

An appeal

- by -

Centurion Health and Fitness  
(“Centurion”)

- 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:** John E. D. Savage

**FILE No.:** 2007A/067

**DATE OF DECISION:** September 5, 2007

## DECISION

### SUBMISSIONS

Mark Pho	for the Appellant
Chad Green	on his own behalf
Robert D. Krell	on behalf of the Director of Employment Standards

### OVERVIEW

1. Centurion Fitness Ltd. (“Centurion”) appeals a determination of the Director dated April 30, 2007 (the “Determination”) that finds Centurion constructively terminated the employment of Mr. Chad Green (“Green”) when it unilaterally reduced his hours of work by one-half.
2. If a condition of employment is substantially altered the Director may determine that the employment of an employee has been terminated. From such a termination certain consequences arise, such as a requirement to pay compensation for length of service.
3. Centurion says the Director failed to observe the principles of natural justice and the Determination is unreasonable. Green had been less than an ideal employee. It argues that either Green quit or Centurion was justified in terminating his employment.
4. A second issue concerns the breaking of a phone. A telephone used in Centurion’s business was broken. Green purchased a replacement phone that was used in the business. Centurion refused to reimburse Green because it says Green was responsible for breaking the phone.
5. In the circumstances, should Centurion have reimbursed Green for the purchase price of the phone and if so, was the *Employment Standards Act* (the “Act”) breached when it did not?

### ISSUE

6. Did the Director err in law or breach the rules of natural justice in finding that Green was constructively dismissed?
7. Was there just cause for dismissal and is this properly before the Tribunal?
8. Did the Director err in law in determining that Centurion breached the *Act* when it did not reimburse Green for the purchase price of the phone?

### APPEALS UNDER THE *EMPLOYMENT STANDARDS ACT*

9. An appeal of the Director’s Determination is not a new hearing of the complaint, but a limited appeal that must be founded on an error of law, a breach of natural justice, or the finding of evidence that was not available at the time the determination was made: subsection 112(1) *Employment Standards Act*. The

burden of establishing that a Determination is incorrect rests with an Appellant: *Natalie Garbuzova* BC EST # D684/01.

10. With respect to appeals alleging an error of law, this Tribunal has a jurisdiction similar to that of an appellate court. In a number of decisions of the Tribunal, panels have adopted the definition of “error of law” set out 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.). That definition can be paraphrased as finding an error of law where there is:
1. a misinterpretation or misapplication of a section of a statute;
  2. a misapplication of an applicable principle of general law;
  3. acting without any evidence;
  4. adopting a view of the facts which could not reasonably be entertained; and
  5. adopting a methodology that is wrong in principle.
11. In this case, as I understand the submission, it is that the Director erred in law in adopting a view of the facts that could not reasonably be entertained. There is no breach of natural justice alleged, except in the appeal form, so these reasons address whether the Delegate erred in law.

## **CONSTRUCTIVE DISMISSAL AND SECTION 66**

12. At common law termination of employment can arise in a variety of circumstances, not just dismissal from employment. For example, a fundamental breach by the Employer of an important term of the contract of employment can give rise to a finding that there has been constructive dismissal.
13. Each case requires an examination of the terms of the contract, a determination of whether there has been a breach, and if there has been a breach, whether there is a fundamental breach of the contract: *Reber v. Lloyds Bank International Canada* (1985), 18 D.L.R. (4th) 122 (B.C.C.A.). The adjudicator must identify the terms and conditions of the employment contract, determine whether a unilateral change amounts to a breach of such contract, and determine whether such breach was fundamental or repudiates the contract: *Farber v. Royal Trust Co.* [1997] 1 S.C.R. 846, Re Short BC EST # D061/04.
14. Section 66 of the *Act* incorporates the notion of constructive dismissal into the *Act*. It confers on the Director the requirement to determine whether a condition of employment is substantially altered and consequentially whether the employment of an employee has been terminated.
15. Whether section 66 incorporates all the elements of the common law ingredients of constructive dismissal has been the subject of discussion, with some tribunal members holding that a finding that an alteration is substantial, is less onerous than a requirement that there be a fundamental breach: *Re Helliker*, [1997] BC EST # D338/97.

## **WAS THERE CONSTRUCTIVE DISMISSAL**

16. In this case there is no dispute regarding the change in the terms and conditions of employment. Although Green denied that he ever received the written statement, Centurion filed with the Director and with this appeal a letter addressed to Green. The letter says “I will be reducing your hours to half” and “I am doing this in order to offer Linnea more hours so she will stay on”. This is consistent with the evidence of Green.

17. In the Determination the Delegate considered this wage reduction in the context of the terms and conditions of employment. Clearly if Centurion was reducing Greens hours by one-half, it was understood that Green had regular hours of work substantially in excess of the hours Centurion sought to impose. In the circumstances it is clear that there was or was to be an alteration in the terms and conditions of employment.
18. In the Determination the Delegate also considered whether the change in hours was a substantial alteration in the terms and conditions of employment. The Delegate determined that changing the terms and conditions of employment by reducing an employee's hours by one-half was a substantial change. I agree.
19. Reduction of an employees hours of work can be a fundamental breach of an employment contract: *Smith v. Tamblyn (Alberta) Ltd.* (1979), 9 Alta L.R. (2d) 274. This tribunal has found that a reduction in hours of work by 40% constituted a constructive dismissal in *Re Simpson*, BC EST # D043/06 while a reduction in hours of work by 50% of a part time employee was found to be even more significant, in constituting a constructive dismissal in *Re JB's Bagatelle Ltd.*, BC EST # D027/99.
20. In the circumstances, in my opinion, reduction of hours of work by one half in this case constituted constructive termination of the contract of employment. The conclusion of the Delegate, that this amounted to a substantial alteration of the contract of employment, is one that is, in my opinion, reasonable and supported by the evidence.

## **JUST CAUSE**

21. In places in its submission here, Centurion argues that it had just cause for Green's dismissal, since he broke the telephone. Green denied breaking the telephone. It is not apparent that Centurion argued that Green was dismissed for just cause before the Delegate. It is, in my opinion, too late on an appeal to introduce a new ground to justify a dismissal. That arises because of the limited nature of a review under the *Act*.
22. Centurion says it might have dismissed Green for just cause because he intentionally broke a telephone while at work. It did not terminate Green, however, and his employment continued until his departure. The phone incident arose on or before July 27, 2006. Green left his employment on August 18, 2007.
23. The limited nature of a review under the *Act* requires that the parties together with the Delegate define the issues in contest. The parties will, accordingly, adduce evidence related to those issues. When a Delegate renders a decision it should address the issues so defined as raised by the parties. A Delegate cannot have erred in law if his Determination fails to address an issue raised for the first time on appeal.
24. In any event, it is apparent that Centurion did not consider Green's act, whether intentional or not, as an act justifying dismissal. Green continued to be employed for some three weeks following the breaking of the phone. In such circumstances it is not open for an employer to, having condoned the act, hold it in reserve should it later determine it wishes to dismiss an employee or substantially change the circumstances of their employment.

## **FINANCIAL RESPONSIBILITY FOR BROKEN PHONE**

25. It is apparent that there was a conflict in evidence before the Delegate. Centurion says Green intentionally broke the phone. Green says he did not break the phone. The Delegate found that he did

not have the jurisdiction to determine whether Green should be held responsible for the breaking of the phone. In the context of the case before the Delegate, I agree.

26. Section 21 of the *Act* provides that “An employer must not require an employee to pay any of the employer’s business costs except as permitted by the regulations”. It is not disputed that the original phone and the phone purchased by Green were used in the business. The Delegate found that the cost of the phone is a business cost of the employer, so Green should have been reimbursed. Since Green was not reimbursed, the *Act* was breached, since he was not paid what he was owed in a timely manner.
27. Whether ultimately the cost of the phone, as between Centurion and Green, should be born by Green is not a matter determined by the Delegate. Nor should it have been.
28. If an employee breaks tools, equipment, or other things belonging to an employer and used in the employer’s business, the financial responsibility for such breakage is a matter for another forum. It is not a matter for a delegate who is only charged with determining the matters entrusted to him or her under the *Act*.
29. If an employee purchases tools, equipment, or other things for use in an employer’s business, then section 21 will normally apply if those things are used in the employer’s business, as they were here.
30. The requirement that an employer reimburses an employee for business purchases, however, does not end the matter, unless the parties choose not to pursue it. Civil liability for damage to an employer’s property is a matter that can be determined by a court if needs be. In the meantime, however, the *Act* requires that the employer repay these business costs. If the amounts are not repaid in a timely manner, the *Act* is breached, as it was here.

## SUMMARY

31. In the circumstances I find that the Delegate did not err in law or breach the principles of natural justice in finding that Green was constructively dismissed. The Delegate did not err in law in finding that the cost of a phone used in the business was a business cost of the employer and should have been paid by the employer. As there were two different breaches the *Act* requires the imposition of two administrative penalties.

## ORDER

32. Pursuant to section 115 of the *Act* I confirm the Determination of the Delegate.

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**John E. D. Savage**  
**Member**  
**Employment Standards Tribunal**