

An appeal

- by -

Tom Lalor operating as Norcorp Ventures Inc.  
(“Norcorp”)

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/48

**DATE OF DECISION:** May 26, 2004

## DECISION

### SUBMISSIONS

On behalf of Norcorp: Tom Lalor  
On behalf of the Director of Employment Standards: Bernie Gifford  
On his own behalf: Jack Hutton

### OVERVIEW

This is an appeal by Norcorp Ventures Inc. ("Norcorp") pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued March 10, 2004.

The Director's delegate concluded that Norcorp had contravened s. 63 of the Act in failing to pay Jack Hutton compensation for length of service. The delegate also determined that Mr. Hutton was entitled to vacation pay and interest, for a total amount of \$1,443.93.

Norcorp alleges that the Director failed to observe the principles of natural justice in making the Determination. Norcorp further submits that evidence has become available that was not available at the time the Determination was made.

### ISSUES TO BE DECIDED

1. Did the delegate fail to observe the principles of natural justice in making the Determination?
2. Has new and relevant evidence become available that was not available, with due diligence, at the time the Determination was made?

### FACTS

Mr. Hutton was employed as a shipper/receiver for Norcorp, a pet training device company, from April 2000 until October 2002. He filed a complaint alleging that Norcorp failed to pay him compensation for length of service.

On August 19, 2003, the delegate sent the parties a document that contained an agreed statement of facts, and set out the remaining issues in dispute between the parties after some issues had been resolved through mediation. The delegate conducted an oral hearing into those issues on September 11, 2003. Mr. Lalor, the President of Norcorp, and Aaron Thom, Norcorp's sales manager, represented Norcorp at the hearing.

At issue at the hearing was whether Mr. Hutton was given notice of his termination, and if so, whether that notice was adequate. Norcorp also asserted that Mr. Hutton was terminated for cause.

The delegate heard evidence from Mr. Lalor and Mr. Thom for Norcorp, and from Mr. Hutton, and considered a number of documents, including letters from Norcorp to Mr. Hutton, and internal memos. Mr. Lalor's evidence was that, on October 3, 2003, he gave Mr. Hutton two weeks' notice of termination in order to give another employee an opportunity to perform the job more satisfactorily. Mr. Hutton's evidence was that he was told he was being laid off as a cost saving measure.

The delegate determined that he was to conclude, on a balance of probabilities, whether he preferred the evidence of Mr. Lalor or Mr. Hutton. He determined that Mr. Hutton's version of events was more credible. The delegate further determined that the documentation did not support termination for cause. He concluded that Norcorp's evidence was insufficient to demonstrate that a reasonable standard of performance was established and communicated to Mr. Hutton, or that Mr. Hutton demonstrated an unwillingness to meet a communicated standard.

The delegate found that Norcorp did not lay Mr. Hutton off, and that Mr. Lalor's actions were consistent with an attempt to avoid payment of compensation for length of service.

## **ARGUMENT**

Norcorp asserts that Mr. Hutton was dismissed for cause, and that it gave Mr. Hutton two weeks' notice to find another job. It also argues that the delegate drew many unjustified conclusions. It contends that Mr. Hutton was replaced by a full time employee who is paid more than Mr. Hutton, that Norcorp provided six documents supporting its position and that Mr. Hutton's rebuttal were lies. Norcorp enclosed invoices that it asserts demonstrates mistakes Mr. Hutton made in shipping.

The delegate's submissions consisted of the documents provided to the Director in the course of the complaint investigation, including documents presented at the hearing.

Mr. Hutton contends that the Determination should be upheld. He submits that all the evidence was available to Mr. Lalor at the time the hearing was conducted, and that, in any event, it does not support termination for cause.

## **ANALYSIS**

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

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

The burden of establishing that the Determination is incorrect rests with an Appellant. Having reviewed the submissions of the parties, I am unable to find that the appellant has discharged that burden.

I will deal with each ground of appeal separately.

### **Failure to observe the principles of natural justice**

Apart from the appeal document itself in which Mr. Lalor checked the box indicating that a ground of appeal was that the delegate failed to observe principles of natural justice, Mr. Lalor's submission contains no allegations, or assertions, that relate to the issue of natural justice.

Principles of natural justice are, in essence, procedural rights that ensure parties know the case against them, the right to respond, and the right to be heard by an independent decision maker.

The evidence discloses no breach of natural justice. The delegate advised Norcorp of the nature of Mr. Hutton's allegations, and set out the issues that would be determined at a hearing. Both parties attended that hearing, gave evidence and subjected to questioning by the other party. The parties were given the opportunity to present documents and witnesses in support of their positions. The parties were also given an opportunity to make final submissions once all the evidence was presented. There is no assertion that the delegate was biased.

I find this ground of appeal without merit.

### **New and relevant information**

In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

1. 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;
2. the evidence must be relevant to a material issue arising from the complaint;
3. the evidence must be credible in the sense that it is reasonably capable of belief; and
4. 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.

Norcorp's appeal form indicates that it has 48 accounts of the reason for termination. The submission attached to the appeal form does not identify those 48 accounts, but it enclosed, I assume as the new evidence, several invoices.

All of the documents included with the appeal were available at the time the parties appeared before the delegate held the hearing on September 11, 2003. They are all dated in 2002. I find that the new evidence was available, with the exercise of due diligence, at the time the hearing was held, and that they ought to have been put before the delegate at that time.

It is not clear how the invoices are material to the issue of dismissal or proper notice. I infer that the documentation relates to Norcorp's position that Mr. Hutton was terminated for cause, but the submission does not indicate how the invoices support its position. The submission does not refer specifically to the

invoices, and does not state what conclusions are to be drawn from them, apart from vague references to alleged shipping errors committed by Mr. Hutton.

I am not persuaded that, even had this evidence been presented to the delegate, the delegate would have arrived at a different conclusion. The delegate considered the test for termination, and concluded that Norcorp had not discharged its burden of substantiating grounds for dismissal.

Norcorp's submission asserts, in essence, that the delegate's conclusion is wrong. The Act prescribes three grounds for an appeal of a Determination. A disagreement with the result is not one of them. However, because appellants often do not understand the grounds of appeal, I have also considered Norcorp's argument under the third ground of appeal, which is that the delegate erred in law.

Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause. What constitutes just cause has been addressed by the Tribunal on many occasions. Generally speaking, what constitutes just cause falls into two categories.

The first category is unsatisfactory conduct, or minor infractions of workplace rules that are repeated despite clear warnings to the contrary, and progressive discipline measures.

To substantiate just cause for this first category, an employer must meet a four part test:

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.

(see: *Silverline*, BCEST #D207/96 and *Kruger* BC EST #D003/97)

The second category is that of exceptional circumstances where a single act of misconduct may justify dismissal without the requirement of a warning. This single act must constitute a fundamental breach of the employment relationship.

The Tribunal is guided by the common law on the question of whether the facts justify a dismissal in these circumstances. Situations which have been held to constitute misconduct include failure to attend work, gross incompetence, a significant breach of a material workplace policy, criminal acts, and insubordination. (see *Kruger, Re: Glenwood Label and Box Manufacturing*, BC EST # D079/97).

The delegate considered the evidence against Mr. Hutton, and analyzed it in light of the law of dismissal. He concluded that Norcorp had not substantiated grounds for termination.

I find no basis for interfering with the delegate's decision. Norcorp has failed to demonstrate that the delegate erred in the application of the law to the facts adduced at the hearing.

As a result, I deny the appeal.

**ORDER**

I Order, pursuant to Section 115 of the Act, that the Determination, dated March 10, 2004, be confirmed, together with whatever interest may have accrued since that date.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**