EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the

Employment Standards Act R.S.B.C. 1996, C.113

- by -

Scott Docherty
(" Docherty ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Paul E. Love

FILE No: 1999/755

DATE OF HEARING: February 14, 15 and 23, 2000

DATE OF DECISION: March 7, 2000

DECISION

APPEARANCES:

Robert Docherty, for Scott Docherty

Yvonne Mollinga-Balla for Scott Cameron Industrial Partnership

Adel Adamic Counsel for the Director of Employment Standards

Graeme Moore, for the Director of Employment Standards

OVERVIEW

This is an appeal by Scott Docherty of a Determination, dated November 26, 1999, that he was dismissed for just cause and was therefore not entitled to compensation for length of service. The Delegate further determined that there were no pre-contractual misrepresentations by the employer to Scott Docherty pursuant to section 8 of the *Act*. The appellant did not attend the hearing but filed written materials, and was represented by his brother, who also gave evidence concerning the course of the investigation. The uncontroverted facts were, that after having received two written warnings regarding altercations with other employees, and knowing that a further altercation would result in dismissal, the employee threw a garbage can, cleared a work bench of tools, and left the jobsite for about 7 hours. The altercation was in relation to instructions given by a lead hand as to how to perform work safely. When Mr. Docherty phoned to inquire if he still had a job, he was terminated. A number of arguments were raised by the employee including "lack of standards in the workplace", misrepresentation under s. 8 of the *Act*, constructive layoff, right as a disabled person not to be assigned work and bias on the part of the delegate, all of which were determined to be without merit. The Determination was confirmed.

The appellant made application to cross-examine the Delegate concerning bias, and how she weighed the evidence in coming to a Determination where the facts were disputed. The Director's Delegate although not present at the commencement of the appearing, appeared at the request of the Adjudicator, and through counsel submitted that the Delegate should not be called either in cross-examination by the Appellant, or by the Adjudicator to testify. On an objective test of reasonable apprehension of bias, it could not be said that there was a prima facie case of bias or a serious issue to be answered, and therefore the Adjudicator exercised his discretion not to compel the Delegate to answer questions concerning "bias" in the investigation. The Adjudicator determined that there was no right to ask questions concerning the weighing of evidence by the Delegate to come to the Determination.

ISSUES TO BE DECIDED

Should the Director's delegate be required to testify at this hearing and answer questions concerning allegations of bias and how she made her determination, in particular how she weighed the evidence before her?

Did the Delegate err in determining that Smith-Cameron Industrial Partnership had just cause to dismiss Scott Docherty?

Did the Delegate err in determining that Smith-Cameron Industrial Partnership did not make any misrepresentation to Scott Docherty, within the meaning of s. 8 of the *Act*?

FACTS

Procedural Issues:

This hearing gave rise to a number of unusual procedural matters which I would like to set down during the course of these reasons.

Audited Financial Statements:

On January 24, 2000, the employee made application to the Registrar of the Tribunal for production of the employer's audited financial statements, for reasons of credibility and to show an entitlement to "profit sharing". The Registrar deferred this application as one to be decided by the adjudicator. The employee did not make any application to me for production of these materials. There was evidence tendered by the employer showing that Mr. Docherty had received profit sharing and by the time of final arguments Mr. Docherty abandoned his position of entitlement to profit sharing.

Security Arrangements:

On February 11, 2000, prior to the hearing of this matter, Ms. Yvonne Mollinga-Balla sent a letter to the Tribunal offices, requesting special arrangements for the Tribunal hearing scheduled for February 14, 2000. As a result of receiving that letter, the Registrar, made arrangements for a security officer to be present. At the commencement of the hearing on February 14, 2000 I provided a copy of Ms. Mollinga-Balla's letter to Robert Docherty who represented the brother. The security officer was present in the waiting area at the hearing room reception area, and was not present at the hearing. I advised the parties, that while I had read the letter, I placed no weight on the letter as it concerned the substantive manner which was before me.

In my view, it is open to the Registrar to make such arrangements as is necessary in order to ensure that the parties can have a fair hearing. Section 107 of the Act provides that:

Subject to any rules made under section 109 (1)(c), the Tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

The words "in the manner it considers necessary" give the Tribunal the power to make such administrative arrangements so that the parties can be heard. In my view, upon being alerted by the employer that there was a fear for her safety, the Registrar is not required to inquire to determine whether the concern raised is a bona fide concern, or whether it is made frivolously. Given the timing of the request, it would have been impossible to investigate this matter in any event. While it may be unusual in the practice before the Tribunal to have security arrangements made, it is not unknown in the context of our civil or criminal justice system. It is for the adjudicator to determine whether it is necessary to have the security officer present in the hearing room. In this particular case, I directed that the security officer remain in the waiting room on the 8th floor of Library Square for the hearing rooms shared by the Employment Standards Tribunal and Labour Relations Board. It was unnecessary for the security officer to be present in the room, as the relationship between the parties was respectful and cordial.

Court Reporter:

Present throughout these proceedings was a court reporter who took notes of the evidence given.

Non-attendance by the Employee:

In his appeal form, the employee made application for an oral hearing:

> The facts in this dispute are numerable and must be presented at an oral hearing with disclosure of all material which the IRO has failed to do.

On January 25, 2000, the appellant's representative sent a letter to the Tribunal indicating that Mr. Docherty, a representative, a witness and a court reporter would be in attendance at the hearing.

Mr. Docherty did not appear in person at this hearing. Ordinarily, the non-appearance by the Appellant may be fatal to an appeal. The non-appearance was surprising given that the Appellant's representative notified the Tribunal that Mr. Docherty would be in attendance, and given the representation that an oral hearing was necessary to decide this matter. At the hearing I was advised that the RCMP had contacted Mr. Scott Docherty and Mr. Robert Docherty. Mr. Robert Docherty advised me that his brother was at work that day, and had made the decision not to attend the hearing, and to avoid further contact with Ms. Mollinga-Balla. If Mr. Scott Docherty was advised not to attend the hearing, this was ill advice. One would think that if Mr. Docherty feared contact with Ms. Bala in the hearing room, the presence of a court reporter would have a civilizing affect on the proceedings. Mr. Docherty did not attend at the oral hearing. I was also advised by Robert Docherty that his brother's attendance was not necessary to advance the issue of bias, because those facts were in the control of the Delegate. I do not consider that there was any reasonable excuse advanced for Scott Docherty's absence.

Delegate as Witness:

At the outset of the hearing Mr. Robert Docherty commented on the absence of the Director's delegate, and made application to call the Delegate as a witness in his case on the issues of bias

in the Determination, and to obtain further evidence as to how the Determination was made. The submission made to me was that the employer had submitted false evidence to the Delegate, and that the Delegate failed to wait to consider a witness statement which she knew the complainant intended to submit prior to issuing her Determination. These are very serious allegations, which in my view, if sustained would support a variation or cancellation of the Determination, and which in the first instance appeared to require the assistance of the Delegate.

During a brief adjournment, I had the Tribunal staff determine whether the Delegate was prepared to attend. I was advised that the Delegate would attend with counsel by noon. I granted Mr. Docherty's request to have the Delegate present during the course of the hearing. By noon it became apparent that the Delegate could not make arrangements for counsel, and was unable to attend until February 15, 2000 with counsel. We proceeded to have the opening statement of the appellant, and evidence from Dr. Docherty. The case was then adjourned until February 15, 2000. When the case resumed on February 15, 2000, the Delegate attended with counsel.

Counsel for the Director took the position that the Delegate should not be compelled to give evidence as no particulars had been given as to any allegation of bias, and the Delegate was an adjudicator, and should not be compelled to give evidence concerning her decision making process. The Delegate submitted that it was open for the employee to cross-examine the employer to determine the nature of the information provided to the Delegate. The Delegate argued that given that there was a hearing, and that I could hear from witnesses, it was not appropriate to hear from the Delegate with regard to how she made the determination. Counsel urged that I ought to defer any consideration as to whether the Delegate ought to testify to the end of the case, when I had the evidence before me to determine if there was a factual basis to compel the Delegate to answer questions. Counsel referred me to the Tribunal's decision in *BWI Business World Incorporated, BCEST #D 050/96*. Counsel also drew a distinction between the function of an adjudicator where the nature of the process was a "hearing denovo" or an "appeal" and referred me to the cases of McKenzie v. Mason (1992), 72 B.C.L.R. (2d) 53 (C.A.) and Dupras v. Mason (1994), 120 D.L.R. (4th) 127 (C.A.).

I hesitate to characterize the nature of the hearing before the Tribunal as a "hearing denovo" as this term was removed from the *Act* when it was amended. The nature of the hearing before the Tribunal is an inquiry, the principal purpose of which is to determine whether the Delegate made an error in the assessment of the relevant facts or law, such that the Determination should be canceled or varied. Typically where the Tribunal has an oral hearing there is evidence called by the parties that relates to the matters in issue, and the alleged errors made by the Delegate. In my view the function of the Tribunal is that principally of "error correction", and is not a forum where one expects that the Adjudicator will "freshly investigate" the complaint in the same manner as the Delegate. The burden was on the employer to establish just cause, when the Delegate investigated, but the burden is on the employee (appellant) to establish an error such that I should vary or cancel the Determination.

The employer submitted that no false information was given. At the conclusion of argument on this preliminary matter, I ruled that the appellant could not call the Delegate as a witness, that no proper notice had been given to the delegate and no particulars given. I determined that the

Delegate as the Director's representative or party could not be called as a witness without the giving of notice and some particulars concerning the case. I also determined that as a party it may be that the Director would open its case and choose to call evidence at the appropriate time, which was after the parties had opened their cases and given evidence. I determined that this issue could be raised again at the end of the case after the Director had been given an opportunity to open its case and call evidence.

The hearing proceeded and on February 15th, the Director's counsel, and on February 16th the Director's representative, did question the witnesses presented.

At the conclusion of the employer's case, the Director's representative, now Graeme Moore, program advisor, elected not to open a case, and not to call evidence, although he indicated that he had submissions to make on the case. Mr. Docherty made application to have the Delegate, in essence, called for the purpose of cross-examination on the issue of bias and for the purposes of ascertaining how the Delegate came to her decision. After hearing argument on this point from all parties, the employer taking the position that they had no questions for the delegate, I adjourned and gave a brief ruling that in the Delegate could not be called for cross-examination as to how she weighed the evidence before her. Further I ruled that while I had jurisdiction to call the Delegate to answer questions concerning bias, that in this case there was no issue for the Delegate to answer. I indicated that I would give reasons in my written decision which are as follows.

The Delegate operates both as an investigator, and as a finder of facts, and decision maker of complaints made under the *Act*. A written decision was made, and in this case many of the documents reviewed by the Delegate were before me in a package of materials. In my view, it would not be helpful for me as an adjudicator to hear how the Delegate came to a particular decision. Determinations are in writing, in a reasoned form, and the decision making process should be apparent on the face of the decision, and in the documents considered by the Delegate. If there is no clear reasoning process, or if the decision of the Delegate is not supported by the evidence, it is open to me to find that there was an error made. In this case the Delegate had to make a decision based on credibility and she engaged in a fact finding process where some of the facts were in dispute. It is of really no assistance to explore before this Tribunal how the Delegate weighed the evidence when I may consider the evidence of the witnesses tendered at a hearing. It certainly would not assist me to hear from the Delegate as to why the Delegate found one informant more credible than another informant.

I must say that the absence of any oral evidence from Scott Docherty makes it difficult to review the facts. In this case one is left with the oral evidence of the employer's witnesses, evidence from Robert Docherty which concerned the nature of the investigation, and the documents.

Bias:

I have jurisdiction as an Adjudicator, where an issue of bias is raised, to compel the Delegate to attend and gave evidence concerning the issue of bias. It is a serious allegation, which if proven can result in the cancellation of a Determination or the variation of a Determination. The remedy will of course depend on the facts of the case, and I do not propose to say anything further on this

point. The fact that the Delegate declines to give evidence, does not prevent me from calling the Delegate to give evidence. By virtue of s. 107 of the *Act*, I have the power to conduct an appeal in the manner that I consider necessary, and by virtue of s. 108 of the *Act* I have the power and authority of a commissioner under sections 12, 15 and 16 of the *Inquiry Act, R.S.B.C. 1996, c.224*. Such power includes the power to subpoena witnesses. As a matter of procedural fairness, the Tribunal is empowered, if necessary, to compel the attendance of a Delegate.

Before such a jurisdiction will be exercised, it is my view that there must be particulars given as to what is alleged to be bias with sufficient notice, so that the Delegate may arrange for the attendance of counsel and so that the Director may know the case to meet. That is the essence of fairness. I do not propose to lay down any particular form for particulars or notice, as this may vary from case to case. It certainly would be helpful if an appellant made known to the Tribunal that it wished to have the Director attend at a hearing. Participants at Tribunal hearings are often not represented by counsel, and anticipate that the Delegate will be in attendance. In practice Delegates attend hearings on an infrequent basis. If bias is raised, as this matter was raised during the course of the hearing, and the Delegate is not present it may be necessary to adjourn the hearing.

In my view the proper time to address the issue of whether the Delegate should give evidence is at the conclusion of the case on behalf of both parties. This is in keeping with the usual procedure at a hearing that the Adjudicator hears first from the party bearing the burden of proof (the appellant), secondly from the respondent who is opposed to appeal, and thirdly from the Director, who has no "interest" in the complaint other than to explain the underlying basis for the Determination or to show that the Determination was made after the consideration of the evidence and submission of the parties.

In my view the Director is a party to the proceedings. There is no obligation for any party to give evidence in proceedings before the Tribunal. Should a party elect to give evidence that party can be cross-examined. Before the Delegate can be compelled to give evidence an adjudicator should be satisfied that the party alleging bias has raised a "serious issue to be tried" or a "prima facie case of a reasonable apprehension of bias". The test is not subjective, it is not what a party considers to be bias, but a reasonable person determines on the facts apparent. The test is an objective test.

In this case I concluded that while I have jurisdiction I was not satisfied that the appellant raised a serious issue or a prima facie case. All that really can be said is that the Delegate did not rule in favour of the employee. In particular I have considered the following steps in the investigation:

1. This investigation took place over the period April 21, 1999 to October 20, 1999. The Delegate forwarding the complaint to the employer on June 7, 1999.

2. After transmitting the essence of the employee's complaint to the employer, the Delegate obtained information from the employer, apparently assessed that information, and communicated the preliminary views on that evidence to the employee by letter dated

August 31, 1999. A similar communication was sent to the employer on September 10, 1999.

3. On September 20, 1999, the employee demanded to meet with the Delegate.

4. On September 21, 1999, by written letter the Delegate invited the employee to provide further information. In particular the Delegate wrote:

> This letter confirms receipt of your fax dated September 20, 1999. I have reviewed the letter and your file with my regional manager today. My review revealed that there has been some miscommunication with respect to your complaint and my subsequent investigation. Although the intent of my letter of August 31, 1999, was to advise you that the employer had provided documentation to warrant a "just cause" dismissal and was an invitation to submit additional information to support your claim, it is obvious that you interpreted it to be something other than that. ... My apologies if I have made you feel that you have not had an opportunity to be heard. That was certainly not my intent. However, in order to give you fair opportunity to state your case, I would like to schedule a meeting time for you to attend our office to review your case to date and hear your position on your claim against your former employer ....

5. The parties meet on October 7, 1999. During the course of that meeting the employees representative indicated that further evidence could be obtained on the issue of "standard of behavior in the work place".

6. On October 20, 1999, the employee obtained a "independent" witness statement on the standard of behavior issue from Scott Keith. The contents of that statement is set out below.

7. The employee did not provide this statement to the Delegate.

8. On October 22, 1999 the Delegate issued a five page letter. The Delegate considered what occurred on the final day of termination, in light of the previous warnings given and concluded that the employer had met the burden of proof of establishing cause, and that the investigation was concluded.

9. The Determination was issued by the delegate after she concluded her investigation and as a result of a written demand by the employee's representative. The employee demanded that a Determination be issued so that an appeal could be filed.

10. The director's representative submitted and Mr. Docherty conceded that if there was bias by the Delegate such bias was cured by this hearing.

It is my view that it is clear that pursuant to s. 77 of the *Act*, the Delegate transmitted the case of the employer to the employee and invited a response. Section 77 reads as follows:

> If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

The Delegate did not ignore any evidence presented by the employee, or proceed to a Determination, without waiting for evidence to be provided by the employee. There is no evidence of bias in this case. In my view the Director conducted an appropriate and adequate investigation, given the rather simple case of cause for dismissal.

I turn now to a review of the facts.

Facts:

Scott Docherty, worked for Scott Cameron Industrial Partnership from May 1, 1998 to March 29, 1999 as a shop assistant. His duties included helping Frank Burns in the shop, and helping in the shipping and receiving department. Scott Cameron Industrial Partnership is engaged in the business of supplying and repairing industrial pumps. It is a small business, and does not have rigid "classifications" or departments. It employs approximately 25 people. The employees are expected to be flexible with regard to job assignments.

The facts in this matter are as follows:

On the final day of employment, Mr. Docherty was directed by his supervisor Mr. Burns with regard to how to lift a pump properly. Scott Docherty became angry. He told his supervisor to "fuck off", cleared a work bench of tools with his arm, and threw a garbage can. Mr. Burns suggested that Mr. Docherty take a few minutes to cool off. Scott Docherty got into his car and left the job site. He phoned Mr. Burns at 3:30 pm to determine if he still had a job. Mr. Burns transferred Mr Docherty to Ms. Mollinga-Bala, the controller for the employer. Mr. Docherty said that he could not return to the worksite because he ran out of gas after driving around to cool off. Ms. Mollinga-Bala terminated Mr. Docherty's employment.

Mr. Docherty had been offered counseling through the employer's employee assistance plan. The employer does not know if Mr. Docherty took advantage of the offer.

It is alleged that Mr. Docherty was unhappy because the employer did not give him training and changed his job duties to more shipping and receiving work. This is advanced as a form of justification for his conduct. His complaint, however, is framed in the following language as set out in the "Complaint and Information Form" signed by him on April 21, 1999:

> I was dismissed after two years of employment with Smith Cameron Ind. I was dismissed do to a personal problem between myself and my office manager. I don't feel that this was a sufficient reason to dismiss me. So I feel I am owed compensation in the form of severance pay. (Sic)

The Delegate was provided with a letter from Dr. Docherty to Human Resources and Development Canada. The letter set out the employee's allegation that Smith Cameron had misrepresented the position:

> Upon my being interviewed by Grant Cameron of Smith-Cameron Industrial it was made clear that the position available was as a shop assistant. It is also discussed that upon my hiring a probation period of 6 months would ensue. Subsequent to this probationary period and assessment I would become a full time shop assistant to receive training and schooling with the goal of becoming a shop technician.
>
> In order to understand this position and opportunity, one must realize that there is no recognized apprenticeship program for this training. Training is hands on and schooling provided by equipment manufactures. A qualified pump technician with certificates of training from manufactures is a unique position, highly qualified and well paid.

The Delegate found as a fact that:

> Based on the submitted evidence, a lack of Docherty's advancement towards becoming a shop technician came about as a result of Docherty's unwillingness to take further courses and his inability to take direction from and work with others. There is no evidence to show a shop technician position was guaranteed to him. As with most jobs, advancement is contingent on a number of factors, including operational and economic requirements of the company, as well as favourable evaluations by the employer of the suitability for advancement. An employer has a right to evaluate and alter its staffing requirements based on economic change and operational requirements. I do not see that the employer has falsely represented the type of work, the wages of the conditions of employment that was offered to Docherty. Consequently, I have determined that there was no contravention of section 8 of the Employment Standards Act.

At the hearing of this matter there was no evidence that demonstrated any error on the Delegate's part in this finding of fact. At the hearing, both Mr. Cameron and Mr. Burns testified that while Mr. Docherty did take and satisfactorily complete a welding program, he was very limited in his math skills which were essential to further advancement. There was no evidence presented by the employee regarding his math skills at the hearing. I accept the uncontradicted evidence of the employer on this point.

In the Determination, the Delegate noted that the employer took the position that Mr. Docherty was placed on notice that his job was in jeopardy for reasons which consisted of:

1. His temper and inability to take direction or cooperate with Management within acceptable standards in order to effectively perform his job functions.

2. For his amount of "no shows" for work and failing to call in on the "no show" days.

The employer also took the view that it was required for operational reasons to change the mix of Mr. Docherty's job duties between shipping and receiving. The employer took the position that Mr. Docherty was hired to assist in the shop and assist in shipping receiving. Mr. Cameron's

note to file made on April 29, 1997 during the hiring interview, fully supports the evidence which he gave at this hearing.

The Delegate considered the following letters, which were also before me at this hearing:

July 8, 1998: warning for behavioral and attitude problems, lack of cooperation and lack of motivation, with one month given to improve behavior

> .. Our main goal is provide you with a clear understanding of what is expected of you in both your work and your attitude.
>
> During our review of September 15, 1998, we discussed you training and progression thereof, we also notified you of increased responsibilities in shipping department until the return of Kathy from maternity leave. You accepted this with no hesitation.
>
> Subsequent to this review your level of work and attitude has deteriorated substantially. The following is a list of items which need to be addressed immediately; sleeping on the shipping counters has to stop, swearing about Management and your job duties in an open manner to other staff is not acceptable, non-stop complaining of your personal problems with other staff on an ongoing basis is not advised. You have also been complaining of the shipping and receiving duties, which you had previously agreed to.
>
> The purpose of your position has been to provide assistance wherever it may be required, within the shop. The lack of cooperation and motivation has forced us to notify of this problem in writing. We request that you review your current position and inform us of any changes that you think you should undertake in order to improve yourself, if we do not see an improvement we will be forced to take other disciplinary action. (sic)

July 13, 1998 meeting :

Mr. Cameron's note to file indicates that Mr. Docherty agreed to flexible work in order to maintain his full employment. The meeting was as a result of an altercation in the shop between Frank Burns and Scott Docherty in regard to requests made for work to be performed. Mr. Docherty exhibited temper in that incident.

August 27, 1998:

> Due to your absence this am, management has reviewed your late days. Upon review we have found that you have been late without calling in 7 times since May 1998. These days include May 13, 16, 24, Jul 14, 27, 31 and August 27, 1998.

> You have been advised verbally that this is not acceptable work practice to be late anywhere from 1 to 4 ½ hours after you are required to be at work.
>
> Effective today late days to this extreme will not be tolerated. If you are going to be late you will be required to call John or Yvonne before or around 8:30 a.m. to advise us of when you intend to arrive at work. Please be advised that any variances from the rules provided in this letter will result in the immediate termination of your employment. (sic)

December 3, 1998:

> ... My sole purpose of the meeting yesterday was to advise you that the problems which occurred in the past were now presenting themselves as problems again and your attitude and refusal to perform certain job duties would not be tolerated. You were told that the repeating of disparaging remarks, publicly disrespectful behavior and reluctance to perform your job duties - and constant complaining thereof were not acceptable. You blamed my attitude for your lack of ability to perform your job and your negative attitude. You accused Grant Cameron of misleading you for the past year and a half and believe that you could become a full time shop assistant. You have been unable to effectively work with Frank Burns because of your inability to take direction. I reminded you that you are ultimately responsible for your own behavior and work habits. At this point, a dramatic change to fulfill your obligations to your job and attitude will be the only acceptable solution in order to maintain your employment. Any complaints or confrontations with other Management or staff members regarding this subject will not be tolerated. Should you choose not to follow the suggestions in this letter, you will be immediately terminated.
>
> Again, the purpose of your position has been to provide assistance wherever it may be required. The lack of cooperation and motivation has again forced us to notify you in writing. I expect that improvement should commence immediately. Please be advised that this is your last warning.

The employer's witnesses were cross-examined at length about an alleged lack of standards of appropriate behavior in the workplace. And the employee made the argument that Mr. Burns was treated in a different manner than Mr. Docherty because Mr. Burns was a lead hand and a more valuable employee". The employee tendered a written statement of Scott Keith which was used to support an argument that there was lack of a clear standard to measure Mr. Docherty's conduct. The contents of this statement were as follows:

Statement of Scott Keith

I Scott Keith swear the following to be true and correct.

1) I was employed at the premises next to Smith-Cameron Industrial for a period of 6 years. This period of employment was prior to Scott Docherty and Ms. Balla being employed by Smith - Cameron Industrial as well as when both were employed there.

2) I know and am aware of Mr. Frank Burns who works for Smith- Cameron Industrial

3) During my employ next to Smith - Cameron Industrial I was aware of several instances of Mr. Burns yelling, screaming profanities and throwing tools and equipment during the course of his work this happened both prior to and during Scott Docherty's employment at Smith-Cameron.

4) I am not aware of Smith-Cameron reprimanding Mr. Burns for his behaviour which was noticed by myself right up until my leaving my employment in late 1998.

5) Mr. Burn's conduct was so loud that retail customers at our business thought that occurrences were happening at the back of our premises. It would therefore be impossible for Smith - Cameron management not to be aware of his conduct and behavior.

6) I admit to knowing Mr. Burns and Mr. Docherty and have no prejudices against either and have nothing to gain by making these facts known.

7) Mr. Docherty does not live at my residence as stated by Ms. Balla at the last hearing.

Dated: October 20, 1999

"Scott Keith"

_____

Scott Keith

Scott Keith was not called as a witness, his statement was somewhat vague, and it appears that he lacked an opportunity to properly observe what happened in Smith-Cameron shop, because he did not work in the shop. It also appears that he was a room mate and friend of Mr. Docherty's. I am not prepared to place any weight on this statement. In a civil proceeding before the courts this "statement" would not be admissible. While the rules of evidence are relaxed in a hearing, in my view it would be an error to accept hearsay evidence on the central proposition, proof of the standard of conduct in the workplace, for which it is tendered.

Mr. Docherty admitted that this statement was not tendered to the Delegate prior to the issuance of the Determination. Had it been delivered to the Delegate, it likely would not have made any difference to the outcome, as there is a clear difference between the behavior of Mr. Burns and that of Mr. Docherty. While Burns admitted that he had lost his temper on occasion, there is some substantial support from Mr. Cameron that any problem in that regard was resolved, and

certainly not problematic, as was the conduct of Mr. Docherty. The further distinction is that the conduct of Mr. Docherty was insubordinate - he became angry or refused to undertake tasks which were properly assigned to him by a superior.

There was a suggestion made that Mr. Docherty was "constructively dismissed because his employment duties changed from that of "trainee shop helper" to that of shipper and receiver. Mr. Docherty referred to various different documents where the job title was described in various manners:

> Graded Staff Performance Review describing the job title as "Service/Shipping/Receiving" and the job duties as " cleaning and organizing shop & tools, assist in shipping & receiving on a daily basis, assist in service & repair duties, assist Dave in QA procedures and checks"
>
> Letter of October 5, 1998 from the employer to Vancity Credit Union confirming employment in the capacity of a "shop assistant"
>
> Letter of December 2, 1998 which sets out the following:
>
> " ... you will be considered full time Shipper/Receiver for Smith Cameron Industrial. You duties under this title include; shipping, receiving, cleaning and organization of the shop and inventory, assisting in fabrication jobs, assistance in repair duties and other duties as requested by Management.

The evidence of the employer was that while there was a change in the mix of job duties, because of an economic slow down and a need to replace an employee who went on maternity leave, the employer submitted that there was no substantial change in the duties of Mr. Docherty.

Allegation of False or Fraudulent Evidence:

Mr. Docherty submitted that false or fraudulent evidence was given by the company to the Director's delegate. The basis for this suggestion, was the oral evidence at the hearing by Mr. Burns that the employee had not thrown a hammer or garbage can at him, rather the employee had cleared the work bench of tools, and had knocked over the garbage can without "aiming" at Burns. Mr. Docherty points to the letter of Ms. Balla to the Director dated August 31, 1999 where she states:

> Again the final day of Mr. Doherty's employment was again as a direct result of his own actions where he chose to leave work for several hours, without permission, and then phoned to see if he still had a job or not. I refer to the letter of March 29, 1999 where Mr. Frank Burns had told Mr. Doherty to leave for a "few minutes" to cool down, after violent altercation, where Mr. Doherty threw a garbage can and a hammer at Mr. Burns head and told him to "fuck off" . Mr. Burns statement of March 29, 1999 refers to Mr. Doherty picking up a garbage can and telling him to "fuck off". In evidence Burns stated that the hammer was on the bench and ended up on the floor.

In my view, it is immaterial whether Mr. Docherty aimed the items at Burns or whether he threw the items and cleared the workbench. It might have been material if the employer's allegation was a dismissal based on assault of a supervisor. The allegation here, however, was that Docherty had been warned with regard to his temper and that further altercations would result in dismissal. It is clear that the incident even as admitted to by Mr. Docherty is an altercation in the workplace, for which he was warned previously that he would be terminated.

The letter of the Delegate dated August 31, 1999 refers to Mr. Docherty picking up a garbage can and throwing it. The Delegate did not make any finding that Mr. Docherty threw the garbage can or hammer at Mr. Burns. The Delegate made the following finding:

Docherty had an altercation with Frank Burns on March 29, 1999, approximately 8:30 am regarding Burn's instructions on how to do a particular job. Docherty threw a garbage can towards Burns and told him to "fuck off". Burns instructed him to leave for a few minutes to cool off. Docherty left, and later called Burns at approximately 3:00 p.m. asking if he still had a job. Docherty was terminated.

I cannot conclude that there was any false evidence presented to the Delegate by the employer. Ms. Mollinga-Balla did not testify in these proceedings. She was the employer's representative during the course of the investigation and she did not have any first hand knowledge of the altercation. She may have erred in what she told the Delegate, but it is apparent that the Delegate decided this on this basis of an altercation that did not constitute an assault.

ANALYSIS

In an appeal before the Tribunal, the burden is on the appellant to demonstrate an error such that I should vary or cancel the Determination. The appellant alleged the following errors in the Determination:

1) Information relied on by the IRO was proven to be falsified by the employer.

2) The IRO has misinterpreted the Act with respect to termination with cause, as it has not been proven that the standard of conduct accepted by the employer has been breached.

3) The employer indicated at another hearing (HRCC) that the employee's supervisor instigated the confrontation with the employee.

4) The IRO has not interpreted the Act correctly with respect to false representation.

5) The IRO has proceeded with decisions throughout the course of her investigation knowing that further information was forthcoming. This indicates bias and prejudice on the part of the IRO due to the personal intricacies involved in this matter. The writer also believes that gender bias has also been demonstrated by the IRO.

6) The IRO has not properly investigated this matter. The employer has relied upon the defence of economic conditions in its submission. The IRO has not investigated the employers annual audited statements of 1998 vs. 1999 to determine the validity of the employers statements.

7) The IRO's statements of fact do not dovetail with the information provided by the employer to the IRO and HRCC. The IRO therefore has put forth as a fact in her Determination evidence relied upon which has and can be proven to be false.

8) The appeal is being made as the Determination filed by the IRO is unjust and not in keeping with the Act.

9) The facts in dispute are numerable and must be presented at an oral hearing with disclosure of material which the IRO has failed to do.

10) The appellant seeks from the Tribunal a finding that the Determination is in error and therefore severance pay due and owing under the Act be forwarded by the employer. Also the employee was short paid his profit sharing in 1997 and 1999 and would expect the employer to forward this as well.

I have dealt with the allegations of bias and false evidence above. Mr. Docherty abandoned the claim for "short profit sharing", after hearing the evidence of Mr. Cameron, and receiving a document from the employer which set out the profit sharing.

Effect of Non Attendance of the Appellant:

Scott Docherty did not attend the hearing and did not give evidence. In this case Mr. Docherty requested an oral hearing because of the issues of credibility. I draw an adverse inference against him because he failed to attend the hearing. On occasion, the failure of the appellant to attend a hearing will result in a dismissal of the claim. Given that the appellant filed written materials, and often the tribunal proceeds to consider appeals on written materials only, and given that Scott Docherty had a representative present to present the case, it was my view that this case had to be heard to conclusion. The appellant who fails to attend, as did Mr. Docherty, runs a substantial risk that he will not provide evidence helpful to the Tribunal:

> [para16] The nature of the burden on appeal was discussed in the case of John Ladd's Imported Motor Car Co, BC EST #D313/96. In this case the Adjudicator held that if the factual underpinnings of the Determination are in issue an oral hearing might be granted. The form of the hearing may take the form of a hearing de novo where the facts are disputed or the credibility of a witness is in issue. The Determination forms the basis of the hearing and frames the issues in dispute. The burden rests with the appellant. The form is more akin to a true appeal, but it has some characteristics of a hearing de novo.
>
> [para17] The non-attendance of a party does not change the onus, which remains on the appellant to demonstrate error or a basis for the Tribunal to vary,

> cancel or confirm a Determination. As a matter of evidence, however, a non-attending party takes the risk that the attending party will tender sufficient and weighty evidence for the appellant to have met its tactical burden to persuade an Adjudicator to vary or cancel a Determination. A party who fails to appear at a hearing does take a risk that information or evidence helpful to Adjudicator may not be available to the Adjudicator. This proposition applies equally to an Employer, and Employee or the Director's delegate. In the case of an appellant, non-attendance is generally fatal to an appeal. In the case of any other party, the non-attendance may or may not be fatal, depending on the circumstances of the case, the issues on appeal and whether the appellant meets the persuasive or tactical burden.

Had there not been any written file material provided by Mr. Docherty, and had his representative not attended, I would have dismissed the appeal. Given that there was some written material before me to consider, and a representative who gave evidence with regard to the investigation, this matter proceeded to hearing.

Mr. Docherty filed an 8 page written submission with Human Resources Development Canada which sets out his position with regard to the events in his employment relationship. In a written letter by the Delegate to Mr. Docherty dated September 21, 1999, the Delegate said

> Although I did review the submission of a letter to Human Resources Canada, I did not see that its content was of any relevance in determining if you had been dismissed with just cause.

Mr. Docherty says that the Delegate dismissed the position of the employee as irrelevant. I have reviewed the contents of the letter. It is a rambling argument which seeks to justify Mr. Scott Docherty's behaviour. He considers the employer's treatment of him an attempt to make him quit. He considers that the employer wished to get rid of him because he had some knowledge of a sexual incident between three employees of the company. On balance, while the letter does address Mr. Docherty's position on why he is dismissed, the impression one receives is that Mr. Docherty continues not to accept responsibility for his misconduct which lead to the termination. Much of what is contained in the letter is not helpful to the assessment of whether there was cause.

Much of what is contained in Mr. Docherty's letter is contradicted in the documents filed by the employer, which the Delegate considered. Much of what Mr. Docherty said in his letter was contradicted by the oral evidence of the employer's witnesses, Grant Cameron and Frank Burns, who appeared to me to be truthful in the manner in which they gave their evidence. The evidence that they gave was corroborated by business documents that were before me at the hearing. Mr. Docherty had the opportunity to attend this hearing and chose not to attend. I am unable to prefer his written submission, over the oral evidence in this case.

In this case the representative for Mr. Docherty raised a number of interesting arguments in support of his brother's claim. Most of these arguments were, however raised without a sufficient factual foundation to support the underlying argument.

Standards in the Workplace:

Mr. Docherty argued that the employer did not set any written standards in the workplace with regard to conduct, and treated Scott Docherty differently than a lead hand, Frank Burns. It was said that Mr. Burns had a temper problem and since the employer did not dismiss Mr. Burns, it should not have dismissed Mr. Docherty. In the employer's oral evidence, given both by Grant Cameron and Mr. Burns, it is clear that Mr. Burns had on occasion been frustrated by having to deal with conflicting demands on his time. He was warned by Mr. Cameron, his conduct was improved. What distinguishes Mr. Docherty's conduct from that of Mr. Burns, is that Docherty's conduct was angry and insubordinate in that he refused to do work as directed by Mr. Burns, Mr. Docherty had a progressive disciplinary history which included a written warning that further outbursts would result in termination.

An employer is not required to set written standards for ordinary decent behavior in the workplace. While language might very between a construction site and an office setting, and language that might be tolerated on a construction site might not be tolerated in an office setting, this case is not about this type of problem. It is clear in this case that the employer set a standard of behavior, and the employee was warned that his behavior was substandard on at least three occasions. The employer made available to him the use of a confidential counseling service. There was some attempt at accommodation and rehabilitation of Mr. Docherty.

Mr. Docherty argued that his brother may have been terminated for leaving the workplace. Mr. Docherty argued that his brother was directed by the employer to leave the workplace, and that he was entitled to remain away from the workplace until he cooled down. The facts, however, appear to be that Scott Docherty was not directed to leave the workplace, he was directed to take a few minutes to cool off. His own conduct in phoning Burns at 3:30 p.m. and asking if he had a job still, is consistent with being absent from the job site without leave.

Mental Impairment and Unsafe Assignment of Work

Mr. Docherty argued that his brother had a mental impairment which created an undue risk to other persons in the work place. He relied upon section 4.19 of the Industrial Health and Safety Regulations:

> 4.19 (1) A worker with a physical or mental impairment which may affect the worker's ability to safely perform assigned work must inform his or her supervisor of the impairment, and must not knowingly do work where the impairment may created an undue risk to the worker or anyone else.
>
> (2) A worker must not be assigned to activities where a reported or observed impairment may create an undue risk to the worker or anyone else.

He says that because of the impairment, his brother was entitled to leave the workplace, and the employer could not in any event assign work because of impairment.

There is no factual support for this argument. There was no evidence which supports a finding of "mental impairment". There is no evidence in this case that Mr. Docherty reported to the employer any impairment which affected his ability to safely perform work tasks. I note further that this argument was not presented to the Delegate for investigation. It was not included in the original reasons for the appeal. Generally the Tribunal will not decide a new issue on appeal, in favour of an appellant, who raised this issue, without raising the issue before the Delegate: *Kaiser Stables Ltd, BCEST #D058/97, Triwest Tractor, BC EST #D268/96*. A party is not permitted to lie in the weeds, but must present the evidence to the Delegate if it was available at the time.

Misrepresentation:

The employee alleges that the Delegate misinterpreted the law with regard to misrepresentation.

Mr. Docherty says that because Scott Docherty was not trained as a pump technician, the employer engaged in misrepresentation in breach of s. 8 of the *Act*. Section 8 of the *Act* reads as follows:

> An employer must not induce, influence or persuade a person to become an employee, or to work or to be available to work, by misrepresenting:
>
> (a) the availability of a position,
>
> (b) the type of work,
>
> (c) the wages, or
>
> (d) the conditions of employment

The Tribunal has recently considered the issue of misrepresentation in *Chintz & Company Decorative Furnishings Inc., BCEST #D 007/00.* The Tribunal confirmed that s. 8 applied to "pre-hiring misrepresentations". In this case the employer says that it hired Mr. Docherty as a shop assistant with duties which included assisting in shop and assisting in shipping and receiving. It says that Mr. Docherty was given some training, including, welding, but the employer did not give further training because, Mr. Docherty had very limited mathematical skills, and had a significant temper problem. Both of these deficiencies had to be resolved before Mr. Docherty would be suitable for training. The employee has not proven any misrepresentation concerning the type of job offered, and the type of job Mr. Docherty received. There was no intentionally false statement made by the employer which induced Mr. Docherty to accept a contract with the employer. The fact that Mr. Docherty did not continue to advance in his position, is due to his own limitations, and perhaps economic circumstances, and not any misrepresentation on the part of the employer. Given Mr. Docherty's obvious limitations, the employer would have had a justification in refusing to provide further out of town training. The employer indicated that many of the courses would have required travel and the employer did not wish to have Mr. Docherty, with his apparent deficiencies, representing the employer at training courses.

Short of activities which can be characterized as constructive dismissal, which I address below, an employee must perform the tasks assigned to him by an employer without insubordination or insolence. These duties can be changed from time to time, as long as the change is not such that one can say that there has been a constructive dismissal.

Error in Approach or Application of the Act

The employee argues that the Delegate erred in applying the Act, and in finding a breach of the standard of conduct in the workplace. This appears to be an argument that the Delegate erred in the finding of facts, and in the application of the appropriate law with regard to "just cause".

I see no error in the manner in which the Delegate approached the assessment of the evidence in this matter. At page 6 of the Determination the Delegate stated:

> "Based on the information set out in the complaint form, I conducted an investigation placing the burden of proof on Smith Cameron to show that there was "just cause" for Docherty's termination."
>
> The Director made inquiries of the employer, and relayed to the employee, the case presented by the employer. The employee had the opportunity to present further evidence and argument at a meeting. The Delegate did not appear to ignore the case presented by the employee, but rather considered the evidence presented by the employer as overwhelming.

At page 8 of the Determination the Delegate further commented that:

> When an employer claims that there was "just cause" for termination, the burden of proof falls on the employer to show that "just cause" exists. Further, if an employer claims that the just cause involves a behavioural or improper conduct of an employee, the employer must establish the following:
>
> 1. That reasonable standard of performance have been set and communicated to the employee,
>
> 2. That corrective discipline measures had been given to the employee for failure to meet such standards,
>
> 3. That the employee had been made clearly aware that his continued employment was in jeopardy if such standards were breached
>
> 4. That a reasonable period of time had been given to the employee to meet such standards
>
> 5. That the employee did not meet those standards ie. that there was a provable culminated incident.

In my view the Delegate correctly formulated the test to be applied when considering the evidence. The test applied was consistent with the approach taken by this Tribunal in *Kruger BC EST #D003/97.* I would further add that given that there is a provable incident of discipline, the employer is not limited to considering that one incident in making its decision to terminate. The employer can rely on the past record. In this particular case the past record of Mr. Docherty was abysmal. He had failed to deal with what appears to be a significant anger management problem. He was offered employment assistance counseling to deal with his conduct.

When one considers the conduct on the date of the culminating incident, in light of his prior insubordinate conduct, anger and other behavioral issues, it can be said that his conduct on the date was incompatible with the continuation of an employment relationship.

Without laying out any definitive rules in this matter some of the questions to be considered are:

1. Did the employee engage in an act of misconduct which was worthy of discipline?

2. Was the employee aware that misconduct of this nature was not acceptable behavior and contrary to employer's policies?

3. Did the employer properly investigate the altercation and invoke discipline to all of the parties involved?

4. Was the employee aware that his continued employment was in jeopardy should he engage in aggressive or abusive behavior?

Mills, BC EST #D028/97

Unprovoked words and actions which are insolent and insubordinate may be cause for dismissal, as this conduct is incompatible with the continuation of the employment relationship: *Justason, BCEST #D109/97.* It is clear on the facts on this case that there was conduct by Docherty that merited discipline, and that he was aware that such an incident violated the employer's standards for acceptable workplace conduce, and that Mr. Docherty was aware that his job was in jeopardy. There was no provocation by Mr. Burns of Mr. Docherty, that there was no participation by Mr. Burns such that his conduct should have attracted disciplinary consequences

Although the Delegate did not formally recite these questions in her Determination, it is clear that these issues were considered by her. Upon my consideration of these points, the answers to these questions must be determined against the employee.

Evidence Given in HRDC proceedings:

I did not hear any evidence of what occurred in the HRDC hearing. Generally the decision of another adjudicator with regard to the facts of a case would not be helpful to me as an adjudicator as I must exercise my jurisdiction under the Act with regard to the facts of the case. There was

an investigator's note before me, presumably created by the HRDC investigator. I did not find it helpful, and it certainly did not prove the employers allegation of false evidence.

Constructive Layoff

The following passage in the Determination caused a great "stir" in these proceedings:

> Finally, I feel I must address Docherty's statements regarding his request to an employer to have his Record of Employment show a "layoff" rather than a "dismissal". As a delegate of the Director of Employment Standards, I have no authority with regards to the issuance of Records of Employment. However, as set out in the section titled "Complainant's Position", Mr. Docherty clearly stated that, if the employer agreed to show "laid off" on his Record of Employment, he would have walked away and Smith Cameron would never have heard from him again. He further stated that it was Ms. Mollinga-Balla's refusal to record "layoff" on the Record of Employment that made him decide to file a complaint with the Employment Standards Branch. Based on the statements made by Docherty, a Determination could have been issued based solely on a finding that Docherty's complaint was vexatious, and had not been filed in good faith, as per section 76(c) of the Act.

Mr. Docherty says that the employer should have given Mr. Scott Docherty a constructive layoff, which would have entitled him to employment insurance, rather than a termination for cause. It is argued that there was a significant change in Mr. Docherty's job duties some 4 months before the termination. This argument is ill conceived. It is clear on the evidence before me that while there may have been some change in the job title of Mr. Docherty, there were no significant changes in his job duties. If there were some changes, they were minor in nature, concerning the mix of duties between assisting in the shop, and working in shipping and receiving. On the facts before me it cannot be said that there was a constructive dismissal. In any event, even if there was a significant change in job duties, Mr. Docherty performed the changed duties, and appears to have acquiessed or accepted the change in duties. His insubordinate conduct and temper problem appears to pre-date the change in job duties in any event.

The Delegate found that she had no jurisdiction to change the issuance of the record of employment from "dismissed with cause" to show "laid off". I agree with her finding with regard to her jurisdiction in this matter. Generally, an employer who has cause to dismiss is ill advised to "sugar coat" a record of employment in favour of an employee, to permit an employee to obtain employment insurance benefits. There was evidence before me that Mr. Docherty applied for employment insurance benefits and was unsuccessful in that regard. There is also evidence before me in the form of a letter from Ms. Mollinga-Balla that the complainant threatened or blackmailed her in order to attempt to obtain from her a favourable record of employment. It is possible that the proceedings under the *Act* were taken for the purpose of establishing entitlement to employment insurance benefits, as suggested by Mr. Docherty. As an adjudicator under this *Act*, I have no jurisdiction with regard to the issuance of employment insurance benefits. As neither Ms. Mollinga-Balla nor the complainant gave evidence

concerning discussions surrounding the record of employment, it is unnecessary for me to determine those controverted facts. It is unnecessary for me to address whether Scott Docherty filed his complaint without good faith and for a vexatious reason, given that the Mr. Docherty has demonstrated no significant error such that I should cancel or vary the Determination.

I have no hesitation in concluding that given the past disciplinary history, that Mr. Docherty knew that his job was in jeopardy if he had another outburst in the shop. His own conduct in phoning at 3:00 or 3:30 pm in the afternoon to inquire whether he still had a job, is evidence of this. I have no hesitation in concluding that Mr. Docherty's conduct was incompatible with a continuing employment relationship, and therefore the employer had just cause to terminate Mr. Docherty's employment. Given a finding of just cause the employer is not required to give notice or give compensation for length of service.

ORDER

Pursuant to section 115 of the *Act*, I confirm the Determination of the Delegate made November 26, 1999.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal