

An appeal

- by -

Able Forklift Ltd.  
(“Able”)

- 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.:** 2011A/35

**DATE OF DECISION:** June 2, 2011

## DECISION

### SUBMISSIONS

Steve Walsh	on behalf of Able Forklift Ltd.
Mike Kinar	on his own behalf
Joy Archer	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an appeal by Able Forklift Ltd. (“Able”), pursuant to Section 112 of the *Employment Standards Act* (the “*Act*”), against a Determination of the Director of Employment Standards (the “Director”) issued February 18, 2011.
2. Mike Kinar worked as a forklift technician/mechanic for Able, a forklift sale and repair business, from June 3, 2008, until August 21, 2009. On September 23, 2009, Mr. Kinar filed a complaint alleging that Able had contravened the *Act* by failing to pay him compensation for length of service.
3. The Director’s delegate held a hearing into Mr. Kinar’s complaint in February 2010. It appears from the submissions that after hearing evidence for approximately 5 hours, the delegate decided to convert the hearing into an investigation. The delegate ultimately issued a Determination in which she concluded that Able had contravened Section 63 of the *Employment Standards Act* in failing to pay Mr. Kinar wages and vacation pay. The delegate concluded that Mr. Kinar was entitled to wages and interest in the total amount of \$1,896.36. The delegate also imposed a \$500 penalty on Able for the contravention, pursuant to section 29(1) of the *Employment Standards Regulation*.
4. Able contends that the delegate failed to observe the principles of natural justice in making the Determination and seeks to have the Determination cancelled.
5. Section 36 of the *Administrative Tribunals Act* (“*ATA*”), which is incorporated into the *Employment Standards Act* (s. 103), and Rule 17 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).
6. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

### ISSUE

7. Did the delegate fail to observe the principles of natural justice in making the Determination?

### FACTS AND ARGUMENT

8. On August 20, 2009, Able stated that it decided to temporarily lay off Mr. Kinar because of a work slowdown. Able’s President, Mr. Walsh, communicated the lay off to Mr. Kinar on August 21, 2009. When Mr. Kinar disagreed with the layoff, the parties discussed alternatives. Although Able then offered Mr. Kinar

reduced hours of work, Mr. Kinar refused that offer because Able was unable to provide him with a work schedule or any guarantee of part-time hours.

9. On August 24, 2009, Mr. Walsh told Mr. Kinar that because he had filed for Employment Insurance (EI), his “best option” was a permanent lay off. On August 25, Mr. Walsh considered that Mr. Kinar was “finished”, because he had filed for EI. By way of an email to Mr. Kinar dated August 26, Able confirmed that Mr. Kinar was temporarily laid off and that his employment was not being terminated. In the email, Mr. Walsh also stated that Able had offered Mr. Kinar part-time work, which he declined. Able contended that it called Mr. Kinar to determine whether or not he was available for work although Mr. Kinar was not given a specific return to work date or times for any shift. Able argued that because Mr. Kinar did not respond to these calls, he had decided not to return to work.
10. On September 4, 2009, Able sent Mr. Kinar a letter terminating his employment. Accompanying the letter was a Record of Employment (ROE) setting out the following reasons for the termination: misconduct, absenteeism, disrespectful conduct, breach of rules/policies, non-return of company property. Able advised the delegate that the status of Mr. Kinar’s employment changed from a lay off to a termination for cause based on the information it received from the Employment Standards Branch and from Service Canada.
11. Able asserted that it had just cause to terminate Mr. Kinar’s employment because he was unable to do work on electrical units, he was ignoring safety features and because his conduct was poor. Able contended that Mr. Kinar had been warned on many occasions about his performance issues, both verbally and in writing.
12. After reviewing the evidence surrounding Mr. Kinar’s lay off, the delegate concluded that Mr. Kinar had neither been laid off nor recalled. She noted that although the parties agreed they discussed the possibility of Mr. Kinar working reduced hours to avoid a full lay off, Able had never provided Mr. Kinar with a schedule of those hours. She also found that Mr. Kinar did not refuse Able’s offer of reduced hours because Able changed his work status before he was able to respond.
13. The delegate noted that Able’s initial position was that it laid off Mr. Kinar temporarily due to a shortage of work and that it decided to terminate Mr. Kinar’s employment only after the Employment Standards Branch advised Able that employers no longer had the ability to temporarily lay off employees.
14. The delegate then considered whether or not Able had just cause to terminate Mr. Kinar’s employment, and concluded that it did not.
15. The delegate noted Able’s evidence that Service Canada advised it what to put on the ROE after being told a lay off was not an option. The delegate found that Able was not specific about what Mr. Kinar’s misconduct was.
16. The delegate found no evidence of wilful misconduct. She also found that Able had not met the test for progressive discipline for minor instances of misconduct. The delegate found one written warning for absenteeism which was not repeated. The delegate found no evidence Mr. Kinar had been either warned or disciplined for performance or workmanship or safety issues. The delegate then examined the allegation of theft, noting that it related to a tool that was in a company van when it was picked up by Mr. Walsh when Mr. Kinar’s employment was coming to an end. Mr. Kinar stated it was an oversight and Mr. Kinar’s wife returned it to Able. The delegate noted that because the alleged theft occurred after Mr. Kinar’s employment had already ended, Able could not rely on this as grounds for dismissing Mr. Kinar.

17. Finally, the delegate found no evidence of “disrespectful conduct” or any discipline measures taken in respect of that conduct and concluded that this, either alone or together with the other issues, did not constitute just cause termination of Mr. Kinar.
18. The delegate examined the employer’s actions around the temporary layoff as well as the reasons Able gave to her over the time she investigated Mr. Kinar’s complaint. She noted that Able developed additional reasons for terminating Mr. Kinar’s employment during the investigation and that many of those reasons had not been identified on the ROE. The delegate wondered why, if Mr. Kinar’s performance issues were so bad, would Able consider recalling Mr. Kinar once work picked up; and concluded that it was because Mr. Kinar’s performance only became an issue once Able realized it would have to pay Mr. Kinar compensation for length of service.
19. The delegate determined that Able did not have just cause to terminate Mr. Kinar’s employment.
20. Able contends that the delegate made several mistakes in the Determination. The appeal submission contains an outline of those alleged errors. Able submits that it had just cause to terminate Mr. Kinar’s employment, stating “although layoff was an option, after harassing conversations and emails from Mr. Kinar and Mr. Kinar’s lack of ability to commit to 20 hours of work a week part-time, we decided termination was our only option.”
21. Able’s submission also contains many points that the record shows were advanced before the delegate.
22. The delegate submits that Able has not substantiated this ground of appeal and contends that the appeal is an attempt to reargue points it made during the investigation.
23. The delegate submits that Mr. Walsh was given every opportunity to respond to the complaint, not only on the issue of just cause but a number of other matters not at issue. She said that although the complaint was originally scheduled for an adjudication hearing, after significant testimony, Mr. Walsh stated that he did not know what the issues were or why he was even at the hearing. As a result, the delegate states that out of fairness to Able and with the consent of both parties, she decided to proceed by way of an investigation. The delegate says that both Mr. Walsh and his partner, Ms. Donetz, indicated that they understood the issues and that they would calculate the compensation for length of service and contact her to resolve the issues. When the delegate later contacted Ms. Donetz, she advised the delegate that Mr. Walsh had changed his mind.
24. In her submission, the delegate set out what had occurred at the adjudicative hearing and the opportunity Mr. Walsh had to present his evidence. She also notes that Mr. Walsh had many opportunities following the hearing to bring forth any evidence he felt relevant to the issue. She says that Able’s appeal submission contains most of the points it has already made before her.
25. The delegate says that she provided her preliminary findings to Able and offered it an opportunity to respond. Although Able presented further information to the delegate, the delegate says it was the same information that had been provided to her several times previously and that, in the absence of anything different, her findings would not change. She submits that this is not evidence of a closed mind but Able’s refusal to acknowledge that the information is not new.
26. The delegate says that the alleged factual errors are either direct contradictions of the evidence Able presented during the investigation or information that was not provided during the investigation. The delegate denies that she misconstrued or invented any of the evidence recited in the Determination.

27. The delegate submits that the appeal should be dismissed and the Determination confirmed.
28. Mr. Kinar says that Mr. Walsh was given plenty of opportunity, both during a mediation session in November 2009 and a hearing in February 2010 to explain Able's reasons for terminating Mr. Kinar's employment and respond to the delegate's questions. Mr. Kinar states that the first 6 hours of the arbitration hearing was taken up by Mr. Walsh's testimony. Following Mr. Kinar's testimony, the delegate unsuccessfully attempted to negotiate a settlement between the parties.
29. Mr. Kinar submits that much of the information Able now brings forward is irrelevant and has no bearing on whether or not there was just cause to terminate his employment.

### ANALYSIS

30. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
- the director erred in law
  - the director failed to observe the principles of natural justice in making the determination; or
  - evidence has become available that was not available at the time the determination was being made
31. The burden of establishing the grounds for an appeal rests with an Appellant. Able must provide persuasive and compelling evidence that the delegate failed to observe the principles of natural justice.
32. After carefully reviewing the record and the submissions, I find no merit to Able's appeal. In my view, the appeal is simply an attempt to re-argue the points advanced before the delegate. Nevertheless, I will consider the submissions in light of each of the grounds of appeal.
33. Able has not persuaded me that the delegate failed to comply with the principles of natural justice. 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.
34. The record discloses that Able was aware of Mr. Kinar's allegations and had every opportunity to respond to them. In fact, the delegate initially attempted to decide the complaint by way of an arbitration hearing. After hearing about 6 hours of evidence from Mr. Walsh, she decided that Mr. Walsh did not fully understand what was at issue and chose to terminate the hearing in order to fully explain the issues to him and give him additional time to respond to those issues. In my view, the delegate's decision to change the nature of the complaint resolution process was made to afford fairness to Able. Furthermore, while Mr. Walsh contends, for example, that the delegate did not put the parties under oath or allow Ms. Donetz to be present except as a witness, I am satisfied that the parties did not object to this process at the time. In any event, I am not persuaded that these points alone constitute a denial of natural justice. It is appropriate to exclude witnesses during a hearing until their evidence is given. However, given that the hearing process was aborted in favour of an investigation, these points are irrelevant. I am not persuaded that Able has substantiated this ground of appeal.
35. Able also submits that the Determination contains many mistakes of fact. 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
36. 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.
37. 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.
38. Having carefully reviewed the record, I am not persuaded that the delegate made any palpable or overriding errors. While Able sets out alleged errors of fact, not only does the record show that each of the evidentiary points are taken from Able's own documents, the facts in "dispute" are irrelevant to the delegate's conclusion that Able did not have just cause to terminate Mr. Kinar's employment. For example, Able asserts that Mr. Kinar started work on April 2008 rather than June 3, 2008. However, the ROE and the "Terms of Employment" both of which were prepared by Able, state that Mr. Kinar's start date was June 3, 2008. I find these submissions entirely without merit.
39. The delegate carefully examined all of the evidence and concluded that Able had not met the burden substantiating that it had just cause to terminate Mr. Kinar's employment. In my view, the delegate's conclusion was amply supported by the evidence. I agree with the delegate's finding that Able attempted to justify Mr. Kinar's dismissal after the fact. I find no basis for Able's appeal on this point.
40. Able's submission also appears to contain new evidence as a basis for arguing that the Determination is in error. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03, the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
- 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;
  - the evidence must be relevant to a material issue arising from the complaint;
  - the evidence must be credible in the sense that it is reasonably capable of belief; and
  - 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.
41. Able's appeal submission attempts to introduce new evidence and argument. The record clearly shows that Able had every opportunity to advance its case during the investigation. Indeed, many of the points now made by Able were made before the delegate. The "new evidence" was all available during the investigation and ought to have been presented to the delegate. Having reviewed all the material, I am not persuaded that the delegate would have arrived at a different conclusion in any event.
42. I dismiss the appeal.

**ORDER**

43. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated February 18, 2011, be confirmed, together with whatever interest may have accrued under section 88 of the *Act* from the date of issuance.

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**Carol Roberts**  
**Member**  
**Employment Standards Tribunal**