Employment Standards TRIBUNAL

An appeal

- by -

Siegfredo B. Bercasio
(the "Appellant")

- 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.: 2009A/063

DATE OF DECISION: August 24, 2009

British Columbia

DECISION

SUBMISSIONS

Siegfredo Bercasio	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

INTRODUCTION

1. The Appellant, Mr. Siegfredo Bercasio (the "Appellant"), was dismissed from his employment as a vehicle sales representative on November 8, 2008. On November 13, 2008 he filed an unpaid wage complaint against his former employer, Hallmark Ford Sales Ltd. (the "Employer"), a motor vehicle dealership. The complaint was investigated and ultimately dismissed in its entirety by way of a determination issued by a delegate of the Director of Employment Standards (the "delegate") on May 6, 2009 (the "Determination"). The Appellant now appeals to the Tribunal, pursuant to sections 112(1)(a) and (b) of the *Employment Standards Act* (the "*Act*"), on the grounds that the delegate erred in law and otherwise failed to observe the principles of natural justice in making the Determination.

2. Although the Appellant originally asked the Tribunal to conduct an oral appeal hearing, the Appellant did not provide any evidence or argument as to why this appeal could not be appropriately adjudicated based on the parties' written submissions. The parties have been given a full opportunity to present their evidence and argument in writing and both the Appellant and the Director's delegate have availed themselves of that opportunity. In my view, and particularly given the nature of the arguments advanced by the Appellant, this appeal can be fairly adjudicated based on the parties' written submissions.

3. I have before me the Appellant's Appeal Form to which is appended a number of other documents (most of which were before the delegate) as well as the Appellant's further written submissions dated July 10, 21. and 23, 2009. I also have considered the delegate's submission dated July 7, 2009 and the section 112(5) "record" that was before the delegate when the Determination was being made. Although invited to do so, the Employer chose not to file any submission in response to this appeal.

4. In my view, the Appellant's July 21, 2009 submission is not admissible before the Tribunal. This brief submission simply attaches two short handwritten statements, each dated July 15, 2009, apparently signed by Gordon Juli, also a former sales representative with the Employer. The delegate interviewed Mr. Juli and thus this evidence was (or could have been) placed before the delegate. Further, the two statements have little, if any, probative value regarding the issues now before me. I do not find that either statement meets the statutory test set out in section 112(1)(c) to be admissible as "new evidence". New evidence is admissible under section 112(1)(c) if the following criteria have been satisfied:

    i) 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;

    ii) the evidence must be relevant to a material issue arising from the complaint;

    iii) the evidence must be credible in the sense that it is reasonably capable of belief; and

iv) 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.

(See *Davies et al.*, BC EST # D171/03)

In my view, neither of the two proffered statements meets the threshold for admissibility under section 112(1)(c).

THE DETERMINATION

5. As is detailed at page 3 of the delegate's "Reasons for the Determination", the Appellant's unpaid wage complaint was originally scheduled for adjudication by way of an oral complaint hearing. The hearing commenced on January 19, 2009 at 9 a.m. and was adjourned over the lunch hour. Shortly before the hearing was to reconvene, the Appellant asked for an adjournment stating he was not feeling well and then left without the presiding officer having ruled on the adjournment request. Attempts were made to contact the Appellant by telephone and e-mail that resulted in the Appellant sending an e-mail communication to the presiding officer stating "you can proceed without me". Initially, the delegate decided to simply continue the hearing as a "written submission" hearing; however, at a later point, the Director's delegate decided to abandon that hearing process and thereafter conducted an investigation into the unpaid wage complaint. I understand that the employment standards officer who was originally assigned the task of conducting the complaint hearing (and who heard some evidence before the hearing was abandoned) was the same delegate who ultimately conducted the investigation and issued the Determination now before me. It also appears that the delegate did consider the testimony that she heard during the course of the complaint hearing – this evidence consisted of the evidence in chief and cross-examination of those witnesses who appeared in the morning before the hearing was abandoned following the lunch recess.

6. The ensuing investigation focused on the five specific issues that the Appellant identified in his original complaint and later written submissions, namely, compensation for length of service (section 63), alleged pre-hire misrepresentations (section 8), unpaid commissions and regular wages (Part 3), and unauthorized wage deductions (sections 21/22). As noted at the outset of these reasons, the delegate dismissed each separate claim. Briefly, the delegate concluded that the Appellant was dismissed for just cause and thus the Employer was not obliged to pay any compensation for length of service. The Appellant's section 8 claim was rejected in part because the alleged misrepresentations did not fall within the ambit of section 8 (in essence, these allegations concerned alleged mistreatment by the employer toward the Appellant during the latter's employment) and, additionally, because the representations made about the nature of the Appellant's compensation arrangements were accurate. The Appellant's claims for unpaid wages (commissions and unpaid regular wages) were dismissed as being statue-barred under section 80 and, in any event, were simply not proven on the evidence. Finally, the claim relating to unauthorized wage deductions was dismissed since the deductions in question were permitted under the *Act*.

7. The Appellant says that the Determination should be cancelled because the delegate's conclusions arose from a hearing process that was tainted by breaches of the principles of natural justice and, in any event, the Determination is predicated on serious errors of law. I shall deal with each of these separate lines of attack in turn dealing first with the natural justice allegations.

ALLEGED BREACHES OF NATURAL JUSTICE

8. The Appellant's attack under the "natural justice" ground of appeal is predicated on several assertions. These assertions are all contained in the Appellant's 2-page July 10, 2009 submission (there is nothing in the Appellant's July 23, 2009 submission addressing "natural justice" concerns other than the wholly untenable assertion that the delegate should have refused to allow one of the Employer's witnesses to testify since this person was "spouting half truths, falsehoods, defamations and fabrications"). On this latter point, I will simply observe that witnesses often say things during their testimony that the other party finds wholly objectionable – that is not a proper basis to "gag" the witness; rather, the whole point of cross-examination is to allow the adverse party the opportunity to question the witness and thereby (hopefully) expose the witness's lack of candour. Further, and more generally, I note that all of the Appellant's allegations regarding alleged "natural justice" violations relate to the January 19, 2009 complaint hearing – a hearing, as noted above, that was abandoned after the Appellant refused to continue to participate. Thereafter, the complaint was adjudicated based on information gleaned (for the most part) via an investigation. There is no evidence before me that the delegate neglected to consider, during the course of her investigation, relevant evidence that the Appellant submitted to her.

9. In a letter dated May 6, 2009 (appended to the Appellant's Appeal Form), the Appellant stated that the delegate "demonstrated bias in favour of the Employer before, during and after the hearing". This allegation is wholly unsupported by any evidence and seems to be predicated on the simple fact that the Appellant's complaint was ultimately dismissed in its entirety. There is absolutely nothing in the material before me that raises even a *prima facie* concern that the delegate was in some way predisposed in favour of the Employer. I do not intend to say anything further about this unfounded allegation.

10. The Appellant made several allegations that arguably might raise (taking a very generous view of the matter) natural justice concerns. First, the Appellant says that at the outset of the subsequently abandoned complaint hearing, he asked the presiding employment standards officer for permission to have the hearing taped and to be "witnessed by a member of the ethnic media". Second, he says that the delegate accepted and relied on a "fabricated" letter from the Employer. Third, the Appellant says that witnesses were allowed to "fraternize" before the hearing commenced and that this alleged procedural failing "invalidated" the hearing. Fourth, witnesses "were called at the last minute giving no time to review their evidence". On this latter point, the evidence before me is that the Appellant was advised less than 2 weeks before the hearing that these witnesses might testify for the Employer. The Appellant disputes the presiding officer's evidence that he was offered and rejected the option of having the hearing adjourned to allow him further preparation time. Finally, the Appellant has rather obliquely advanced the notion that perhaps some evidence was not produced despite being summoned: "There is guess work whether evidence subpoenaed could or would have been presented." I shall briefly address each allegation in turn.

11. The delegate's refusal to allow the proceedings to be taped does not amount to a contravention of the principles of natural justice. Generally speaking, when administrative proceedings are recorded on an *ad hoc* basis, the recording is undertaken by a neutral person (not an interested party) and only after full disclosure and consent. Where proceedings are recorded, invariably the tribunal itself controls the recording process and maintains possession of the ensuing electronic record. The January 19, 2009 complaint hearing was eventually abandoned so it is difficult for me to even envision how the delegate's decision not to allow the Appellant to tape-record the proceedings ultimately affected the fairness of the later investigation. Further, the delegate's failure to allow the proceedings to be tape-recorded is entirely consistent with the protocol that the Tribunal has adopted for oral hearings (see, for example, *Tennant*, BC EST # D302/97 and *Galter Holdings Ltd.*, BC EST # D289/00, confirming D074/00). Similarly, the delegate's discretionary decision to only allow the parties and their witnesses to remain in the hearing room, in the context of this case (where the matter

was, in any event, ultimately resolved via a private investigation process) does not, in my view, constitute a failure to observe the principles of natural justice.

12. The Appellant's allegation that the delegate relied on "fabricated" letters does not, on its face, raise a natural justice concerns unless, of course, it could be irrefutably accepted that the delegate knowingly based her decision on evidence that was, in effect, "manufactured". In general, a decision-maker's reliance on clearly unreliable evidence constitutes an error of law. Parties often challenge the veracity of documents that are tendered at a hearing and, of course, the process of cross-examination affords the adverse party a direct opportunity to challenge the veracity of the other side's evidence whether proffered by way of oral testimony or in the form of a document. Although this is not clear from the Appellant's material, it appears that the critical document in question is a September 5, 2008 "warning letter" (headed "Notice to Payroll Department") issued to him by the Employer following an incident that occurred at the workplace the day before. Had this matter proceeded as a complaint hearing, the Appellant would have had the opportunity to challenge the veracity of the warning letter through cross-examination. Of course, since the Appellant refused to continue to participate in the complaint hearing, his right to cross-examine the Employer's witnesses regarding the warning letter was, by his own actions, frustrated. After the delegate determined to continue the process as an investigation, she did turn her mind to the Appellant's challenge to the September 5th warning letter. The delegate addressed this matter at pages 14 – 15 of her Reasons for the Determination ("Reasons"). In my view, the delegate carefully considered the parties' conflicting evidence and her conclusion that the September 5th "Notice to Payroll Department" was the same document that was presented to the Appellant on September 5, 2008 (and which he refused to sign as having received) was an entirely reasonably conclusion. The delegate noted that the Appellant acknowledged having been given some sort of warning document and, in addition, noted that the Appellant's own evidence about the contents of the document "is fairly consistent with the wording of the warning". I do not consider the delegate's decision on this point to reflect a contravention of the principles of natural justice or an error of law.

13. With respect to the Appellant's other allegations regarding "natural justice", there is no principle of law that forbids witnesses from speaking with each other in advance of an oral hearing although there is a generally recognized rule that a witness who has testified should not discuss their testimony with other potential witnesses prior to the latter giving their own evidence at the hearing. In this case, the entire issue is moot since none of the witnesses testified at the abandoned complaint hearing. The Appellant's concern about witnesses being allowed to testify even though he only received notice to that effect several days before the date of the complaint hearing is similarly not relevant in light of the fact that these witnesses never did testify since the hearing was abandoned. In any event, even if the hearing had proceeded, I am satisfied that the Appellant was offered, but refused, an adjournment that would have allowed him whatever additional preparation time he required. Finally, with respect to the evidence that was before the delegate, there is nothing in the material before me that suggests the delegate ignored relevant evidence that was placed before her or that either party was denied the opportunity, consistent with section 77 of the *Act*, to comment on the evidence tendered by the other party.

14. In sum, I am not persuaded that the Determination should be cancelled on the basis that the delegate failed to observe the principles of natural justice. I now turn to the "error of law" ground.

ALLEGED ERRORS OF LAW

15. The Appellant has not specifically identified any alleged errors of law, however, it seems clear from the general tenor of the Appellant's various submissions that he does not believe the Employer satisfactorily demonstrated that it had just cause for dismissal and that the delegate otherwise erred in rejecting his various

claims for unpaid wages, recovery of an unauthorized wage deduction and compensation for section 8 misrepresentations.

16. I propose to briefly address the delegate's various findings regarding these issues save for the matter of "just cause" which I will address more fully. The delegate's conclusions regarding section 8 (pre-hire misrepresentations) are set out at pages 15 – 16 of her Reasons. Certain of the Appellant's allegations should be addressed in another forum (for example, complaints about harassment and discrimination) and, I understand that the Appellant has, in fact, filed a complaint with the B.C. Human Rights Tribunal. The one issue that was properly before the delegate, namely, an allegation that the Employer misrepresented the nature of the Appellant's compensation arrangements was addressed (Reasons, pages 15 – 16). The delegate reviewed various payroll records and found them to be entirely consistent with the Appellant's evidence regarding his understanding of the compensation scheme. The delegate dealt with the Appellant's claim for unpaid wages at pages 16 – 18 of her Reasons and I am unable to conclude based on the material before me that the delegate's conclusions are not based on a proper evidentiary foundation. Further, I agree with the delegate's conclusion regarding section 80 of the *Act* which, in this case, stands as a statutory bar to certain components of the Appellant's claim. The evidentiary record amply supports the delegate's conclusion that there were no unauthorized wage deductions (see Reasons, pages 19 – 20). I now turn to the "just cause" issue.

17. Compensation for length of service (section 63) takes the form of an earned benefit (defined as "wages" in section 1 of the *Act*) that is presumptively payable upon termination of employment. Compensation for length of service is not simply the statutory equivalent of "severance pay in lieu of reasonable notice" (*i.e.*, a form damages payable for breach of an employment contract; see *Colak v. UV Systems Technology Inc.*, 2007 BCCA 220) although, in either case, an employer is not obliged to make payment if it has "just cause" for dismissal (see the *Act* section 63(3)(c)).

18. "Just cause" is not defined in the *Act*, however, there is a well understood common law definition, namely, that the employee has fundamentally failed to perform an essential term of their employment contract (more formally, this is known as a "repudiation" of the employment contract). In *McKinley v. BC Tel*, [2001] 2 S.C.R. 161, the Supreme Court of Canada emphasized that just cause must be assessed in light of the overall context of the misconduct (para. 48) and that dismissal must be a proportional response to the nature of the misconduct in question (para. 53):

> In light of the foregoing analysis, I am of the view that whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically, the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer…
>
> Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed…

Although *McKinley* concerned alleged employee dishonesty, the Supreme Court of Canada's comments regarding "just cause" have been applied to other forms of misconduct (see *e.g.*, *Wise v. Broadway Properties Ltd.*, 2005 BCCA 546; *Menagh v. Hamilton* (City), 2007 ONCA 244; *Hodgins v. St. John Council for Alberta*, 2008 ABCA 173).

19. As I read the delegate's reasons, she appears to have inappropriately "blended" two quite separate matters, namely, just cause arising from poor performance (discussed at pages 13 – 14 of her Reasons) and just cause based on "insubordination" (at page 15; although the delegate does not actually use this term). Just cause arising from poor performance relates to the *quality* (or, in some cases, the *quantity*) of the work performed whereas insubordination flows from the employee's refusal to carry out, or otherwise abide by, the employer's lawful instructions. The delegate appears to have concluded that the Employer had just cause for dismissal since it instructed the Appellant (by way of the September 5, 2008 "warning letter") that he must not continue certain behaviours and, if he persisted, he would be terminated. The delegate's key findings are reproduced below (Reasons, page 15):

> Given that [the Appellant's] submission states that he was asked to sign a document on September 5, 2008 and his description of the document is fairly consistent with the wording of that warning, I find that the document [the Appellant] refers to in his submission is the "Notice to Payroll" dated September 5, 2008. On the balance of probabilities, I find that [the Appellant] received this warning. [The Employer's representative] states that when he gave [the Appellant] this letter, he informed him that his employment would be terminated if he did not follow the chain of command. The fact that [the Appellant] refused to sign this warning does not negate it. It is not unreasonable for an employer to ask its employees to deal with problems and issues through their managers before escalating the issues up through the chain of command…
>
> I find that the employer set and communicated a reasonable standard and informed the [Appellant] how he was not meeting the standard; [the Appellant] was informed that if he wished to continue to work for [the Employer] he would need to follow this standard. On November 7, 2008, [the Appellant] again contacted administrative staff in regards to pay issues instead of following the chain of command as he had been instructed to do in warning given to him on September 5, 2008. [The Appellant] was subsequently terminated. I find that the employer has discharged its liability to pay compensation for length of service and [the Appellant] is not entitled to it.

20. I have already noted that the delegate's finding regarding the veracity of the Employer's September 8, 2008 "warning letter" must stand. That said, it does not inevitably follow that the Employer had just cause for dismissal based on the Appellant's behaviour after the contents of that letter were reviewed with him. The delegate found that prior to September 2008, the Appellant often spoke directly with the Employer's former payroll administrator and other administrative staff regarding payroll and related concerns. On September 4, 2008 the Appellant approached the payroll administrator and inquired about a matter relating to his pay and then asked to see his personnel file (Reasons, page 5). This former inquiry was answered but the latter request was rebuffed; the Appellant was apparently advised that he would only be permitted to review his personnel file in the presence of his sales manager and that, in future, all payroll or other administrative concerns must be routed through his sales manager. These events apparently precipitated the September 5, 2008 "warning letter".

21. As previously noted, the September 5th "warning letter" is in the form of a "Notice to Payroll" – it is an internal memorandum that is not specifically addressed to the Appellant although he was presented with a copy of the document that he read but refused to sign. The 1-page form document contains a 1-paragraph printed note that states:

> Freddy must follow protocalls [*sic*] at Hallmark Ford if he wishes to continue working here. Some of these protocalls [*sic*] in clude [*sic*] but are not limited to staying out of the managers [*sic*] desk area unless invited up. Staying out of the accounting office unless instructed to enter by a manager and following the chain of command by speaking to a sales manager about any issues he has first. If sales managers don't [*sic*] know that there is an issue it can not [*sic*] be solved.

22. In early November 2008 events occurred that led to the Appellant's summary dismissal. These events are recorded in the delegate's Reasons (at pages 6 – 7) as follows:

> [The Appellant] asked why [the previous payroll administrator] had an open-door policy of welcoming any concerns employees had with the dealership. [The Employer's controller] stated she performed her work in accordance with company policies and could not speak to the way in which [the former payroll administrator] did her job. [The controller] stated she had not been aware that [the previous payroll administrator] discussed issues with employees. She became aware of this when [the current payroll administrator] informed her that this appeared to have occurred.
>
> On November 6, 2008, [the current payroll administrator] stated [the Appellant] approached her while she was at the photocopier and asked her whether he was getting top-up pay. She stated that she told him she could not remember off the top of her head but didn't think he was not getting one. She told him if he was getting one he would receive it on the 5th day of the month. She stated that the following Friday, [the Appellant] called her to question her as to why he had not received a cheque. She told him to speak to [one of the Employer's sales managers] as [the Appellant's sales manager] was not in that day…
>
> During the hearing, [the Appellant] questioned [the current payroll administrator] as to why he had not received a top-up cheque after she had told him he was going to receive one. She responded that it was human error. She had tried to cut the cheques the day before [the Appellant] had asked her the question and she had thought she had cut one for him. Later she realized she had not. She stated she doesn't keep track of each individual by name.
>
> [One of the Employer's sales managers] testified [the Appellant] spoke to administration before approaching him in regards to his pay issue on November 7, 2008.
>
> [The Appellant] questioned [one of the Employer's sales managers] in regards [*sic*] to his termination and whether [the sales manager] felt it was just cause to dismiss an employee for speaking to payroll in regard to pay issues. [The sales manager] responded that yes it was just cause for termination.

The Appellant was terminated the next day (November 8, 2008), allegedly for cause.

23. I do not doubt that the Appellant's failure to follow the Employer's protocol regarding payroll or other administrative inquiries was cause for some sort of disciplinary action. Undoubtedly, the Employer was frustrated about the Appellant's attempts to circumvent the "chain of command" and take his complaints directly to the payroll office rather than routing them through his sales manager. On the other hand, the uncontroverted evidence is that this is precisely the practice that was followed during the former payroll administrator's tenure.

24. The evidence is that the Appellant asked the payroll administrator if he would be receiving a "top up" cheque and was given the impression that he would be receiving such a payment. When that payment did not materialize, he followed up on the matter with the payroll administrator directly. This was, of course, contrary to the earlier written instructions he received but, in my judgment, hardly qualifies as a "capital offence". The payroll administrator told him to go and speak with a specific sales manager and this is precisely what the Appellant did. The Appellant's crime was that he "spoke to payroll in regard to pay issues" directly rather that lodging the request with his sales manager and for that failing he was terminated. I think it important to reiterate that when the payroll administrator reminded the Appellant that his concern would have to be first taken up with a sales manager, the Appellant fully complied (the very next day) with that instruction. In my view, and taking a contextual approach to the circumstances, summary termination was a wholly disproportionate response to the behaviour in question.

25. In *Keays v. Honda Canada Inc.*, 2006 CanLII 33191 the Ontario Court of Appeal observed that only very serious insubordination justifies the ultimate penalty of summary dismissal without pay or notice (at paras. 30 and 31) – the Ontario Court of Appeal's finding on this point was not disturbed by the Supreme Court of Canada (see *Honda Canada Inc. v. Keays*, 2008 SCC 39):

> The appellant also attacks the trial judge's finding that the appellant's dismissal of the respondent was totally disproportionate to his alleged insubordination and, therefore, was done without just cause.
>
> In my view, this argument also fails. In *McKinley v. B.C. Tel.*, 2001 SCC 38 (CanLII), [2001] 2 S.C.R. 161 at paras. 53-57, the Supreme Court of Canada made it clear that an employer's response to employee misconduct must reflect the principle of proportionality. Just cause for the most serious sanction, namely dismissal, requires the most serious misconduct. The Court describes this degree of employee misconduct in a number of different ways: conduct that gives rise to a breakdown in the employment relationship; conduct that is fundamentally or directly inconsistent with the employee's obligations; or conduct that violates an essential condition of the employment contract. In a broad sense, the question is whether the employee misconduct is irreconcilable with his or her continued employment.

26. Although the Employer may well have had just cause for some disciplinary action, it did not, in my view, have just cause for summary dismissal and I consider the delegate to have erred in finding that there was just cause for summary dismissal without written notice. The Appellant's behaviour in bypassing the chain of command was a breach of the specific instructions that had been previously given to him. However, I do not consider that this breach, standing alone, constituted behaviour that led to an irreconcilable breakdown in the employment relationship thus justifying summary dismissal without any notice.

27. The Employer's actions suggest it clearly had enough of the Appellant and no longer wished to retain his services. In the absence of just cause for dismissal (although it undoubtedly had cause for some lesser disciplinary action), it could have terminated the Appellant by the simple expedient of giving him, in light of his 15 months' service, 2 weeks' written notice of termination. Had the Employer proceeded in this fashion it would have fully satisfied its obligations under the *Act*. However, it failed to give any notice and thus, in my view, the Appellant is entitled to the equivalent of 2 weeks' wages pursuant to section 63(2)(a) of the *Act*.

ORDER

28. Pursuant to section 115(1)(a) and (b) of the *Act*, the Determination is varied to the limited extent that the Appellant is entitled to 2 weeks' wages as compensation for length of service (together with section 88 interest) since he was not dismissed for just cause. The matter of the Appellant's precise monetary entitlement is referred back to the Director for purposes of calculation.

29. In all other respects the Determination is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal