Employment Standards TRIBUNAL

An appeal

- by -

Provident Security Corp.
("Provident")

- 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: Shafik Bhalloo

FILE No.: 2016A/82

DATE OF DECISION: August 18, 2016

DECISION

SUBMISSIONS

Michael Jagger — on behalf of Provident Security Corp.

OVERVIEW

1. Pursuant to section 112 of the *Employment Standards Act* (the "*Act*"), Provident Security Corp. ("Provident") has filed an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 8, 2016.

2. The Determination found Provident had contravened Part 8, section 63 of the *Act* in respect of the employment of Jason Mackay ("Mr. Mackay") and ordered Provident to pay Mr. Mackay wages in the amount of $10,982.09 inclusive of interest and to pay administrative penalties in the amount of $500.00. The total amount of the Determination is $11,482.09.

3. Provident has appealed the Determination, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. In correspondence dated June 28, 2016, the Tribunal notified the parties, among other things, that no submissions were being sought from any other party pending a review of the appeal by the Tribunal and, following such review, all or part of the appeal might be dismissed. In the same correspondence, the Tribunal requested the Director to provide the Tribunal with a complete copy of the section 112(5) "record" (the "Record") that was before the Director at the time the Determination was made.

5. On July 11, 2016, the delegate provided the Tribunal with the Record.

6. On July 12, 2016, the Tribunal sent a copy of the Record to Provident and provided the latter with the opportunity to object to its completeness. No objection to the completeness of the record has been received and, accordingly, the Tribunal accepts it as being complete.

7. I have decided this appeal is appropriate for consideration under section 114 of the *Act*. At this stage, I will assess the appeal based solely on the Determination, the reasons for Determination (the "Reasons"), the appeal, the written submission filed with the appeal, and my review of the material that was before the Director when the Determination was being made. Under section 114(1) of the *Act*, the Tribunal has discretion to dismiss all or part of an appeal, without a hearing, for any of the reasons listed in subsection (1). If satisfied the appeal or a part of it has some presumptive merit and should not be dismissed under section 114(1) of the Act, the Director and Mr. Mackay will be invited to file submissions. On the other hand, if it is found the appeal satisfies any of the criteria set out in section 114(1), it will be dismissed.

ISSUE

8. The issues in this case are whether the Director erred in law or failed to observe principles of natural justice in making the Determination and whether there is any reasonable prospect this appeal can succeed.

THE FACTS

9. Provident operates a security business in Vancouver, British Columbia, offering access control services, alarm and surveillance system installation, alarm monitoring, and mobile response service. Mr. Mackay was employed by Provident as a Security Technician from March 27, 2006, to February 26, 2016, at the rate of pay of $32.00 per hour.

10. Mr. Mackay's employment was terminated on February 26, 2016, for what Provident alleged was just cause.

11. Mr. Mackay filed a complaint with the Director on March 2, 2016, alleging that Provident owed him wages for compensation for length of service.

12. The Director conducted a complaint hearing on May 30, 2016. Mr. Mackay testified on his own behalf and Michael Jagger ("Mr. Jagger"), the sole director, president and secretary of Provident, testified on Provident' s behalf.

13. The questions the delegate sought to determine at the Hearing were: Is Mr. Mackay entitled to compensation for length of service? If so, how much?

14. At page R2 of the Reasons, the delegate of the Director set out the evidence of the parties that was not in dispute as follows:

> Mr. Mackay sent an e-mail to Mr. Jagger and two other superiors on February 25, 2016 at 5:47 a.m. The e-mail stated that "due to a family emergency [he would not] be at work" that day. In reality Mr. Mackay was attending an examination to be accredited as a Field Safety Representative, or FSR. An FSR is a technical accreditation pertinent to the security industry.
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> Another Provident employee informed Mr. Jagger that Mr. Mackay took the day off to write the FSR exam. Mr. Jagger then made inquiries with the exam authority to verify whether Mr. Mackay had attended the exam, and confirmed that he had. He confronted Mr. Mackay the next day at 6:30 a.m. in a private meeting, with an envelope in his hand containing Mr. Mackay's final wages and pay stub.
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> The meeting began bluntly, with Mr. Jagger asking how Mr. Mackay fared at the exam. Mr. Mackay did not deny that he had attended the exam, and the two parties discussed how difficult it had been. The meeting then turned toward Mr. Mackay having lied about his absence from work. Tempers flared a bit, and Mr. Jagger terminated Mr. Mackay without notice, handing him the envelope containing his final wages. Compensation for length of service was not included.

15. The delegate next meticulously sets out the other evidence of the parties, at page R3 to R6 inclusive of the Reasons, which, together with the undisputed evidence, he then reviews in context of the applicable statutory and common law to determine whether Provident had just cause to terminate the employment of Mr. Mackay.

16. More particularly, at page R6, the delegate refers to section 63 of the *Act* stating that under it the employee is entitled to a written working notice of the termination of his employment commensurate with tenure, or pay in lieu of such notice. However, the employer is not required to give notice if there is just cause for termination of the employee's employment. In Mr. Mackay's case, he notes, Provident did not give him any notice of the termination of his employment or pay in lieu of notice. Therefore, the question that arises is whether Provident had just cause to terminate Mr. Mackay's employment. He notes the evidentiary burden is on Provident to prove just cause.

17. The delegate next refers to the seminal decision of the Supreme Court of Canada in *McKinley v. BC Tel* [2001] SCC 38 which propounds a two-fold contextual approach to assessing whether dishonesty of an employee is sufficient to warrant summary dismissal. At pages R6 and R7 of the Reasons, he states:

> Whether an employer is justified in terminating an employee with just cause on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. Just cause exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer. In accordance with this test, one must determine (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted termination.
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> The second branch of the test requires the facts of each case to be carefully considered and balanced. It is a factual inquiry rather than a legal one, meaning that the mere presence of dishonesty dos not, as a matter of law, amount to just cause. This is not to say that the contextual approach might not occasionally lead to a strict outcome, for example, where theft, misappropriation or serious fraud is found. However, less serious misconduct might warrant lesser sanctions. An effective balance must be struck between the severity of the employee's misconduct and the sanction imposed. Underlying the contextual approach is the principle of proportionality.
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> In setting the threshold for just cause, it is crucial to recognize that work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self- worth and emotional well-being (see Reference Re Public Service Employee Relations Act (Alta.), [1987] 1 SCR 313). The manner in which an employment is terminated can be equally important (see Wallace v. United Grain Growers Ltd., [1997] 3 SCR 701).

18. Having delineated the applicable law in this case, the delegate next examines the evidence of the parties in context of the two-part test in *McKinley* to establish just cause for dishonesty. In his assessment of the evidence under the first part of the test, the delegate states that "family emergency" is "serious, unexpected, and often dangerous situation requiring immediate action" and Mr. Mackay knew that he could not reasonably stretch its meaning to include the FSR exam. In using the said words in his email to Provident, Mr. Mackay wanted to avoid further inquiries from his employer about his absence from work. In the circumstances, the delegate concluded that Mr. Mackay's conduct was deceitful and the first part of the just cause test in *McKinley* was satisfied.

19. With respect to the second part of the test in *McKinley*, the delegate, after painstakingly setting out the evidence of the parties, concludes the nature and degree of Mr. Mackay's dishonesty was not sufficient to warrant termination of his employment. The delegate's reasons, while long, are noteworthy and I set out them out verbatim below:

> Mr. Mackay's dishonesty is mitigated by the fact that he had an unblemished record of employment for nearly ten years. He was reliable, dependable, and skilled employee. Mr. Jagger confirmed his work performance was good and that he was a company leader. Mr. Jagger even made exceptions pertaining to time off for Mr. Mackay to "repay" him for good work over the years, and acknowledged he had earned those privileges. There is nothing in Mr. Mackay's work history that suggests a tendency to bedsheets, or that he ever fell short of being a loyal employee until he felt he had a reason to suspect his job was in jeopardy.
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> The dishonesty is further mitigated because I accept Mr. Mackay's evidence that it did not arise from opportunism and cunning but from fear of job security. Mr. Jagger had an authoritative presence and impressed as sophisticated and attentive throughout the hearing. He did not dispute Mr. Mackay's evidence regarding the tenor and content of the October, 2015 meeting. I accept that Mr. Mackay was intimidated when Mr. Jagger put to him that he was at a professional fork in the road. Though the

dishonesty that followed was in poor judgment and not inconsequential, it was defensive in nature. Further, this case is distinguishable from cases where an employee lies to avoid work only to be found playing sports or attending a social event. The fact that Mr. Mackay lied to get a day off work, only to do something directly related to work, does not mitigate the dishonesty *per se* but lends credence to the argument that his dishonesty was truly motivated by fear of job loss or a related consequence.

With respect to the premeditated nature of the dishonesty, it is true that Mr. Mackay had time to consider how he would approach the matter of the exam, but it is impossible to determine how much time. It is possible Mr. Mackay made the initial decision to write the FSR exam already intending to lie; it is also possible that the idea to lie did not arise until later, perhaps even as late as the night before the exam day itself; or perhaps Mr. Mackay never thought about lying until he realized it was just too late to ask for a legitimate day off. Based on Mr. Mackay's candour and history as a trustworthy employee, the fact that he struck me as a conflicted individual acting out of fear rather than opportunism, and the fact that he was only informed of the exam date early in February, I find it unlikely he decided to lie as early on in the timeline than Mr. Jagger assumes. While I do not believe that his lower grade of premeditation acts to mitigate the ultimate decision to lie, it reduces the aggravation level of the premeditation.

With respect to the dishonest e-mail having been sent to three superiors (as opposed to just one), I accept that sending to three superiors was a common practice to ensure scheduling matters are addressed timely. I attach no weight either way to this factor.

With respect to Mr. Mackay having used "family emergency" as the excuse for his absence from work, I do not find this to have been predatory, or an abuse of Provident' s past goodwill. Rather, as discussed above, this excuse was simply the one most likely to generate no further inquiries. I attach little weight to this as an aggravating factor.

With respect to Mr. Mackay not having reason to lie to get time off to take the FSR exam in the first place, I find this is probably true. Mr. Jagger, like many astute business owners, appeared supportive of employees developing skills even if it made them more attractive to other employers. However, the issue should be viewed through a subjective lens, taking into account Mr. Mackay's view of the circumstances at the material time. After the October, 2015 meeting, Mr. Mackay did not feel secure in his job, confident asking for time off or that Mr. Jagger was as open to discussion as he may once have been. To Mr. Mackay the character of the relationship with his employer had changed and it was reasonable for him to conclude that the past was not a good indicator of the future. Accordingly, I attach little weight to this as an aggravating factor.

With respect to Mr. Mackay having failed to show remorse and attempting to justify his dishonesty, I find those actions to have been understandable in the circumstances and I am disinclined to treat such behaviour as an aggravating factor. The fact is Mr. Jagger did not give Mr. Mackay much time to compose himself or to organize his thoughts when he confronted him about the dishonesty the day after the exam: the meeting happened at 6:30 a.m.; Mr. Jagger had already arranged for Mr. Mackay's final wages and had the envelope containing them in his hand; and Mr. Jagger started what might have been a sensitive conversation with a blunt query about how the exam had been. I have no doubt that these circumstances led Mr. Mackay to feel ambushed. To his credit, he made no attempt to prolong the dishonesty and immediately confessed, but if he reflexively tried to justify his actions, as any person feeling ambushed might do, I do not consider this out of line. I find it more likely than not that Mr. Jagger was unwilling to listen to any justifications because the decision to terminate Mr. Mackay had already been made, causing tempers to flare. It follows that for Mr. Jagger to expect an apology in the heat of the moment was probably unrealistic.

With respect to the negative practical consequences that Provident experienced as a result of Mr. Mackay's dishonesty, Mr. Jagger did not provide particulars and could not quantify the consequences Provident experienced beyond saying there had been some juggling of responsibilities and appointments. That evidence does not persuade me that Provident experienced a meaningful disruption to its operations as a result of Mr. Mackay's absence. The fact that Provident remains shorthanded today is irrelevant because the choice to terminate Mr. Mackay was Provident's.

20. The delegate also addresses, in the Reasons, Mr. Jagger's argument that dishonesty, in a security company, is a "binary" issue and that the nature of the security business was incompatible with an employee who was capable of being dishonest in the course of his work. While the delegate preferred the contextual approach in *McKinley* noting that the Supreme Court in the latter case rejected the "binary' approach, he agreed with Mr. Jagger that the nature of the business is a factor that should be considered in assessing the severity of an employee's dishonesty and found the comments of Donald J., in dissent, in *Steel v. Coast Capital Savings Credit Union* 2015 BCCA 127 instructive in this regard. More particularly, Donald J. commented that the nature of the employer's business in Steel – financial – did not warrant the standard of trust between the employee and the employer to be elevated. I will review the Steel decision in more detail under the heading ANALYSIS below as Provident takes issue with the delegate's consideration of Donald J's comments, in dissent, in *Steel, supra.*

21. In the result, the delegate concluded that the severity of Mr. Mackay's dishonesty did not warrant the termination of his employment and therefore he was entitled to compensation for length of service under section 63 of the *Act* which together with vacation pay and interest totalled $10,982.09.

SUBMISSIONS OF PROVIDENT

22. As previously indicated, Mr. Jagger has filed written submissions in support of Provident's appeal. He sets out, under 6 different headings alleged "errors" the delegate made in the Determination that warrant the cancelation of the Determination by the Tribunal. He also attaches about 90 pages of documents Provident previously submitted at or before the Hearing and constitute part of the Record.

23. I have read all of Mr. Jagger's submissions carefully and while I do not propose to set them out verbatim here, I will summarize the core of his submissions below.

24. The first error he contends is the delegate failed to correctly apply the "legal principles enunciated in McKinley" and "misdirected himself as to the law and particularly as McKinley was applied in Steel". In *Steel*, he states, Goepel J. for the majority stated "McKinley makes it clear that a single act of misconduct can justify dismissal if the misconduct is of a sufficient character to cause the irreparable breakdown of employment relationship". Therefore, he argues, once the delegate found Mr. Mackay's dishonesty caused the working relationship between the parties to be damaged "beyond repair" - when he said in the preamble of the "FINDINGS AND ANALYSIS" section of the Reasons that "(t)his is a case where an employee's poor judgment damaged the working relationship beyond repair" – "the test in McKinley for finding there was cause to terminate the employment contract" was met by Provident. In the circumstances, he argues Provident had cause to dismiss Mr. Mackay and the delegate erred in concluding otherwise.

25. In the balance of Mr. Jagger's submissions –"Error #2" to "Error #6 – he sets out various passages from the Reasons and disputes the delegates findings of fact and related assessment of evidence under the contextual approach for assessing just cause for dismissal propounded by the Supreme Court in *McKinley, supra.*

26. Under "Error #2", he argues that there was no evidence at the Hearing to support the delegate's conclusion that Mr. Mackay's dishonesty in order to do something "work related" supported the argument that he was motivated by "fear of job loss". He states that Mr. Mackay chose not to ask for time off to write the FSR exam because he did not want to risk being asked to make up the loss of time later that day. Instead, Mr. Mackay chose to tell one or more employees of his plan to take the exam and call in sick well in advance. He chose to "deceive Provident for personal gain". Mr. Jagger argues that the delegate failed to give any consideration to these facts and, instead, decided to rely on unsupported "speculation of Mr. Mackay's motives".

27. With respect to "Error #3", Mr. Jagger submits that Provident presented evidence at the Hearing that previously Mr. Mackay had been granted his requests for time off and he could have, on this occasion, simply asked for the morning off for a personal appointment without disclosing more and he would not have been questioned by Provident. However, he chose to purposely lie about a family emergency, when Provident's installation schedule was backed up, to get the full day off work as he did not want to make up time or impact his vacation schedule. He acted not based on any fear for his job but rather to get "what he wanted".

28. Mr. Jagger also contends that the delegate's "decision to both create, and then assign weight to, his own 'possibilities' of why one might have lied in Mr. Mackay's position as a factor reducing the aggravation level of the dishonesty discounts Mr. Mackay's candid admission that he had advised others in advance of his plan."

29. With respect to "Error #4", Mr. Jagger argues that the delegate erred in failing to assess the "seriousness of the workplace knowing that Mr. Mackay had lied" when the latter sent emails to his colleagues "not superiors" about the "family emergency". Mr. Jagger argues that this "speaks directly to the employment relationship becoming irrevocably broken down".

30. Mr. Jagger also states that during the Hearing "Mr. Mackay acknowledged that he had advised one or more employees of his pending FSR exam, as well as the fact he intended to 'call in sick' in order to get the day off without impacting his vacation days" and that is how Provident discovered Mr. Mackay's dishonesty. He states the delegate failed to consider this fact.

31. With respect to "Error #5", Mr. Jagger submits that the delegate erred in "finding that Mr. Mackay did not feel confident asking for time off. He states there was no evidence for the delegate to have arrived at that conclusion and submits that there was ample evidence to show Mr. Mackay received ample time off when he requested time off in the past.

32. With respect to "Error #6", Mr. Jagger contends that the delegate erred in deciding not to treat the nature of Provident's business as an aggravating factor in this case. In *Steel*, *supra*, Mr. Jagger states the majority disagreed with Donald J. "regarding the nature of a business as an aggravating factor" and considered the trust inherent in Ms. Steel's position in the financial institution. He contends that similar to Ms. Steel, Mr. Mackay held a position of "great trust in an industry where trust is paramount". He further contends that Mr. Mackay's position went further than the Plaintiff's in Steel as "he not only had access to all client data as it related to security (including alarm codes, access patterns as well as the ability to see whether client's alarm was armed or not, or even if they were home) he also had access to their house keys." Therefore, argues Mr. Jagger, the delegate's decision to ignore the nature of Provident's business and the unique responsibilities and trust required in Mr. Mackay's position was an error. In support of his submission, Mr. Jagger refers to the decision of the BC Court of Appeal in *Roe v. British Columbia Ferry Services Ltd.* 2015 BCCA 1 where the Court of Appeal set aside the trial decision holding the employer did not have cause to dismiss a senior management employee and remitted the matter back to trial on the basis that the trial judge failed to follow the contextual approach to assessing cause set out in *McKinley, supra.* He suggests that the delegate's error in this case is similar to the Trial Court's in *Roe, supra.* I will discuss the Court of Appeal decision in *Roe* in more detail below.

ANALYSIS

33. The grounds of appeal are statutorily limited to those found in subsection 112(1) of the *Act*, which provides:

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

34. The Tribunal has consistently stated that 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 on the appellant to persuade the Tribunal there is an error in the Determination under one of the statutory grounds.

35. The Tribunal has also repeatedly stated that the grounds of appeal listed in section 112 of the *Act* do not provide for an appeal based on errors of fact and the Tribunal has no authority to consider appeals which seek to have the Tribunal reach a different factual conclusion than was made by the Director unless the Director's findings raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. In *Britco Structures Ltd.* the Tribunal stated that the test for establishing an error of law on this basis is stringent and requires 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 that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to the findings of fact made by the Director.

36. Provident has grounded this appeal in an alleged error of law and failure by the Director to observe principles of natural justice in making the Determination.

(a) Error of Law

37. The British Columbia Court of Appeal's decision in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12-Coquitlam),* [1998] B.C.J. No. 2275 (BCCA) provides the following instructive definition of an error of law:

> 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.

38. Under the error of law ground of appeal, as previously noted, Mr. Jagger contends that the delegate failed to correctly apply the "legal principles enunciated in McKinley" and "misdirected himself as to the law and particularly as McKinley was applied in Steel". The foundation for Mr. Jagger's contention is the delegate's comment in the first sentence under the heading "FINDINGS AND ANALYSIS" in the Reasons where the delegate states that "(t)his is a case where an employee's poor judgment damaged the working relationship

beyond repair". According to Mr. Jagger, once this finding was made, the test in *McKinley* was satisfied and the delegate should have concluded that there was just cause for Provident to terminate Mr. Mackay's employment. On the face of it, it does appear that the delegate's statement quoted above would lead to a conclusion that the two part contextual approach test in *McKinley* was satisfied by Provident and the latter had cause to terminate Mr. Mackay. However, upon reviewing the balance of the delegate's analysis in the Reasons (which I have set out verbatim in paragraph 19 above) which assesses Mr. Mackay's misconduct through the lens of the two-part contextual approach in *McKinley*, it is clear that the delegate arrived at a conclusion that appears inconsistent with his earlier comment in the Reasons that the relationship of the parties was irreparably damaged or "beyond repair".

39. In *McKinley*, *supra,* the Supreme Court, delineated the contextual approach for assessing just cause for dismissal as follows at paragraphs 48 and 49:

> 48. … I am of the view that 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. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
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> 49. In accordance with this test, a trial judge must instruct the jury to determine: (1) whether the evidence established the employee's deceitful conduct on a balance of probabilities; and (2) if so, whether the nature and degree of the dishonesty warranted dismissal. In my view, the second branch of this test does not blend questions of fact and law. Rather, assessing the seriousness of the misconduct requires the facts established at trial to be carefully considered and balanced. As such, it is a factual inquiry for the jury to undertake.

40. In this case, after finding that Provident met the first part of the test in *McKinley*, by establishing, on balance of probabilities, that Mr. Mackay engaged in deceitful conduct by sending Provident the email in question, the delegate proceeded to examine the second part which is also referred to as the proportionality test, namely, whether the nature and degree of dishonesty of the employees warranted termination of employment. After carefully weighing the evidence of the parties, the delegate concluded Mr. Mackay's dishonesty did not warrant termination of his employment. I find the delegate's analysis of the evidence in the second part of the test (as set out above in paragraph 19) to be balanced and well-reasoned and his conclusion persuasive.

41. While I do not find the delegate misdirected himself in the application of the legal principles delineated by the Supreme Court in *McKinley,* I do find that his inconsistent language in the preamble of the "FINDINGS AND ANALYSIS" section of the Reasons unfortunate as it is confusing. However, this error of the delegate did not lead him to the wrong conclusion in this case. I find it was open for the delegate, on the basis of the evidence of the parties, to come to the conclusion that Mr. Mackay's dishonesty did not warrant termination of his employment and it is not for this Tribunal to interfere with that conclusion absent the appellant establishing an error under one of the available grounds of appeal in section 112 of the *Act*.

42. Having said this, I also note that Mr. Jagger, in his submissions under "Error #1" and "Error #6 refers to the *Steel* decision and takes issue with the delegate's consideration of Donald J's comments, in dissent, in *Steel*. He also compares the *Steel* decision to this case and suggests that the outcome in this case should have been the same as the outcome in *Steel*.

43. In *Steel*, a 21-year employee of Coast Capital Savings Union, working as part of the IT Helpdesk team, had unrestricted access to every document in Coast's database. However, all employees of Coast were forbidden by company policy from accessing any other employee's personal folder without that employee's permission. In the course of her employment Ms. Steel accessed her manager's personal folder to find out her ranking on a priority list for parking spaces. Her manager found out and Coast terminated her employment for cause. At trial, the court dismissed Ms. Steel's action concluding that Coast had cause to terminate her employment. On appeal, the majority upheld the trial decision that Coast did have just cause to terminate Ms. Steel's employment. The majority also said that although Ms. Steel's long service with the company had to be taken into account, it could not excuse her breach of Coast's policies. Applying the contextual approach in *McKinley*, the majority found that when assessing whether or not a particular incident of misconduct is sufficient to justify summary dismissal, the Court must decide whether or not the nature of the misconduct was reconcilable with a continuing employment relationship. Applying that analysis to the facts of this case, the majority noted that Ms. Steel worked for an employer that operated in the financial services industry, an industry in which trust in employees is important. Further, Ms. Steel's position as an IT help desk worker gave her unrestricted access to all of the company's electronic data and she worked almost entirely without supervision. The company had to place its full faith in Ms. Steel's judgment and trust that she was conducting herself in accordance with its policies. It was not practical or desirable for someone to monitor her access to the company's systems. Based on these facts, the majority concluded that Coast was justified in concluding that the trust and good faith that was required to sustain its employment relationship with Ms. Steel had been irrevocably broken.

44. In dissent, in *Steel*, Donald J., disagreed with the decision of the majority. While relying also on the contextual approach to assessing just cause set out in *McKinley,* Donald J., in the second part of the proportionality test, added that "unless the impugned behaviour involves money or the affairs of a client, the fact that an employer is a bank or a credit union is irrelevant… the standard of trust is not elevated simply because the business is financial in nature." The delegate, in this case, took heed of Donald J.'s comments and interpreted them to mean that for an employee's dishonesty to be aggravated by the nature of the business there must be a connection between the dishonesty and the nature of the business. The delegate found there was no such connection in this case because Mr. Mackay's lie had no bearing on the safety or security of Provident's clients and did not cause Provident any reputational harm as a provider of security services. Therefore, the delegate concluded that the nature of Provident's business is not an aggravating factor in this case.

45. Mr. Jagger, it appears, is arguing that the nature of the business of Provident in this case and Mr. Mackay's position warranted an elevated standard of trust and the delegate erred in heeding to Donald J's comments in *Steel*. While I find that the delegate in this case *did* take into consideration the nature of Provident's business and Mr. Mackay's position within that business, he did not give these factors disproportionate deference in the second part of test in *McKinley*. I find that the delegate's analysis was balanced and he did not err in his conclusion by simply referring to Donald J.'s comments. I find the delegate's analysis (in paragraph 19 above) and conclusion in the Determination respect the principle of proportionality and balance between severity of an employee's misconduct and the sanction imposed advocated by the Supreme Court in *McKinley* at paragraphs 53 to 57 inclusive:

> 53 Underlying the approach I propose is the principle of proportionality. An effective balance must be struck between the severity of an employee's misconduct and the sanction imposed. The importance of this balance is better understood by considering the sense of identity and self-worth individuals frequently derive from their employment, a concept that was explored in *Reference Re Public Service Employee Relations Act (Alta.)*, 1987 CanLII 88 (SCC), [1987] 1 S.C.R. 313, where Dickson C.J. (writing in dissent) stated at p. 368:

> Work is one of the most fundamental aspects in a person's life, providing the individual with a means of financial support and, as importantly, a contributory role in society. A person's employment is an essential component of his or her sense of identity, self-worth and emotional well-being.
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> …
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> 54 Given this recognition of the integral nature of work to the lives and identities of individuals in our society, care must be taken in fashioning rules and principles of law which would enable the employment relationship to be terminated without notice. The importance of this is underscored by the power imbalance that this Court has recognized as ingrained in most facets of the employment relationship. In *Wallace*, both the majority and dissenting opinions recognized that such relationships are typically characterized by unequal bargaining power, which places employees in a vulnerable position *vis-à-vis* their employers. It was further acknowledged that such vulnerability remains in place, and becomes especially acute, at the time of dismissal.
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> 55 In light of these considerations, I have serious difficulty with the absolute, unqualified rule that the Court of Appeal endorsed in this case. Pursuant to its reasoning, an employer would be entitled to dismiss an employee for just cause for a single act of dishonesty, however minor. As a result, the consequences of dishonesty would remain the same, irrespective of whether the impugned behaviour was sufficiently egregious to violate or undermine the obligations and faith inherent to the employment relationship.
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> 56 Such an approach could foster results that are both unreasonable and unjust. Absent an analysis of the surrounding circumstances of the alleged misconduct, its level of seriousness, and the extent to which it impacted upon the employment relationship, dismissal on a ground as morally disreputable as "dishonesty" might well have an overly harsh and far-reaching impact for employees. In addition, allowing termination for cause wherever an employee's conduct can be labelled "dishonest" would further unjustly augment the power employers wield within the employment relationship.
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> 57 Based on the foregoing considerations, 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.

46. Having said this, I also note that in his submissions under "Error #6", Mr. Jagger refers to the decision of the British Columbia Court of Appeal in *Roe v. British Columbia Ferries Services Ltd.*, *supra,* and states that the failure by the trial court to consider "the unique responsibilities and trust attached to senior position" in the latter case led the Court of Appeal to overturn the trial decision. Therefore, he states this Tribunal should heed to the Court of Appeal's decision in *Roe* and cancel the Determination because the delegate, in this case, "deci[ded] to ignore the nature of Provident's business and specifically the unique responsibilities and trust required in Mr. Mackay's position". I respectfully disagree with Mr. Jagger for the same reasons set out earlier that the delegate did consider the nature of Provident's business as well as Mr. Mackay's position at Provident but he did not give those factors disproportionate deference in the second part of the test in *McKinley*. The delegate's analysis, I find, respected the principle of proportionality and balance between the severity of an employee's misconduct and the sanction imposed as required by the Supreme Court in *McKinley*.

47. In *Roe*, a senior management employee working as a terminal manager, knowingly violated a written policy of the employer, by issuing or donating food vouchers twice to his daughters' sports teams and attempting to conceal his act by using outdated and untraceable vouchers. The trial judge found that the plaintiff's misconduct, while dishonest, when viewed objectively by a reasonable employer in all of the circumstances, was "bordering on trifling" and "relatively minor" and did not fundamentally undermine the employment relationship. The court of appeal found the trial judge was fixated on the minor value of the vouchers and failed to follow the contextual approach for determining just cause set out in *McKinley* and set the trial decision aside and remitted the matter back for a new trial as the trial court failed to make any findings of fact and made its decision on the Plaintiff's assumed misconduct. Unlike in *Roe*, I find that the delegate did apply the contextual approach in *McKinley* and unlike in *Roe*, based his decision on actual findings of fact. I also find that there are material differences between *Roe* and this case. *Roe* unlike Mr. Mackay was a senior management employee who knowingly violated a written policy of the employer for personal gain and tried to conceal it. *Roe* effectively involved a theft or misuse of the employer's assets which, in terms of the gravity of misconduct, is higher relative to Mr. Mackay's lie to Provident to obtain time off to take the FSR test. I find *Roe* distinguishable for all these reasons from this case.

48. In summary, I do not find Provident has shown an error of law by the delegate in making the Determination.

(b) Natural Justice

49. Provident has also advanced the natural justice ground of appeal.

50. In *Re: 607730 B.C. Ltd.* (c.o.b. English Inn & Resort), BC EST # D055/05, the Tribunal explained that principles of natural justice are, in essence, procedural rights ensuring the parties have an opportunity to learn the case against them, the right to present their evidence and the right to be heard by an independent decision-maker.

51. In *Imperial Limousine Service Ltd.*, BC EST # D014/05, the Tribunal expounded on the principles of natural justice as follows:

> Principles of natural justice are, in essence, procedural rights ensuring that parties have an opportunity to know the case against them; their right to present their evidence; and the right to be heard by an independent decision maker. It has been previously held by the Tribunal that the Director and her delegates are acting in a quasi-judicial capacity when they conduct investigations into complaints filed under the *Act* and their functions must therefore be performed in an unbiased and neutral fashion. Procedural fairness must be accorded to the parties, and they must be given the opportunity respond to the evidence and arguments presented by an adverse party. (see *B.W.I. Business World Incorporated*, BC EST # D050/96)

52. The onus is on the appellant claiming a breach of natural justice to demonstrate, on a balance of probabilities, a violation of its natural justice or procedural rights.

53. Having reviewed the Determination, including the Record and the submissions of Mr. Jagger, I find there is no basis whatsoever for the natural justice ground of appeal advanced by Provident. I am satisfied that Provident was accorded procedural rights required under the *Act*. Provident was aware of the Complaint, presented evidence at the Hearing and was heard by an independent decision maker.

54. However, what is transparent in Mr. Jagger's submissions, including particularly under "Error #2" to "Error #5" inclusive, is that Mr. Jagger and Provident disagree with the delegate's assessment of the evidence and findings of fact. However, this is not a valid basis for appeal to the Tribunal. The Tribunal will not substitute

its opinion for the Director's without some basis for doing so. The burden is on Provident to show the Determination is wrong. Where the appellant, as in this case, is challenging a conclusion of fact, the appellant must show that the conclusion of fact was simply based on wrong information, was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant,* BC EST # D576/98).

55. I find the appeal is Provident's attempt to take the proverbial "second kick at the can" and have this Tribunal take a different view of the facts and circumstances of the termination of Mr. Mackay and arrive at a different conclusion than the Director. I find no error of law has been shown in the findings of fact or breach of natural justice by the delegate in making the Determination.

56. Pursuant to section 114(1)(f) of the *Act,* I dismiss Provident's appeal of the Determination.

ORDER

57. Pursuant to section 115 of the *Act,* I confirm the Determination made on June 8, 2016, together with any additional interest that has accrued under section 88 of the *Act*.

Shafik Bhalloo
Member
Employment Standards Tribunal