

An appeal

- by -

593174 B.C. Ltd. o/a Scottown Shell Service Station
("Shell")

- 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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2003A/21

DATE OF DECISION: March 18, 2003

DECISION

This decision is based on written submissions by Raj Khera on behalf of 593174 B.C. Ltd., operating as Scottown Shell Service Station ("Shell"), Brad Murrell, and Richard Saunders, a delegate of the Director of Employment Standards.

OVERVIEW

This is an appeal by Shell, pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued December 16, 2002. Mr. Murrell alleged that his employment was terminated without cause, and entitled to compensation for length of service.

The Director concluded that Mr. Murrell was dismissed from his employment without cause, and entitled to compensation for length of service, vacation pay, and interest in the total amount of \$2,188.70.

ISSUE TO BE DECIDED

Whether the Director's delegate erred in concluding that Mr. Murrell's employment was terminated without cause.

FACTS

Mr. Murrell began working for Shell as a service station attendant on February 1, 1996. The current owner/manager purchased the business on January 15, 2002. There is no dispute that the new management reduced Mr. Murrell's hours of work by 25% shortly after taking over the business.

On February 8, 2002, Mr. Murrell complained that Shell's manager, Raj Khera, fired him without cause on February 7. Mr. Murrell alleged that, when he asked Mr. Khera why his employment was being terminated, Mr. Khera told him that he didn't have to tell him. Mr. Murrell also alleged that, although he pressed Mr. Khera for a reason, one was not given.

Mr. Murrell provided the delegate with a letter from Shell's previous owner, Lloyd Ponting, for whom he had worked for 6 years. Mr. Ponting wrote that Mr. Murrell was one of his better employees; that he was dependable, responsible, trustworthy and honest, and that, given an opportunity to hire Mr. Murrell elsewhere, would do so.

The delegate contacted Mr. Khera by letter on September 18 for his response to Mr. Murrell's allegations.

Mr. Khera responded on October 18, contending that, on January 30, 2002, he had given Mr. Murrell a letter warning him that his job performance was not satisfactory, and that if Mr. Murrell's performance did not improve, his employment would be terminated. Mr. Khera also advised the delegate that Mr. Murrell had been given two verbal warnings before he was given the written warning. Mr. Khera stated that, on February 7, he advised Mr. Murrell to look for another job as he was not pleased with his job performance. Mr. Khera alleged that, when he terminated Mr. Murrell's employment, Mr. Murrell made racist comments to him, and assaulted him.

Mr. Murrell denied receiving any verbal or written warnings about his job performance, and denied receiving a copy of the January letter. Mr. Murrell acknowledged being upset when his employment was terminated, but denied that he made racist comments or assaulted Mr. Khera.

The delegate concluded that Mr. Murrell had not made racist comments to Mr. Khera, or assaulted him, since Mr. Khera had not mentioned that to the delegate during his first conversation with him by telephone.

The delegate found that, even if Mr. Murrell had been given the January 30 letter, it did not clearly set out the standards of performance Mr. Murrell was to meet, and, in any event, the seven day period between January 30 and February 7 was an insufficient length of time for Mr. Murrell to meet the required standards of performance. I infer that the delegate concluded that the three week period between the date Mr. Khera assumed ownership of the company and the date of Mr. Murrell's dismissal was too short for Mr. Khera to have assessed that Mr. Murrell's performance was detrimental to Shell, and to then issue two verbal warnings and a written warning.

The delegate concluded that given the inadequate length of time Mr. Murrell may have been given to improve his performance and the lack of any support for Mr. Khera's position, Mr. Murrell had been dismissed without just cause, and concluded he was owed 6 week's compensation for length of service.

ARGUMENT

Mr. Khera argues that the delegate failed to observe principles of natural justice since he was not given an opportunity to prove that Mr. Murrell assaulted him and made racist comments. He contends that he has a witness to that event. Mr. Khera says that, although the delegate did telephone him to advise him about the complaint, the discussion was solely about Mr. Khera's response letter. Mr. Khera says that the delegate never asked him any other questions, or explained how the process worked. He contends that the delegate issued the determination after he provided his written response. He alleges that the only verbal contact he had with the delegate was regarding the process, not the substance of the complaint. Mr. Khera provides names of two witnesses to the alleged assault and racist comments in his letter of appeal, and included their written statements.

Mr. Khera also made submissions on issues that do not relate to the grounds of the appeal, and I have not set them out here.

Much of Mr. Murrell's submissions also relate to matters that are not relevant to this appeal, and I have not set them out here. However, Mr. Murrell disputes Mr. Khera's allegations that he called him racist names or assaulted him. He does acknowledge, however, that he was very upset because his employment had been terminated for reasons he felt were unfair and false, and that he likely used profanity in his final conversation with Mr. Khera.

The delegate did not reply to Mr. Khera's allegation that he was denied an opportunity to provide witness statements, that Mr. Murrell made racist comments to him, or that he was never interviewed on the telephone, and therefore, had no opportunity to mention the incident that occurred on the date Mr. Murrell was fired.

ANALYSIS

The burden is on an appellant to substantiate the grounds of appeal. Mr. Khera does not appear to dispute the delegate's conclusions that the reasons for Mr. Murrell's dismissal, that being that his conduct up to February 7 did not constitute grounds for termination without cause. The sole issue on appeal is whether the delegate failed to observe the principles of natural justice in making the Determination.

Having reviewed the submissions of the parties, the appellant has not persuaded me that the Determination should be set aside.

Natural justice and fairness, broadly speaking, are procedural rights that encompass two major principles; the right to be heard, and the right to be heard by an unbiased party. The right to be heard includes the right of a party to know the allegations against them, the right to dispute or clarify anything that may be prejudicial to their interest, and to present arguments and evidence supporting their own position. It is this aspect of natural justice to which Mr. Khera refers.

The delegate's determination against Mr. Khera rests, in part, on his finding that Mr. Khera failed to mention Mr. Murrell's allegedly racist behaviour at the first possible opportunity. Mr. Khera alleges that he was never interviewed by telephone prior to the issuance of the determination, and thus, was never given the opportunity to mention it.

The record discloses that, after being notified by the delegate in writing of the complaint and the criteria Shell would have to meet to establish just cause, Mr. Khera responded with a letter detailing the concerns he had with Mr. Murrell's performance. His response, which was considered by the delegate, set out his reasons for terminating Mr. Murrell's employment. Mr. Khera stated that he spoke to Mr. Murrell on several occasions regarding his refusal to stock shelves and other housekeeping duties, and that, on February 7, he took Mr. Murrell into his office and told him to look for another job. Mr. Khera wrote that Mr. Murrell got angry at him, and began shouting and swearing at him. Mr. Khera also alleged that Mr. Murrell began calling him "racist words" and "brought his hand and face within 1 inch of my face and spit at me. Threatened to harm me... He assaulted me".

I find that Mr. Khera was given full opportunity to respond to Mr. Murrell's allegations. He was provided with the allegations, and presented his case fully to the delegate. The delegate did not find the employer's reasons sufficient to justify terminating Mr. Murrell's employment for cause. Although Mr. Khera disagrees with the delegate's conclusion, there is no evidence that the delegate "never gave [him] a chance to speak", as he alleges. Therefore, I find no basis to set the determination aside on the ground that he was denied an opportunity to be heard.

However, even if I were to conclude that the delegate failed to ask Mr. Khera to substantiate his allegations about an incident that occurred after he terminated Mr. Murrell, I would not set the determination aside in any event.

There appears to be no dispute that Mr. Khera had no grounds to terminate Mr. Murrell's employment until February 7. Indeed, I agree with the delegate's conclusions on that point. Mr. Khera suggests that, after he fired Mr. Murrell, Mr. Murrell became upset. The incidents related by Mr. Khera occurred after he terminated Mr. Murrell's employment, and would not support his contention that Mr. Murrell's job performance was unsatisfactory.

Mr. Khera argues that Mr. Murrell's comments and actions towards him after he was fired constitute grounds to end his employment. While the fact is that Mr. Murrell's employment was already terminated by this point, as I understand Mr. Khera's argument, even if he had no just cause to terminate Mr. Murrell's employment up to that point, he had just cause based on that incident.

Mr. Murrell acknowledged being upset because he felt he was unfairly treated. However, he denied that he had made racist comments or assaulted Mr. Khera. Mr. Khera provided no corroborating evidence of Mr. Murrell's behaviour when he replied to the delegate. Indeed, he makes no mention that there were witnesses to Mr. Murrell's behaviour in his letter of response. The delegate can hardly be expected to question witnesses when Mr. Khera failed to indicate that there were any.

I have reviewed the witness statements provided by Mr. Khera's appeal documents. Neither statements were sworn, and thus carry less weight than they might otherwise.

One of those statements contains the following sentences: "...I remember the day that Brad Murrell left in February 2002. He was shouting, swearing and ~~threatening to hurt~~ Raj Khera." (crossed out portions in original)

The crossed out portion was initialled by the witness. It is not clear to me whether Mr. Khera wrote the letter and the employee disagreed with what he had written, or the employee changed his mind after writing the statement. In any event, this "witness statement" does not support Mr. Khera's allegations. Indeed, the witness expressly denies that he saw Mr. Murrell physically threatening Mr. Khera. There is also no mention of any racist comments, or comments of a racial nature. This statement corroborates Mr. Murrell's evidence.

The other witness statement indicates that Mr. Murrell made racist remarks to Mr. Khera, and also threatened to hurt him. As noted, this statement is unsworn, and is vague. It contains insufficient detail of the incident to bring its veracity into question.

On balance, I do not accept that Mr. Murrell behaved the way Mr. Khera suggests he did.

There can be no doubt that behaviour of the kind Mr. Khera alleges is upsetting. Therefore, it is reasonable to expect that references to witnesses to this type of behaviour would be made available at the first opportunity. Mr. Khera could have provided the names of witnesses to the delegate corroborating this behaviour at first instance, and did not do so. I have drawn an adverse inference from Mr. Khera's failure to do so. Furthermore, of the witness statements provided on appeal, one supports the evidence of Mr. Murrell, the other is sufficiently vague that I have placed little weight on it.

Therefore, the appeal is denied.

ORDER

I Order, pursuant to Section 115 of the Act, that the Determination, dated December 16, 2002, be confirmed, together with whatever interest may have accrued since the date of the determination, pursuant to s. 88 of the Act.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal