

An appeal

- by -

Ivan Gaspar

- 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: Robert Groves

FILE No.: 2007A/106

DATE OF DECISION: November 27, 2007

DECISION

OVERVIEW

1. Ivan Gaspar appeals a determination dated August 10, 2007 (the "Determination") issued by a delegate of the Director of Employment Standards (the "Delegate"). Mr. Gaspar had filed a complaint under section 74 of the *Employment Standards Act* (the "Act") alleging that his former employer, Commercial Body Builders Ltd. ("Commercial"), had contravened the *Act* by failing to pay him compensation for length of service. Following a hearing held on June 14, 2007, the Delegate dismissed Mr. Gaspar's complaint.
2. I have before me the Determination, the Reasons for the Determination, Mr. Gaspar's Appeal Form and attached submission, a letter submission from counsel for Commercial, copies of the record the Delegate indicates was before the Director at the time the Determination was made, a brief letter submission from the Delegate, and a further letter submission from Mr. Gaspar.
3. The Tribunal has determined that I will decide this aspect of the appeal on the basis of the written materials submitted by the parties, pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act* and Rule 16 of the Tribunal's Rules of Practice and Procedure.

FACTS

4. Commercial manufactures bodies for buses, fire trucks and ambulances. It employed Mr. Gaspar as an electrician from August 8, 2000 until it terminated his employment on August 28, 2006.
5. Commercial alleged that Mr. Gaspar's employment was terminated for just cause.
6. In support of this contention, Commercial presented evidence to the Delegate from its general manager, Bruno Sutter, to the effect that Mr. Gaspar's performance and attitude deteriorated once Mr. Sutter came to the conclusion that Mr. Gaspar did not have the requisite skills to lead the company's electrical team. Thereafter, the relationship soured further as other employees received raises designed to recognize performance, and Mr. Gaspar did not.
7. In June 2006 Mr. Gaspar complained to Mr. Sutter about the size of his pay increase. Mr. Sutter testified that Commercial was about to perform work on a new contract for a bus prototype plus further units. Mr. Sutter invited Mr. Gaspar to lead the project, and promised a "nice incentive".
8. No blueprints were made available to Commercial to assist it in building the bus prototype. Instead, the customer provided specifications and ready access to its engineering staff for the members of the Commercial team working on the project, including Mr. Gaspar.
9. The evidence accepted by the Delegate indicates that Mr. Gaspar finished the wiring on the first bus to be completed on the project a few days prior to his being terminated. That work was completed without the assistance of blueprints. Mr. Sutter then told Mr. Gaspar to start working on bus number two.
10. On August 24, 2006, Mr. Sutter noticed that no work had been started on bus number two. He was concerned about meeting a production deadline. Mr. Sutter spoke to Mr. Gaspar, who informed him that

what he was working on would take but a couple of hours. A couple of hours later, and at the end of the work day, Mr. Sutter noted that there was still no work which had been commenced on bus number two.

11. On the morning of Friday, August 25, 2006, Mr. Sutter observed that Mr. Gaspar was still performing work unrelated to bus number two. Mr. Sutter again spoke with Mr. Gaspar, and tempers flared. Mr. Gaspar told Mr. Sutter that he required "schematics" in order to complete the wiring for bus number two. Mr. Sutter reminded Mr. Gaspar that no blueprints had been provided for bus number one, the prototype, and that Mr. Gaspar was to wire bus number two in the same way that he had wired bus number one. Mr. Sutter also told Mr. Gaspar that he was to make the work on bus number two a priority, that he should do nothing except work on bus number two, and that he should start that work or he would be fired.
12. Mr. Sutter then returned to his office to take a telephone call. Looking out the window of his office onto the shop floor he saw Mr. Gaspar working on a vehicle at the opposite side of the shop to where bus number two was located. When the telephone call was concluded, Mr. Sutter exited his office to search for Mr. Gaspar, but the other employees informed him that Mr. Gaspar had left. Mr. Sutter received no communication directly from Mr. Gaspar during the remainder of that business day. However, the record contains a document marked "Bruno's Notes" which indicates that another employee told Mr. Sutter that Mr. Gaspar had telephoned to say he had visited his doctor, that he was "stressed", and that he might not be in on the following Monday.
13. Mr. Sutter later discussed the situation with Commercial's CEO. It was decided that Commercial would terminate Mr. Gaspar's employment on the grounds of insubordination.
14. Mr. Gaspar did not report for work the following Monday, August 28, 2006. Mr. Sutter telephoned Mr. Gaspar's number and left a message. Mr. Gaspar returned Mr. Sutter's call, at which time Mr. Sutter informed him that his employment was terminated.
15. Mr. Gaspar testified that Mr. Sutter took a dislike to him within months of his being hired, among other things because Mr. Gaspar had said uncomplimentary things about Commercial to a friend, and because Mr. Gaspar had gone over Mr. Sutter's head to complain about certain aspects of his job to Commercial's CEO.
16. At the hearing conducted by the Delegate, Mr. Gaspar did not dispute Mr. Sutter's recollection of the events of August 25, 2006 in many of its essential particulars (misdescribed by the Delegate as having occurred on August 24, 2006 on page 5 of the Reasons for the Determination). Mr. Gaspar conceded that Mr. Sutter told him to make his work on bus number two a priority and that he was not to work on anything else. He also testified that "Sutter said he's going to fire me if I do not do as he says."
17. Following that conversation with Mr. Sutter, Mr. Gaspar said he felt ill. The material the Delegate had in hand from Mr. Gaspar before making the Determination indicates that Mr. Gaspar was upset and shaking as a result of what he construed to be an unwarranted verbal assault perpetrated by Mr. Sutter, and that he felt it would be unsafe for him to continue to work. He decided to visit the first aid attendant. She told him she had no medication to calm him down, so he decided to leave the workplace and see his physician. He did see his doctor later that day, who told him to return on August 28, 2006 if he did not feel any better. Mr. Gaspar felt no better on August 28. He telephoned the Commercial first aid attendant and informed her he would not be coming to work. He then made a further visit to his physician. Arriving back home, he returned Mr. Sutter's telephone call and was informed that he had been terminated.

ISSUES

18. Is there a basis for my deciding that the Determination must be varied or cancelled, or that the matter must be referred back to the Director for consideration afresh?

ANALYSIS

19. Mr. Gaspar has appealed the Determination on the three grounds set out in section 112(1) of the *Act*, which reads:

112(1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds:

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

20. Section 115(1) of the *Act* should also be noted. It says this:

115(1) After considering whether the grounds for appeal have been met, the tribunal may, by order,

- (a) confirm, vary or cancel the determination under appeal, or
- (b) refer the matter back to the director.

21. I propose to deal with the grounds of appeal set forth in section 112 in reverse order.

New Evidence

22. An appeal based on section 112(1)(c) requires the appellant to demonstrate that evidence has become available that was not available at the time the Determination was being made. In my view, Mr. Gaspar has presented no evidence that is "new" having regard to the meaning of that word in the section. In his submissions delivered for the purposes of this appeal, he refers to earnings statements which clarify whether he received a raise in 2004, and a letter from Sun Life Financial dated January 29, 2007 confirming that his medical and dental coverage ceased as of August 25, 2006. Mr. Gaspar has provided no explanation why this evidence was not available to him at the time the Determination was being made, and I can see no reason why it was not. Moreover, I do not believe the evidence is probative in the sense that it is material to a relevant issue raised on the appeal.

Natural Justice

23. An appeal under section 112(1)(b), alleging that the Delegate failed to observe the principles of natural justice in making the Determination, gives voice to a procedural concern that the proceedings before the Delegate were in some manner conducted unfairly, resulting in Mr. Gaspar's either not having an opportunity to know the case he was required to meet, or an opportunity to be heard in his own defence. The duty is imported into proceedings conducted at the behest of the Director under the *Act* by virtue of

section 77, which states that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

24. In this case, the Delegate conducted a hearing. Mr. Gaspar attended, gave evidence, and made submissions. There is nothing in the record, or the submissions made by the parties to this appeal, which persuades me that Mr. Gaspar was deprived of the opportunity to know the case being made against him, or a reasonable opportunity to respond to it.
25. Mr. Gaspar also argues that the Delegate failed to observe the principles of natural justice because she decided to accept the evidence tendered on behalf of Commercial. Evaluating the quality of the evidence, and making findings of fact, are precisely the tasks it was part of the obligation of the Delegate to perform. The mere fact that in doing so the Delegate drew conclusions contrary to the position asserted by Mr. Gaspar cannot, on its own, ground an argument that she failed to observe the principles of natural justice.

Error of Law

26. In his reply submission Mr. Gaspar appears to argue that section 67 of the *Act* operates so as to render his termination ineffective. Section 67 appears in Part 8 of the *Act*, which addresses termination of employment. The relevant part of section 67 reads as follows:

67(1) A notice given to an employee under this Part has no effect if

(a) the notice period coincides with a period during which the employee is on...leave, ...or is unavailable for work due to...medical reasons...

27. Mr. Gaspar submits that he was dismissed while he was on sick leave. In support of this contention he has produced a letter from his physician which describes the visits Mr. Gaspar made on August 25 and 28, 2006.
28. Mr. Gaspar does not appear to have raised a concern relating to the application of section 67 in the proceedings conducted by the Delegate. The record does, however, contain a submission made to the Delegate on behalf of Commercial which suggests that the Delegate did reference the topic in her communications with Commercial. The Delegate did not address the question in her Reasons for the Determination, from which I infer she did not, in the event, consider the section to be germane to Mr. Gaspar's complaint.
29. The decision of the Tribunal in *Rupert Title Search Ltd.* BC EST #D070/03 clarifies that section 67 is a statutory adjunct to the obligation of an employer to provide appropriate written notice, a combination of notice and money, or a payment of money equivalent to the period of notice required in order to discharge its obligation to compensate an employee for length of service pursuant to section 63. In circumstances where an employer is obliged to provide compensation for length of service pursuant to section 63, section 67 mandates that if the employer attempts to meet that obligation by providing working notice, the notice will be ineffective if any part of the notice period coincides with a period when the employee is, for example, on leave, or unavailable for work due to medical reasons.
30. It is clear from the language of section 63(3)(c), however, that an employer's liability to provide compensation for length of service, including any component made up of notice, is discharged where an employee is dismissed for just cause. It is, of course, Commercial's position that Mr. Gaspar was

dismissed for just cause. That dismissal was meant to commence immediately. That being so, it is my opinion that there was no "notice period" in question in this case in respect of which the provisions of section 67 could attach.

31. It follows that Mr. Gaspar cannot succeed on this appeal on the basis of an application of section 67 of the *Act*.
32. Can it be said that the Delegate erred in law in deciding that Commercial dismissed Mr. Gaspar for just cause? I do not think that it can.
33. The question whether an employee has been dismissed for just cause is a question of mixed law and fact (see *Panton v. Everywoman's Health Centre Society* [2000] BCJ No.2290 at paragraph 7). Questions of mixed law and fact are questions about whether the facts in a case satisfy the relevant legal tests. A question of mixed law and fact involves an error of law where an extricable error on a question of law can be identified in the legal analysis under review (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc.* [1996] SCJ No.116; *Britco Structures Ltd.* BC EST #D260/03). By way of example, an extricable error on a question of law would occur if the decision-maker has applied an incorrect legal standard to the facts as found.
34. Questions of fact, *simpliciter*, are questions about what actually took place between the parties. They are only reviewable by the Tribunal as errors of law in situations where it is shown that a delegate has committed a palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will only succeed in challenging a delegate's finding of fact if he establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).
35. The fact that the dispute is over a question of mixed law and fact counsels deference. Appellate bodies should be reluctant to venture into a re-examination of the conclusions of a decision-maker on questions of mixed law and fact (see *Canada (Director of Investigation and Research, Competition Act) v. Southam Inc., supra*).
36. In her Reasons for the Determination the Delegate referred, properly in my view, to the comments of Southin J.A. in *Stein v. British Columbia (Housing Management Commission)* [1992] BCJ No.280, which establish the legal standard which must be considered when determining whether an employee has given cause for discharge due to disobedience. A portion of those comments reads as follows:

I begin with the proposition that an employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks advisable so long as they are neither contrary to law nor dishonest nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss and it is an essential implied term of every employment contract that, subject to the limitations I have expressed, the employee must obey the orders given to him.

37. In *Stein, supra*, the court relied on the formula articulated by Lord Evershed M.R. in *Laws v. London Chronicle (Indicator Newspapers) Ltd.* [1959] 2 All E.R. 285 to the following effect:

It is no doubt, therefore, generally true that wilful disobedience of an order will justify summary dismissal, since wilful disobedience of a lawful and reasonable order shows a disregard – a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master and that, unless he does so, the relationship is, so to speak, struck at fundamentally.

38. *Stein* was later relied upon by the British Columbia Court of Appeal in *Panton, supra*, where Saunders J.A., for the majority, said this:

In order for disobedience to constitute cause, the direction disobeyed must be clear and lawful, and the act of disobedience willful and one of substance.

39. In this instance, the Delegate found as a fact that Mr. Gaspar was instructed on more than one occasion to commence work on bus number two. Mr. Gaspar did not respond to these directions. The Delegate further found that on August 25, 2006, after a final instruction "to do nothing except work on bus number two," and a warning that a failure to do so would result in dismissal, Mr. Gaspar was seen to be working on another vehicle. Mr. Gaspar then left the worksite due to illness.

40. In her Reasons for the Determination, the Delegate set out her rationale for her conclusion that Commercial had not contravened the *Act* in its dealings with Mr. Gaspar, in these terms:

I am satisfied that Gaspar was given a valid work instruction for which he was qualified to perform and for which he had all the information required. I accept Commercial's evidence that this work was an exact duplicate of work on the prototype that had recently been completed. I am also satisfied that Gaspar was told he would be terminated as a consequence to his continued refusal to do the work he was directed to do. Knowing this, Gaspar continued to refuse to work on bus number two. As a result, I find Gaspar was terminated for just cause and he is not entitled to compensation for length of service.

41. While I may have interpreted the circumstances leading to Mr. Gaspar's dismissal differently, I am not persuaded that Mr. Gaspar has demonstrated that the Delegate acted perversely, or inexplicably, in concluding that Mr. Gaspar wilfully disobeyed a clear and lawful instruction on an issue of substance. Part of my difficulty emanates from the fact that the Delegate did not discuss in any detail the fact that Mr. Gaspar left the worksite on August 25, 2006 due to illness, which required medical attention. One inference which the Delegate could have drawn from this evidence was that Mr. Gaspar's failure to respond to Mr. Sutter's instruction was not wilful, because it was due to his becoming ill. It must be remembered, however, that the Delegate conducted a hearing at which both Mr. Gaspar, and Mr. Sutter, gave testimony. The Delegate therefore had the benefit of hearing these witnesses give their evidence, and observing them in cross examination. I have not. The mere fact that the Delegate did not discuss Mr. Gaspar's evidence of illness in depth is insufficient to warrant my interfering with the Delegate's findings of fact. It is also clear that the Delegate was entitled to prefer the testimony of one witness over another, and to place more weight on some parts of the evidence than others (see *Housen v. Nikolaisen* [2002] SCJ No.31 at paragraph 72).

42. The Delegate referred in her Reasons for the Determination to Mr. Gaspar's evidence that he became ill, so it cannot be said that she ignored it, or misconceived it in a way that affected the result. The inference I am forced to draw is that the Delegate decided that Mr. Gaspar was disobedient in such a way as to give

cause for dismissal, notwithstanding that he later departed the worksite due to illness. The material before me reveals some evidence on the basis of which a reasonable person, acting judicially and properly instructed as to the relevant law, could have come to that conclusion. I cannot say that in arriving at this conclusion the Delegate committed errors of fact amounting to errors of law, or misconstrued the applicable legal test.

43. In my opinion, the Determination must be confirmed. I echo, however, the comments of Hutcheon J.A. in *Stein, supra*, concurring in the result:

...I agree that this appeal should be dismissed for the reasons set forth. The result is harsh but the present law is such that if an employee has disregarded essential conditions of employment the employer is entitled to terminate the employment for just cause...The Court is without jurisdiction to substitute a reprimand or suspension more appropriate to the circumstances.

ORDER

44. Pursuant to section 115(1)(a) of the *Act*, I order that the Determination dated August 10, 2007 be confirmed.

Robert Groves
Member
Employment Standards Tribunal