Employment Standards TRIBUNAL

An appeal

- by -

K & R Poultry Ltd. carrying on business as Farm Fed
("K & R")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/31

DATE OF DECISION: June 18, 2015

DECISION

SUBMISSIONS

Jacob R. Parkinson	counsel for K & R Poultry Ltd. carrying on business as Farm Fed
Melanie Zabel	on behalf of the Director of Employment Standards

OVERVIEW

1. On January 14, 2015, a delegate of the Director of Employment Standards (the "delegate") issued a Determination under section 79 of the *Employment Standards Act* (the "*Act*"). By way of the Determination, K & R Poultry Ltd. carrying on business as Farm Fed ("K & R") was ordered to pay its former employee, Gurcharan Basrom ("Mr. Basrom"), the sum of $8,422.78 on account of eight weeks' wages as compensation for length of service (see section 63) together with concomitant 6% vacation pay and section 88 interest. In addition, the delegate levied a single $500 monetary penalty against K & R for having contravened section 63 and, accordingly, the total amount payable under the Determination is $8,922.78.

2. On February 23, 2015, legal counsel for K & R filed an appeal of the Determination on the ground that the delegate erred in law (subsection 112(1)(a) of the *Act*). More particularly, K & R says that the delegate erred in: i) "failing to determine whether [Basrom] was constructively dismissed on 29th July, 2013"; ii) "failing to consider whether [Basrom] was subsequently dismissed during a probationary period"; and iii) "granting eight weeks of compensation".

3. I am adjudicating this appeal based on the parties' written submissions. I have both an initial and a reply submission from K & R's legal counsel as well as a submission from the delegate. Although invited to do so, Mr. Basrom did not file a submission with the Tribunal. In adjudicating this appeal, I have also reviewed the subsection 112(5) record that was before the delegate when she was making the Determination.

BACKGROUND FACTS

4. On May 22, 2014, Mr. Basrom filed a complaint under section 74 of the *Act* in which he claimed over $53,500 in unpaid wages; he asserted that he had been unlawfully demoted and then terminated without just cause. The delegate presided at a complaint hearing held on October 1 and November 17, 2014, and then issued the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on January 14, 2015. I note that the delegate's reasons are erroneously dated January 14, 2014.

5. As recounted in the delegate's reasons, K & R operates a poultry-processing plant in Abbotsford. Mr. Basrom commenced his employment with K & R in May 2005. He worked as both a "janitorial supervisor" (at $24.11 per hour) and a "general labourer" (at $18.00 per hour).

6. On July 29, 2013, Mr. Basrom was called into a disciplinary meeting and given a letter that outlined several grounds for concern regarding Mr. Basrom's conduct. In effect, K & R issued a disciplinary demotion for conduct that was described as follows:

    - "You instructed a co-worker…to punch in your time card as you were going to be late."

- "You were permitted…to leave for 'a few minutes' the night of July 24th. We noticed however, that you had actually taken off for 2 hours with another employee…leaving 2 other employees to do the work unsupervised. You also both failed to punch out or in when you left." (underlining in original text)
- "We received several complaints that you are being disrespectful towards co-workers or their family by the way you communicate to or about them behind their backs."
- "On several occasions we found out that you have been dishonest with us when confronted with a concern over broken equipment during your shift. We have given you opportunities to come 'clean' however you continued to deny any wrong doings [sic] until you were informed we have proof via video camera and co-workers."
- "…you have been urinating on/in boots of other employees. This gross and disgusting act is unacceptable and will not be tolerated."

7. With respect to each of the above allegations, K & R noted that Mr. Basrom would be "dismissed immediately" if the conduct were to be repeated. The July 29 letter, headed "Probation Notice" concluded as follows:

> On these grounds management has placed you on a 3 months [*sic*] probation period. As well we removed you from your supervisor position and removed all extra hours i.e. Sunday start up & duck waxing [*sic*]. You are only to work your shift, keep your comments to yourself and work as a team [*sic*]. Any further complaints brought to management will cause immediate dismissal [*sic*].

8. On August 20, 2013, K & R informed Mr. Basrom, by letter, that his pay and benefits were being reduced as a result of his disciplinary demotion:

> Dear Gurcharan,
>
> This letter is to confirm the letter previously given to you that is dated July 29, 2013. Due to the fact that you have been removed from your supervisor position, your new hourly rate is $19.90 per hour. In addition, your enrolment in the Empire Life group plan will be terminated on December 31, 2013 as your change in position means that you no longer qualify for the plan.

9. According to Mr. Basrom, following his demotion he felt "ridiculed" and "humiliated' and thus unilaterally placed himself on "a stress-related medical leave" (delegate's reasons, page R7; Mr. Basrom apparently did not engage in any prior consultation with, and did not have permission from, K & R to go on such leave). It should be noted that a "stress leave" is not provided for in Part 6 of the *Act*. In any event, the delegate's reasons recount, at page R5:

> On September 9, 2013, Ms. Vane [K & R's plant manager] received a doctor's note either on her desk or outside her office door stating that Mr. Basrom would be off work for a month due to medical reasons. On Tuesday September 10, 2013, Ms. Vane received an e-mail from Mr. Basrom that stated, "I have attached a letter from the doctor for my absence." The email had a copy of the doctor's note attached to it. [*sic*]

10. The "doctor's note" is a very cursory and vague document. It is a single sentence pre-printed form with certain handwritten information recorded on it. The form, on the letterhead of a two-doctor walk-in medical clinic and signed by one of the two doctors practising at the walk-in clinic, reads as follows (with the pre-printed information in normal text and the handwritten portion in *italicized* text):

> [Clinic address and telephone/fax numbers]
>
> Date: *SEPT 9/2013*

> **TO WHOM IT MAY CONCERN:**
>
> This is to confirm that *GURCHARAN S. BASROM* was seen at our office on *SEPT 9/2013*, for medical reasons. It is suggested that they [*sic*] remain off work from *SEPT 9/2013* to *oct 9/2013* [*sic*].

11. I feel compelled to observe that this form falls well short of what I would expect in a medical report informing an employer that one of its employees will not be able to work for one month. Certainly, this note does not even remotely qualify as an expert report under sections 10 and 11 of the *Evidence Act*. Mr. Basrom was apparently suffering from some sort of psychological or psychiatric condition and it is not clear to me that a family doctor working in a walk-in clinic could make a credible diagnosis on the basis of a (typically) 15-minute consultation. Further, the report is framed as a "suggestion" and does not indicate that Mr. Basrom was not medically fit to work. In my view, this "report" has virtually no probative value in terms of Mr. Basrom's fitness to work.

12. The September 10, 2013, e-mail attaching the doctor's note appears to have emanated from an e-mail account not belonging to Mr. Basrom and Mr. Basrom did not provide any further detail in this e-mail (it simply stated, following a subject line reading "sick note": "I have attached a letter from the doctor for my absence."). One can certainly understand if Mr. Basrom's employer was somewhat flummoxed by the communication.

13. A few days later, on September 15, 2015, Ms. Vane received another e-mail from the same e-mail account again with the subject line "sick note" that read as follows: "To whom it may concern, I was wondering when my record of employment can be ready for me to pick it up" [*sic*] yours truly, GURCHARAN BASROM". On September 25, 2013, and as requested, K & R issued Mr. Basrom a record of employment ("ROE") which indicated that Mr. Basrom's employment ended on September 6, 2013, and was being issued due to "Illness or Injury". The ROE also indicated that the "expected date of recall" was "unknown" rather than a specific date or, the third option on the form, "not returning".

14. Recall that Mr. Basrom's doctor's note "suggested" Mr. Basrom remain off work until October 9, 2013. I return to the narrative as set out in the delegate's reasons (page R5):

> On October 9, 2013, the date Mr. Basrom's medical leave was set to expire, [K & R] did not hear from Mr. Basrom, and he did not return to work. On or about that date, Ms. Vane asked the sanitation department employees if they had heard from Mr. Basrom or if they knew he was coming back. They informed her they had not heard from him and they did not know if he was coming back to work.
>
> On October 23, 2013, [K & R] concluded that Mr. Basrom had quit his employment because he had not returned to work and Mr. Basrom had not contacted [K & R] to give any updates about his return to work. [K & R] issued Mr. Basrom his final paycheque for accrued vacation pay and an ROE stating the reason for issuance was that he quit his employment. The ROE and vacation pay were sent in the same envelope by regular mail to Mr. Basrom's home address.

15. This second ROE, dated October 23, 2013, indicated that it was issued because Mr. Basrom "quit" and there was no expected date of recall because he was "not returning".

16. The uncontested evidence given by K & R's controller at the complaint hearing (Mr. Basrom declined the opportunity to cross-examine the controller) was that he attempted to contact Mr. Basrom unsuccessfully by telephone before the second ROE was issued and that the only medical note K & R ever received was the note, referred to above, dated September 9, 2013. With respect to the matter of his failure to provide any sort of reporting to K & R regarding his "fitness for work" after October 9, 2013 (when, according to the one note he did provide, he was supposed to return to work), Mr. Basrom's testimony at the complaint hearing

was that he did obtain other notes but "did not submit them to [K & R] at the time they were issued" apparently because he thought he did not have to provide any further medical documentation to his employer (delegate's reasons, page R7).

17. The record before me includes four further medical notes from the same walk-in clinic and all in identical format, none of which is any more edifying than the first note, that all "suggest" Mr. Basrom remain off work from October 10 to November 10, 2013 (note dated October 10, 2013); from November 11, 2013 to December 11, 2013 (note dated November 11, 2013); from December 11, 2013 to January 11, 2013 [*sic*] (note dated December 11, 2013); and a final note dated January 15, 2014, that states: "It is suggested that they remain off work from *fit to work*".

18. The notes dated November 11, 2013, and December 11, 2013, are both stamped "Service Canada Received, Abbotsford, B.C." with a date (November 12, 2013, and December 23, 2013, respectively). It would appear that these two notes – and quite possibly the other notes as well – were obtained for the purpose of securing Mr. Basrom's continuing entitlement to employment insurance benefits and not to keep K & R informed about his medical condition (see also delegate's reasons, penultimate para., page R7, where his application for employment insurance benefits is discussed). That would perhaps explain why these notes, other than the first one dated September 9, 2013, were never submitted to K & R.

19. On January 14, 2014, Mr. Basrom, using the same e-mail account he had previously utilized, sent an e-mail to Ms. Vane:

> to whom it may concern, [*sic*]
>
> I Gurcharan Basrom am writing this to let you know that I am now available to work. I will be waiting for your reply.
>
> sincerely,
>
> Gurcaran [*sic*] Basrom

20. On January 16, 2014, Ms. Vane sent a letter to Mr. Basrom by way of response to his January 14, 2014, e-mail:

> On July 29, 2013 you were informed by management via a letter that you had been placed on probation due to theft (of working hours), dishonesty and harassment towards co-workers and their families. Although this was grounds for immediate dismissal, we put you on a three month probation period. Shortly after receiving the July 29, 2013 letter, you submitted a doctor's note indicating that you were on medical leave until October 9, 2013.
>
> After October 9, 2013, we did not receive any updates from you. It was your responsibility to contact us in regards to your availability to return to work. Not hearing from you has indicated to us that you no longer desire to work here. Through your actions, we came to the conclusion that you had terminated your employment with us. We sent you a revised ROE and your vacation pay on October 23, 2013. The revised ROE indicated a quit code.
>
> Do [*sic*] to the above actions, we no longer have a position open for you.
>
> We wish you much success in finding alternate employment.

21. As noted above, on May 22, 2014, Mr. Basrom filed a complaint claiming, *inter alia*, damages for "unfair treatment" and he also noted that the "reason for demotion and termination of employment are disputed" [*sic*].

THE DETERMINATION

22. Mr. Basrom's complaint was the subject of a hearing conducted on October 1 and November 17, 2014. On January 15, 2015, the delegate issued the Determination now under appeal.

23. The delegate rejected K & R's position that Mr. Basrom quit his employment (at pages R8-R9):

> There must be unmistakable evidence of an employee's intention to quit before the Employer can be relieved of its obligation under section 63 of the Act. While not showing up to work or contacting the Employer after an employee's medical leave expires could arguably be an act inconsistent with continued employment, Mr. Basrom stated that he had the medical documentation from his doctor to authorize his extended absence from the workplace, but that he did not know he was required to submit it to [K & R]…I am not satisfied that Mr. Basrom's failure to contact [K & R] or report to work after October 9, 2013 was clear and unequivocal evidence that he intended to quit his employment.

24. Accordingly, the delegate determined that Mr. Basrom was, in effect, terminated without cause and thus awarded him eight weeks' wages as compensation for length of service (I should note that the delegate's calculation as to Mr. Basrom's compensation for length of service is not in issue, only K & R's legal obligation to pay it – see delegate's reasons, page R4).

25. The delegate also turned her mind to whether Mr. Basrom's disciplinary demotion on July 29, 2013, constituted a deemed dismissal within section 66 of the *Act* inasmuch as K & R unilaterally reduced Mr. Basrom's duties, responsibilities and pay. Section 66 states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." Ultimately, the delegate did not make any finding regarding whether K & R had just cause for the disciplinary demotion nor did she find that there was a section 66 dismissal (pages R10-11):

> As I have found that Mr. Basrom's employment was terminated on January 16, 2014, I find it is not necessary to exercise my discretion to determine whether his employment was terminated on July 29, 2013, when [K & R] stripped him of his duties and job title as a supervisor. I have already determined that eight weeks' compensation under section 63 of the Act is payable as a result of [K & R] terminating Mr. Basrom's employment on January 16, 2014.

REASONS FOR APPEAL – FINDINGS AND ANALYSIS

26. In his written submissions, K & R's legal counsel advanced two separate arguments in this appeal. First, he says that the delegate did not apply the proper legal test relating to termination of employment because she failed to take into account that Mr. Basrom was a probationary employee. Second, he says that the delegate erred in failing to conclude that Mr. Basrom abandoned his employment. I will address each argument in turn.

Probationary Employee

27. K & R notes that the disciplinary demotion occurred on July 29, 2013, and Mr. Basrom continued to work under those new terms and conditions for several months. Indeed, Mr. Basrom's September 10, 2013, e-mail attaching the September 9, 2013, doctor's note does not in any way suggest that he is challenging the demotion. K & R argues that Mr. Basrom effectively accepted, by acquiescence, his new terms and conditions of employment. Since Mr. Basrom had more than a reasonable time within which to determine if he would accept the new terms and conditions (see *Farquhar v. Butler Brothers Supplies Ltd.*, 1988 CanLII 185 (B.C.C.A.) and *Belton v. Liberty Insurance Co. of Canada*, 2004 CanLII 6668 (ON C.A.)), it follows that if there were a breach of contract, the contract in question was that defined by K & R's July 29, 2013, letter to Mr. Basrom.

28. The July 29 letter placed Mr. Basrom on "probation" for a period of three months and counsel argues that since Mr. Basrom was on probation, the governing legal standard applicable to termination of employment is "suitability" rather than "just cause". As a matter of common law, probationary employees may be terminated if the employer, in good faith, determines that the employee is not "suitable" for continued employment (see, for example, *Pathak v. Royal Bank of Canada*, 1996 CanLII 2130 (B.C.C.A.); *Jadot v. Concert Industries Ltd.*, 1997 CanLII 4137 (B.C.C.A.); *U.B.C. v. The Association of Administrative and Professional Staff on Behalf of Bill Wong*, 2006 BCCA 491; and *Miller v. Convergys CMG Canada Limited Partnership*, 2014 BCCA 311). "Suitability" is a lower threshold for dismissal than the "just cause" standard.

29. However, I disagree with counsel's assertion that since Mr. Basrom was on probation, K & R only needed to demonstrate a lack of suitability to terminate his employment. The notion of a probationary employee is a common law notion and it flows from a specific contractual agreement between the parties regarding the terms and conditions of the employee's probation. There is no concept of a "probationary employee" to be found in the *Act* and, in fact, the term "probation" is not contained in the *Act*. The *Act* defines an "employee" and does not distinguish between "regular" and "probationary" employees.

30. While it is true that compensation for length of service is not payable until the employee has competed "3 consecutive months of employment" (and thus an employee terminated without cause prior to completing three months' service has no entitlement to compensation or notice), this does not mean that the employee is "on probation" for the first three months of their employment. Further, even it could be said that an employee is "on probation" for the first three months of their employment, in this case, the "statutory probationary period" (and, I repeat, I do not believe there is any such thing) only applies for the employee's first three months of employment – Mr. Basrom would have completed his "probationary period" years earlier, sometime in the summer of 2005. If an employer is terminating, without just cause, the employment of an employee with more than "3 consecutive months of employment", it must either provide pay or written notice as mandated by section 63 (unless some other statutory exception applies – see, for example, section 65).

31. In my view, the assertion that Mr. Basrom was a "probationary employee", insofar as his rights under the *Act* are concerned, is wholly misconceived.

Abandonment of Employment

32. I now turn to K & R's next submission, namely, whether the delegate erred in finding that Mr. Basrom did not effectively abandon his employment sometime after October 9, 2013, when he failed to return to work or make any effort to contact his employer about when he might be fit to return to work. Counsel submits:

> In the present case, it is submitted that viewed objectively, a reasonable person would conclude that [Mr. Basrom] had abandoned his position, as he failed to return to work at the conclusion of his leave, failed to communicate at all with his employer until fourteen weeks later, and cashed the final cheque to pay out his vacation pay, which had been sent along with the ROE indicating "quit".
>
> It is submitted that the application of the correct test would have resulted in a finding of abandonment, for the reasons set out above.

33. Counsel says that the delegate was overly focused on determining whether K & R made sufficient efforts to contact or locate Mr. Basrom rather than taking an objective view of the entire factual matrix.

34. Compensation for length of service is not payable "if the employee… terminates the employment, retires from employment, or is dismissed for just cause" (subsection 63(3)(c)). K & R does not argue it had just

cause to terminate Mr. Basrom's employment; rather, it says that Mr. Basrom himself terminated the employment by abandoning his job. The following facts are, in my view, relevant to determining whether Mr. Basrom abandoned his employment:

- Mr. Basrom accepted his demotion and thus there is simply no section 66 issue relating to this matter. If Mr. Basrom wished to challenge this demotion as a section 66 dismissal, he would have been obliged to file a complaint within six months following the demotion (section 74) and he failed to do so. I might also add, simply for the sake of completeness, that if K & R had expressly terminated Mr. Basrom for the behaviour set out in the July 29, 2013, letter (and Mr. Basrom never denied these incidents before the delegate and refused to challenge K & R's evidence at the complaint hearing relating to these matters), in my view, there would have been just cause for the dismissal.
- Mr. Basrom carried on under his new terms and conditions of employment until September 10, 2013 (*i.e.*, for a period of about 1 ½ months) when he unilaterally declared that he would no longer be reporting for work and was taking some sort of medical leave (I have previously commented on the wholly inadequate nature of the medical note submitted in support of his request for leave and I should perhaps also note that there is no provision in Part 6 of the *Act* for unpaid medical leave; further, the delegate determined that K & R did not have a formal medical leave policy in place during the relevant time period – see delegate's reasons, page R6). The September 9, 2013, doctor's note *suggested* that Mr. Basrom remain off work until October 9, 2013; the note certainly did not indicate that Mr. Basrom was medically unfit to work. However, K & R was nonetheless prepared to grant Mr. Basrom a *1-month* unpaid medical leave. Mr. Basrom asked for an ROE to be prepared (apparently so he could obtain employment insurance benefits) and K & R complied with his request. The ROE indicated that it was issued due to "illness or injury" and that Mr. Basrom's return to work date was "unknown". The only reasonable inference to be drawn from these facts is that K & R was prepared to allow Mr. Basrom an unpaid medical leave of a limited, but uncertain, duration of no more than one month.
- Mr. Basrom did not return to work on October 9, 2013, and he failed to provide any medical evidence to K & R justifying his failure to return to work in accordance with his original timetable. Mr. Basrom made no effort whatsoever to contact K & R to inform them about his possible return to work or to seek an extension of his medical leave. K & R inquired of other employees about his whereabouts and was advised that none of them had heard from him. K & R's controller unsuccessfully tried to reach Mr. Basrom by telephone to ascertain his whereabouts.
- Not having heard a word from either Mr. Basrom, or his doctor, for about two weeks following his scheduled return to work date, K & R concluded that Mr. Basrom did not intend to return to work. Accordingly, K & R issued a cheque to Mr. Basrom for his final accrued vacation pay and also a second ROE (issued October 23, 2013) indicating that he was "not returning" to work since he had "quit". Mr. Basrom received both the cheque and the ROE as they were mailed together and the cheque cleared in early November 2013.
- Despite having received formal notification that K & R considered him to have "quit" his employment, *Mr. Basrom took no action whatsoever* (for example, by contacting K & R to explain his situation and to provide further medical evidence about his fitness to work) *for over two months* until he sent an e-mail to Ms. Vane on January 14, 2014, stating that he was "now available to work".

35. The law governing an "abandonment" of employment has been canvassed in a number of decisions. The Nova Scotia Court of Appeal framed the appropriate inquiry in the following terms: "…viewed objectively,

did [the employee do] or [say] [any]thing to lead [the employer to] reasonably to believe that [the employee] had abandoned his contract of employment?" (*Coleman v. Sobeys Group Inc.*, 2005 NSCA 142 at para. 29). In *Beggs v. Westport Foods Ltd.*, 2011 BCCA 76 at para. 37), the British Columbia Court of Appeal adopted the following passage from the David Harris text, *Wrongful Dismissal*, as accurately setting out the governing test:

> The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to say or do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation."

36. In *Pereira v. The Business Depot Ltd.*, 2011 BCCA 361 at para. 47, the British Columbia Court of Appeal expressed the "test for abandonment" in the following terms:

> The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (*i.e.*, repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593 (CanLII), 47 B.C.L.R. (4th) 56 at para. 8.

37. Applying these legal principles to the facts of this case, I am satisfied that Mr. Basrom abandoned his employment when he failed to return to work after his originally scheduled October 9, 2013, return to work date and, in addition, failed to provide any medical evidence to, or communicate in any way with, K & R for several months until his e-mail of January 14, 2014. In early November 2013, at the very latest, he knew that K & R was taking the position that he had "quit" – this was expressly noted on the ROE he received at this time – and, yet, even in the face of that information, he resolutely failed to communicate in any fashion with K & R for a further two months. In my view, the only reasonable inference to be objectively drawn from Mr. Basrom's actions (and inaction) was that he had abandoned his employment.

38. In my view, the delegate erred in law when she determined that Mr. Basrom was entitled to compensation for length of service. It follows that the Determination must be cancelled in its entirety.

ORDER

39. Pursuant to subsection 115(1)(a) of the *Act*, the Determination is cancelled.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal