by SCM's other witnesses he presented to the Branch or the delegate in advance of the Hearing were not used or considered by the delegate in making the Determination and wants to have an opportunity now to call those witnesses at another or a new hearing of the matter.
23. Lastly, I note Mr. Massa resubmits the witness statements he presented previously at the Hearing or in advance of the Hearing for consideration in the appeal and states:

I have been in business for almost 23 years. I am not a lawyer and have not been to a Labour hearing before. There are numerous details in the Determination that I don't agree with and now that I know what they are looking for I ask for the opportunity to have this case heard again where I will submit All my evidence and witnesses during the hearing.

### **SUBMISSIONS OF THE DIRECTOR**

24. The Director challenges both the natural justice and the new evidence grounds of appeal advanced in the appeal of the SCM. In the case of the natural justice ground of appeal, the Director notes that the delegate afforded Mr. Massa an opportunity to provide all his evidence at the Hearing and while the latter presented names of witnesses he intended to call at the Hearing, he stated that he felt he had "proven his case after calling only one witness", Mr. Uptigrove, and did not wish to call any more witnesses.

25. The Director further notes that the delegate, at the end of his testimony, asked Mr. Massa if he was certain of his decision not to call anymore witnesses and Mr. Massa “was adamant that he has no need to present them as he felt he had proven his case”. In response, the Director notes, the delegate offered Mr. Massa the services of a mediator for the purpose of educating him on the subject of just cause but Mr. Massa responded that he had read the Fact Sheet and did not need any further education on the subject.
26. The Director also submits that contrary to Mr. Massa’s submissions, the written statements the latter provided, namely, Mr. Uptigrove’s (which is in an email form containing the substance of his discussions with Mr. Picha) and Mr. Paul Massa’s dated May 13th, 2009 (whom the Director mistakenly refers to as Rod Massa) were both considered in the Determination and the Director points to the pages where they are referred to or considered by the Delegate.
27. The Director further submits while Mr. Massa alleged that there were numerous other instances of misconduct on the part of Mr. Picha, he did not call any evidence or elaborate on those instances.
28. With respect to Mr. Massa’s contention that he had to work hard to retain his standing with Mr. Uptigrove as a client, the Director notes Mr. Uptigrove’s testimony at the hearing that his or his company’s business relationship did not change with SCM after his conversation with Mr. Picha.

On the new evidence ground of appeal, the Director notes that Mr. Massa’s submission that Mr. Picha was soliciting business for himself while employed with SCM was not previously presented at the Hearing and the vague reference to this “after acquired cause” is not supported in any evidence of SCM. The Director also notes that in the case of the witness, Mr. Uptigrove, there was no evidence of any solicitation of his company’s business by Mr. Picha. The Director suggests that this new allegation of Mr. Massa that Mr. Picha was soliciting business for himself from SCM’s clients appears to be an afterthought once SCM received clarification of the definition of conflict of interest.

## **FINAL SUBMISSION OF SCM**

29. In response to the Director’s submissions, Mr. Massa submits, in the final reply, that at the Hearing he was under the impression that “a statement was as good as calling the actual witness who could have expanded on the misconduct”.
30. Mr. Massa also states, with respect to the delegate’s offer of the mediator at the hearing, that he “was led to believe” that the mediator was available to assist with a resolution between the parties and he was not apprised of the role of the mediator in educating him on the subject of just cause.

## **ANALYSIS**

### ***(i) Natural Justice***

31. One of two grounds of appeal SCM relies upon in its appeal is the natural justice ground of appeal in section 112(1)(b) of the *Act*. More specifically, under this ground of appeal the Tribunal examines whether the Director breached the principles of natural justice in making the determination. The principles of natural justice, are, essentially 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 (see *Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort) [2005] B.C. E.S.T.D. no. 55 (QL)).

32. 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.

33. Having reviewed the record and the submissions of Mr. Massa on behalf of SCM, I find that SCM has not discharged its onus to show an infringement of the principles of natural justice by the Director. I find there is no evidence that the proceeding before the delegate including the Hearing was conducted unfairly. SCM was afforded an opportunity to know the case it was required to meet and received ample opportunity to be heard in its own defence. I further note that the delegate, in this case, specifically asked Mr. Massa at the Hearing if “he did not wish to call any more witnesses” in light of the list of witnesses he had in advance provided the delegate, however, Mr. Massa refused the offer and felt confident with the evidence he had adduced. The delegate at that point offered Mr. Massa the services of a mediator before concluding the Hearing to allow Mr. Massa to educate himself on the subject of just cause, which Mr. Massa also refused. While Mr. Massa says that he did not understand that the mediator was offered to him for that purpose, I prefer the evidence of the delegate to Mr. Massa’s on this point as I find the delegate’s evidence consistent with his other evidence including the evidence pertaining to his efforts to afford Mr. Massa an opportunity to call other witnesses on his list of witnesses.
34. I also find that the written statement of SCM’s foreman, Paul Massa, and the email of Mr. Uptigrove were both considered and dealt with in the delegate’s determination, contrary to the suggestion of Mr. Massa in the appeal submissions. Neither of these documents and the evidence contained therein showed any evidence of a conflict of interest on the part of Mr. Picha. In the case of the written statement of Paul Massa alleging misconduct on the part of Mr. Picha, it was dated May 13th, 2009, and predated the termination of Mr. Picha’s employment by about 4 months. The conduct complained of in the said document by Mr. Paul Massa could have qualified as insubordination on the part of Mr. Picha, if proven (although I note that Mr. Paul Massa was not called as a witness by SCM at the Hearing). However, there was no evidence adduced by Mr. Massa of any disciplinary action by SCM against Mr. Picha respecting the alleged incident and Mr. Picha’s employment continued without any break thereafter until September 12, 2009. As for Mr. Uptigrove’s emailed statement, the delegate considered the said statement including Mr. Uptigrove’s telephone testimony at the Hearing and, in my view, correctly concluded in the Determination that there was no evidence of a conflict of interest although there may have been evidence of a breach of Mr. Picha’s duty of fidelity warranting perhaps some form disciplinary action but not termination of his employment.
35. It appears that Mr. Massa and SCM, in the appeal, are challenging the findings or conclusions of fact of the delegate. In my view this is not a proper ground for advancing an appeal of the Determination.
36. I also note that Mr. Massa is pleading ignorance of the hearing and complaint process and what is required of him to prove his case and is now requesting an opportunity for a new hearing “now that (he) know(s)” what is relevant evidence. He states that he “will submit ALL (his) evidence and witnesses during the (new) hearing”. As discussed under the new evidence ground of appeal below, this is neither fair nor appropriate nor in the interest of efficiency and contrary to the stated purposes of the *Act* in section 2(d).

(ii) ***New Evidence***

37. With respect to the new evidence ground of appeal, it should be noted that section 112 (1)(c) of the *Act* provides that a person may appeal a determination on the ground that evidence has become available that was not available at the time the determination was being made. It is important to note that this subsection is not intended to allow a person dissatisfied with the result of a determination to simply seek out more evidence to supplement or buttress what was already provided to, or acquired by, the Director during the complaint process or at the hearing of a complaint if, in the circumstances, that evidence could have been provided to the Director before the determination was made. The main or essential aspect of this ground of appeal is that the fresh evidence was not available at the time the determination was made.
38. The oft quoted decision of the Tribunal delineating the test governing the new evidence ground of appeal is *Re: Merilus Technologies Inc.*, [2003] B.C.E.S.T.D. No. 171 (QL), (27 May 2003), BC EST # D171/03. In this decision, the Tribunal, faced with the issue of whether or not to accept fresh evidence, decided that it should be guided by the test applied in civil courts for admitting fresh evidence on appeal. That test is a four-fold test as follows:
- (a) The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
  - (b) The evidence must be relevant to a material issue arising from the complaint;
  - (c) The evidence must be credible in the sense that it is reasonably capable of belief; and
  - (d) The evidence must have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.
39. The four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence must satisfy each of them before the Tribunal will accept the purported new evidence and consider it on appeal.
40. In this case, the purported new evidence is Mr. Massa's claim of the existence of other clients of SCM Mr. Picha allegedly contacted "to solicit business for himself". This allegation was not made at the Hearing or at any time before the Determination was made. It has surfaced for the first time in the appeal without any particulars beyond the general allegation. Mr. Massa has also not explained why this allegation and supporting evidence, if any, were not adduced during the complaint process or at the Hearing and before the Determination was made.
41. I, like the Director, find the allegation in question suspect and likely prompted by Mr. Massa's discovery, after the Determination, of the definition of conflict of interest, which the Delegate set out in the Determination. I am also not at all convinced that SCM has met the first criterion in the *Merilus* test, namely, the evidence of the alleged "conflict of interest" could not have, with the exercise of due diligence on the part of SCM or Mr. Massa, have been discovered and presented to the delegate during the investigation or adjudication of the Complaint and prior to the Determination being made. In the circumstance, I reject SCM's new evidence ground of appeal.
42. I also note that section 2(d) of the *Act* lists one of the purposes of the *Act* is to provide "fair and efficient procedures for resolving disputes over the application and interpretation of this Act". It would defeat this very important purpose of the *Act* if parties, like SMC, were allowed to present piecemeal their evidence and

then attempt to get the proverbial “second kick at the can” when the Determination is unfavourable by adducing more evidence. Here it appears that SMC and particularly Mr. Massa was confident in opting, despite the opportunity provided by the delegate to present its other witnesses, to rely on one instance of alleged misconduct on the part of Mr. Picha to the exclusion of others. There was no evidence at all, whether written or otherwise, or any hint of any evidence at the Hearing or prior to the Determination, of Mr. Picha attempting to solicit any business from any customers of SCM including Mr. Uptigrove. If there was such evidence then it should have been produced at least before the Determination was made and if Mr. Massa felt confident that he did not need to produce it because he had enough to justify cause for the termination of Mr. Picha’s employment in the evidence of his only witness, Mr. Uptigrove, then that was his decision and one which SMC has to live with. As indicated, I reject SCM’s new evidence ground of appeal.

### **ORDER**

43. Pursuant to Section 115 of the *Act*, I order that the Determination be confirmed as issued together with whatever additional interest may have accrued pursuant to Section 88 of the *Act* since the date of issuance.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**