



An appeal

- by -

Payam Azad

- 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: Carol L. Roberts

FILE No.: 2006A/99

DATE OF DECISION: October 19, 2006

DECISION

SUBMISSIONS

Payam Azad	on his own behalf
Katherine Wulf	on behalf of the Director of Employment Standards
Joel Thomas, counsel	on behalf of Wal-Mart Canada

OVERVIEW

1. This is an appeal by Payam Azad pursuant to Section 112 of the *Employment Standards Act* (“the *Act*”), against a Determination of the Director of Employment Standards (“the Director”) issued July 19, 2006.
2. Mr. Azad worked for Wal-Mart Canada Corp./La Compagnie Wal-Mart Du Canada (“Wal-Mart”) as a shelf stocker from October 4, 2002 until September 14, 2005. Mr. Azad filed 2 complaints; the first on September 14 alleging that Wal-Mart had contravened sections 44 and 46 of the *Act* in posting a notice containing information regarding statutory holidays that was in contravention of the *Act*, and in failing to pay statutory holiday pay. He also complained that Wal-Mart contravened section 83 by sending him home during a scheduled shift for questioning the posted notice during a staff meeting.
3. On September 26, 2005, Mr. Azad filed a second complaint alleging that Wal-Mart had contravened section 83 by terminating his employment for complaining about the notice, and for filing a complaint with the Branch.
4. Following an investigation of Mr. Azad’s complaint, the Director’s delegate determined that Wal-Mart had not contravened the *Act*, and dismissed the complaint.
5. Mr. Azad contends that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Both the delegate and Wal-Mart seek to have the appeal dismissed and the Determination upheld.
6. Section 36 of the *Administrative Tribunals Act* (“ATA”), which is incorporated into the *Employment Standards Act* (s. 103) and Rule 16 of the Tribunal’s Rules of Practice and Procedure provide that the Tribunal may hold any combination of written, electronic and oral hearings. (see also *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Although Mr. Azad sought an oral hearing, I find that this appeal is properly adjudicated on the written submissions of the parties. This appeal is whether the delegate erred in law, an issue which can be determined on the record. There is also no need to hear *viva voce* evidence on the issue of whether the delegate failed to observe the principles of natural justice. This appeal is decided on the section 112(5) “record”, the submissions of the parties, and the Reasons for the Determination.

ISSUES

7. Did the Director err in law in concluding that Wal-Mart had not contravened the *Act* or *Regulations*?
8. Did the Director fail to observe the principles of natural justice in making the Determination? Specifically at issue is whether:
 - a. the delegate denied Mr. Azad the opportunity to respond to evidence relied upon by the employer to terminate his employment, and
 - b. the delegate was biased in favour of Wal-Mart.

FACTS AND ARGUMENT

9. As set out in the overview, Mr. Azad filed two separate complaints to the Employment Standards Branch. The first alleged that Wal-Mart's statutory holiday pay policy contravened the *Act*, and that he was entitled to statutory holiday pay of \$160.00. After an investigation, the delegate concluded that Mr. Azad had been paid for all statutory holidays. Although Mr. Azad does not appeal the delegate's conclusion on the issue of his statutory holiday pay, he does allege that the delegate failed to confirm that Wal-Mart's statutory holiday pay policy contravened the *Act*.
10. Mr. Azad's second complaint alleged that he had been suspended, and subsequently terminated, because of his earlier complaint to Employment Standards Branch. Mr. Azad said that he objected to a posted notice on Wal-Mart's statutory holiday pay policy at a September 13, 2005 meeting between the employer and the employees, and warned his employer that if it did not remove the policy and pay two unnamed employees statutory holiday pay, he would make a complaint to Employment Standards. He alleged that Wal-Mart refused to remove the policy and suspended him.
11. Mr. Azad said that after he filed his second complaint, Wal-Mart advised him that it had removed the policy from the wall and agreed to pay the two full time employees their statutory holiday pay. He alleged that the employer told him to report for work that evening, and to meet with the store manager the following day. Mr. Azad met with the store manager on September 15, 2005, following which his employment was terminated. He complained that his employment was terminated in contravention of s. 83. Mr. Azad enclosed one page of the policy with his complaint.
12. The delegate sought Wal-Mart's response to Mr. Azad's complaint. Wal-Mart took the position that Mr. Azad's employment was terminated not because he had expressed concerns about its statutory holiday pay policy or because he had filed a complaint with the Branch, but because of three separate incidents in which Mr. Azad displayed threatening and disrespectful behaviour towards co-workers. It provided the delegate with information supporting its position, including letters of complaints from a number of employees. The delegate asked Wal-Mart's counsel, Mr. Thomas, whether the employees' statements could be given to Mr. Azad. Mr. Thomas indicated that he did not think it would be appropriate given Mr. Azad's "predisposition to threatening behaviour."

13. In a letter to Mr. Azad dated March 9, 2006, the delegate advised him that Wal-Mart took the position that his employment was terminated for cause. The delegate summarized the reasons Wal-Mart gave for the termination as follows:

[Wal-Mart alleges] that your behaviour was gross misconduct in the following instances:

- * your behaviour towards other staff members in August 2005 over a payroll issue.
- * your behaviour surrounding the posted notice at a staff meeting.
- * Behaviour at a meeting on September 15, 2005.

I will separate the instances that Wal-Mart refers to and ask for your written response to their information.

August 2005

Wal-Mart provided statements from two employees regarding a payroll issue. In the statements the employees state that you were angry, yelled at them, punched the wall and made threatening statements. Regarding this incident, Wal-Mart reported that you received a verbal warning about your behaviour.

I requested your personnel file. The performance evaluations all indicate that you were a good employee and tried to assist your colleagues.

With regards to this allegation, please respond in writing to the following:

- (a) What is your version of this event?
- (b) Who gave you a verbal warning?
- (c) What, if any, was the warning?
- (d) Was there any triggering event that caused you to lose your temper with these two employees?

Staff meeting September 13, 2005

With regards to this allegation, please respond in writing to the following:

- (a) Who was at the meeting?
- (b) What is your version of the events?
- (c) What, if any, disciplinary action was taken by the employer?

Meeting with Dan September 15, 2005

Wal-Mart has provided a statement from an individual who was present at the meeting on September 15, 2005. The information contained in the statement reported that you were called to a meeting with the manager. The manager attempted to speak with you regarding your behaviour and that you refused to discuss the issue.

The statement further states that you raised your voice and went to leave the meeting. Allegedly, the manager asked you to sit down and you walked to the door to leave. It was at that point that the manager stated you were fired.

I kindly ask that you please advise in writing whether you find this version of events accurate of the termination and if there are any details that you would like to add.

14. In a letter dated March 17, 2005, Mr. Azad requested the statements made by the Wal-Mart employees, along with their names and positions. He advised the delegate that if he did not receive them, he would not respond to the delegate's questions. Mr. Azad reiterated this request in a letter dated April 4, 2005.
15. In a letter dated April 5, 2005, the delegate advised Mr. Azad that an investigating delegate was not required to show the parties every document that is submitted, and that to provide him with statements given by witnesses to events at which he was present would compromise the investigation. The delegate gave Mr. Azad until April 26 to provide the information she requested, and in the absence of any response, she would issue the Determination on the information she had before her.
16. In a letter dated April 16, 2005, Mr. Azad wrote that the delegate had a duty to investigate the complaint in a "democratic, legal and therefore transparent manner in which nothing is supposed to be secret or confidential. Failure to provide me with the above noted documents will make the complaint process and investigation procedurally unfair, undemocratic, and illegal". He did not respond to Wal-Mart's reasons for terminating his employment.
17. In the Determination, the delegate set out additional reasons for Mr. Azad's termination that had not previously been disclosed to him. According to Wal-Mart, Mr. Azad yelled and berated the night manager during the staff meeting of September 13, even after she advised him that he should speak to the store manager about his concerns. She noted Wal-Mart's contention that Mr. Azad threatened to "cut [the night manager] down to size". The night manager and the other staff members at the meeting contended that Mr. Azad's behaviour was disrespectful, aggressive and threatening. Wal-Mart disciplined Mr. Azad over this incident by suspending him for one shift. Wal-Mart's discipline form was attached to the Determination as Appendix D.
18. On September 15, 2005, Mr. Azad met with the store manager and an assistant store manager about his conduct at the September 13 meeting. According to Wal-Mart, Mr. Azad became angry and refused to discuss his conduct, telling the store manager that he was going to tell the customers that he was mistreated and would picket the store. Although the manager told Mr. Azad to sit down, Mr. Azad refused, and as he walked out, the store manager told him he was fired. Wal-Mart submitted that Mr. Azad's employment was terminated for cause because Mr. Azad was not prepared to conduct himself in a proper manner towards management and staff, contrary to Wal-Mart's policy respecting the treatment of other employees even though he had previously been warned about his behaviour.
19. Presumably in an effort to assess Wal-Mart's evidence, the delegate also spoke with Dan Ackimenko, the store manager at the time of Mr. Azad's termination. Mr. Ackimenko, who was no longer employed with Wal-Mart, advised the delegate that he had investigated Mr. Azad's behaviour towards a payroll associate, and had issued him a verbal warning. He also provided the delegate with his version of events at the September 15, 2005 meeting, and described his fear for his personal safety during and after Mr. Azad's termination.
20. The delegate noted that the statements regarding the payroll incident were created because the employees were upset with Mr. Azad's behaviour and wanted it dealt with, not for purposes of the investigation. She reviewed the statements and concluded that some of the employees would reasonably perceive Mr. Azad's statements and actions to be threatening.
21. The delegate noted Mr. Azad's objections to not being provided with witness statements. She determined that providing him with the statements would not assist him in providing his version of events. She also

considered the fact that some of the witnesses felt threatened by Mr. Azad, and considered that some might be subjected to harassment by Mr. Azad. She considered the allegations that Mr. Azad had threatened to picket the store, thrown a pen at a payroll associate, banged his fist on the wall, and threatened to physically harm both the night manger and the store manager. She considered that providing Mr. Azad with the substance of the allegations about his behaviour, along with the corroborating statements, was sufficient information for him to reply. The delegate noted section 77 of the Act required the delegate to make reasonable efforts to give a person under investigation an opportunity to respond, and noted, despite being asked to respond, Mr. Azad raised only objections.

22. The delegate weighed the statements provided by Wal-Mart employees, noted Mr. Azad's failure to respond to the allegations, and concluded that his employment had not been terminated for raising the issue of the notice at a staff meeting or for filing a complaint under the *Act*. She was satisfied that Mr. Azad's employment was terminated because of his behaviour, not as a retaliatory measure for filing an earlier complaint.
23. After concluding that Wal-Mart had not terminated Mr. Azad's employment under section 83, the delegate addressed the question of whether it had cause to dismiss him. She correctly put the burden of establishing grounds for termination on the employer.
24. The delegate assessed the reliability of Wal-Mart's evidence and the credibility of the previous store manager, and found that Wal-Mart's evidence was both credible and reliable.
25. The delegate concluded that Mr. Azad's conduct towards the night manager and the store manager constituted serious wilful misconduct. She noted that, in a September 17, 2005 letter to Wal-Mart, which he attached to his complaint, Mr. Azad reiterated his intention that "he would not rest until [he] cut [Wal-Mart] down to your own size." In the absence of any response to Wal-Mart's allegations, the delegate determined that Mr. Azad breached company policies about workplace behaviour and undermined the corporate culture by treating his fellow employees in a disrespectful and threatening manner.
26. The delegate reviewed Tribunal cases in which employees had acted in a similar manner, and concluded that Wal-Mart had substantiated just cause for Mr. Azad's termination. She dismissed Mr. Azad's complaint under section 79(8) of the *Act*.

ARGUMENT AND ANALYSIS

27. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:
 - (a) the director erred in law
 - (b) the director failed to observe the principles of natural justice in making the determination;
or
 - (c) evidence has become available that was not available at the time the determination was being made
28. The burden of establishing the grounds for an appeal rests with an Appellant. Mr. Azad must establish that there were errors of law in the Determination, as alleged, or that the delegate failed to observe the principles of natural justice.

29. Having considered the record and the submissions of the parties, I am not persuaded the Determination should be cancelled or varied.
30. Several of Mr. Azad's grounds of appeal are easily disposed of.
31. Mr. Azad says that the Director erred in law in "failing to apply the Act and Regulations" to the complaint. Mr. Azad's appeal sets out a number of complaints about the Director's investigation process, including issues about delay and the fact that three different delegates investigated the matter. Mr. Azad ultimately complained to the Ombudsman about the delay. I note that Mr. Azad's complaints were filed in September 2005, and the Determination was issued July, 2006, less than one year later. The Ombudsman's office took no action as it considered the matter to have been resolved. Although I note Mr. Azad's frustration with the speed of the investigation, I do not consider this issue to constitute an error of law and have not addressed it further.
32. Mr. Azad asserts that the delegate erred in finding that his employment had not been terminated after he objected to Wal-Mart's refusal to pay statutory holiday pay to two of his fellow workers. He submits that the delegate did not address this issue, even though it was the basis of the complaint. He says that she ignored the evidence and censored his comments in favour of the employer. In fact, Mr. Azad's September 14 complaint was that Wal-Mart failed to pay him statutory holiday pay. There was no reference to two other employees. The delegate addressed this issue, and found no basis for the complaint. I find no error in this respect.
33. Mr. Azad further contends that the delegate failed to order an appropriate remedy in this case. He says that, because the delegate erred in law in finding that Wal-Mart had not retaliated against him, she also failed to order his reinstatement under section 79(2). Since a remedy under section 79(2) would only be ordered if a contravention had been found, I find no error in this respect.
34. Finally, Mr. Azad submits that the delegate "has used a very poor logic in the Determination". As "poor logic" does not constitute a ground of appeal, I have not considered Mr. Azad's allegations in this respect further.
35. The balance of Mr. Azad's arguments focus largely on one issue, which is that the Director denied him an opportunity to respond. He says, correctly, that this constitutes both an error of law, as it is contrary to section 77 of the *Act*, as well as a denial of natural justice. He also says that the delegate's actions constituted bias in favour of Wal-Mart.

Error of Law/Denial of Natural Justice

36. Mr. Azad contends that the delegate both erred in law and denied him the opportunity to properly respond to the allegations against him when she declined to provide him with the names and statements of the witnesses to incidents Wal-Mart relied upon to terminate his employment, and the dates the complaints were made. Mr. Azad says that the delegate refused to allow him to

hear, or know the content of the verbal statements made by the employer, only in the Determination (and not before that)! The Director disclosed no verbal statement, made by the employer...prior to the appellant's receipt of the Determination. In addition neither the Director nor the employer provided any written statement, made by the employer, including the document marked in the Determination as "D"... The information provided by the Director to the appellant,

outlined in the Director's letter of March 9, 2006, is neither clear nor meaningful and sufficient. For example, in the above noted letter, the Director writes vaguely about the threats, allegedly uttered by the appellant directed at the employer, without mentioning what those alleged threats were... [reproduced as written]

37. Mr. Azad says that the delegate, for the first time in the Determination, states that the allegations were not fully disclosed to him during the investigation because the employees were afraid of him. He argues that the employer first became afraid of him after he reported unlawful and unethical behaviour. He says that he is and has always refuted the allegations of misconduct.
38. Finally, Mr. Azad says that the delegate demonstrated bias in favour of Wal-Mart by failing to disclose the allegations and responses of the parties, and in fact, failed to properly investigate his complaint. He further submits, in support of this allegation, that the delegate "stopped processing" the complaint four times, and did not resume the investigation until he had complained to the Ombudsman. Mr. Azad also says that the Director has acted in bad faith.
39. The delegate submits that Mr. Azad never denied he was involved in and present at the incidents set out, and refused to respond to the allegations despite being offered repeated opportunities to do so. She submits that he was advised of the consequences of not cooperating with the investigation, and that he ought not be allowed to provide any new information on appeal.
40. The delegate submits that although Mr. Azad may not have seen the disciplinary form attached to the Determination as Appendix D, there was never any dispute that Mr. Azad was given a one day suspension for his behaviour at the September 14, 2005 meeting.
41. Wal-Mart's counsel submits that the delegate's March 2006 letter clearly set out the allegations Wal-Mart was relying on. Mr. Thomas argues that Mr. Azad was given meaningful disclosure and had ample opportunity to respond to that disclosure.
42. As this Tribunal has often said, an investigation under the *Act* does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. One of the purposes of the *Act* is to provide a mechanism allow appeals with some informality, with the minimum possible reliance on lawyers, and at the lowest possible cost to the parties. (see *O'Reilly* (BC EST #RD165/02)).
43. Section 77 of the *Act* requires that the Director "make reasonable efforts to give a person under investigation an opportunity to respond". Section 77 is a legislated minimum procedural fairness requirement, consistent with the purposes of the *Act* to "promote fair treatment of employees and employers" and to "provide fair and efficient procedures for resolving disputes over the application and operation of this Act." (ss. 2(b) and (d)) (see *Insulpro Industries Inc.* (BC EST #D405/98), and *J. C. Creations Ltd.* (BC EST #RD317/03)).
44. Provided that witness statements are summarized accurately and thoroughly, the delegate is under no obligation to fully disclose them. In *Re Cyberbc.com AD & Host Services Inc. (c.o.b. 108 Temp and La Pizzaria* (BC EST #RD344/02), the Tribunal said that, while section 77 "does not necessarily require the production of the whole investigative file prior to issuing the determination and it is not intended to allow for a form of "discovery", there still must be meaningful disclosure of the details of the complaints in order to make the opportunity to respond reasonable and effective."

45. In *Re Medallion Developments Inc.* (BC EST #D235/00), the Tribunal held that section 77 required that reasonable efforts be made so that a person under investigation is made aware of the allegations and be given a reasonable opportunity to respond. In *Re Inshalla Contracting Ltd.* (BC EST #RD054/06), the Tribunal held that the duty of fairness requires both the employer and the employee to be given adequate notice in order to afford them a reasonable opportunity to present evidence and argument. In this respect, there is an overlap between section 77 and the common law of natural justice.
46. In my view, Mr. Azad was given meaningful disclosure of the employer's allegations. The delegate identified three incidents, including dates and a summary of what the allegations were. The allegations were sufficiently particularized to enable Mr. Azad to make a meaningful response. Mr. Azad did not deny or express surprise at the allegations. Therefore, he ought to have reasonably known the identity and job positions of the persons making the allegations. Certainly, he had sufficient information in which he could have responded, even in a general fashion. At no time did Mr. Azad deny that the incidents happened as alleged. Furthermore, despite his assertions on appeal, he never denied the allegations of misconduct then or at any time. He simply refused to respond, even after the delegate warned him that she would make a Determination on the information she had available to her.
47. An appeal is not an opportunity to re-argue a case that was presented to the Director in the first instance. While it is clear that Mr. Azad is not satisfied with the result, I am not persuaded that he was denied the opportunity to know about and respond fully to the employer's evidence.
48. I find no basis for this ground of appeal.

BIAS

49. An allegation of bias against a decision maker is serious and should not be made speculatively. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 (C.A.)).
50. To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia (Securities Commission)* [1999] B.C.J. No. 1046 (B.C.C.A.))
51. The onus of demonstrating bias lies with the person who is alleging its existence. Mere suspicions, or impressions, are not enough. Mr. Azad has presented no evidence that the delegate was biased, asserting that she was simply on the basis that she found against him. I find no merit to this ground of appeal.

Error of Law

52. Finally, Mr. Azad also says that the delegate erred in concluding that Wal-Mart had just cause to terminate his employment. He says that although he threatened to "cut [the employer] down to ...size", such a comment was quite appropriate and does not constitute an unlawful threat. Further, he says that talking to the customers regarding the wrongs done by the employer and picketing the store are neither unlawful nor constitute misconduct.

53. The delegate assessed Wal-Mart's evidence in light of Tribunal cases and the common law of misconduct, and concluded, in the absence of any response from Mr. Azad that Wal-Mart had discharged the burden of establishing that his employment had been terminated for cause. Mr. Azad has not demonstrated any error of law in this conclusion.

ORDER

54. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 19, 2006, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal