Employment Standards TRIBUNAL

An appeal

- by -

Trevor Kretchmer
("Mr. Kretchmer")

- 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.: 2016A/33

DATE OF DECISION: April 19, 2016

DECISION

SUBMISSIONS

Tim Higinbotham — counsel for Trevor Kretchmer

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Trevor Kretchmer ("Mr. Kretchmer") has filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the "Director") on January 26, 2016 (the "Determination").

2. The Determination concluded that Mr. Kretchmer's former employer, 4 Seasons Electrical Mechanical Contractors of B.C. Ltd. ("4 Seasons"), did not contravene the *Act* and, therefore, did not owe any wages to Mr. Kretchmer.

3. Mr. Kretchmer appeals the Determination on the ground that the Director erred in law in making the Determination. Mr. Kretchmer seeks the Employment Standards Tribunal (the "Tribunal") to vary the Determination and award him compensation for length of service.

4. By way of a letter, dated March 8, 2016, the Tribunal informed 4 Seasons and the Director that it had received an appeal by Mr. Kretchmer, dated March 4, 2016, and enclosed the same for informational purposes only. In the same letter, the Tribunal also requested the Director to provide the section 112(5) "record" (the "Record") by March 22, 2016.

5. On March 17, 2016, the Tribunal disclosed the Record to Mr. Kretchmer, and provided him with an opportunity to object to its completeness. Mr. Kretchmer did not submit any objections within the time permitted. Therefore, the Tribunal accepts the Record as complete.

6. I have reviewed the appeal, including the submissions of Mr. Kretchmer's counsel supporting the appeal, the Reasons for the Determination (the "Reasons") and the Record, and have decided this appeal is an appropriate case for consideration under section 114 of the *Act*. Therefore, I will assess the appeal based solely on the Reasons, the appeal submissions of Mr. Kretchmer's counsel and my review of the Record that was before the Director when the Determination was being made. Pursuant to section 114 of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing of any kind, for any of the reasons listed in subsection 114(1). If I am satisfied the appeal, or part of it, has some presumptive merit and should not be dismissed under section 114(1) of the *Act*, 4 Seasons will, and the Director may, be invited to file further submissions. On the other hand, if it is found the appeal is not meritorious, it will be dismissed under section 114(1) of the *Act*.

ISSUE

7. The sole issue to be considered at this stage is whether there is any reasonable prospect that Mr. Kretchmer's appeal can succeed.

THE FACTS

8. 4 Seasons operates a residential heating and cooling sales and service business.

9. Mr. Kretchmer was employed by 4 Seasons from July 10, 2006, to September 25, 2015. He started his employment as an installation technician and later became a salesman.

10. On September 29, 2015, pursuant to section 74 of the *Act*, Mr. Kretchmer filed a complaint with the Employment Standards Branch (the "Branch"), alleging that 4 Seasons contravened the *Act* by failing to pay him compensation for length of service and requiring him to incur costs on behalf of the business (the "Complaint").

11. On December 18, 2015, a delegate of the Director conducted a hearing into the Complaint (the "Hearing"). Mr. Kretchmer abandoned his claim that he incurred costs on behalf of the business and the sole issue at the Hearing was whether 4 Seasons discharged its liability to pay Mr. Kretchmer compensation for length of service because he was dismissed for just cause.

12. The Hearing was attended by Mr. Kretchmer on his own behalf. 4 Seasons was represented by Elaine Lakeman ("Ms. Lakeman") and Richard McNeill ("Mr. McNeill"), both owners and directors of 4 Seasons. 4 Seasons also presented two (2) employees as witnesses; namely, Jansen Blackstock ("Mr. Blackstock") and Dyan Neitz ("Ms. Neitz").

13. At the Hearing, 4 Seasons contended that Mr. Kretchmer was dismissed for just cause because of his egregious behaviour towards Mr. Blackstock on September 25, 2015, which constituted a fundamental breach of the employment relationship. Mr. Kretchmer, on his part, argued that his behaviour during his altercation with Mr. Blackstock did not amount to a fundamental breach of the employment relationship and, therefore, his dismissal was without just cause. He submitted that there were ulterior motives behind his dismissal; namely, Mr. McNeill and Ms. Lakeman wanted him gone so as to improve their ability to sell the company, and Mr. Blackstock wanted to assume his more lucrative position.

14. With respect to the incident on September 25, 2015, upon which 4 Seasons relied to dismiss Mr. Kretchmer for just cause, there were two (2) witnesses to it; namely, Mr. Kretchmer and Mr. Blackstock. Mr. McNeill observed very little of the altercation, and Ms. Nietz, an intermittent officer manager for 4 Seasons, only observed the aftermath in terms of the reaction of Mr. Blackstock and the atmosphere at the office during the weeks following the incident.

15. In the Reasons, the delegate meticulously summarizes the evidence of each witness. While I do not find it necessary to reiterate the evidence of each witness here, I think it is useful to set out the contrasting evidence of Mr. Kretchmer and Mr. Blackstock, as summarized by the delegate. With respect to the evidence of Mr. Blackstock, the delegate set out the following summary:

> On Friday, September 25, 2015, Mr. Blackstock arrived at 4 Seasons at 9:00 a.m. Mr. Kretchmer and Mr. McNeill were already at the office, where Mr. Blackstock overheard them discussing another employee named Alex, who worked in the shop next to the office. The discussion was apparently about Alex receiving time off from work. Mr. McNeill then left the office and went to the shop to discuss the matter with Alex.
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> With just the two of them left in the office, Mr. Blackstock approached Mr. Kretchmer to inquire about his conversation with Mr. NcNeill. They proceeded to engage in a discussion concerning Alex's time off. Mr. Kretchmer was under the impression that Alex was being forced to take time off. Mr. Blackstock thought that Alex had actually requested the time off. The discussion quickly escalated to an argument. Mr. Blackstock told Mr. Kretchmer, 'don't be an idiot, go ask him yourself.' It was this statement that enraged Mr. Kretchmer.
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> 'Don't call me a fucking idiot,' Mr. Kretchmer yelled at Mr. Blackstock. 'You're a fucking idiot!'

As Mr. Kretchmer's demeanour became more threatening, Mr. Blackstock started to apologize to Mr. Kretchmer and back himself towards the office's only exit, a door leading to stairs down and out of the building. Mr. Kretchmer proceeded to threaten Mr. Blackstock by saying something along the lines of, 'get back in your office or I'll break your other leg'.

Before the situation could escalate any further, Mr. McNeill arrived back at the office and put himself between Mr. Kretchmer and Mr. Blackstock. Mr. Blackstock said that he does not remember exactly what happened next because he was so 'out of sorts.' But he thought that Mr. McNeill told him to go back into his office, which he did, and then Mr. Kretchmer said something like, 'you're lucky Rick is here or I would have broken your other leg.' Mr. Kretchmer stormed out of the office.

Mr. McNeill reassured Mr. Blackstock that Mr. Kretchmer had left for the day. He encouraged Mr. Blackstock to sit down and calm himself before getting back to work.

Mr. Blackstock was unable to calm himself. Later that morning he started sobbing, sweating, and shaking. He described himself as being in shock. He could not continue working. He was fearful for his safety. He left the office at approximately 11:00 a.m. to go home for the day. At home, he discussed the situation with his parents, and then phoned the Central Saanich Police at approximately 12:30 p.m. to lodge a formal complaint against Mr. Kretchmer.

Mr. Blackstock did not return to work until Wednesday or Thursday the following week, despite being scheduled to work, because of his emotional state.

During Mr. Blackstock's testimony, Mr. Kretchmer raised the issue of what Mr. Blackstock told the police. Prior to the hearing, Mr. Kretchmer had filed police reports that he had received as Crown disclosure with respect to the criminal proceeding brought against him. According to these police reports, Mr. Blackstock was fearful for his safety during and after the altercation with Mr. Kretchmer because Mr. Kretchmer had previously told Mr. Blackstock that he had worked for the Hells Angels, that he had been to jail, that he had had a hard childhood, that he had lived on the streets, that he had sold drugs, and that he had a violent history. Mr. Blackstock agreed that he told this information to the police. Mr. Blackstock clarified that Mr. Kretchmer did not always directly tell him these things about his past, but that Mr. Kretchmer 'insinuated' about aspects of his past. Mr. Blackstock and Mr. Kretchmer did not socialize outside of work. Mr. Blackstock gleaned all of this information about Mr. Kretchmer while working with him at the office.

Mr. Blackstock described himself as six feet tall and approximately 240 pounds. He had played contact sports. He described Mr. Kretchmer as five foot ten or five foot eleven and roughly the same weight as himself. Mr. Blackstock had broken his ankle about two months before the altercation. He was wearing an air cast on his foot which allowed him to walk without necessarily using a crutch. He had one crutch with him that day but was unsure whether he was using it during the altercation.

Mr. Blackstock said that he still suffered from the emotional effects of the altercation with Mr. Kretchmer. He had talked about the incident with his pastor but had yet to receive any professional treatment.

16. With respect to Mr. Kretchmer's evidence, the delegate set out the following summary:

Mr. Kretchmer said that he arrived at the office shortly before 9:00 a.m. on September 25, 2015. He had received a call from Alex, who advised Mr. Kretchmer that he was only working half the day. Mr. Kretchmer thought that the company was too busy for Alex to only work half the day. He approached Mr. McNeill about this issue while they were both in the office. Mr. McNeill, who did not know that Alex was only working half the day, left the office to go to the shop to speak with Alex about the matter. Mr. Blackstock apparently overheard Mr. Kretchmer's conversation with Mr. McNeill. According to Mr. Kretchmer, once Mr. McNeill left the office, Mr. Blackstock approached Mr. Kretchmer and asked, 'What are you, a fucking idiot?'

> This kind of language coming from Mr. Blackstock startled Mr. Kretchmer. He had known Mr. Blackstock to be a very humble, quiet man, who rarely cursed. Mr. Kretchmer responded to Mr. Blackstock by telling him to 'get back into your fucking office.' A few other heated words were exchanged, but no threats. According to Mr. Kretchmer, by the time Mr. McNeill returned, Mr. Blackstock was back in his own office. This argument with Mr. Blackstock, coupled with the other stresses of the job, caused Mr. Kretchmer to decide to leave the office for the day. He told Mr. McNeill that he was leaving and that 'all I'm asking for is a contract.' As he was leaving the office, he told Mr. Blackstock, 'after all the shit I've done for you, you're lucky I don't fucking break your other leg'.
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> Mr. Kretchmer stressed that this last statement he made to Mr. Blackstock was not intended as a threat. He explained that he said it jokingly. It was just his manner of speaking. As a salesperson in the construction industry, he is constantly interacting with tradespeople for whom vulgar language is often part of doing business. Yet he said that making threats was not part of doing business.
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> After leaving the office, Mr. Kretchmer made two house calls, which lasted about an hour and a half, before going home. He then received a call from an unnamed co-worker who told him that the police were looking for him. He immediately called the police. He spoke to the investigating officer about the altercation with Mr. Blackstock that morning. The officer called Mr. Kretchmer back later that afternoon and asked him to come into the station. Mr. Kretchmer attended the station where he was arrested and charged with uttering threats to cause bodily harm and death. He provided a statement and was released.
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> Mr. Kretchmer received a phone call from Mr. McNeill on September 28, 2015 advising him that he was fired from 4 Seasons. He received the termination letter dated September 29, 2015 after he met with Mr. McNeill in a parking lot on October 3, 2015.
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> To resolve the criminal charge, Mr. Kretchmer said that he entered into a twelve-month peace bond on December 3, 2015 to keep the peace, be of good behaviour, and have no contact with Mr. Blackstock (except for the purposes of this employment standards matter). He said that he did not have the financial means to hire a lawyer and fight the charge.
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> Mr. Kretchmer argued that Mr. Blackstock's reaction to the altercation was an embellishment. He denied that he ever told or insinuated to Mr. Blackstock that he worked for the Hells Angels, spent time in prison, had lived on the streets, and so on. He did not wear clothing suggestive of criminal activity. He did not own a motorcycle. He did not have any visible tattoos. The police conducted a criminal record and criminal activity check of Mr. Kretchmer that returned no results. Mr. Kretchmer argued that Mr. Blackstock exaggerated about Mr. Kretchmer's past to the police in order to explain his emotional breakdown. Mr. Kretchmer also argued that Mr. Blackstock was furthering 4 Season's desire to rid the company of Mr. Kretchmer. According to Mr. Kretchmer, Mr. Blackstock committed such dishonesty because he was the type of person who did as he was told and because he was in line to assume Mr. Kretchmer's more lucrative position within the company.
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> Mr. Kretchmer provided a letter dated November 30, 2015 from a Chris Marshal, who did not testify at the hearing. I considered this to be a character letter and afforded it little weight with respect to the relevant issue of Mr. Kretchmer's actions on September 25, 2016 [*sic*].

17. After considering the evidence of all of the witnesses, and particularly of Mr. Blackstock and Mr. Kretchmer, the delegate set out the applicable law, both statutory and common law, governing termination for cause. In particular, the delegate noted that under section 63(3)(c) of the *Act*, an employer's liability to pay compensation for length of service to an employee is discharged if the employee is dismissed for just cause. However, the onus is on the employer to prove just cause.

18. As just cause is not defined in the *Act*, the delegate went on to consider common law, and distinguished between issues of poor performance and issues of misconduct giving rise to just cause. In particular, the delegate noted that the employer may establish just cause for dismissing an employee in one of two ways. The first is when an employee commits a series of failures or transgressions, each of which on their own do not justify dismissal, but when taken together do, provided the employer has made the necessary efforts to

correct such behaviour by setting standards, issuing warnings, and applying progressive discipline. The second way is when an employee's single act of misconduct is so serious that it fundamentally and irreparably breaches the employment relationship such that summary dismissal is justified. In the latter case, the delegate notes there is no requirement for warnings or for progressive discipline.

19. Having said this, the delegate then went on to apply the law to the facts in this case, noting, at the outset, that 4 Seasons did *not* rely on Mr. Kretchmer's prior conduct in 2009, when he was issued a "Final Written Warning" for uttering threats and screaming at another salesman, to justify his dismissal after the altercation with Mr. Blackstock on September 25, 2015. Instead, 4 Seasons argued that Mr. Kretchmer's act of misconduct on September 25, 2015, by itself, justified his dismissal. Notwithstanding, the delegate did note that the 2009 incident in which Mr. Kretchmer was involved at work "reinforces the fact that Mr. Kretchmer was aware that obnoxious behaviour towards co-workers was unacceptable".

20. The delegate then turned to and reviewed the incident of September 25, 2015, stating as follows:

> A single criminal act, such as a threat or an assault on a co-worker, may amount to a fundamental and irreparable breach of an employment relationship. Such actions are completely at odds with the proper discharge of an employee's duties and the healthy functioning of his workplace.
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> I accept Mr. Kretchmer's evidence that he has not been criminally convicted for his actions on September 25, 2015. To resolve the criminal charge, he entered into a twelve-month peace bond. As such, there is no determinative evidence that his behaviour toward Mr. Blackstock amounted to a criminal act, and I am certainly not in a position to decide such a question that is exclusively within the jurisdiction of the criminal courts. Furthermore, although Mr. Kretchmer submitted as evidence a comprehensive police report which suggests that Mr. Kretchmer's behaviour was very serious, I give little weight to this evidence as it is hearsay and none of the investigating officers testified at the hearing. The best evidence I have before me is from the testimony of the people who actually witnessed the altercation on September 25, 2015: Mr. Kretchmer, Mr. Blackstock, and, to a more limited extent, Mr. McNeill. I find that Ms. Lakeman['s] and Ms. Neitz's evidence with respect to the altercation to be hearsay and should be given little weight.
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> Mr. Kretchmer does not dispute that he engaged in a heated argument with Mr. Blackstock on September 25, 2015 and that he said words to the effect of breaking Mr. Blackstock's other leg. He disputes Mr. Blackstock's account of the details of the argument and the authenticity of Mr. Blackstock's reaction to the argument.
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> With respect to Mr. Blackstock's reaction to the altercation, I find that it was authentic. I accept his testimony that the altercation caused him to shake and break down into tears. I also accept Mr. McNeil['s] and Ms. Neitz's testimony that they witnessed Mr. Blackstock's breakdown. I do not accept Mr. Kretchmer's argument that Mr. Blackstock embellished his reaction to further his motive of assuming Mr. Kretchmer's job and to further the company's motive of ridding itself of Mr. Kretchmer. There is insufficient evidence to support Mr. Kretchmer's speculations. The fact the 4 Seasons was for sale, that Mr. Kretchmer may have been an inconvenience for the company, and that his job was more lucrative than Mr. Blackstock's is not enough to give an air of reality to the theory that Mr. Blackstock faked his reaction. Although I find the evidence about Mr. Blackstock's learning of Mr. Kretchmer's apparently non-existent criminal past to be unusual, I find no reason to doubt Mr. Blackstock's testimony that he was genuinely fearful for his safety as a result of Mr. Kretchmer's actions towards him. He was fearful enough that he sought the assistance of the police. His reaction was severe enough that he missed several days of work and sought counselling from his pastor. In short, I find that Mr. Blackstock's reaction to the September 25, 2015 altercation shows that Mr. Kretchmer's behaviour toward Mr. Blackstock was harmful.

21. As to the details of what occurred during the altercation of September 25, 2015, the delegate preferred Mr. Blackstock's account over that of Mr. Kretchmer. While he believed that Mr. Blackstock may have instigated

the argument, he concluded that Mr. Kretchmer's reaction was disproportionate in the circumstances "especially given the aggregating factors of the two men being alone in the office and Mr. Blackstock wearing a cast on his foot". The delegate further reasoned:

> …Mr. Kretchmer knew or ought to have known that his body language and cursing in these circumstances would be perceived by Mr. Blackstock as threatening and not as a joke or hyperbole. Furthermore, Mr. Kretchmer's knowledge that such behaviour was unacceptable was reinforced by the warning he received after the 2009 incident. I reject Mr. Kretchmer's justification that his language was consistent with typical interactions in the construction industry. I can appreciate people in the construction industry might use coarse language without indenting or causing any harm. But this went far beyond that. Mr. Blackstock was not a construction worker but an office worker, who by all accounts, including Mr. Kretchmer's, was not the type of person to engage in bawdiness. I find that Mr. Kretchmer has minimized his conduct during the altercation, and I am satisfied that Mr. Kretchmer's actions toward Mr. Blackstock were not flippant or trivial but were deliberate and violent.
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> I find Mr. Kretchmer's actions caused 4 Seasons material harm by reducing productivity and morale. Mr. Blackstock missed several days of work. Mr. McNeill and Ms. Lakeman spent time and resources addressing the fallout from the altercation instead of focusing their attentions on the regular operation of the company. I accept Ms. Neitz's evidence that the atmosphere in the office became tense and that the ordeal 'took a toll'. I further find that, although customer traffic at 4 Seasons was moderate, there was still a risk that customers could have been exposed to the altercation, thereby damaging customer relations. This all goes to show that Mr. Kretchmer's behaviour was totally inconsistent with the proper functioning of the workplace.

22. Based on the above analysis of the facts and law, the delegate concluded that when 4 Seasons learned of Mr. Kretchmer's conduct towards Mr. Blackstock on September 25, 2015, it was justified in dismissing Mr. Kretchmer for just cause. It was not required to have an explicit workplace policy in place prohibiting behaviour such as Mr. Kretchmer's, as it was entitled to expect that its employees would not engage in abusive behaviour towards co-workers. It did not need to warn Mr. Kretchmer about his impugned conduct, nor did it have to apply discipline short of dismissal or give Mr. Kretchmer another chance to improve his behaviour. It was entitled to conclude that Mr. Kretchmer's behaviour damaged the employment relationship beyond repair, and the proper course of action, in these circumstances, was dismissal. In the result, the delegate concluded that 4 Seasons met its onus of establishing just cause to dismiss Mr. Kretchmer and, thus, discharged its liability to pay Mr. Kretchmer compensation for his length of service pursuant to section 63(3)(c) of the *Act*.

SUBMISSIONS OF MR. KRETCHMER

23. Counsel for Mr. Kretchmer, Tim Higinbotham, presented written submissions, dated March 3, 2016, in support of Mr. Kretchmer's appeal.

24. In his submissions, counsel argues that Mr. Kretchmer was terminated for a single act of misconduct, not a series of failures or transgressions. He relies on the decisions of the Tribunal in *Kenneth Kruger* (BC EST # D003/97), and the Supreme Court of Canada in *McKinley v. BC Tel*, 2001 SCC 38, to argue that in order to find that a single act of misconduct by an employee can justify summary dismissal without warning, the Director should consider the employee's length of service and contributions to the company, should be guided by common law jurisprudence, and should consider whether the case presented "exceptional circumstances" where the conduct was so serious that it fundamentally and irreparably breached the employment relationship.

25. Counsel then refers to and summarizes two (2) Tribunal decisions, *Downie Timber* (BC EST # D023/98) and *Keep On Trucking* (BC EST # D087/99), and contends that the facts in these cases are comparable to the facts found by the delegate in the present case and demonstrate the proper application of the concept of "just cause" when it comes to single acts of misconduct. *Downie Timber* involved a threat uttered by an existing employee, away from work, to his supervisor, and *Keep On Trucking* involved a threat uttered by an employee to the president of the company after the latter terminated his employment. Counsel contends that the threats in both cases were comparable to the threat made by Mr. Kretchmer in the present case to Mr. Blackstock, but the adjudicator did not find them sufficient to constitute just cause for summary dismissal.

26. Counsel then goes on to discuss both the *Downie Timber* and *Keep on Trucking* cases in greater detail and argues that the facts in *Downie Timber* were more aggravating, relative to the facts in the present case, and even then the Tribunal did not find the employer had just cause to terminate the employee:

> First, the threat made by the Appellant in the present case was instigated by Mr. Blackstock calling him an 'idiot'. While it is admitted that the Appellant's reaction was disproportionate to the insult received, there was at least a provocation for the ensuing argument and threat. In *Downie Timber*, however, the employee made the threat in response to a greeting from the employer when the employee mistakenly thought the supervisor was spying on him.
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> Second, the threat in *Downie Timber* was made to a supervisor. The Adjudicator in that case noted that 'the act of threatening [a supervisor] is contemptuous of authority and undermines the ability of the employer to manage'. These aggravating factors are not present in this case, as the threat was not made to a person in authority.
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> Third, the Appellant has been employed by 4 Seasons for more than 9 years, where the employee who made the threat in *Downie Timber* had been employed for just over 6 years.
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> Finally, in the *Downie Timber* case, the worker, one day after being suspended for violent threats, called the supervisor and called him a 'gutless coward' before threatening to 'bash his head in' once again. There was only one incident of misconduct in the Appellant's case.
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> The *Keep On Trucking* case is also of some assistance. The employee in that case had been employed for less than a year. He was told by his employer that he was being laid off because of operational losses. The employee threatened the president of the company with physical violence. Using abusive language, the employee told the president over the phone that, if he had a vehicle, he would come to the president's residence and give him 'what for' and punch him 100 times in the face. The adjudicator noted that the employee had already been dismissed and was upset about it when he made the threats, but it should also be noted that the relatively new employee made abusive threats of physical violence to the president of the company, and the Adjudicator still found that the employee was entitled to be compensated for length of service.

27. In concluding that the delegate failed to properly apply the principle of "just cause" to the facts in this case, counsel reasons as follows:

> The Director found that 4 Seasons was 'justified in dismissing Mr. Kretchmer, as it was entitled to expect that employees would not engage in abusive behaviour towards coworkers' and the employer 'did not need to warn Mr. Kretchmer about his impugned conduct, apply discipline short of dismissal, and then give him another chance to improve his behaviour'. With respect, the decision[s] in *Downie Timber* and *Keep on Trucking* are inconsistent with these findings. I assume that the employer in *Downie Timber* was also entitled to expect that employees would not engage in abusive behaviour towards coworkers (let alone supervisors), yet the Adjudicator found that almost identical abusive threats to those made in this case did not 'justify dismissal'. Furthermore, in *Downie Timber*, the employer *did* provide the employee with a warning, discipline short of dismissal, and another chance to improve his behaviour. A day after that

> progressive discipline was imposed, the employee made *another* threat to a supervisor, and the Adjudicator still found that termination without notice was not justified.
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> I submit that the Director has not applied the principle of 'just cause' properly in this case. It is inconsistent with the application of the principle in analogous cases, and is not supported by any analysis of the principle with reference to common law jurisprudence, which is highly relevant given that no definition of 'just cause' is found in the Act.
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> I submit that, when considering the common law jurisprudence and the Appellant's length of service and contributions to the company, it cannot be determined that the Appellant's single act rose to the level of an 'exceptional circumstance' of gross misconduct of such seriousness that it fundamentally and irreparably breached the employment relationship.

28. Counsel asks the Tribunal, in the circumstances, to vary the Determination and award compensation to Mr. Kretchmer for length of service, including vacation pay thereon and any accrued interest.

ANALYSIS

29. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> (a) the director erred in law;
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> (b) the director failed to observe the principles of natural justice in making the determination;
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> (c) evidence has become available that was not available at the time the determination was being made.

30. The Tribunal has indicated time and again that an appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal that there is an error in the determination under one of the above statutory grounds.

31. Having said this, it should be noted that the grounds of appeal listed in section 112(1) do not provide for an appeal based on errors of fact, and the Tribunal does not have any authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than that made by the Director in the determination unless the latter's findings raise an error of law (see *Britco Structures Ltd.*, BC EST # D260/03).

32. Mr. Kretchmer, through counsel, argues that the Director erred in law in finding, in the Determination, that 4 Seasons discharged its liability to pay him compensation for his length of service pursuant to section 63(3)(c) of the *Act*.

33. It should be noted that section 63 of the *Act* sets out a statutory liability on an employer to pay length of service compensation to an employee upon termination of employment. That statutory liability may be discharged by the employer by giving appropriate notice to the employee, by providing a combination of notice and payment in lieu of notice to the employee, or by paying the employee wages equivalent to the period of notice to which the employee is entitled under the *Act*.

34. Alternatively, an employer may be discharged from this statutory liability by the conduct of the employee, if the employee resigns, retires or is dismissed for "just cause".

35. As indicated, Mr. Kretchmer states that the Director made an error of law in finding that 4 Seasons had just cause to terminate him and, therefore, had discharged its liability to pay Mr. Kretchmer compensation for length of service pursuant to section 63(3)(c) of the *Act*.

36. The Tribunal has adopted the following test outlined by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.) to determine whether an error of law has been made:

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment 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 reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

37. I am not persuaded that any of the findings of fact made by the delegate, or the principles of general law governing the issue of just cause considered by the delegate, or the method of assessment employed by the delegate in coming to the conclusion that 4 Seasons had just cause to terminate Mr. Kretchmer's employment can be said to be an error of law.

38. In *Kenneth Kruger*, *supra*, the Tribunal summarized the principles of law that apply when considering the issue of whether just cause has been proved as follows:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer;
2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:
    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.
3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.
4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

39. This case involves a summary dismissal of Mr. Kretchmer by 4 Seasons based on a single act of misconduct. Therefore, if an error of law can be said to exist, it has to be found in the delegate's conclusion that 4 Seasons had just cause and, therefore, had discharged its liability to pay Mr. Kretchmer compensation for length of service pursuant to section 63(3)(c) of the *Act*.

40. It should be noted that, in *Esquimalt Saanich Taxi Ltd.* (BC EST # D203/01), the Tribunal stated that in cases of deliberate and intentional misconduct:

> …just cause can exist as a result of a single act where the act is willful and deliberate and is inconsistent with the continuation of the contract of employment, or inconsistent with the proper discharge of the employee's duties, prejudicial to the employer's interests, is breach of trust, or is such as to repudiate the employment relationship. In these cases, there is no requirement for warnings and certainly no requirement for progressive discipline.
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> Just cause in cases of misconduct can include fundamental breaches of the employment relationship such as criminal acts, gross incompetence, breach of trust, insubordination, or a significant breach of workplace policy, *Re: Silverline Security Locksmith Ltd.*, BCEST#D207/96.

41. In this case, it was not disputed at the Hearing of the Complaint, nor is it disputed in the appeal, that Mr. Kretchmer engaged in a heated argument with Mr. Blackstock on September 25, 2015, and uttered a threat to Mr. Blackstock to the effect of breaking the latter's other leg. Also, in his appeal submissions, counsel for Mr. Kretchmer admits that Mr. Kretchmer's "reaction was disproportionate to the insult received". The question that arises is whether Mr. Kretchmer's conduct in question constituted a minor infraction of a rule or a serious, deliberate and intentional misconduct such as to justify summary dismissal without the requirement of a warning.

42. In reviewing the Reasons, and particularly the delegate's analysis and rationale set out in paragraphs 20 and 21 above, I find that the delegate was indeed guided by common law jurisprudence in concluding that Mr. Kretchmer's conduct constituted a serious, "deliberate and violent" misconduct that fundamentally and irreparably breached the employment relationship and justified his summary dismissal by 4 Seasons. I find the delegate's reasons to be consistent with the principles for determining "just cause" delineated in *Kenneth Kruger, supra*. Mr. Kretchmer's conduct, in my view, clearly exceeded any objective and reasonable threshold of "just cause". While he was not convicted for the threat of violence against Mr. Blackstock and resolved the criminal charge against him by entering into a twelve-month peace bond, this does not reduce or diminish the seriousness of his conduct to a minor infraction, notwithstanding his length of service and contributions to 4 Seasons.

43. I also add that the impact on Mr. Blackstock and 4 Seasons of Mr. Kretchmer's conduct cannot be disregarded in assessing the seriousness of Mr. Kretchmer's conduct. The delegate set out the harm both Mr. Blackstock and 4 Seasons suffered as a result of Mr. Kretchmer's conduct in some detail in the passages from the Reasons quoted in paragraph 20 and 21 above. The delegate noted that Mr. Blackstock was genuinely fearful for his safety as a result of Mr. Kretchmer's actions towards him. He was fearful enough that he sought the assistance of the police. His reaction was severe enough that he missed several days of work and sought counselling from his pastor. In the case of 4 Seasons, the delegate notes that Mr. Kretchmer's actions caused it material harm by reducing productivity and morale. Both Mr. McNeill and Ms. Lakeman spent time and resources addressing the fallout from the altercation instead of focusing their attentions on the regular operation of the company. The atmosphere in the office became tense and that the ordeal "took a toll".

44. In the result, I do not find that the delegate erred in making the findings contained in the Determination, nor did the delegate misapply or misinterpret the *Act* or principles of general law. To the contrary, I find the delegate properly applied the relevant provisions of the *Act*, as well as the principles concerning the determination of just cause at common law. I also find the delegate's findings were based on the evidence before him, and it cannot be said that he acted on a view of facts that could not reasonably be entertained. Therefore, the delegate did not err in law in finding that 4 Seasons had just cause to terminate Mr. Kretchmer's employment.

45. Having said this, there is the matter of the two (2) cases, namely, *Downie Timber* and *Keep On Trucking,* that counsel for Mr. Kretchmer referred to in arguing that the delegate's analysis of just cause and conclusion in

this case were inconsistent with these cases. I do not agree with counsel. First, with respect to the *Keep on Trucking* decision, I note that the delegate, in that case, rejected the employer's argument that the employee's threat of physical harm against the president of the company that "[he] should punch his face 100 times" constituted just cause for termination because that threat was made after the president had already informed the employee of the termination of his employment. The Tribunal stated that "[t]he simple logic of the events supports this conclusion".

46. With respect to the decision in *Downie Timber*, where the employee, Mr. Valair, outside of the workplace, directed profanity against his supervisor, Mr. Marusic, and threatened to kick the latter's head in, the Tribunal, while noting that threatening to assault a supervisor is a serious matter and not acceptable behaviour at any time, found the misconduct in question was not sufficiently serious to justify summary dismissal for the following reasons:

> …First, the initial threat was not treated as significant by Marusic. He did not tell Smythe [Operations Manager] about it until Smythe relayed the comment Valair had made about him and his sister. That is confirmed by both Marusic and Valair in their evidence. As well, Marusic did not tell Smythe of the telephone call which was made by Valair on September 14 until September 20, when he returned from vacation time off.
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> Second, Marusic's response to the threat made on September 11 gave no outward indication that it would be treated as serious misconduct from an employment perspective. His response to that threat was to take off his jacket and reply 'Anytime'.
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> Third, Valair was under considerable pressure relating to his W.C.B. claim. The threats were made by Valair in the context of what he perceived to be a scheme by the employer to adversely affect his W.C.B. benefits, and possibly his employment, and he viewed Marusic to be taking a large part in that scheme. He was both angry and frightened by what he felt was happening. The emotional effect upon him of the pressures he felt are evident in his breaking down and weeping during his meeting with Smythe on September 13.
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> Fourth, the threat made by Valair could not be viewed as imminently likely. Marusic said in his evidence that Valair told him in the September 11 discussion that he would not fight because he was on a compensation claim. Immediately following the threat made by Valair on September 11, Marusic involved himself in a discussion with Valair during which, in his own words, he tried to 'de-escalate' the situation. By the end of the discussion he was satisfied he had done that. For his part, Valair thought it was sorted out between them.
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> Fifth, Marusic was not warned or otherwise disciplined for his part in the incident. If the employees are to believe Downie Timber does not condone threats of assault against their supervisors at any time, their supervisors must be discouraged from inviting the altercation initiated by the threat. Downie Timber seemed unconcerned that Marusic had accepted the challenge offered in the September 11 threat.
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> Finally, while Marusic is a supervisor and from time to time would supervise Valair, there is no indication that the threats had any effect on the ability of the employer to manage its business, or on Marusic's ability to continue to effectively supervise. Valair believed the matter to be unrelated to work and personal to he [*sic*] and Marusic. It was not a direct challenge to the authority of the employer.

47. Unlike in the present case, the threat of violence by the employee in *Downie Timber*, which was made outside of work premises, did not seriously impact the threatened employee or the company the way Mr. Kretchmer's conduct at work did to both Mr. Blackstock and 4 Seasons. While counsel for Mr. Kretchmer, in paragraph 12 of his written submissions, appears to focus on the nature of the threat in *Downie Timber* to suggest that the outcome in the present case should be the same as in the *Downie Timber* case, he appears to disregard or downplay the impact of the threat on the recipient and the employer, both of which are relevant considerations in the assessment of the seriousness of the threat made.

48. Accordingly, I dismiss the appeal.

ORDER

49. Pursuant to section 115 of the *Act*, I order the Determination, dated January 26, 2016, is confirmed as issued.

Shafik Bhalloo
Member
Employment Standards Tribunal