Employment Standards TRIBUNAL

An appeal

- by -

Willowbrook Motors Ltd.
("WML")

- 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.: 2010A/114

DATE OF DECISION: October 22, 2010

DECISION

SUBMISSIONS

Douglas Seal	on behalf of Willowbrook Motors Ltd.
David House	on his own behalf
Marc Hale	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an appeal by Willowbrook Motors Ltd. ("WML"), pursuant to Section 112 of the *Employment Standards Act* (the "*Act*"), against a Determination of the Director of Employment Standards (the "Director") issued July 9, 2010.

2. David House worked as a commissioned salesperson for WML, a car dealership, from May 19, 2000, until his employment was terminated on March 17, 2010. Mr. House filed a complaint alleging that WML had contravened the *Act* in failing to pay him commissions and compensation for length of service.

3. The Director's delegate held a hearing into Mr. House's complaint on June 21, 2010. Prior to the hearing, the parties resolved the commission wage claim. The sole issue to be determined by the delegate was whether or not Mr. House was entitled to compensation for length of service.

4. Following the hearing, the delegate concluded that WML had contravened Section 63 of the *Act* in failing to pay Mr. House compensation for length of service. He determined that Mr. House was entitled to wages, annual vacation pay and interest in the total amount of $8,704.29. The delegate also imposed a $500 penalty on WML for the contravention, pursuant to section 29(1) of the *Employment Standards Regulation.*

5. WML contends that the delegate failed to observe the principles of natural justice in making the Determination and sought to have the Determination cancelled.

6. Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Act* (s. 103), and Rule 17 of the Tribunal's *Rules of Practise 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). This appeal is decided on the section 112(5) "record", the submissions of the parties, and the Reasons for the Determination.

ISSUE

7. Whether or not the Director's delegate failed to observe the principles of natural justice in determining that Mr. House was entitled to compensation for length of service.

FACTS

8. The essential factual findings of the delegate are not in dispute. They may be summarized as follows:

9. Mr. House and another employee, Mr. Santos, were involved in a physical altercation on March 14, 2010. The employer terminated their employment on March 17, 2010. The employer contended that he had just

cause to terminate Mr. House's employment without compensation for length of service based on the fact that Mr. House had been suspended on two prior occasions for aggressive behaviour towards other employees as well as a clause in his Salesperson's Employment Agreement which provided that "the salesperson shall exhibit conduct at all times which is business-like and a credit to the Dealership".

10. The delegate heard the evidence of the parties and two witnesses for the employer. The delegate found that Mr. House followed Mr. Santos out of the dealership and was screaming, yelling and swearing loudly at him. The delegate found that there was a physical altercation between Mr. Santos and Mr. House and that Mr. Santos sustained injuries that resulted in a loss of blood.

11. The delegate noted that the employer had the burden of establishing just cause and referred to the Tribunal's decision in *Super Save Gas* (BC EST # D374/97) in his analysis.

12. The delegate found that Mr. House had verbal heated arguments with co-workers on two separate occasions before the incident on March 14, 2010, which resulted in Mr. House being suspended from work for one week and one weekend, respectively. He found that the employer had not documented Mr. House's behaviour leading up to the suspension and that Mr. House had not received any written or verbal warning that his employment was in jeopardy.

13. The delegate noted that there was no workplace policy about workplace suspensions and that the employer tried to encourage salesmen to solve their own problems. He wrote that "there was no written policy in place making it clear to the complainant that his employment was in jeopardy as a result of being suspended from work".

14. The delegate found Mr. House's behaviour to be inappropriate and determined that Mr. House would have known that it was inappropriate given his previous suspensions for verbal aggression towards other employees. However, the delegate found that because Mr. Seal had not warned Mr. House that his employment was in jeopardy as a result of his repeated inappropriate behaviour, he could not rely on those suspensions to support Mr. House's termination for "just cause".

15. The delegate then considered whether Mr. House's behaviour on March 14, 2010, was sufficiently serious to justify summary dismissal without the need for a warning. The delegate noted that Mr. House had been involved in two prior incidents involving shouting at co-workers that had resulted in him being suspended from work, and that Mr. House continued that inappropriate behaviour on March 14, 2010. He said:

> The difference between the events is that the latest episode of inappropriate behaviour directly contributed to a physical altercation at work. There is no place for fighting in any work place and my decision does not question the employer's decision to terminate the employment of the two salespersons.

16. The delegate then found that the employer had failed to meet the burden of showing just cause because he had failed to warn Mr. House that his employment was in jeopardy:

> I have found the employer did not warn Mr. House his employment was in jeopardy as a result of his repeated inappropriate behaviour. As a result, Mr. House would not have known that his verbal aggressive behaviour on March 14th would lead to the termination of his employment. The act of fighting at work, although reprehensible, was mitigated by the fact the employer was aware the complainant's inappropriate behaviour could lead to a physical confrontation and chose not to warn the complainant that his employment was in jeopardy.

17. The delegate concluded that WML had not met the burden of establishing that Mr. House's employment had been terminated for just cause and as a result, was obliged to pay Mr. House compensation for length of service.

18. WML disagrees with the Determination. It says that the delegate's statement that "there is no place for fighting in any workplace and my decision does not question the employer's decision to terminate the employment of the two salespersons" is inconsistent with the delegate's conclusion that WML had not met the burden of establishing just cause.

19. WML also says that its warnings to Mr. House about the consequences of his aggressive behaviour were sufficient to communicate to him that his employment was in jeopardy. Finally, WML contends that any reasonable person would realize that the events of March 14, 2010, would lead to termination for cause.

20. The delegate submits that his comments regarding the employer's decision to terminate the employment of the two salespersons referred to the inappropriate behaviour, not whether the employer had just cause. The delegate contends that WML is attempting to re-argue the case that was before him and that the appeal should be dismissed.

21. Mr. House's submissions do not address any of the grounds of appeal.

ANALYSIS

22. Section 112(1) of the *Act* provides that a person may appeal a determination on the following grounds:

> 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; or
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> c) evidence has become available that was not available at the time the determination was being made

23. The burden of establishing the grounds for an appeal rests with an Appellant.

24. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. WML's appeal document does not outline how WML was denied natural justice and the record does not disclose any breach of natural justice. WML appeared at a hearing before the delegate and was given the opportunity to present its case and respond to the complaint. I find no basis for this ground of appeal.

25. WML's stated ground of appeal is that it disagrees with the delegate's conclusion. Although disagreement with a result is not a ground of appeal, it is important that the Tribunal as well as the Director address the substance of the appeal rather than the form (see *JC Creations,* BC EST # RD317/03). The essence of WML's appeal is that the delegate erred in his conclusion that it did not have just cause to terminate Mr. House's employment. Although WML does not expressly advance the argument that the delegate erred in law, I have considered this as the substance of the appeal.

26. The Tribunal has adopted the factors set out in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)* (1998] B.C.J. (C.A.) as reviewable errors of law:

> 1. A misinterpretation or misapplication of a section of the Act;
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> 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 be reasonably entertained; and

5. Exercising discretion in a fashion that is wrong in principle

27. While WML does not dispute the delegate's findings of fact, it contends that his conclusion based on those facts is incorrect.

28. Section 63 of the *Act* establishes a statutory liability on an employer to pay length of service compensation to an employee on termination of employment. An employer may be discharged from that liability where the employer is able to establish that the employee is dismissed for just cause.

29. The appropriate analytical approach for determining what constitutes just cause was set out by the Tribunal in *Ellison (*BC EST # RD122/03) and bears repeating in full:

TRIBUNAL PRINCIPLES RELATING TO JUST CAUSE

The Tribunal has consistently applied several principles to questions of just cause for dismissal. These principles were identified in *Randy Chamberlin and Sandy Chamberlin operating as Super Save Gas*, BC EST # D374/97:

1. The burden of proving the conduct of the employee justifies dismissal is on the employer.

2. Most employment offences are minor instances of misconduct by the employee not sufficient on their own to justify dismissal. Where the employer seeks to rely on what are in fact instances of minor misconduct, it must show:

    1. A reasonable standard of performance was established and communicated to the employee;

    2. The employee was given a sufficient period of time to meet the required standard of performance and had demonstrated they were unwilling to do so;

    3. The employee was adequately notified their employment was in jeopardy by a continuing failure to meet the standard; and

    4. The employee continued to be unwilling to meet the standard.

3. Where the dismissal is related to the inability of the employee to meet the requirements of the job, and not to any misconduct, the tribunal will also look at the efforts made by the employer to train and instruct the employee and whether the employer has considered other options, such as transferring the employee to another available position within the capabilities of the employee.

4. In exceptional circumstances, a single act of misconduct by an employee may be sufficiently serious to justify summary dismissal without the requirement of a warning. The tribunal has been guided by the common law on the question of whether the established facts justify such a dismissal.

The term 'misconduct' typically refers to conduct that is blameworthy; it is ordinarily thought of as conduct which an employee can control. The above principles recognize that misconduct, even minor instances of misconduct, can provide just cause for dismissal. The requirement to set and communicate standards and give employees the appropriate notices and opportunities in cases involving misconduct is premised on the concept that an employee, properly apprised of the unacceptable nature of their conduct and the consequences of persisting in such conduct, will alter their conduct to conform to an acceptable standard. If an employee is not advised their conduct is unacceptable, they may be lulled into a false sense of security. The above principles also recognize that conduct which is not blameworthy, and can be

> attributed to factors beyond the employee's control, can also provide just cause for dismissal. The Tribunal has generally referred to this conduct as 'an inability to meet the requirements of the job'. In other contexts such conduct has been described as "involuntary misfeasance" or "non-culpable conduct". The Tribunal recognizes that even conduct which is said to be involuntary may be capable of improvement and thus to be within the control of the employee to some extent. For that reason, the Tribunal has required employers, in most circumstances, to use a graduated response that includes advising employees of what is expected of them, and warning them that their employment might be in jeopardy. Employees are thereby given the opportunity to chose to improve their workplace performance where that is possible. Finally, it may not be presumed there is any rigid line between what is misconduct and "involuntary misfeasance". In reality, it can be difficult to distinguish conduct which is blameworthy from that which is not. Many cases involve conduct that has both elements. In other cases, it may not be immediately apparent to the parties whether the conduct was one or the other or a combination of the two.
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> . . . Such a principle ignores that the objective of any analysis of dismissal for just cause under the *Act* is to decide whether the conduct of the employee has undermined the employment relationship, effectively depriving the employer of its part of the bargain. That objective holds whether the basis for the dismissal is grounded in misconduct, conduct demonstrating an inability to meet the requirements of the job, or some combination of the two. We agree with the following statement from Sproat, John R., *Employment Law Manual: Wrongful Dismissal, Human Rights and Employment Standards*, 1990 (Carswell):
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> > . . . In order to constitute just cause for dismissal, the acts of the employee must constitute a repudiation of the employment relationship which the employer may accept by terminating the contract.
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> The above statement does not distinguish between misconduct, on the one hand, and an inability to meet the requirements of the job on the other, when deciding if the acts of the employee amount to a repudiation of the employment relationship. Conduct that goes to the root of the contract and gives an employer just cause to dismiss an employee may consist of any type or combination of work related conduct or misconduct, but there is no logical or rationale for making one and not the other reviewable on an objective standard. Any objective standard would necessarily involve a consideration of any factors that might mitigate against dismissal.
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> Based on the foregoing considerations, the *Act* directs an analytical framework that examines each case on its own particular facts and circumstances, and considers the nature and seriousness of the conduct 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 unsatisfactory job performance, incompetence, or minor infractions of work place rules with just cause for dismissal. At the same time, it would properly emphasize that such conduct going to the core of the employment relationship carries the potential to warrant dismissal for just cause.

30. Thus, generally employers are obliged to warn employees if their continued employment is in danger because of a pattern of minor misconduct or because of a failure to meet a required standard of performance. However, as stated in *Super Save Gas*, *supra*, there are exceptional circumstances where a single act of misconduct by an employee is sufficiently serious to justify summary dismissal without the requirement of a warning.

31. On the undisputed facts of this case, I find the misconduct for which Mr. House's employment was terminated to be such an incident. Mr. House was not the victim of an unprovoked attack or even a reluctant participant in the physical altercation. The facts found by the delegate were that Mr. House followed

Mr. Santos out of the dealership screaming, yelling and swearing loudly at him, and there was then a physical altercation between them in which Mr. Santos sustained injuries that resulted in a loss of blood.

32. In these circumstances, I find the delegate was correct when he stated that he did not question the employer's decision to terminate the employment of Mr. House for this misconduct, but that he fell into legal error when he went on to apply a warning requirement. As *Super Save Gas* indicates, certain kinds of serious misconduct, such as voluntarily and aggressively engaging in a physical altercation with a co-worker while at work as a salesperson in a car dealership, are so obviously inconsistent with the employment relationship that the employer is not required to establish that it warned its employees not to engage in such conduct before dismissing them if they do.

33. On the undisputed facts, Mr. House's misconduct constituted just cause for summary dismissal with no requirement for a warning. Accordingly, the delegate erred in finding the employer had not established just cause for dismissal. Just cause was established on the facts, and the determination that WML must pay Mr. House compensation for length of service is accordingly wrong in law and must be cancelled.

ORDER

34. I Order, pursuant to Section 115 of the *Act*, that the Determination, dated July 9, 2010, be cancelled.

Carol L. Roberts
Member
Employment Standards Tribunal