Employment Standards TRIBUNAL

An appeal

- by -

CWS Industries (Mfg) Corp.
("Appellant")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act, R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER: Rajiv K. Gandhi

FILE No.: 2016A/53

DATE OF DECISION: August 16, 2016

DECISION

SUBMISSIONS

Brandon Wiebe	counsel for CWS Industries (Mfg) Corp.
Richard B. Johnson	counsel for Piotr Wolak
John DaFoe	on behalf of the Director of Employment Standards

OVERVIEW

1. On March 7, 2016, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") in which CWS Industries (Mfg) Corp. (the "Appellant") was found to have contravened section 63 of the *Employment Standards Act* (the "*Act*") by failing to pay Piotr Wolak, the complainant, compensation for length of service following dismissal from his employment. The Director held that Mr. Wolak was due the sum of $2,429.34, inclusive of wages, vacation pay, and interest. The Appellant was also ordered to pay an administrative penalty in the amount of $500.00.

2. The Appellant now asks this Tribunal to refer the complaint back to the Director under section 115(1)(b) of the *Act*, arguing that the Determination suffers from the Director's failure to observe the principles of natural justice, one of three permitted grounds of appeal specified in section 112(1) of the *Act*.

3. Having reviewed the record of the Director submitted on April 29, 2016, and written submissions:

   (a) from counsel for the Appellant dated April 14, 2016, and July 5, 2016;

   (b) from counsel for Mr. Wolak, dated June 24, 2016; and

   (c) from the Director, dated June 24, 2016,

   I conclude that this appeal should be dismissed.

4. My reasons follow.

FACTS AND ANALYSIS

5. The Appellant employed Mr. Wolak from August 21, 2012, until his dismissal on May 8, 2015.

6. According to sections 63(1) and 63(2)(a) of the *Act*, the Appellant would ordinarily have been liable on termination to pay Mr. Wolak an amount equal to two weeks' wages. However, the Appellant says that the requirement to pay compensation for length of service was discharged according to section 63(3)(c) of the *Act*, because Mr. Wolak was dismissed with just cause.

7. The narrow scope of Mr. Wolak's complaint requires the Director to do nothing more, or less, than to determine whether or not the Appellant had just cause to dismiss Mr. Wolak.

8. In doing so, the Director must consider the adequacy and credibility of evidence offered at the hearing. If, based on that evidence, the Director agrees with the Appellant's assertion of just cause, Mr. Wolak's complaint fails. If not, Mr. Wolak is entitled to receive two weeks' wages.

9. Although the final determination rests with the Director, the onus to show just cause belongs to the Appellant (see *McCall Bros. Funeral Directors Ltd. v. Employment Standards et. al.* 2000 BCSC 1507 at paragraph 7). In the absence of sufficient evidence, Mr. Wolak's termination is presumed to be without cause.

10. According to the Appellant, the test to establish just cause is enumerated in *Silverline Security Locksmith Ltd.*, BC EST # D207/96, at page 5. The Appellant must show that:

(a) reasonable standards of performance have been set and communicated;

(b) warning was given that employment was in jeopardy if such standards were not met;

(c) a reasonable period of time was given to meet such standards; and

(d) those standards were not met.

11. Certain facts do not appear to be in dispute:

(a) on January 9, 2015, the Company published for its employees a three-page safety policy (the "Safety Policy"), the receipt of which Mr. Wolak acknowledged on January 16, 2015;

(b) the Safety Policy lists a set of "General Rules" and "Cardinal Safety Rules", the distinction between them being, apparently, that a failure to abide by the "Cardinal Safety Rules" will result in termination, something which is not necessarily the case with the "General Rules";

(d) under the Safety Policy, both the "use of unsafe equipment or tools" and "operating equipment in an unsafe manner" are deemed "automatic write up offences";

(e) on May 7, 2015, a ladder was discovered in the Appellant's workshop which had been modified (the "Ladder");

(f) Mr. Wolak admits that he modified the Ladder;

(g) Mr. Wolak's employment was terminated by letter dated May 8, 2015, citing the Ladder as a "flagrant disregard" of health and safety policies.

12. According to the Safety Policy:

(a) as a "General Rule", employees are permitted to "use only approved ladders and scaffolding for working at heights…";

(b) as a "Cardinal Rule", employees must "never bypass a required safety device", and must "never put [anybody] in imminent danger where the chance for a serious or fatal injury could occur".

13. The Appellant says that Mr. Wolak was warned not to modify company equipment, once by the Appellant's safety officer, Mr. Gottschalk, in July or August of 2014, and a second time by one of the Appellant's management staff, Mr. Minch, in February 2015. Mr. Wolak denies both conversations.

14. Assuming that it happened, the discussion with Mr. Gottschalk predates the Safety Policy, and the evidence about the discussion itself is vague. Specifics of the discussion with Mr. Minch are not in evidence.

15. The Appellant says that Mr. Wolak hid the Ladder after it was modified. There is no evidence of this, and the Appellant appears to acknowledge that the Ladder, when found, was readily visible. Mr. Wolak denies that he hid the Ladder.

16. The Appellant further says that Mr. Wolak admitted his wrongdoing in discussions with Mr. Gottschalk and another employee, Mr. Campbell, on May 7, 2015. Mr. Wolak denies this, as well. Mr. Campbell did not give evidence.

17. Finally, the Appellant relies on an incident report signed by certain of the Appellant's managers between May 7, 2015, and May 12, 2015, together with an unsigned, undated, statement – apparently from Mr. Gottschalk - which appears to me to have been created sometime between Mr. Wolak's termination and the date upon which the Appellant submitted an evidence package to the Director – that is, not contemporaneously with the incidents it purports to describe.

18. In my review of the Record and the Determination, I note the absence of specific evidence that Mr. Wolak violated a Cardinal Rule.

19. Having regard to the test in *Silverline*, *supra*, the Appellant appears to say that reasonable standards were set in the Safety Policy, that warning and time were given when Mr. Wolak was twice told not to modify the Ladder, and that failure to meet those standards was shown when Mr. Wolak modified and hid the Ladder.

Natural Justice

20. The principles of natural justice require the Director, at all times, to act fairly, in good faith, and with a view to the public interest (*Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48 at paragraph 2).

21. Within the framework of a hearing or an investigation under the *Act*, fairness means that all parties involved have the right to notice, the right to know the case to be met and the right to answer it, the right to cross-examine witnesses, the right to a decision on the evidence, and the right to counsel (*Tyler Wilbur operating Mainline Irrigation and Landscaping*, BC EST # D196/05, at paragraph 15).

22. According to the Appellant, the Director's failure to observe the principles of natural justice is evident on two fronts.

23. Firstly, the Appellant says that the Director should not have accepted or given any weight to specific evidence from Mr. Wolak concerning the alleged discussion with Mr. Gottschalk, Mr. Minch, and Mr. Campbell or, having accepted it, should have given the Appellant an opportunity to respond (this is the right to know the case to be met and the right to answer it).

24. Secondly, the Appellant says that the Director's reasons in the Determination are insufficient (this is the right to a decision on the evidence.)

The Appellant's Right to Know the Case to be Met, and the Rule in Browne v. Dunn

25. The Appellant says that it had no prior warning that Mr. Wolak would deny the fact of his (alleged) conversations with Mr. Gottschalk, Mr. Minch, and Mr. Campbell, or the fact that he (allegedly) hid the Ladder. By reason of the rule in *Browne v. Dunn*, the Appellant says that Mr. Wolak's denials carry no weight and should not be considered.

26. That rule, established by the British House of Lords in 1893, is a procedural one, intended to prevent one party from putting forward a case without giving the opposing party an opportunity to respond.

27. Mr. Wolak did not challenge the Appellant's witnesses with respect to the warnings they say were given in July or August of 2014 and in February 2015, or the meeting had on May 7, 2015, and otherwise did not challenge them with respect to the claim that he hid the Ladder. When presenting his own case, however, Mr. Wolak denied all of it.

28. The utility of the rule in *Browne v. Dunn* in proceedings under the *Act* is, at best, "dubious"; application of the principles of natural justice does not require "the full panoply of procedural and technical rules that might operate in a criminal or civil court proceeding" (see *Storey*, BC EST # RD107/14, at paragraphs 22 to 24). Employment standards legislation is intended to provide a "relatively quick and cheap means of resolving employment disputes" (*J.C. Creations Ltd. o/a Heavenly Body Sport*, BC EST # RD317/03, at page 11), something which the rule does not necessarily achieve.

29. In any event, the focus of the rule in *Browne v. Dunn* is credibility, not admissibility.

30. To the extent that the Appellant asks the Director to give less weight to Mr. Wolak's evidence, he is arguing a question of fact, for which the *Act* provides no basis for appeal unless those findings raise an error of law. (*Cellular Baby Cell Phone Accessories Specialist Ltd. and B-Mobile Telecommunication Inc.*, BC EST # D134/12, at paragraph 23, and *Britco Structures Ltd.,* BC EST #D260/03, at pages 13 and 14).

31. The Appellant does not argue this appeal on the basis of an error in law, and in the absence of a requirement for strict adherence to *Browne v. Dunn*, I do not agree that the Director has failed to observe the principles of natural justice.

32. Even if *Browne v. Dunn* were applicable, I point out that Appellant's evidence with respect to conversations with Mr. Minch and Mr. Campbell are all but non-existent, and details of Gottschalk's conversations are, at best, sorely lacking in detail. Similarly, while the Appellant argues that Mr. Wolak hid the Ladder, there appears to be no evidence of this and, when found, the Ladder was in plain sight. I have some difficulty accepting that Mr. Wolak should be required to challenge the Appellant on matters that were not really in evidence.

The Right to Answer the Complaint – Opportunities for Rebuttal

33. Next, the Appellant submits that, having heard Mr. Wolak's evidence, it was incumbent on the Director to offer the Appellant's representatives an opportunity to make rebuttal, particularly in light of the fact that they were effectively self-represented, inexperienced, and without legal training.

34. In support of that position, the Appellant relies on the decisions of this Tribunal in *Oster*, BC EST # D120/08, and *Re: Marlow,* BC EST # D037/06.

35. In *Oster*, *supra*, at paragraphs 104 – 105, the Tribunal held that (<u>emphasis added</u>):

> … The Director must understand the problems [of] a self-represented party appearing at a complaint hearing, which may include, but not be limited to, an ignorance of the provisions of the *Act*, unfamiliarity with advocacy and the procedure being used by the Director, difficulty in marshalling facts, an inability to cross-examine and test evidence and a general failure to understand or appreciate directions given or their obligation to comply with orders…. <u>a delegate conducting a complaint hearing has both the right and the duty to be interventionist although in doing so must walk the fine line between ensuring fairness and losing neutrality</u>. In the context of the complaint process, the boundaries of legitimate intervention are flexible and will be influenced by the statutory duty of the Director under the *Act*, the need for intervention and its affect on the fairness of the complaint hearing.

36. One of the purposes of the *Act* is to "provide fair and efficient procedures for resolving disputes…" Streamlined procedures for making, hearing, and deciding complaints means that participants often do not have the benefit of representation, training, experience, or familiarity with quasi-judicial adjudications. There is merit to the suggestion that the Director should take an active and somewhat interventionist role, to ensure the better administration and application of justice for employers and employees.

37. However, I do not agree that this duty requires the Director to interfere to the extent advocated by the Appellant.

38. At the risk of repeating myself, the burden of proving just cause rests with the Appellant.

39. The Appellant was, or should have been aware of the need to bring proper evidence to the hearing. To the extent that it says it was blindsided by something the complainant said, or did, at hearing, it should have known that it could ask for an adjournment.

40. I note that the Director's Record includes a copy of the Notice of Complaint Hearing dated July 30, 2015, to which is attached a fact sheet, published by the Employment Standards Branch, titled "Adjudication Hearings". The fact sheet contains the following warnings at pages 2 and 3:

(a) "If a representative gives an account of matters he or she has only been told about, it may not be admitted as evidence, or will be given very little weight…"

(b) "If parties bring witness statements to the hearing instead of producing witnesses in person, the contents of those statements may not be admitted as evidence or will be given less weight…."

(c) "If issues are raised for the first time at a hearing, whether by the parties or by the Adjudicator, a short recess, or an adjournment, may be granted to give the parties time to address those issues."

41. *Re: Marlow, supra,* does not help the Appellant. In that matter, the original complaint involved unpaid wages. At the hearing, additional issues were raised (vacation pay, statutory holiday pay) and the employer was not given an opportunity to address them. In this appeal, the single issue to be decided by the Director (just cause) did not change, nor did the burden of proof imposed on the Appellant. The only item of note is that the complainant gave evidence that the Appellant was not prepared to address.

42. In my estimation, the Appellant's evidence was lacking. Having regard to the *Silverline* test, I see nothing in the Appellant's evidence referred to in the Determination or included in the Record suggesting that in any discussions between Mr. Wolak and either Mr. Gottschalk or Mr. Minch, Mr. Wolak was clearly warned that his employment would be in jeopardy if he modified the Ladder. The Safety Policy is ambiguous. Ultimately, the Appellant's evidence does not stand on its own, as it must, if the burden of proof is to be satisfied.

43. Requiring the Director to instruct or invite participants to locate and tender rebuttal evidence based on what witnesses say in the course of a hearing would strip from the Director any real semblance of impartiality, and impose additional stress on an already overtaxed system. One might consider that to be contrary to the public interest.

44. Already, this process tests the boundaries of what can reasonably be called "efficient". How much longer would these matters take, and how much more expense would the parties bear, if, based on what witnesses say in the course of a hearing, the Director was required to act as complainant, respondent, and judge ? It is

not lost on me that the Director did not decide Mr. Wolak's complaint, filed on June 8, 2015, heard on September 22, 2015, until March 7, 2016 and, by dint of this appeal, it is still not resolved.

45. There may be instances where it is appropriate for the Director to intervene with respect to the treatment of specific evidence, particularly where the answer is obvious to the point of being absurd and where it might reasonably be expected to change the outcome. This is not one of those, and I do not agree in these circumstances that the Appellant has been denied a right to know or to answer the complaint.

46. I also point out that the Appellant's representatives had an opportunity to cross-examine Mr. Wolak, and they could have challenged his evidence at that time. It does not appear to me that they did so, at least in any meaningful way.

The Right to a Decision on the Evidence – Insufficiency of Reasons

47. The Appellant argues that the Determination is insufficient and, as such, violates the principles of natural justice.

48. The Tribunal has previously adopted a "functional context-specific approach" when assessing the sufficiency of reasons (see, for example, *Kirk Edward Shaw*, BC EST # D089/10, and *Worldspan Marine Inc.*, BC EST # D005/12.)

49. Guidelines with respect to this approach and applicable to proceedings under the *Act* were established by the Supreme Court of Canada in *R. v. R.E.M*, 2008 SCC 51, starting at paragraph 15*:*

(a) courts of appeal considering the sufficiency of reasons should read them as a whole, in the context of the evidence, the arguments, and the trial, with an appreciation of the purposes or functions for which they are delivered;

(b) the objective is not to show <u>how</u> a decision is reached, but why;

(c) every finding or conclusion need not be explained in the process of arriving at a verdict; and

(d) there is no requirement to expound on each piece of evidence or controverted fact, so long as the findings linking the evidence to the verdict can logically be discerned.

50. The Appellant says that the Determination is deficient by reason of the Director's failure to say why the Appellant did not have just cause to dismiss Mr. Wolak.

51. The *Act* presumes the absence of "just cause". The onus to rebut that presumption rests with an employer. In this instance, the Director's actual obligation is to explain why the Appellant's evidence does not satisfy that burden.

52. On a plain reading of the Determination, it is clear to me that:

(a) the Director identified the basis upon which just cause was alleged – specifically, contrary to explicit direction and policy, the Appellant says Mr. Wolak modified, and hid, the Ladder;

(b) the Director identified the evidence that both parties accepted as true;

(b) the Director identified the conflict in evidence between the Appellant's assertions, and Mr. Wolak's denials, that he was warned about modifying the Ladder and that he hid it;

(c) the Director noted the Appellant's failure to produce key witnesses, and its reliance instead on vague evidence from Mr. Gottschalk and inconsistent incident reports containing information of questionable utility.

53. Accordingly, the Director concluded that the Appellant's onus to prove just cause was not satisfied. The "why", in this case, is explained, if briefly so, by gaps in the Appellant's evidence coupled with Mr. Wolak's denials.

54. Ignoring those denials, I am hard pressed to agree that there was just cause for termination. I am unable to discern from the Safety Policy, whether or not modifying the Ladder violates a General Rule or a Cardinal Rule. That is, I am unclear if it is a "write up" offence, or a firing offence. Mr. Gottschalk appears to have given vague evidence about the timing and content of the warning alleged to have been delivered to Mr. Wolak. I cannot say if that the warning was the denial of a request to modify the Ladder, an admonition not to modify the Ladder, or if it was a warning that modification of the Ladder would result in termination. The termination letter included in the Record does contain some detail, but to the extent that it was prepared only after the decision to terminate Mr. Wolak had been made, it is self-serving and does not absolve the Appellant of the need to adduce proper evidence. On the basis of the Record and those facts found by the Director, I do not think that the second or third parts of the *Silverline* test have been satisfied.

55. The Appellant also impugns the sufficiency of the Determination because, it says, the conflict between the employer's and the employee's evidence was not resolved – that is, according to the Appellant, the Director makes no findings of credibility. I disagree.

56. The Director found the Appellant's evidence wanting. Combined with Mr. Wolak's denials, the Director made a finding with respect to the Appellant's failure to satisfy its burden of proof. Clearly, the Director attributed some weight to those denials. As I have noted, in the absence of an error in law, I have no real ability to upset the Director's determination with respect to the weight to be given to that evidence.

57. I acknowledge that the Determination suffers from brevity, but I do not agree that it is insufficient or otherwise fail the *R.E.M.* test. The Determination as written does not violate the principles of natural justice.

58. For all of these reasons, I conclude that the Determination should be upheld, and that Mr. Wolak should receive two weeks' wages in lieu of notice according to Part 8 of the *Act*, together with vacation pay and interest.

59. This appeal is dismissed.

ORDER

60. Pursuant to section 115 of the *Act*, I confirm the Determination issued on March 7, 2016.

Rajiv K. Gandhi
Member
Employment Standards Tribunal