Employment Standards TRIBUNAL

An appeal

- by -

Oceanfood Industries Limited
("OFI")

- 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: David B. Stevenson

FILE No.: 2012A/52

DATE OF DECISION: September 26, 2012

DECISION

SUBMISSIONS

Duncan J. Manson	counsel for Oceanfood Industries Limited
Jenny Ferguson	on behalf of Khamphou Chantavong
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision addresses an appeal filed under Section 112 of the *Employment Standards Act* (the *"Act"*) by Oceanfood Industries Limited ("OFI") of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 16, 2012.

2. The Determination was made in respect of complaints filed by eight former employees of OFI ("collectively, the complainants"), including Khamphou Chantavong ("Mr. Chantavong"), who alleged OFI had contravened the *Act* by failing to pay length of service compensation.

3. The Director found OFI had contravened Part 8, section 63 and Part 7, section 58 of the *Act* in respect of the complainants and ordered OFI to pay a total amount of $29,154.87, an amount which included wages and interest under section 88 of the *Act*.

4. The Director also imposed an administrative penalty on OFI under Section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $500.00.

5. The total amount of the Determination is $29,654.87.

6. OFI has appealed only that part of the Determination relating to Mr. Chantavong. In the appeal, OFI says the Director erred in law in finding Mr. Chantavong was entitled to length of service compensation under the *Act*. The appeal is premised on the assertion the Director was wrong to find OFI had not shown there was just cause to summarily terminate Mr. Chantavong. OFI seeks to have the Determination as it applies to Mr. Chantavong cancelled.

7. The Tribunal has discretion to choose the type of hearing for deciding an appeal. Appeals to the Tribunal are not *de novo* hearings and the statutory grounds of appeal are narrow in scope. The Tribunal is not required to hold an oral appeal hearing and may choose to hold any combination of oral, electronic or written submission hearing: see section 103 of the *Act* and section 36 of the *Administrative Tribunals Act*. The Tribunal finds the matters raised in this appeal can be decided from the written submissions and the material on the section 112(5) "Record", together with the submissions of the parties. OFI has not sought to ground this appeal on additional evidence coming available or to add evidence to the material already on the "Record" and, as a result, no question – with the exception of one matter which I shall address later – arises about whether the findings in the Determination and the "Record" represent the entire factual basis for the appeal.

ISSUE

8. The sole issue in this appeal is whether OFI is able to show the Director made any error in law in finding Mr. Chantavong was entitled to length of service compensation.

THE FACTS

9. I do not intend to provide a comprehensive recitation of the facts, but only an overview. The Determination more completely outlines the facts and the findings that were made on those facts.

10. Mr. Chantavong was one of a number of employees terminated by OFI on November 19, 2010. Eight of the employees, including Mr. Chantavong, filed complaints with the Director, alleging they were entitled to, but not paid, length of service compensation upon termination.

11. OFI is a food processing business producing hot and cold salmon that is "ready to eat". The complainants were night-shift cleaners at OFI.

12. As a result of events that occurred on August 20, 2010, and a conversation with a former night-shift cleaner, the Plant Manager for OFI, John Makowichuk ("Mr. Makowichuk") decided to monitor the working habits of the night-shift employees. The monitoring of the night-shift was commenced by Mr. Makowichuk on August 30, 2010. On August 31, 2010, in response to a request from Mr. Chantavong for an additional night-shift cleaner, Mr. Makowichuk asked Mr. Chantavong to provide him with a completed time sheet form for each night-shift cleaner setting out, in half hour increments, the work that cleaner performed over the course of their shift.

13. Between August 30 and September 23, 2010, Mr. Makowichuk attended at the plant during the night-shift on several days for varying periods of time and recorded in writing his observations during his attendance. On September 4, 2010, Mr. Makowichuk met with Robert Graham and Louise Graham, who are referred to in the Determination and Record as owners and managers of the business, to discuss the observations he had made and what course of action might be taken. The Determination notes that they resolved at that meeting to look for alternative options for performing the plant sanitation and, if a viable alternative could be found, to terminate the complainants' employment.

14. It was also decided to engage a security company to do surveillance and to have the security company make a video recording of the surveillance. The surveillance was conducted on September 28, 29 and 30, and October 22, 2010, and recorded by the security company.

15. On October 13, 2012, Mr. Makowichuk posted a notice to employees regarding hours of work, breaks and punch-out procedures.

16. Mr. Makowichuk also drove by the plant on October 14, 2010, and made some observations which he recorded in writing.

17. After reviewing the surveillance footage and considering Mr. Makowichuk's observations, OFI decided to summarily terminate several employees, including the complainants. This was done on November 19, 2010. OFI justified their decision to summarily dismiss the complainants on the view that their observed and recorded actions was, in effect, time theft and compromised the safety of their product and, potentially, the health and possibly the lives of the consumers of their product.

18. The Director found OFI had not provided evidence to show the actions of the complainants compromised the safety of the plant or the product. More specifically, the Director found no evidence allowing for the conclusion that the complainants were not completing their assigned tasks to the appropriate standard prior to the completion of each of their shifts. The Director also noted the health and safety concerns raised by OFI were undermined by their delay, from September 24, 2010, to November 19, 2010, before acting on their view that the complainants were not working a full 7.5 hours during their shifts.

19. The Director also found, for six of the complainants, that while there *could have been* (emphasis added) misconduct in their taking mid-shift breaks, the response of OFI was disproportionate to their misconduct. For one of the complainants, the Director found he had not engaged in any misconduct relating to the alleged time-theft.

20. For Mr. Chantavong, the Director found he had engaged in misconduct "by spending time in the lunchroom as opposed to actively being on the floor supervising employees and attending the kiln" and generally "not properly attending to his duties as a supervisor by not ensuring [OFI] policy was followed with regard to hours of work and break times and not informing [OFI] management of the apparent excess amount of time the complainants had to complete their duties".

21. Mr. Chantavong was the supervisor of the night-shift. The evidence concerning his duties and responsibilities are found throughout the Determination. There is a discussion of his authority at pages R16-17 of the Determination. Specific findings relating to his claim are found at pages R20-22 of the Determination. Apart from the above findings of misconduct set out above, the Director also made the following findings that are relevant to this appeal:

- while Mr. Chantavong did not have actual authority over the working conditions of the employees on the night-shift, he was expected by OFI to acquaint the night-shift employees with their terms and conditions of employment and direct them in their duties;
- in the above circumstances, it was not unreasonable for the night-shift employees to believe Mr. Chantavong had sufficient authority to direct them on break times and work breaks; and
- Mr. Chantavong did direct the night-shift employees on when to take their breaks and often his directions did not align with the expectations of upper management of OFI;

22. The Director found the response of OFI to the misconduct of Mr. Chantavong to have been disproportionate to that misconduct.

ARGUMENT

23. Counsel for OFI has raised a preliminary matter concerning the possibility that information provided to the delegate of the Director ("the first delegate") who initially had conduct of the complaints was not passed on to the delegate of the Director who completed the investigation and issued the Determination and its reasons. A memorandum prepared by Mr. Makowichuk concerning a May 20, 2011, meeting between the first delegate and representatives of OFI is included with the appeal. Counsel for OFI seeks to have this memorandum included in the appeal Record. This matter will be addressed later in this decision.

24. In respect of the substance of the appeal, counsel for OFI argues the Director erred in addressing the health and safety question in the circumstances of Mr. Chantavong, submitting the issue is not whether the plant's safety was actually compromised, but whether Mr. Chantavong's actions breached essential conditions of

employment that were assigned to him by OFI. Counsel says there was no need to show the plant's safety was actually compromised; only that Mr. Chantavong did not follow the instructions given to him by OFI. In that regard, counsel says the evidence that was presented by OFI showed Mr. Chantavong violated essential conditions of his employment and committed acts inconsistent with his obligation to ensure the members of the night-shift crew followed company policy and procedures that required them to work 7.5 hrs each shift sanitizing and cleaning the plant.

25. Additionally, counsel argues the Director failed to give sufficient weight to Mr. Chantavong's dishonesty, which was inherent in the request for an additional cleaner, in the preparation of the time sheet forms and in his representation to Mr. Makowichuk that the information contained on those time sheet forms was an accurate reflection of the time spent by each member of the night-shift crew on his or her job responsibilities. Counsel adds this act of dishonesty should have been addressed in addition to the time-theft matter.

26. The Director and Mr. Chantavong have filed replies to the appeal. For clarification, the reply to the appeal from the Director was not submitted by the delegate who wrote and issued the Determination and the reasons for it. The reply notes the second delegate, on assuming conduct of the investigation, informed the parties and communicated to them what evidence, records and submissions were on file. The Director says there was ample opportunity to address any perceived information shortfall. There has been no disagreement with this statement from any of the other parties.

27. In response to the preliminary matter raised in the appeal, the reply says it appears, from a review of the Determination, that the information provided to the first delegate was considered by the second delegate and expresses a concern that the memorandum submitted represents only one person's recollections of the May 20, 2011, meeting. It is submitted that, in any event, the contents of the memorandum relevant to the issue were canvassed during the investigation and in the Determination and that the memorandum itself should not be added to the Record.

28. In reply to the substance of the appeal argument made by counsel for OFI, the submission made on behalf of the Director says there was no error of law in the analysis of the just cause issue.

29. In response to the argument relating to Mr. Chantavong breaching fundamental employment obligations, the submission made on behalf of the Director says the matters raised in the appeal on this point were analysed in the Determination and, when considered in context and against the available evidence, were not found to justify summary dismissal.

30. The response of the Director is similar on the "dishonesty" argument, which the submission made on behalf of the Director says is analysed at page R16 of the Determination. The response of the Director adds that Mr. Chantavong's actions relating to the preparation of the time sheets does not prove dishonesty in the context of termination of employment in this case. A finding was made in the Determination that Mr. Chantavong had engaged in misconduct, but that the nature and degree of that misconduct, in all the circumstances, did not support summary dismissal.

31. The response filed on behalf of Mr. Chantavong notes the evidence that Mr. Chantavong was never provided with a proper job description, job review or management training, that the proper cleaning and sanitation of the plant was never in question and that the time sheet forms were prepared with no intention on his part to promote or encourage a fraud.

ANALYSIS

32. As a result of amendments to the *Act* which came into effect on November 29, 2002, the grounds of appeal are statutorily limited to those found in Subsection 112(1) of the *Act*, which says:

> *112 (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:*
>
> *(a) the director erred in law:*
>
> *(b) the director failed to observe the principles of natural justice in making the determination;*
>
> *(c) evidence has become available that was not available at the time the determination was made.*

33. A review of decisions of the Tribunal reveals certain principles applicable to appeals have consistently been applied. The following principles bear on the analysis and result of this appeal.

34. An appeal is not simply another opportunity to argue the merits of a claim to another decision maker. An appeal is an error correction process, with the burden in an appeal being on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

35. The *Act* does not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals based on alleged errors in findings of fact unless such findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. The Tribunal noted in the *Britco Structures Ltd.* case that the test for establishing an error of law on this basis is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or they are without any rational foundation. The Tribunal has adopted the following definition of "error of law" set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam),* [1998] B.C.J. No. 2275 (B.C.C.A.):

1. a misinterpretation or misapplication of a section of the Act [in *Gemex*, the legislation was the *Assessment Act*];
2. a misapplication of an applicable principle of general law;
3. acting without any evidence;
4. acting on a view of the facts which could not reasonably be entertained; and
5. adopting a method of assessment which is wrong in principle.

36. I shall first address the preliminary matter raised by counsel for OFI in the appeal submission. For the reasons found in the response of the Director and having reviewed the memorandum, I am not inclined to include the memorandum in the Record. I agree with the Director that all of the information contained in the memorandum that was relevant to the issues was before the Director when the Determination was being made. The initial paragraph in the Determination under the heading "Opening submissions of the Employer", that:

> "[OFI] provided a narrative of events leading to the complainants' termination that was drafted by Plant Manager John Makowichuk (Mr. Makowichuk)."

37. A review of the Record provided by the Director under section 112(5) indicates the above reference was to 70 pages of information and four video discs provided by OFI at the May 20, 2011, meeting supporting their decision to terminate the complainants. The summary of OFI's position found in the Determination shows the Director fully appreciated the concerns that led to the termination of the complainants that are expressed in the memorandum. Otherwise the memorandum is only Mr. Makowichuk's summary of what transpired at the May 20, 2011, meeting; it is not itself evidence of anything except that Mr. Makowichuk created such a summary.

38. Counsel for OFI has says the error of law committed by the Director arose from the failure of the Director to find Mr. Chantavong's "breaches of fundamental conditions of employment relating to the proper cleaning and sanitization of the appellant's food processing plant" and/or his "dishonesty when reporting to Mr. Makowichuk that the members of the cleaning crew were fully occupied in the cleaning and sanitation work" was not sufficiently serious misconduct to justify summary dismissal.

39. Counsel acknowledges the Director "correctly cited" the Supreme Court of Canada's decision in *McKinley v. BC Tel* [2001], S.C.C. 38. I am uncertain about what that comment means because, in my view, the Director not only correctly cited that decision, but correctly applied it as directing the approach to be taken under the *Act* to cases involving summary dismissal for cause.

40. This approach has been endorsed by the Tribunal in several decisions. In *Nedco, A Division of Westburne Industrial Enterprises (WEIL) Ltd.*, BC EST # D547/01 (Reconsideration denied, BC EST # RD233/02), the Tribunal adopted the approach described in *McKinley* for assessing just cause under the *Act* in the following terms:

> In my view, all cases of dismissals for cause must be now be viewed in light of *McKinley v. BC Tel* [2001], S.C.C. 38. In *McKinley*, the Court found that a contextual approach must be taken in assessing whether an employer is justified in dismissing an employee for misconduct:
>
> > ...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 (at para. 48)

41. See also *Tanya Tortorella*, BC EST # D055/08, and *Siegfredo B. Bercasio*, BC EST # D088/09 (Reconsideration denied, BC EST # RD049/10). In the former case, the Tribunal stated, at paras 29 and 30:

> The Court [in *McKinley*] concluded that only conduct going to the core of the relationship would amount to cause for dismissal. Underlying the Court's approach is the principle of proportionality, which the Court says should seek to strike a balance "between the severity of an employee's misconduct and the sanction imposed". The concept underlying this balancing approach is the "sense of identity and self-worth of individuals frequently derive from their employment" (at para 53).
>
> In *McKinley* the misconduct alleged was dishonesty, but the contextual analysis applies to any case where just cause is alleged: "the common thread is that the behaviour in question must amount to a fundamental failure by the employee to meet their employment obligations or, as the Supreme Court of Canada has recently stated, "that the misconduct is impossible to reconcile with the employee's obligations under the employment contract": see *Jim Pattison Chev-Olds*, BC EST #D643/01 and *Nedco, A Division of Westburne Industrial Enterprises (WEIL) Ltd.*, BC EST #D547/01 (Reconsideration refused BC EST #RD233/02).

42. In the latter case, the Tribunal reaffirmed the application of the approach directed in *McKinley* where the issue was whether the misconduct of an employee justified summary dismissal and reinforced this approach with reference to the observation made by the Ontario Court of Appeal in *Keays v. Honda Canada Inc.*, 2006 CanLII

33191, that only very serious insubordination justifies the ultimate penalty of summary dismissal without pay or notice (at paras. 30 and 31), also noting, at para 25, 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).

43. Accordingly, those cases cited by counsel for OFI, like *Stein v. British Columbia (Housing Management Commission)*, (1992) 65 B.C.L.R. (2d) 181 and *Candy v. C.H.E. Pharmacy Inc.*, [1997] B.C.J. No. 684 (C.A.), that suggest the appropriate response to an employee's insubordination, wilful disobedience or dishonesty, is summary dismissal regardless of the seriousness of such misconduct, would appear to be at odds with the general law of just cause as it currently stands and is clearly at odds with the approach adopted by the Tribunal for assessing just cause under the *Act*.

44. I find the Director made no error of law in assessing the findings of fact on the issue of just cause on the approach described in *McKinley* and adopted by the Tribunal as the appropriate approach to that issue under the *Act*.

45. On the facts, nothing new has been added to the case of Mr. Chantavong by this appeal. An examination of the Determination shows all of the actions, *i.e.*, misconduct, upon which OFI relied in terminating Mr. Chantavong, and which are raised again in this appeal, were considered in the Determination.

46. In respect of the arguments relating to health and safety issue in the appeal, which would include the rather vague allegation in the appeal that Mr. Chantavong "breached the essential conditions of his employment as explained to him by his employer", the simple response is that the Director did not have evidence on which to find proper sanitary standards were not being met by the night-shift crew and was not prepared to draw the inference that because the complainants, including Mr. Chantavong, were observed not working they had rendered the plant susceptible to contaminating food. In this context, it is important that OFI took no action on what it knew to be periods when the night-shift crew were not actively working for nearly two months and that the Director found Mr. Chantavong was performing a final inspection of the night-shift crew's work at the end of each shift.

47. The essential character of this argument is to have the Tribunal alter factual conclusions reached by the Director about the evidence, altering some and ignoring others, without showing those findings, individually or cumulatively, amounted to an error of law. The Tribunal has no authority to engage in a review of such factual findings made in a Determination.

48. The answer to argument of counsel for OFI relating to alleged "dishonesty" on the part of Mr. Chantavong in filling out the time sheets is similar. Apart from the fact no dishonesty on the part of Mr. Chantavong relating to the time sheets was ever alleged, none was never proved or sought to be proved by OFI during the investigation. OFI alleged in Mr. Chantavong's termination letter that he had engaged in a "fraudulent misrepresentation" of the hours worked, but neither was that allegation established on the evidence.

49. In any event, the Tribunal has also recognized, in *Wallace & Carey Inc.*, BC EST # RD007/06, that even proven dishonesty as a ground justifying summary termination must now be viewed through the prism of the Supreme Court of Canada's decision in *McKinley v. BC Tel*, [2001] 2 S.C.R. 161. That decision referred to the comments of the Court found at paras 48-49, 51 and 53-57, including the following:

> . . . I favour an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the dishonesty in order to assess whether it is reconcilable with sustaining the employment relationship. Such an approach mitigates the possibility that an employee will be unduly punished by the strict application of an unequivocal rule that equates all forms of dishonest behaviour with just cause for dismissal. At the same time, it would properly emphasize that

> dishonesty going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

50. The Determination clearly reflects that Mr. Chantavong's misconduct, including not informing OFI management of the excess amount of time the complainants had to complete their duties, was an element of the contextual analysis engaged by in the Director.

51. It is not the function of the Tribunal to be asked to second guess the Director on the same set of facts in the absence of some reviewable error. OFI has not shown any error; they may not agree with the result, but such result is not outside of the reasonable range of responses the Director could have made on this matter and the Tribunal may not interfere with it.

52. The appeal is dismissed.

ORDER

53. Pursuant to section 115 of the *Act*, I order the Determination dated April 16, 2012, be confirmed in the amount of $29,654.87, together with any interest that has accrued under Section 88 of the *Act*.

David B. Stevenson
Member
Employment Standards Tribunal